

DOCUMENT RESUME

ED 293 076

CG 020 724

AUTHOR Hogler, Raymond L., Ed.  
 TITLE Substance Abuse in the Workplace: Readings in the Labor-Management Issues.  
 INSTITUTION Pennsylvania State Univ., University Park. Dept. of Labor Studies and Industrial Relations.  
 SPONS AGENCY Pennsylvania Milrite Council, Harrisburg  
 PUB DATE 87  
 NOTE 211p.  
 PUB TYPE Collected Works - General (020)

EDRS PRICE MF01/PC09 Plus Postage.  
 DESCRIPTORS \*Alcohol Abuse; Civil Rights; Court Litigation; \*Drug Abuse; \*Employee Assistance Programs; \*Employees; \*Personnel Policy; \*Substance Abuse; Work Environment  
 IDENTIFIERS \*Drug Use Testing

ABSTRACT

This document contains a collection of readings offering a broad overview of the subject of drug and alcohol abuse in the workplace. Included are: (1) "'Miller Time' in Antebellum America: An Historical Appraisal of the Drinking Habits of the Working Class" (John C. McWilliams); (2) "The Impact of Substance Abuse at the Workplace" (James T. Wrich, et al.); (3) "The Role of Employee Assistance Programs in Dealing with Employee Substance Abuse" (Judith Vicary); (4) "Why Drug Testing is a Bad Idea" (Lewis L. Maltby); (5) "The Employer's Need To Provide a Safe Working Environment: The Use and Abuse of Drug Screening" (Richard E. Dwyer); (6) "Managerial Control, Employee Assistance Programs, and the Medical Disease Ideology of Alcoholism" (Richard M. Weiss); (7) "Drug and Alcohol Abuse in the Workplace: Balancing Employer and Employee Rights" (Thomas E. Geidt); (8) "Screening Workers for Drugs: A Legal and Ethical Framework" (Mark A. Rothstein); (9) "Substance Abuse in the Workplace: Managerial Authority, Employee Rights, and the Common Law" (Raymond L. Hogler); (10) "Arbitration Standards in Drug Discharge Cases" (Pat Wynns); and (11) "Development of Comprehensive Language on Alcoholism in Collective Bargaining Agreements" (Carl J. Schramm). The decision of the federal district court in "Capua v. City of Plainfield," which has become the leading opinion on drug testing, is appended. (NB)

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# **SUBSTANCE ABUSE IN THE WORKPLACE:**

**Readings in the Labor-Management Issues**

Edited by

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Under Contract to

**The MILRITE Council of the  
Commonwealth of Pennsylvania**



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## PREFACE

This book was made possible through funds from the State of Pennsylvania's MILRITE Council, which awarded a grant to the Department of Labor Studies and Industrial Relations to complete various research projects. MILRITE'S purpose is the promotion of labor-management cooperation in the Commonwealth of Pennsylvania; education is an important means of attaining that objective. The Pennsylvania AFL-CIO was instrumental in securing legislative support for the MILRITE program. Judy Heh, Secretary-Treasurer and Director of Education for the state federation, was particularly helpful to the Department in these endeavors.

Many other individuals assisted in the preparation of this work. Gilbert Gall, Editor of the Labor Studies Publication Series, provided the necessary technical expertise. Carol Reilly typed numerous drafts of the manuscript. The individual authors and journal editors were cooperative and gracious in devoting their time to the book. And, finally, the entire project would never have been realized without the efforts of Ron Filippelli, Head of the Department, whose administrative skills translated the conception into reality.

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## INTRODUCTION

The matter of drug and alcohol abuse in the workplace is deeply divisive. Perhaps no single issue in the employment relationship so profoundly implicates the interests of workers or employers. There are, on the employer's part, legitimate managerial concerns involving safety, productivity, and disciplinary authority. But employees may likewise perceive a threat to their rights of privacy, individual autonomy, and fair treatment. Courts, legislators, and academic commentators continue to debate the refractory dimensions of the problem.

This collection of readings offers a broad overview of the subject; it aims at a balanced approach and is intended for the general reader. The respective articles were selected on the basis of their quality and their contribution to an important aspect of the topic. In addition, several items were written or specifically adapted for inclusion in this volume. A brief survey of the book's contents follows.

John McWilliams' article examines the use of alcohol in the workplace from an historical perspective. As he convincingly demonstrates, drinking has been associated with work in this country from pre-revolutionary times. Moreover, alcohol consumption on the job was often expected by the worker and accepted by the employer. Certainly, alcohol at work is not a modern phenomenon, despite the massive publicity currently devoted to it.

The next five articles examine the respective interests of employers and employees as they are affected by efforts to control substance abuse. According to the Conference Board Report, drugs and alcohol pose an increasing threat which must be dealt with by employers; that position is documented through the commentary of the various authorities who contributed to the report. Judith Vicary's description of employer strategies for assisting addicted workers further substantiates the need to implement rehabilitative programs. In the selections by Maltby, Dwyer, and Weiss, however, a somewhat different approach is presented. Drug testing is viewed by the first two authors as intrusive, inaccurate, and unnecessary. Weiss argues that employer assistance programs, in many instances, are not rationally designed to identify and assist alcoholic employees, although they do effectively screen out employees having performance problems.

On a more specialized level, the articles by Geidt, Rothstein, Hogler, and Wynns analyze the legal environment of substance abuse and employer discipline. The web of statutory, common law, and arbitral protections that may pertain to a given disciplinary situation is immensely complex. In the contemporary labor relations setting employers discharge employees at their peril; the possible theories of litigation under which workers might sue are multifarious, confusing, and pregnant with sizeable damage awards. Consequently, employers must be aware of, and solicitous toward, employees' rights.

The next article in the book examines one avenue of accommodation for labor and management. Over a period of years, many union representatives have

negotiated contractual procedures dealing with drug and alcohol abuse. Carl Schramm traces the development of such contract language and demonstrates that there can be a workable adjustment of the respective concerns. The examples described by Schramm may also provide guidance to nonunion employers in formulating policies.

Last, the decision of the federal district court in *Capua v. City of Plainfield* is included as Appendix A. *Capua* has become the leading opinion on drug testing, and it articulates with particular clarity the constitutional safeguards applicable to public sector employees. Although those protections do not extend to workers in private employment under current constitutional doctrine, the basic concepts may well be incorporated into future legislation.

This book, it should be emphasized, is intended to promote inquiry rather than to advocate any position. Conceding the massive costs of drug and alcohol addiction to our society, there are, nevertheless, important reasons why the attack on drugs and alcohol should not be concentrated in the workplace. The debate on that point will undoubtedly continue to influence the evolving nature of work in this country.

**"Miller Time" in Antebellum America:  
An Historical Appraisal of Drinking Habits  
of the Working Class**

*John C. McWilliams*

"If God had intended man to drink water, He would not have made him with an elbow capable of raising a wine glass."

—Benjamin Franklin

"There are two things that will be believed of any man whatsoever, and one of them is that he has taken to drink."

—Booth Tarkington

**Introduction**

The use, or more accurately, abuse of alcohol has become an issue of incredible magnitude as a vexing contemporary social problem. Its seriousness can be measured by numerous references to it in periodicals and scholarly journals which have examined this phenomena in several contexts, including adolescent alcoholism, highway safety, the impact of television commercials, the print media's use of celebrities to sell alcohol and, of course, alcoholism among adults.<sup>1</sup> Several recent studies have focused on a more narrow but no less serious alcohol-related problem--drinking and drunkenness on the job.

Because it prevents management from achieving maximum efficiency and productivity, and is frequently a disruption to harmonious working relationships, drinking in the workplace has attracted wide-spread attention as a serious labor-related problem. Until recently, most employers would summarily dismiss an employee who was inebriated or was caught consuming alcohol while on the job. Now, however, a more common practice is to "rehabilitate" the employee rather than discharge an otherwise diligent worker. This humanitarian "reform" has been adopted by many companies for essentially two reasons. First, it offers the worker an opportunity to redeem himself and re-gain his dignity as he continues to be a productive member of the work force. More pragmatically, it enables the company to save considerable time and money. By not firing the employee, management protects its investment and saves the expense of hiring and training a replacement. If the employee in question has a long tenure, the company will also not lose that person's valuable experience.

Though the problem of employee drinking has only recently been recognized as serious, it has hampered labor relations for at least the past century and a half,

beginning with the American Revolution. To more fully understand the origin and development of this situation it is helpful to have some knowledge of the social and cultural setting at the time of the American Revolution. While colonial patriots and the Founding Fathers were fighting for independence on the battleground and grappling with fundamental political questions in an attempt to aid the burgeoning new nation, their society was one that not only tolerated widespread drinking, but did little to discourage it.

### Alcohol Use in the Early Nineteenth Century

There were some, of course, who spoke out against what had become a widely accepted practice and popular custom. Dr. Benjamin Rush, a Philadelphia physician and signer of the Declaration of Independence, who was concerned about the effects of alcohol consumption and advocated greater moderation as early as 1772, published his observations in a pamphlet entitled *An Inquiry into the Effects of Spiritous Liquors on the Human Body and Mind* in 1784. Dr. Rush continued to write brochures until 1815 in which, based on "scientific evidence," he described the invidious effect of alcohol.<sup>2</sup> As forcefully and eloquently as Rush may have articulated his exhortations about excessive drinking, his admonitions went largely unheeded. At least until the 1830s the prevalent attitude of many Americans, particularly the working class, was that consumption of alcohol--ale, malt, liquor, and whiskey--was a long-held custom.<sup>3</sup>

Though the primary focus of this essay is on the drinking habits of workers, it is important to note that few Americans in the first half of the nineteenth century would have condemned anyone for drinking or drunkenness. Workers represented an easily identifiable group who shared common characteristics and attitudes that made them distinct and unique. First, however, it is necessary to understand that American society as it existed during antebellum America differed in several important ways from contemporary society. To appreciate the workers' habits it is important that the earlier period be kept in its proper context.

Drinking in the first half of the nineteenth century was a practice that pervaded every strata of society. On the frontier hard liquor was a central part of the pioneers' diet. Since nutrition in the form of fruits and vegetables was not readily available on the "cutting edge" of civilization, liquor was regarded as food and a source of heat in the numbing winter cold. But primitive cabins along the Appalachian frontier were not the only centers where liquor was consumed. Consequently the consumption of alcohol, especially in the form of distilled spirits--hard cider made at home--skyrocketed. Whiskey was generally the preferred choice, but hard cider was an acceptable alternative when more potent drink was not available. Some kind of alcoholic beverage was kept in supply by most families. Moreover, shops and city taverns as well as country inns served alcoholic drinks with or without meals; indeed they were considered necessary if one wanted to properly demonstrate his hospitality

and good fellowship. In the same way many artisans and mechanics were of the belief that alcohol enhanced their mechanical skills. The wealthy and influential classes used liquor to promote social intercourse. Everyone in America, it seemed, drank, and many drank excessively; drinking was an accepted and expected practice.

Actually, there was hardly an occasion on which Americans did not drink and according to historian W. J. Rorabaugh, "every social event demanded a drink."<sup>4</sup> Whiskey was as plentiful at a Southern barbeque as it was in urban areas at dances where guests frequently drank to intoxication. In the West, liquor was regarded as a valuable commodity and form of currency exchange where even church subscriptions were often paid for with whiskey. At horse races, weddings (the bride was rarely given away without liquor), and funerals, guests and spectators drank freely. When a contract was signed it was "sanctified" with a drink, and it was not uncommon for auctioneers to pass out bottles of whiskey as an expression of their appreciation to bidders who made the event a profitable one. One might easily have had an exhilarating afternoon at an auction even though he failed to purchase a single item!

Any occasion that brought people together was a cause to dispense intoxicating beverages, frequently to an incredible degree. At times it seemed as though any event, no matter how trite, was an excuse to drink. Farmers traditionally celebrated a bountiful harvest with a series of feasts punctuated with dozens of toasts, presumably to thank the forces of nature for providing them with such good fortune. House-raising, corn-huskings, and land clearings--the most mundane activities--demanded strong drink. When men received their discharge from the militia, people drank, indeed one criterion for getting elected officer--perhaps the only one--was the anticipation that those elected would treat. Even to recruit new men the army condoned, or at least did not ban, the use of liquor to lure enlistments.

It would be neither inaccurate nor a hasty generalization to conclude that alcohol was considered as an integral part of American society. Liquor was omnipresent and its imbibing was not limited to one sex. Women relied on spirits to relieve them of boredom and thankless work chores. Whether they congregated for sewing societies, quilting parties, or the monotonous chore of extracting seeds from the cotton plant, they frequently used inebriants to make their work less tedious. Although they drank less extravagantly than men they still consumed from an eighth to a quarter of the nation's liquor. The commonly held ideal of femininity--that women should be pious, sober, and nonassertive--made drinking in public awkward for women who were expected to exercise restraint, and few did so. Occasionally some women, eastern socialites most likely, drank in mixed company at formal dinner parties; most female consumption, however, took place in the privacy of their own homes where they downed alcohol-based medicinal potions that were intended to improve one's health. People from every geographical region, every ethnic group, and every socio-economic class drank, and were uninhibited about drinking excessively and openly. They drank for leisure and entertainment. Ian R. Tyrell has stated that "almost every form of entertainment in antebellum society involved the temptation of drinking."

Most theaters provided liquor for their patrons of music and stage, and it was not uncommon to observe drinking while bowling, a sport that became popular in the 1840s. Americans also drank while they worked, whether in the fields or in the factory.<sup>5</sup>

Politics and alcohol were almost inseparable. Adhering to a custom that originated in colonial days, instead of actively campaigning for office (which was considered "inappropriate"), candidates set up kegs of whiskey outside the polling places to entice the voters. In the 1800s the practice came to be expected by the electorate, and the use of taverns as polling places only facilitated the consumption of liquor.<sup>6</sup> Understanding this mindset helps explain why the inauguration of Andrew Jackson, the first president from the West (Tennessee) and the first who was not a product of an aristocratic environment, was celebrated with plenty of hard liquor. Even traditional Washington protocol did not prevent the White House from turning into a place of revelry in 1829 as the "common man" quite literally savored the taste of victory. Seven years later during the campaign of 1836, the practice was continued by the candidates of both major parties when they liberally distributed rum and other spirits to prospective voters. It is the legacy of the Jacksonian triumph that produced the festive and carnival-like atmosphere that surrounds political elections today.

Perhaps the widespread drinking habits of Americans was best summed up by Horace Greeley, a subsequent presidential candidate himself and editor of the *New York Tribune*. Reflecting on his youth Greeley provided a startling first-hand account of just how vital a role alcohol played in peoples' everyday lives:

*In my childhood there was no merry-making, there was no entertainment of relatives or friends, there was scarcely a casual gathering of two or three neighbors for an evening's chat, without strong drink...No house or barn was raised without a bountiful supply of the latter, and generally of both. A wedding without "toddy," "flip," "sling" or "punch," with rum undistinguished in abundance, would have been deemed a poor, mean affair, even among the penniless. . . .<sup>7</sup>*

### Social and Economic Factors

Greeley's recollection might seem startling by contemporary standards, but it was not an exaggeration. Clearly, America and Americans had a drinking problem. Consumption was comparatively high in the colonial period, but in the early nineteenth century it increased to such a degree that the figures for 1810, reliable as they are, rivaled what was believed to have been the heavy drinking habits of the 1970s.<sup>8</sup> In 1790, for example, Americans were consuming 2.6 gallons of hard liquor; by 1830 consumption was up to 5.2 gallons for every man, woman, and child in the country, or nearly triple today's rate. In a study of consumption statistics compiled by Rora-baugh, the "intake of absolute alcohol peaked in 1830, at a rate twice that estimated

for 1970." Beginning around 1850 the consumption began to fall off, but during the first four decades of the century the country seemed like it was on an alcoholic binge. While a more enlightened or health-minded person who is aware of the debilitating effects of alcohol might be critical of these earlier customs and staggering statistics, there were several pragmatic factors that can be attributed to America's binging. First, and perhaps most practical, many Americans believed that the consumption of liquor promoted good health, that it provided nutrition, and that it was--paradoxically--stimulating and relaxing.<sup>9</sup> Apparently they also felt that the warm sensation produced internally by high-proof whiskey functioned as a kind of anti-freeze that would maintain a higher body temperature in cold weather. If liquor did ensure good health, which was a convenient rationalization, the taste of whiskey was certainly more preferable than other medicines of the day. In the same context, something so pleasing to the palate was desirable, if not necessary, to wash down the food, commonly described as "poorly cooked, greasy, salty, and sometimes rancid."<sup>10</sup>

As strictly an economic matter, liquor was cheap and widely available, especially for settlers along the frontier. Arable (and cheap) land was so plentiful that it allowed for such abundant crop-yields of grain that the price of whiskey fell to twenty-five cents a gallon, not only making it less expensive than wine and beer, but nearly twenty cents cheaper than coffee, tea, or milk.<sup>11</sup> Any product that is both inexpensive and easy to obtain is certain to be in high demand; when it also alleviates one's insecurities and anxieties--and the economic upheaval caused by the Panic of 1837 certainly aroused those psychological elements--that product was bound to be a best-seller. Moreover, in the early years of the century, because whiskey was so profitable, it had become an important component of the slave trade.<sup>12</sup>

A third cause of excessive drinking was due to demographical and ideological influences. The populations of cities and urban areas, especially along the eastern seaboard were composed of transients who frequently moved from town to town. Populations in a such a state of constant flux are more likely to experience higher rates of crime, poverty, and drinking. This occurrence, together with a growing disregard for "traditional" standards of morality, made it difficult to control drinking. Thus, drinking and drunkenness became the custom.<sup>13</sup>

The social leveling effect resulting from the successful revolution by the colonies against the mother country and newly-won independence also produced a greater concern and pride in the notion of equality. Many patriotic-minded Americans who drank began to associate themselves more closely with an egalitarian society. Drinking in a group intensified the individual's appreciation for liberty and freedom, and intoxication was a means of experiencing the ultimate sensation of self-control--a catharsis of sorts. As Joseph Gusfield has written:

*Drinking to the point of intoxication was done by choice, an act of self-will by which a man altered his feelings, escaped from his burdens, and sought perfection in his surroundings. Because drinking was a matter of choice, it increased a man's sense of*

*autonomy. To be drunk, was to be free. The freedom that intoxication symbolized, led Americans to feel that imbibing lustily, was fitting for independent men to celebrate their country's independence.*<sup>14</sup>

The aforementioned factors for individual drinking could easily be applied to society as a whole, including the working class. But there were other unique reasons why a member of this class was customarily inclined to visit the local tavern immediately at the end of his work day and not leave until he had exhausted his day's wages and had gotten himself thoroughly drunk. To some degree these reasons were grounded in a psychological reaction to sweeping change.

By the 1820s expansion and modernization had caused many Americans to question their country's future directions. Old perceptions about the nation's heritage were constantly subjected to re-examination and re-definition as the country entered a period of industrialization that would forever revolutionize concepts of work, the individual's role as a producer, and the position of the laboring class in society. Many workers began to feel they no longer enjoyed the degree of status and independence they once had, that they were "wasting their health in the production of wealth" as one historian has written, and were "doomed not only to poverty...but even to contempt."<sup>15</sup> Laborers throughout the country thus began to experience a deep-seated sense of alienation.

The workingman's plight was real. In the depression years of 1837 to 1845, a manufacturing job could provide a decent livelihood, but the new industrial order was altering the composition of the laboring class. A new worker who was now selling only his labor rather than his skills, had emerged. Industrialization forced a reorganization of work and redefined work patterns, signaling an end of the upward progression from apprentice to journeyman to master. Most laborers could no longer realistically expect to rise to the position of independent craftsman; they would work for others forever. Nor were they earning what they felt was a reasonable income, and they complained bitterly about "wage slavery" that prevented them from achieving basic goals. Instead of being able to provide a better more secure economic life for their children, workers had to be satisfied that they were no worse off than they were. The American dream was postponed another generation.

Workers also developed resentment toward their employers and their attempts to exert greater and greater control over employees. In the new factories, relationships became impersonal and detached as management was more interested in the workers' output and productivity and less interested in their welfare. Artisans accustomed to working irregularly, pausing for idle conversation or to share a dream with a co-worker, were reprimanded or fired. In the workplace, employers are entitled to set rules and regulations; they expect to get something in return for their investment. But owners sometimes extended their authority beyond the factory and encroached on employees' "outside time." In Cincinnati, for example, manufacturers tried to destroy the working-class culture when they abolished volunteer fire compa-

nies and shut down saloons, both regarded as "nonproductive" activities. Stagnant wages, and rising costs for food and housing made a tolerable situation almost unbearable. In a society where the rich were getting conspicuously richer, the workers sensed that they were on the low end of an economic seesaw.

Unskilled laborers employed in building canals, turnpikes, and railways under strenuous working conditions, and who were especially vulnerable because their work was seasonal, felt increasingly victimized. The disillusionment of the factory or skilled workers also became manifest in their protests for a ten-hour day. Even artisans in the apprenticeship system--shoemakers, tailors, cabinet-makers, and coopers, for example--who enjoyed greater vertical mobility, vocalized their dissatisfaction with what they perceived as deteriorating conditions.<sup>16</sup> Industrialization and the emergence of the factory system were seriously threatening the *status quo* and upsetting the harmonious order in the workplace that employees had felt secure with. More efficient modes of transportation, a burgeoning population (caused primarily by huge waves of immigrants), and increased mechanization resulted in revolutionary changes in work. Additional pressure was felt by many members of the work force with the introduction of piece work, which speeded production. It also cut operating costs which induced employers to hire people less skilled like women, children, and even criminals.<sup>17</sup>

Slowly even the skilled artisans were being displaced. Not surprisingly, the mood of the workers changed from abandonment to shock to anger; eventually they rebelled. In short, a diminished sense of creativity, self-esteem, and social status had produced a changing attitude among the workers that led them to try to escape from a continually worsening situation.

This exploitation of the workers by the employer, however, probably did more to undermine the laborers' faith in the system than any other economic factor. Exploited, the worker felt he was being squeezed out, that what he did as an individual was not really making a difference any more. With the advent of mass production and increased mechanization he could accomplish little as an artisan or journeyman from which he could derive pride and a sense of gratification. To alleviate his malaise he drank on the job. It was a simple and easy means of escaping an intolerable situation. Shop-time drinking was not new, but the worker drank more frequently than before, and he drank greater quantities. Where previously 11:00 a.m. was the customary time for the first drink, balanced with a mid-afternoon break, the occasions for passing a bottle were extended to include welcoming a new employee, or sending off an old one. When a co-worker became a proud new parent or got married, or when an apprentice "came of age," the shop was more than happy to celebrate the accomplishment by drinking in dutiful deference.<sup>18</sup>

Drinking was not limited to working hours. Employees from each company patronized a preferred tavern or grog shop, often until midnight. The tavern quickly became an important refuge for the disconcerted worker, and the typical working-class pub acquired its own flavor, an atmosphere particularly unique and appropriate

to its clientele. In at least one tavern, "The Four Alls," this was conspicuously evident by the quip that was suspended from the main rafter in full view:

1. King-- *I govern all*
2. General-- *I fight for all*
3. Minister-- *I pray for all*
4. Laborer-- *I pay for all*<sup>19</sup>

The message was wryly humorous. Then, as now, the laborer or "common person" was the primary source of financial support for society's leaders and decision-makers. It was a paradox for the worker: on one hand he was proud he could make such a contribution, but at the same time he felt victimized and unappreciated, precisely because he was burdened with such a responsibility. Liquor created a sense of egalitarianism and independence for some, for others it was an escape.

Many workers found their escape in the tavern. If they had a penchant for gambling there was cockfighting--a popular sport that drew large crowds--as well as games of chance and lotteries. More important to the disillusioned worker, however, was the camaraderie he found in the pub. Of course many workers welcomed the opportunity to unwind from a day in the shop or factory regardless of their attitude toward their jobs. But socializing in the neighborhood tavern minimized their discontent or at least distracted them from their daily routine. Opinions on politics, current events, and other issues of the day were shared over numerous mugs of malt liquor.

Initially saloons, which differed from taverns because they did not provide overnight lodging for guests, also functioned as a source of amusement, recreation, and companionship for single men who boarded in private homes and who found it difficult to cultivate and maintain social contacts. Eventually the bachelors began to socialize with married men who worked outside the home. Not only did these men gravitate to the saloon for socializing, they also were able to escape increasing numbers of community restraints on their behavior. It was easier for them to find comfort in the saloon than it was to conform to new and constraining conventions of behavior.<sup>20</sup>

That liquor was so closely associated with work and that it was an integral part of the work day was attributed to the traditional concepts of work. In the twentieth century, particularly since the introduction of time clocks, which scrupulously monitor a laborer's time on the job, both he and his employer are well aware of when the employee's shift begins and ends. There is a clear demarcation between work and leisure.

In antebellum America no time clocks existed, and though the colonial practice of integrating work with leisure was on the decline, nineteenth century artisans still had an inclination to drink on the job. This was especially prevalent among those who worked out of doors where the elements played an important role.

Many believed that drink was a stimulus to labor and that it would replenish lost energy; some even refused to work without their ration of rum.

The biggest consumers of alcohol were stage drivers, lumberjacks, river boat men, canal builders, and agricultural laborers in commercial farming areas.<sup>21</sup> These occupations shared particular characteristics: they were transient, sporadic, and subject to the weather. The men who worked these jobs had no roots, were outside the boundaries of mainstream society, alienated, and isolated from social institutions. Alcohol was a constant and reliable companion. So given to drinking were some lumberjacks that company owners often paid for the wood in liquor rather than cash. These jobs required men who were of stern disposition and mettle, who frequently engaged in brawls that began over a fatuous argument which was likely an outlet for pent-up tensions.

Heavy drinking was not confined to those who labored out-of-doors or who experienced seasonal and erratic periods of employment. Shoemakers in Lynn, Massachusetts, were known as excessive drinkers, and grog shops in every part of town satisfied their needs. School-aged apprentices could be seen in these places enjoying an after-hours dram. Even when purchasing supplies from the local shopkeeper, workers were offered liquor by the glass, a shopkeeper's ploy to detain customers in hopes of a more lucrative sale. Paul Faler has observed that "No working-man would labor unless his employer provided a half pint of liquor per day as part of his wages."<sup>23</sup> The Lynn shoemakers, who drank daily pints or sometimes quarts, were joined by clerks, artisans, doctors, and even ministers, as they perpetuated the drinking patterns associated with a pre-industrial culture in which the distinction between work and leisure was extremely blurred.

But the physical workers were not the only ones predisposed to heavy drinking. School teachers, who usually possessed some formal education, drank as robustly as their unskilled counterparts.<sup>24</sup> Teaching may have been a more respected profession than that of an artisan or mechanic or manual worker, but it, too, had many members who lacked self-fulfillment and gratification. Schoolmasters drank because they moved frequently due to uncertain tenure conditions which negated any sense of communal attachment. If the town had the means to support a teacher, one was hired. If funds ran low the next year, he was simply discharged and forced to move to the next town for employment.

During the 1830s three factors converged to exert a prodigious effect on the economic life of all Americans, and all three were felt most acutely by the working-class. The discovery of steam, the introduction of credit, and an awareness of seemingly unlimited and untapped natural resources transformed American culture and society so rapidly and so completely, that many workers were thrown into a state of profound confusion, caught up as they were in the transition between pre-industrial and industrial America.

Steam had its most immediate and direct impact on unskilled laborers. Its value had long been recognized in cooking and later in drawing water from coal

mines, but by the 1820s it was used for powering huge spindles in textile mills, propelling ships, and moving long trains of railroad cars. The uses of steam as a productive power were limited only by man's inventiveness and imagination.

The same might be said of the use of credit, the effects of which historians have documented in numerous societies whose economy revolved around its use. In the 1830s credit was not widespread, but many Americans were "speculating" in the potential value of the West, ultimately siphoning off many dissatisfied factory workers and farmers from the East who were looking for better opportunities. And finally, when the Jacksonians took over the White House, they continued to promote Jefferson's agrarian ideal that all of America was an endless agrarian expanse, a concept made more practicable after Jefferson doubled the size of the United States through the Louisiana Purchase. Through the development of that resource these Democratic Nationalists believed that growth would preserve help preserve freedom.

The combination of these factors represented infinite possibilities in the early nineteenth century. Indeed, they aided in advancing American democracy from Jefferson's agrarian ideal to the more modern financial and industrial model realized during the Jacksonian period. It was a change reflected in the mindset of the new, emerging American who was more venturesome, assertive, and free-spirited than his colonial ancestors.

For two decades prosperity went unchecked. Then, in 1837, the economic boom came to an abrupt halt. A panic, or business recession, forced the closing of many of the country's banks. Prices of commodities plummeted and businesses that were too shaky to endure volatile conditions collapsed. The financial effects on the worker were, of course, disastrous. But even more significantly, the panic also reinforced his suspicions about how the encroaching capitalistic economy was undermining workers' position in society.

During this transition period, when the factory system was gradually being introduced to the American labor force, along with an increasing awareness of time, workers developed new industrial habits. Prior to this, however, irregular and undisciplined work patterns related to drinking were a constant source of frustration to cost-conscious management. For example, when a shipbuilder in Bradford, Massachusetts, refused to allow his men "grog privileges," they quit.<sup>25</sup> In Philadelphia it was said that employers expected journeymen to lose time from work because of their excessive drinking. That these indiscretions were tolerated accounts for why workers assumed they could drink at work. Sylvester Graham, a Presbyterian minister, was incredulous when he witnessed several journeymen during an afternoon "treating time" abruptly leave their work to pass around a jug of whiskey.<sup>26</sup>

Many employers, naturally concerned with worker productivity, were caught in a precarious situation. By banning liquor altogether, they risked losing their crews. On the other hand, if they permitted workers to drink on the job, efficiency suffered for it was difficult to maintain a good level of productivity with an unreliable work force. Getting intoxicated after hours and remaining in that state for the duration of a

week-end was an all too common practice. Absenteeism due to over-indulgence in the 1800s, particularly on Mondays, was as much a problem then as it is for many employers in the 1980s.

Beyond the confines of the workplace, outdoorsmen like farmers, gradually adopted a new attitude toward the use of distilled liquors. The farmers, who once believed that the ingestion of corn liquor was required as a source of energy and vitality, were becoming less convinced of its regenerative qualities. Barn-raising, fence-building, harvesting, ploughing, planting, and other farm activities, they discovered, could be performed more quickly and cheaply without the stimulous of whiskey. Once he no longer believed that alcohol relieved fatigue (which we now know produces exactly the opposite effect), the laborer's dependence on liquor to aid him in his arduous tasks diminished. This realization, together with the recent notion that drinking cold water as an alternative created no uncomfortable side effects, resulted in a greater willingness of many manual laborers to work for a day's wages that did not include a ration of whiskey or rum.

### Temperance Reform

By 1840 a combination of economic recession and the success of the temperance movement caused a decline in liquor traffic which was also evidenced in empty grog shops and closed distilleries. The economic arguments against drinking at work that stressed the relationship between total abstinence and labor efficiency had a significant impact. Reformers who wished to uplift the individual and rid society of its evils were successful in persuading employers to enforce restrictions against the use of intoxicants during working hours. Throughout the 1840s and into the 1850s it became clear that the temperate worker, no longer distracted by social drinking, was capable of more productive labor in a work day than his intemperate counterpart. This was more than an emotional argument. The loss of property due to employee negligence and carelessness was reduced, and the interruption of operations caused by inebriated artisans or mechanics was tremendously reduced. Since fewer men were fired because of their inability to function, employee turnover was also less of a problem resulting, in turn, in a more harmonious and productive shop.

How was it that the idea of temperance--denying a pleasurable means of socialization and for some, escape--was so appealing to some workers that they would suddenly go dry? One reason was management's adoption of a ban on liquor. But it was more than a ban. Employers had imposed restrictions against on-the-job drinking before. Actually, the motive that induced nineteenth century workers to give up drinking was the same that prompted many union workers in the 1980s to accept wage cuts: they both wanted to keep their jobs. In the throes of the Panic of 1837, and the ensuing depression, employees realized that their own prosperity depended on that of their employers. Sober employees who provided greater efficiency allowed the employer to maximize profits which enabled him to stay in business and maintain his

work force. Increasingly, as mechanics, artisans, clerks, and shopkeepers were confronted with the dreaded possibility of unemployment, they demonstrated a greater proclivity to take a pledge of abstinence. In the end it was an economic incentive of higher wages, promotion, and individual prosperity that motivated employees to shun liquor more than any moral argument.

By the 1830s, as the result of the publication and distribution of literature that condemned drinking and debunked many of the popular misconceptions of the day about liquor (such as how it prevented disease and relieved fatigue, for example), temperance organizations began to attract an audience among the entrepreneurial class. When these anti-drinking societies produced scientific and medical papers that challenged the notions that alcohol was conducive to good work habits, employers readily threw their support behind the temperance movement. Now, employers, who wanted a more efficiently-run factory, and reformers, who wanted to create a better society, shared a mutual interest: the eradication of alcohol. Not all employers, of course, were supportive of temperance, but their number was significant.

In 1832 a questionnaire sent out by the New York State Temperance Society to manufacturing establishments in the region showed that forty employers were unanimous in expressing their opposition to the use of "ardent spirits" because they believed that "labor efficiency was thereby impaired."<sup>27</sup> One construction superintendent on the Baltimore and Ohio Railroad had no doubt about the adverse effects of alcohol when he stated publicly that:

*The destructive and demoralizing effects of the use of ardent spirits became so manifest in producing riots, and other flagrant disorders, that I determined, with the sanction of the president of the company, to prohibit the use of it in all future contracts.... It is believed that the work may be executed without the use of this dreadful poison, more advantageously to the interests of the company,....as well as beneficial to the laborers themselves.*<sup>28</sup>

The soundness and logic of the temperance rhetoric was equally a factor in changing attitudes in urban shops and factories. Eventually it had an impact on trade unions and labor organizations who were concerned about the problems related to intemperance. Abstinent societies began to spring up in the late 1830s in Baltimore, New York, Boston, and Philadelphia. It was in the Pennsylvania Quaker City that an unusual experiment was conducted among hundreds of artisans and mechanics who volunteered, on February 3, 1835, to abstain from using ardent spirits for six weeks. At the conclusion of the trial dry period they would meet to share their experiences and evaluate the advantages and disadvantages of refraining from the use of intoxicants.

The test was a huge success. So successful, in fact, that three hundred of the participants--men who had been accustomed to daily drams--not only signed a pledge

to remain abstemious, but also formed the Mechanics and Workingmen's Temperance Society of Philadelphia. After decades of mixing work with pleasure, these men, apparently convinced that alcohol deprived them of their dignity and achievement, swore off liquor. According to temperance organizations, which possessed a strain of evangelical protestantism, eliminating liquor as a staple was the first step toward asserting one's independence and self-esteem. Drunkenness was synonymous with slavery and in a period of a changing and unpredictable economy, sobriety was requisite for effecting one's destiny.

The lesson taught by temperance advocates was effective but simplistic in tone. Consistent with the Puritan ethic, it pre-dated Horatio Alger's moralistic parables, by stressing hard work, piety, and integrity as a means of achieving upward mobility and economic security. Respectability, it was believed, brought prosperity, and there was nothing respectable about drinking enormous amounts of liquor.

By the mid-nineteenth century drinking among the laboring class was not just seen as an individual problem, but as one that affected the whole population. As John Krout has pointed out, alcohol lowered the worker's efficiency, reduced production, decreased consumption, increased taxation, and threatened business prosperity.<sup>29</sup> This was a most serious matter that involved every American citizen. As the workers became concentrated under one management in larger enterprises in the "new industrialization," the relationship between drinking--or more accurately, not drinking--and labor efficiency became a problem of serious consequence. The industrialist was beginning to regard liquor as a grave menace that was further aggravated by the constant influx of immigrants into the United States. Both threatened the industrial *status quo*, but the liquor problem was easier to control and the move toward prohibition was gaining momentum until the Civil War disrupted it and all reform movements.

Employers may have supported prohibition but workers, who distinguished between prohibition and performance, did not. Despite the close alliance between temperance organizations such as the Washington Temperance Society of Baltimore, which contributed to the formation of labor cooperatives, unions, and labor reform groups, there was little support among the workers for total prohibition.<sup>30</sup> As individuals, the workers were willing to yield to temperance as long as it was evident they were protecting their jobs; prohibition, or total abstinence, however, was another matter.

It should not be concluded that employers either condoned or tolerated their wage earners passing a jug of whiskey in their shop during working hours. Most employers were adamant in their opposition to drinking, but they were not always in a position to enforce anti-drinking regulations. Bruce Laurie has noted that "owners of textile mills could afford to do so because they relied upon a semi-skilled labor force which could be replaced with relative ease." Employers who were smaller and not as independent, however, were of necessity more tolerant of workers who drank.

Also a factor in how lax employers were in allowing alcohol on the premises was the kind of work being performed. In large factories and textile mills where large looms and spindles were operated, anti-liquor restrictions were more vigorously enforced. To minimize industrial accidents (which were extraordinarily high) it was imperative that the worker be in full control of all his mental faculties. To ensure that, it was necessary that he forego alcoholic beverages to maintain sobriety. Once the worker left the job, he might frequent a favorite tavern to "wash away the day," but for many the days of "occupational drinking" were over.

### Conclusions

By 1850 it was evident that a combination of factors was responsible for transforming American society's reactions towards the use of alcohol, including the subculture of workers. First, the "old order" was rapidly breaking down; no longer did the worker enjoy the freedom and autonomy he once had. When he was forced to leave his home and follow the production of goods to the factory, he experienced a commensurate loss of status, independence, and self-worth. But the effects of the move to the factory were more than psychological, producing a tendency to drink--they were also economic. His sense of displacement was real. Women, children, immigrants who were quite willing to work for a lower wage, and even prisoners were replacing skilled artisans. One reaction among the laborers was an attempt to unite, usually according to occupation or level of skill. In the process of unionizing laborers had become more militant, demanding shorter hours and better pay, but they were largely unsuccessful in convincing employers to meet their demand, and became progressively alienated.<sup>30</sup> The devastating Panic of 1837 made them even more vulnerable. As a result of the ensuing depression, high rates of unemployment and reduced wages were the general rule, and it would be another century before labor organized itself and achieved any degree of effectiveness. Thus it became important to accede to restraints on the use of alcohol in the workplace in order to continue in what employment was available.

A second, more politically and culturally influenced factor was the evolution of social mores and their impact on workers, since by the 1850s abstention from alcohol, according to Gusfield, "had become more and more of a symbol of middle-class, native American respectability." It was, the author argued, the urban, immigrant lower class which had emerged as the "counter-image" to the more moralistic and pious disciples to temperance.<sup>31</sup> Drinking was no longer trendy; mainstream society was not drinking and since the custom was popular among the immigrants, it was desirable not to share the same characteristics or be identified with those who were scorned and viewed suspiciously and attempts were made to change their behavior. Even the act of drinking itself, irrespective of the immigrant issue, was being questioned. Formerly drinking and drunkenness occurred without reproof, having been more acceptable in a less refined culture. Now, however, over-indul-

gence was looked upon was shameful and ill-mannered. Social condemnation was one deterrent against such offensive behavior, but it also became more difficult to justify drinking as some of the old excuses lost validity. Improved methods of cooking and better quality food made for a more nutritious and a generally more appealing diet. More efficient home-heating systems reduced the need for internal warmth provided by liquor.

As reasons for drinking became more select, so did the groups who participated in it. While drinking by men would still be expected, consumption by women and children was vehemently disapproved of and by the Civil War diminished; at least those concerned about their reputations did not do so publicly. From this set of circumstances would emerge the modern-day standard regarding drinking habits for men and women.<sup>32</sup>

Finally, the temperance societies must be credited for playing an important role in altering the public's--and especially the workers'--attitude toward drinking. In the 1840s these organizations became centers of socialization, and with their membership drives, rituals, and initiation activities, they filled a void in the workers' lives. All-male associations like the Odd Fellows and Masons sponsored numerous occasions for socializing. Picnics, fairs, and holiday celebrations like the Fourth of July afforded splendid opportunities for the lonesome worker to find companionship or to initiate a courtship with a female guest.<sup>33</sup> With the appearance of these organizations, the taverns and grog shops, formerly refuges from isolation and despair, declined in social importance.

Neither Americans in general nor members of the working-class would stop drinking altogether, of course, and alcohol remains as much a social problem today--if not a greater one--than it was 150 years ago. But the antebellum laborer would have to accept his employer's expectation that a full day's work should be exchanged for a fair wage without the benefit of alcohol. Caught up in the Jacksonian "social workers'" zeal to uplift the individual by providing him with the opportunity for self-improvement, workers internalized some of their values. To reform is to change, and while the temperance movement was successful in eradicating alcohol in the shop and reshaping attitudes toward drinking in the period before the Civil war, the change was not permanent. By the end of the nineteenth century constant large-scale immigration renewed protests against "John Barleycorn," ultimately resulting in the ratification of the Eighteenth Amendment, or "Prohibition" as it was more popularly known. This second attempt to alter individual habits, this time by enforcement, was a miserable failure. For the past half century, since the repeal of the "Noble Experiment," legal authorities, psychologists, sociologists, and other academics have been perplexed by problems related to alcohol abuse. Still a major problem in American society, it is one of gigantic proportions in the workplace and is extremely costly to employers in terms of efficiency and productivity.

Historically, alcoholism has ranked as one of the nation's greatest social problems, and the continuing practice of including clauses related to problem-

drinking in labor contracts is an obvious indication that it remains a serious issue. At an estimated annual cost of \$9 billion to \$15 billion to the economy, there is little wonder society is as concerned about drinking on the job today as it began to be in the antebellum period.<sup>34</sup>

#### NOTES

<sup>1</sup>A cursory survey of the 1986 *Reader's Guide*, for example, is indicative of the media's interest in this topic. Numerous alcohol-related articles appear under diverse subheadings pertaining to: Automobile Drivers, Employment, Amish, Alcoholism, Youth, Airplane Accidents, Religion, Sports, Families, the Aged, Sex and Crime. There is virtually no facet of American Society that is untouched by this drug.

<sup>2</sup>See John A. Krout, *The Origins of Prohibition* (New York: Alfred A. Knopf, 1925), pp.80-81; W. J. Rorabaugh, *The Alcoholic Republic: An American Tradition* (New York: Oxford University Press, 1979), pp. 39-47; Alice Felt Tyler, *Freedom's Ferment: Phases of American Social History from the Colonial Period to the Outbreak of the Civil War* (New York: Harper & Row, Publisher, 1962), pp. 314-15; and Ronald Walters, *American Reformers, 1815-1860* (New York: Hill and Wang, 1978), p. 125.

This is not to say that Dr. Rush's treaties had no impact at all. Until his *Inquiry* was published in 1784; virtually no one in the medical community hesitated to prescribe hard liquor for the relief of pain, to bring down fevers, treat dyspepsia, and alleviate inflammations. See Ian R. Tyrell's *Sobering Up: From Temperance to Prohibition in Antebellum America, 1800-1860* (Westport, CT: Greenwood Press, 1979), p. 17.

<sup>3</sup>Edwin J. Hendricks and C. C. Pearson, *Liquor and Anti-Liquor in Virginia* (Durham, NC: Duke University Press, 1967), p. 4.

<sup>4</sup>Rorabaugh, pp. 19-21, and Tyler, p. 311.

<sup>5</sup>Rorabaugh, pp. 20-21; and Tyrell, pp. 176-77.

<sup>6</sup>*Ibid.*, p. 20, Tyrell, p. 18; and Charles Sydnor, *American Revolutionaries in the Making: Political Practices in Washington's Virginia* (New York: The Free Press, 1952), Chapter 4, "Swilling the Planters With Bumbo," pp. 44-59.

<sup>7</sup>Quoted from Alice Felt Tyler's *Freedom's Ferment*, p. 310.

<sup>8</sup>Ronald G. Walters, *American Reformers*, p. 139; and W. J. Rorabaugh, "Estimated U.S. Alcoholic Beverage Consumption, 1790-1860" *Journal of Studies on Alcohol* 37 (January-March 1976), p. 361. Hereafter referred to as "Estimated Consumption."

<sup>9</sup>Rorabaugh, "Estimated Consumption," p. 361.

<sup>10</sup>Rorabaugh, p. 362.

<sup>11</sup>See Tyrell, p.20; and Rorabaugh, "Estimated Consumption," p. 361. Rorabaugh quotes the price of coffee, tea, and milk at 43 or 44 cents a gallon.

<sup>12</sup>Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the Movement* (Urbana, IL: University of Illinois Press, 1963), p. 39.

<sup>13</sup>Gusfield.

<sup>14</sup>Gusfield.

<sup>15</sup>Douglas T. Miller, *The Birth of Modern America, 1820-1850* (New York. Pegasus, 1970), p. 101.

<sup>16</sup>Miller, pp. 106-07.

<sup>17</sup>Miller, p. 108.

<sup>18</sup>Rorabaugh, *The Alcoholic Republic*, p. 132.

<sup>19</sup>Quoted in Bruce Laurie, "Nothing on Compulsion: Life Styles of Philadelphia Artisans, 1820-1850," *Labor History* 15 (1974), p. 346.

<sup>20</sup>Jed Dannenbaum, *Drink and Disorder: Temperance Reform in the Cincinnati from the Washington Revival to the WCTU* (Urbana, IL: University of Illinois Press, 1984, p. 5.

<sup>21</sup>See Dannenbaum, *Drink and Disorder*, pp. 5-6; and Rorabaugh, *The Alcoholic Republic*, pp. 143-44.

<sup>22</sup>Dannenbaum, p. 145.

<sup>23</sup>Paul Faler, "Cultural Aspects of the Industrial Revolution: Lynn, Massachusetts, Shoemakers and Industrial Morality, 1820-1860," *Labor History* 15 (1974), p. 379.

<sup>24</sup>Dannenbaum, p. 144.

<sup>25</sup>Herbert G. Gutman, "Work, Culture, and Society in Industrializing America, 1815-1919," *American Historical Review* 78 (June-October 1973), p. 544.

<sup>26</sup>Bruce Laurie, *Working People of Philadelphia, 1800-1850* (Philadelphia: Temple University Press, 1980), p. 56.

<sup>27</sup>Krcut, p. 140.

<sup>28</sup>Not all mechanics and artisans were prepared to sign a pledge of abstinence. For a useful demographic and socio-economic breakdown of who were likely to be supporters of temperance within the working classes see Jill Siegel Dodd, "The Working Classes and the Temperance Movement in Ante-Bellum Boston," *Labor History* 19 (Fall 1978), p. 510-31.

<sup>29</sup>Walters, p. 141. The author also notes that other reasons for joining temperance societies included the services they provided, (health insurance, and employment "benefits") and sociability.

<sup>30</sup>The first union of any significance in the Jacksonian era was the shortlived Mechanics' Union of Trade Associations in Philadelphia, formed in 1827. In 1829 a Workingmen's Party was organized in New York City which succeeded in electing some state-level candidates, but by the mid-1830s had all but disappeared in a depression economy.

It should be noted that the party was not preoccupied with wage-and-hours-issues. Members also wanted free public schools, the abolition of imprisonment for debt, a revision of the militia system, and mechanics' lien laws that would protect worker's wages when employers were insolvent.

<sup>31</sup>Gusfield, p. 55-57.

<sup>32</sup>Though contemporary advertising attempts to appeal to both sexes, there is still an awareness of the unwritten rule that men can come home after a long day at the factory or office thinking they deserve to unwind with a beer while scanning the evening newspaper in the Lazy-Boy. One television commercial continually reinforces this popular ritual with the refrain "This Bud's for you!"

<sup>33</sup>Walters, p. 142.

<sup>34</sup>For figures on the economic loss to employers see Carl J. Schramm, ed. *Alcoholism and Its Treatment in Industry* (Baltimore: The Johns Hopkins University

Press, 1977), p. ix; and Richard L. Williams, ed. *Occupational Alcoholism Programs* (Springfield, IL: Charles C. Thomas Publisher, 1975), p. 5.

Although cocaine is currently the most publicized drug, the most widely used in the United States is alcohol, as reported by the Metropolitan Life Insurance Company in its *Statistical Bulletin*.

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## The Impact of Substance Abuse at the Workplace

*FROM ALL ACCOUNTS, the use of alcohol and illegal drugs is at least as prevalent in the workplace as it is in the population at large. The following presentations outline the negative impact of this problem on corporate productivity and profitability--and suggest a disparity between the dimensions of the problem and the corporate response.*

### Some National Statistics

*James T. Wrich*

Even the most cursory examination of substance-abuse statistics, as they relate to employee populations, is enough to cause management serious concern. For example, approximately ten million persons in the United States fit the clinical definition of alcoholism. But the problem does not stop with these severely addicted individuals. For every such person, one must also consider family members, co-workers and supervisors--a total of 40 to 50 million other people directly affected by alcoholism. The afflicted and those directly affected thus number as many as 60 million people.<sup>1</sup> The untreated adult children of alcoholics form still another category of approximately 20 million persons. This means that up to 80 million people--a third of the U.S. population--have had a profound, sometimes almost catastrophic, experience with alcohol. Moreover, clinical experience shows that rarely is a person involved with only one drug. Someone using heroin, cocaine or marijuana is very often also a problem drinker.

The impact of substance abuse on society can be shown in other statistics. For example:

- Approximately 64 percent of all drivers involved in fatal accidents have been drinking beforehand, and 40 to 60 percent of all fatal crashes involving young drivers are alcohol-or drug-related.
- About 50 percent of those perishing in accidental falls and fires show evidence of alcohol intake prior to the fatal episode. (One estimate shows that chemically dependent people are ten times more likely to die in fires.)
- 50 to 60 percent of drowning victims show evidence of either alcohol or drug intake.

This report was previously published in Helen Axel, ed., *Corporate Strategies for Controlling Substance Abuse* (New York: The Conference Board, 1986). Reprinted by permission.

■ Substance abuse is a contributing factor in a big percentage of incarcerations, family and other violence, and suicide. (One study shows that 80 percent of suicide cases have had some involvement with addictive substances.)

The workplace is not immune from the effects of substance abuse. Mental-health specialists estimate that 12 to 15 percent of all workers experience some sort of personal problems, and that at least half of those problems involve substance abuse. Persons addicted to mind- or behavior-altering substances have absenteeism rates that, on average, are approximately two-and-one-half times that of nonaddicted workers. Some studies show that these persons are away from their jobs 16 times as often as other employees.

In addition, these workers are frequently responsible for productivity losses due to theft and declining performance. On average, compared with their nonaddicted counterparts, substance abusers consume three times the medical benefits, are five times as likely to file workers' compensation claims, experience seven times as many garnishments; and are repeatedly involved in grievance procedures. In sum, applying national averages to a hypothetical company with 1,000 employees, each with an average salary of \$23,000, chemical dependency would cost that firm upwards of \$500,000 a year.

While the legal system and social-service agencies have long been struggling with the problems of substance abuse, they have not made notable headway. Attempts in the schools to prevent the cycle of abuse and addiction through educational efforts have only been moderately successful. Hospitals do what they can, but usually only after the onset of illness and trauma. And, with the decline of religious and family authority, there are fewer institutional impediments to the continuing growth of drug and alcohol problems.

One of the few remaining places where this problem can be dealt with effectively is the workplace. It has been demonstrated that persons with addictive disorders often value their jobs more highly than their families and other social-support networks. Since virtually every person in this country is, in some significant way, associated with an employer, the workplace can serve as a powerful motivator to receive help. The locus of attention has also shifted to the workplace because corporations, too, have begun to relate the impact of substance abuse to worker performance and corporate profits.

### Direct and Indirect Costs to Industry

*Diana Chapman Walsh*

One of the principal ways that corporate managers justify their involvement in substance-abuse programs is to analyze the overall cost implications of substance

abuse in the workplace. In 1977, the cost to employers was put at \$26 billion, with an additional amount of \$16 billion representing lost productivity.<sup>2</sup> In order to make them more understandable, these costs can be grouped according to four categories:

(1) *Manifest Direct Costs*--These are payments for overt treatment of substance-abuse problems, including psychiatric care and detoxification programs. National expenditures for mental health services account for approximately 15 percent of total health-care expenditures, and appear to be increasing. A 1981 report by Blue Cross/Blue Shield of Minnesota found dramatic growth in expenditures for chemical dependency and psychiatric care that could not be explained by any change in the benefit level. The increase (close to 115 percent over a five-year period) was occurring out of all proportion to other health-expenditure categories.<sup>3</sup>

As companies become more sophisticated about the utilization of their health-care benefits by tracking episodes of illness, many find that they are paying much more for mental health and substance-abuse problems than they initially believed. For example, a company in Massachusetts estimated that such expenses amounted to about 8 percent of total health costs.<sup>4</sup> But when the firm's health-cost data were analyzed, company officials discovered that 28 percent of all claims paid were for drug- and alcohol problems and mental disorders.

(2) *Latent Direct Costs*--These are medical-care costs for physical illnesses that are less obviously associated with substance abuse. Such illnesses typically have an important emotional or behavioral component. Costs for this type of medical care can be documented by analyzing claims filed by employees and/or family members who have substance-abuse problems.

Substance abusers are found to be high-cost consumers of health care. Such patients typically have repeated short hospitalizations, not a single costly stay. In Boston, for example, a study of six leading hospitals found that 13 percent of the patients used as many resources as the remaining 87 percent, and these patients' charts showed more evidence of drinking, smoking and obesity.<sup>5</sup> In a company studied in 1980-1981, 24 percent of the cases coming through the employee assistance program accounted for 78 percent of the firm's total disability claims and 89 percent of all the medical claims.<sup>6</sup> In a third study, 20 to 40 percent of emergency cases, and 25 to 60 percent of all hospital patients, in New York City were found to be problem drinkers.<sup>7</sup>

(3) *Manifest Indirect Costs*--Major items in this category include absenteeism, productivity losses, turnover, waste and accidents. A 1979

report described these costs as they relate to employee drinking in seven of the largest U.S. railroad companies. The indirect costs associated with 44,000 problem drinkers amounted to at least \$29 million, and possibly as much as \$106 million. The study found, in fact, that it cost more to discharge a rule violator (using the grievance process) than it did to rehabilitate an employee with an alcohol problem.

(4) *Latent Indirect Costs*--In addition to the costs associated with damage to public relations and to morale, this category includes costs arising from the employer's potential legal liability for substance abuse problems caused by job-related stress--a possible future source, some say, of major claims against corporations. In recent years, corporate liability in such cases has been defined more broadly. At one time companies were held responsible only when high-stress situations were shown to lead to specific physical illnesses. Later, companies were found to be liable if repeated or ongoing stress was shown to cause specific physical disabilities. Now, with a blurring of distinctions between on-job and off-job behavior, it appears that a wide range of physical and psychiatric illnesses are compensable if they can be linked to cumulative and ongoing work-related stress.

When the costs are tallied, they produce varying projections of the social impact of substance abuse. For example, two of the most widely quoted studies, using different estimating procedures, come to somewhat different conclusions about the cost of alcohol abuse. The population-specific approach used in one analysis compared per capita health-care costs of alcohol abusers with those of nonabusers. Multiplying the difference in the per capita figures by an estimate of the prevalence of alcohol abuse yielded an aggregate cost of \$42.8 billion for 1975.<sup>8</sup> However, such a procedure has been criticized for overstating the cost because it fails to adjust for a number of health risks that have been found to be more common among heavy drinkers.

An alternative approach identified specific events or illnesses associated with alcohol abuse, and came up with a total cost of \$49.4 for 1977.<sup>9</sup> (That study put the cost of drug abuse at \$16.4 billion.) In calculating treatment costs, for example, the illness-specific approach included all expenditures for illnesses attributable solely to alcohol abuse, but included only those expenditures that could be ascribed to alcohol-related problems for illnesses with multiple causes. The cost-of-illness methodology tends to produce more conservative estimates than the population method.

But however the economic costs are calculated, it is generally recognized that the total burden of alcohol and drug abuse is substantially greater when social costs are figured in. These include the pain and suffering of the affected families, and the host of medical, psychological and social consequences that a full accounting of costs would ultimately have to include in one way or another. Studies to date do little more

than acknowledge that these intangible costs, if they could be accurately quantified, would add billions of dollars to the overall costs of substance abuse to society.

### The Cost to Corporations and Families

*Jonathan E. Fielding, M.D.*

Corporations need to look at costs of substance abuse in three ways. One obvious cost is the effect on individual employees. If companies have a strong interest in the health of the employees and their families, they are, in effect, encouraging employees to assume greater personal responsibility for themselves and their families. A second concern is the cost to the company's shareholders, since substance-abuse problems will inevitably affect the firm's bottom line. The third cost aspect can be expressed in terms of corporate social responsibility. Corporate contributions and community projects directed at reducing the societal impact of substance abuse will also prove cost beneficial to the company.

Nonintervention has broad ramifications. Absenteeism rates, for example, may be two to five times as great for a person who is abusing alcohol and drugs than for other employees. There are also some less obvious implications: What is the cost of losing a customer because of low-quality products? What about employee theft, accidents and disruptive behavior? The dollar figures may be elusive, but even conservative estimates of these costs may be surprisingly high.

#### Substance Abuse--An Update on Costs

Amid-1984 report by the Research Triangle Institute (under contract with the Federal Government) is the latest in a series of studies to examine the economic burden of substance abuse on society.<sup>1</sup> This study (an update of a 1981 report analyzing statistics for 1977) estimates that alcohol and drug abuse in 1980 were responsible for \$136.4 billion in costs associated with treatment, research and prevention programs; treatment of related health problems; crime; motor vehicle accidents; and reduced productivity and lost employment.<sup>2</sup> These figures compare with an estimated \$65.8 billion in economic costs for substance abuse in 1977.

Although the costs of substance abuse doubled between 1977 and 1980, the authors explain that the increases do not indicate any major changes in the severity of alcohol and drug-abuse problems. They attribute a major portion of the increased costs to improved methodology in collecting and analyzing data. For example, inclusion of cost data associated with fetal alcohol syndrome has added a new dimension to these figures. Also, recent research on productivity losses associated with marijuana use, and more reliable evidence on the link between violent crime and drug abuse, have produced more comprehensive data in the 1984 report. Other factors contributing to the cost differential between the two studies are inflation and population growth.

Cost components shown in the accompanying table provide 1983 estimates projected by the authors from the base statistics for 1980. Adjustments were made to account for inflation and changes in the size of the population at risk. According to the report, these factors are the ones most likely to affect costs over the short run. Other variables--such as changes in the prevalence or incidence of substance

(continued)

### Substance Abuse--An Update on Costs (Continued)

abuse, have produced more comprehensive data in the 1984 report. Other factors contributing to the cost differential between the two studies are inflation and population growth.

Cost components shown in the accompanying table provide 1983 estimates projected by the authors from the base statistics for 1980. Adjustments were made to account for inflation and changes in the size of the population at risk. According to the report, these factors are the ones most likely to affect costs over the short run. Other variables--such as changes in the prevalence or incidence of substance abuse, the sociodemographic composition of the population, societal responses, and other causal relationships--are not accounted for in short-range updates because they are believed to influence trends only in the longer term.

<sup>1</sup>Henrik Harwood, Diana M. Napolitano, Patricia L. Kristiansen, and James J. Collins, *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980*. Research Triangle Park, NC: Research Triangle Institute, 1984.

<sup>2</sup>The study also assumes an additional \$54.2 billion of costs associated with mental disorders. Although the researchers acknowledge that "pure" alcohol abusers and "pure" drug abusers are rare, and that substance abuse and mental illness are often linked, their analysis attempts to eliminate this cost overlapping. Most costs are attributed to the individual's "principal" problem, which is described as the "primary", or first-listed, diagnoses. Unassigned administrative costs are prorated.

### ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE, 1983

Millions of Dollars

CORE COSTS <sup>1</sup>	Total	Alcohol Abuse	Drug Abuse
<b>Direct:</b>			
Treatment and Support	16,914	14,865	2,049
<b>Indirect:</b>			
Mortality <sup>2</sup>	20,637	18,151	2,486
Reduced Productivity	98,928	65,582	33,346
Lost Employment	5,728	5,323	405
<b>OTHER RELATED COSTS</b>			
<b>Direct:</b>			
Motor Vehicle Crashes	2,667	2,667	a
Crime	9,172	2,607	6,565
Social Welfare Programs	52	49	3
Other	4,350	3,673	677
<b>Indirect:</b>			
Victims of Crime	1,137	192	945
Crime Careers	10,846	0	10,846
Incarceration	5,404	2,979	2,425
Motor Vehicle Crashes (time loss)	583	583	a
<b>TOTAL<sup>3</sup></b>	<b>176,421</b>	<b>116,674</b>	<b>59,747</b>

<sup>1</sup>"Core" costs are costs that occur in the health sector. "Direct" costs are those in which resources are consumed and formal payment in cash or in kind is made. "Indirect" costs involve no formal payment for resources used and maybe incurred over a period of time.

<sup>2</sup>Production lost due to premature death calculate at 6 percent discount rate.

<sup>3</sup>Totals may not add due to rounding. Data for alcohol and drug abuse are not strictly comparable. Most significant differences occur in the completeness of data relating substance abuse and reduced productivity. Figures are more complete for alcohol abuse.

<sup>a</sup>Insufficient data to provide reliable estimate.

Source: Harwood, et. al., 1984, p. G-16.

Chemical dependency must be viewed as both a medical and a social problem. It must also be described in a family context. An employee with a problem of abuse or addiction may come from a family where other members are similarly affected. It is well-known that families that have experienced drug use are more likely to continue the pattern into the next generation. This is particularly true for alcoholism. Since drug patterns are often established at a very young age, corporations might consider supporting prevention programs that are directed at employees' children. Such efforts are likely to reap benefits in the long term.

Another reason for viewing substance abuse in a family context is that family problems may exacerbate the drug or alcohol usage patterns of individual members--or vice versa. An adverse family environment may convert an occasional user into a person who is dependent on intoxicants. Or substance abuse may encourage family violence, a problem that has come out of the closet in recent years. On the other hand, strong family ties and relationships can be very important for patients in the recovery process.

### Alcohol Problems in the Railroad Industry

*Joseph J. DeRosa*

In 1977, the Department of Transportation authorized an outside evaluation of alcohol abuse in seven railroads, a study that involved approximately 234,000 employees. Data were obtained from personal interviews and confidential (and anonymous) mail questionnaires completed by 5,7000 randomly selected railroad employees. Because the response rate was very high--up to 90 percent in some companies, and at least 70 percent in others--the survey findings were deemed accurate.

The results of this study, called the REAP Report, are illustrative of the problems businesses face in dealing with substance abuse.<sup>10</sup> The disturbing results of the research were summarized in a monograph published in 1979.<sup>11</sup> The study's findings include the following:

- 75 percent of the workers consumed alcoholic beverages.
- 25 percent were classified as problem drinkers--that is, they drank on the job, drank while subject to duty, or had alcoholic beverages in their possession.
- Two-thirds of those studied became drunk at least once a year, one-fourth at least monthly, one-seventh at least every two weeks, and one in eleven every week. (These individuals were not necessarily drunk on the job.)

- 12 percent of all railroad employees (28,000 workers, as projected from the findings) drank while on duty.

- 10 percent drank while subject to duty. ("Subject to duty" means than an employee has been notified of a possible call for extra work.) According to regulations, an employee is not permitted to drink when subject to call. Because this rule (known as Rule "G") is a drinking rule, not a drunkenness rule, it does not matter how much alcohol is consumed. As little as one ounce of spirits or beer constitutes a violation and subjects the employee to immediate dismissal. Despite this penalty, however, each of those one-in-ten workers averaged about three violations a year.

- 5 percent of the workers were very drunk while on duty while 15 percent admitted to having been "somewhat drunk."

Based upon the employee population in the study, 125 employees were drunk while on duty during any given day in 1978. This statistic was a damning indictment of the companies' efforts to control the problem of alcohol abuse. What makes these statistics even more alarming is that the study dealt only with alcohol--not with the total universe of abused substances.

### Some Findings on Corporate Perceptions and Responses

*James W. Schreier*

Research that I have conducted suggests that corporate efforts over the last five to ten years have not made significant progress in solving the problem of drug abuse at the workplace. A survey of corporations in 1981 found that the problem of chemical dependency--and the perception of the problem by business executives--appeared to have increased significantly since similar, but somewhat smaller, surveys were conducted in 1971 and 1976.<sup>17</sup> Comparing the findings from the latest study, which involved 141 manufacturing and service organizations, primarily from the Midwest, with the one made five years earlier, some significant trends become apparent. The survey found that the proportion of firms:

- directly involved with drug and alcohol problems in their work forces increase from 50 to 80 percent;
- reporting substance abuse to be the same or a more serious problem than five years previously grew from 67 percent to 84 percent;

- observing that substance abuse (typically identified only with male workers) is a growing problem among women went from 26 to 34 percent.

In spite of these widely held perceptions, the managers responding to the study continued to believe, as they had in 1976, that substance abuse was a less severe threat in their own organizations than elsewhere. Moreover, while more companies had formal, written policies regarding alcohol and drug use in 1981 than in 1976, 44 percent of the firms still remained without them.

#### New Regulations to Control Substance Abuse in the Transportation Industry

The message of the 1979 REAP Report, which documented the alarming extent of alcohol abuse in the railroad industry, has been recently reinforced by a series of highly publicized railroad accidents linked to alcohol and/or drug abuse.<sup>1</sup> In 1984 testimony before the Senate Commerce Surface Transportation Subcommittee, the Secretary of Transportation referred to the seriousness of the current problem. Citing Department of Transportation (DOT) statistics, the Secretary reported that at least 45 alcohol-and drug-related railroad accidents occurred in the eight-year period between 1975 and 1983. These accidents were responsible for 34 deaths and property damage in excess of \$28 million.<sup>2</sup> (As of mid-1985, these figures were upped to 37 deaths, 80 injuries, and over \$34 million in property damage.<sup>3</sup>)

Since 1979, an extended debate has taken place between the railroad industry and the Federal Government on ways to address the problem—that is, whether action should be taken through voluntary efforts within the industry, or whether new federal regulations should be imposed. Railroad workers have long operated under an industry work rule, "Rule G," that prohibited drinking while on duty or on call but had no federal penalties and did not allow mandatory testing. Union officials generally support efforts to fight substance abuse but, as in most negotiations with industry on this issue, want to "decriminalize" the problem and encourage afflicted employees to seek treatment. Some of the affected employees, who were interviewed for a newspaper article, suggested that the jobs themselves were at fault. They cited irregular hours, loneliness due to long layovers in isolated areas, and lack of direct supervision, as conditions contributing to substance abuse. They recommended changes in working conditions as the fundamental solution to the problem.<sup>4</sup>

In June, 1984, the Federal Railway Administration (FRA) issued proposed regulations to control alcohol and drug use in the railroad industry. These regulations, which became final in August, 1985, were scheduled to become effective in November of that year. However, injunctions obtained by the rail workers' unions delayed implementation of the regulations until February 1986, when the Supreme Court set aside the lower court order and granted the Administration's request that the rules be carried out while their validity is being challenged.<sup>5</sup>

According to the text of the FRA report, the new rules contain six major provisions. They:

"(i) prohibit the use of alcohol and drugs in railroad operations; (ii) require toxicological testing of employees following major accidents and incidents; (iii) require pre-employment drug urine screens for applicants for certain positions; (iv) authorize the railroads to require employees to cooperate in breath and urine tests administered by or for the railroad in certain circumstances that would be deemed to constitute just cause for testing; (v) require the railroads to institute policies that will encourage the identification of employees troubled by alcohol and drug abuse; and (vi) institute improvements in the

(Continued)

### New Regulations to Control Substance Abuse in the Transportation Industry

(Continued)

accident/incident reporting systems that will assist in better documenting the extent of alcohol and drug involvement in train accident."<sup>6</sup>

The Department of Transportation has also directed recent attention to the airline industry. DOT officials note that while accidents in commercial aviation are only infrequently related to alcohol abuse, this problem is viewed as a serious one among pilots in general aviation. Although pilots have long been subject to federal regulation—through licensing procedures, and rules regarding alcohol use that carry stiff penalties (such as fines and loss of licenses)—stricter regulations became effective in April, 1985. Rules issued by the Federal Aviation Administration established a blood-alcohol standard for determining when airline pilots and crew members are impaired. Set at 0.04 percent, this level is well below the 0.10 percent standard used as the threshold for definging when motorists are considered legally drunk.

<sup>1</sup>Timothy A. Mannello, *Problem Drinking Among Railroad Workers: Extent, Impact, Solution*. Washington, D.C.: University Research Corporation, 1979.

<sup>2</sup>"New Rules on Alcohol Abuse by Trainmen Set." *The Daily Labor Report*, June 8, 1984.

<sup>3</sup>"U.S. Acts to Cut Rail Drug Abuse." *The New York Times*, August 1, 1985.

<sup>4</sup>Bill Paul, "Danger Signal: Alcohol and Drug Use By Railway Crewmen Poses Threat to Safety." *The Wall Street Journal*, August 16, 1983.

<sup>5</sup>"Rules on Drug Testing for Rail Workers to Go Into Effect Monday." *The New York Times*, February 9, 1986.

<sup>6</sup>Federal Register, 49 (114), June 12, 1984, p. 24252.

Against this backdrop of increased prevalence and mixed responses, the companies in the study indicated that they continued to encounter a number of problems in attempting to set up effective substance-abuse programs. Although company experiences often reflected the size of their work forces, many of the difficulties encountered were similar. These typically involved detecting drug use, obtaining accurate information, and determining an appropriate policy. On balance, the study suggests that companies appear far more able to formulate reactive policies to substance-abuse problems than to adopt preventive programs.

Lack of top-management interest in alcohol and drug issues also remains a serious problem. Senior executives appear unconvinced that they must play a leadership role in dealing with these problems, although it is evident that lasting solutions necessarily require visible and sustained top-management support. In order to achieve this kind of commitment from management, the study suggests that valid information on the cost effectiveness of chemical-dependency treatment needs to be developed. Ideally, such information should demonstrate that hospital costs can be lowered if available rehabilitation and treatment facilities are used; that absenteeism can be reduced; and that savings in disability, workers' compensation, and salary-continuation costs are possible.

Additional work needs to be done, too, in the area of program evaluation. Clear evidence must be produced in order to measure the success and long-term

impact of rehabilitation programs. And, if possible, program information and outcomes need to be subjected to scrutiny by outside evaluators.

Other aspects of corporate substance-abuse programs require attention as well. For example, companies need to: (1) be more consistent in their policies and their work rules; (2) apply basic management skills and practices to administering these programs; (3) recognize that some jobs, supervisors or work situations may help to cause or intensify drug and alcohol problems; and (4) incorporate substance-abuse programs into the broader strategy of health promotion.

### Findings on High School Seniors: Implications for the Future Work Force

*Edward C. Senay, M.D.*

A number of government investigations have been conducted since the mid-1960s on the habits of people with respect to the use of intoxicants. The first national study, in 1964-1965, was on alcohol consumption. In 1970, the National Institute on Drug Abuse began to add other classes of drugs. The investigations have involved many population groups--civilian workers, military personnel, adolescents, the elderly, women and minorities. The most prominent government-sponsored study on drug use is the annual survey conducted among high-school seniors by the School of Social Science Research at the University of Michigan. Each year more than 15,000 students are queried about their experiences with various drugs.

The results of these studies are revealing: When 10 to 20 percent of the approximately 3.5 million seniors in the nation's high schools regularly take drugs that have major negative health consequences, the potential impact on the workplace is considerable. Drug abuse tends to be a behavior pattern that starts in adolescence and, for most classes of drugs, persists over many decades. Alcohol, nicotine and marijuana are all drugs that people like and continue to use over long periods of time, usually in ever-increasing amounts. Such increases in dosages usually signal more serious health consequences.

Extrapolating further from these data, several major trends emerge that give rise to great concern:

- *Increased Variety of Drugs.* In addition to more widespread use of drugs during the last two decades, there has been a tremendous increase in the kinds of substances used and abused. For example, if we try to compare data for the eight classes of drugs that are reported in the 1980 survey (alcohol, nicotine, marijuana, hallucinogens, therapeutic drugs, cocaine, other opiates, and heroin), we find that only alcohol and nicotine show up in the usage charts for 1960.

■ *Younger Ages of Users.* Youthful use of intoxicants is another aspect of the change that has occurred in recent decades. The seventh or eighth grade is the time at which a young person in our society begins to confront the issue of whether or not to use intoxicants--and whether or not to associate with people who use and/or sell illicit drugs. In general, the larger the school, the younger the age at which students must make decisions about drugs.

Until now, there has been no society in history in which 10, 11 and 12 year-olds have engaged in becoming intoxicated with any regularity. The consequences for their health are very serious. The younger people are when they start using intoxicants, the more pathology they appear to have at any given later age. Put another way, if the welfare, social, familial and economic status of a cohort of young people starting to use marijuana at age 10 were compared with a group that started use at age 15, the latter group would have superior scores in all dimensions.

■ *Increased Use of Multiple Substances.* There was a time when there were "pure" alcohol users or "pure" heroin users. For example, in drug-treatment efforts in Illinois during the late 1960s, 88 percent of the heroin addicts coming in for treatment used only heroin. (On an occasional basis, they also used marijuana and/or alcohol.) But that proportion was reversed by 1970: Only 12 percent of the heroin addicts under treatment used heroin as the sole drug of abuse.<sup>13</sup> National statistics now show that people are using multiple substances in a rotating fashion.

Another unhappy piece of news is that people are taking substances whose nature is unknown to them. Drugs sold on the street are often not what the seller believes them to be, and not what the buyer thinks he or she is buying. Some of these drugs are also being used in combinations that are particularly pathological--they exhibit unique profiles of pharmacological and psychological effects.

■ *Increased Drug Potency.* The marijuana that was being smoked in this country during the late 1960s was very close to the placebo level--that is, most of the "benefit" was psychological in origin. Now, with advances in the technology of growing cannabis, the chemical dosage delivered per unit of use has increased. This is also true of cocaine, where much greater potency--achieved through the technique of "freebasing" (smoking purified cocaine through a water pipe)--has significantly increased the harmful effects of the drug.

### Update on Drug Use Among Teenagers

Abbreviated data, released in early 1986, report on trends in drug use among high school seniors between 1975 and 1985. The findings are from an annual survey conducted by the Institute for Social Research at the University of Michigan with funding from the National Institute on Drug Abuse. A representative sample of more than 16,000 students from 132 public and private schools nationwide participated in the most recent survey.

Although comprehensive data from the 1985 survey were not available at press time, the figures show that the recent downward trend in the use of some drugs appears to have leveled off. The statistics also indicate that the proportion of students using cocaine is at an all-time high. Seventeen percent of the class of 1985 reported experimenting with the drug and 13 percent had used it within the past year. Each of these figures is up a percentage point over levels shown in the past few surveys. The proportion of daily users, though still a very small 0.4 percent, doubled between 1984 and 1985.

Other trends in drug use, as revealed by students responding to the 1985 survey, are noted in the following highlights:

- Over three-fifths of all students experiment with illicit drugs before they leave high school, and 40 percent have used drugs other than marijuana. About 5 percent of students drink alcohol daily, and 45 percent of boys and 28 percent of girls consumed five or more drinks in a row in the two weeks prior to the survey.
- Almost 30 percent of all high school seniors had used illicit drugs within the past 30 days, down from 39 percent in 1979, but about the same level as in 1984.
- The proportion of active marijuana users rose a percentage point between 1984 and 1985, but the percentage reporting use of the drug within a month of the survey is still well below the high of 37 percent recorded in 1978 and 1979. Daily marijuana use is at its lowest level since the survey began—at just under 5 percent, or less than half the peak level recorded in 1978.
- Students continue to report lower use of a number of other drugs, including amphetamines, methaqualone, and LSD. But the use of PCP (phencyclidine) and various inhalants appears to be on the rise, based on the 1985 survey data. Heroin, and other opiates, have shown relatively stable levels of use in recent years.
- Nonprescription stimulants (pseudo-amphetamines, diet pills, and stay-awake pills), included in the survey for the first time in 1982, continue to hold a significant "market share" in usage.
- Alcohol use has remained more or less unchanged since 1976—92 percent had tried alcohol and 86 percent had used it in the past year—but the pattern of daily use that had been edging downward since the late 1970s was up over the 1984 level. Similar trends were recorded for cigarette smoking.

The study's authors noted that, despite some apparently favorable trends, substance use and abuse patterns among high school seniors remain high when compared with long-term historical standards in the United States. Illicit drug involvement also continues to be more extensive among youth in this country than in any other developed nation in the world.

<sup>1</sup>High School Senior Drug Use: 1975-1985" NIDA Capsules, January, 1986. Data for 1984 can be found in: Lloyd D. Johnston, Patrick M. O'Malley and Jerald G. Bachman, *Use of Licit and Illicit Drugs by American's High School Students, 1975-1984*. DHHS Publication No. (ADM)85-1394. Washington, DC: U.S. Government Printing Office, 1985.

NOTES

<sup>1</sup>Statistics on the prevalence and impact of substance abuse can be found in the National Institute of Alcohol Abuse and Alcoholism, Fifth Special Report to the U.S. Congress on Alcohol and Health from the Secretary of Health and Human Services, December, 1983. DHHS Publication No. (ADM)84-1291. Washington, DC: U.S. Government Printing Office, 1984.

<sup>2</sup>A. Cruze, H. Harwood, P. Kristiansen, J. Collins and D. Jones, *Economic Costs of Alcohol and Drug Abuse and Mental Illness-1977*. Research Triangle Park, NC: Research Triangle Institute, 1981.

<sup>3</sup>Blue Cross and Blue Shield of Minnesota. "Blue Cross and Blue Shield Statistics on Chemical dependency and Psychiatry," News Release, June 19, 1981 (mimeo).

<sup>4</sup>Health Policy Institute, "Conference on Treatment for Chemical Dependency and Mental Illness: Can This Utilization Be Managed?" December 13-14, 1984. Unpublished proceedings. For report on conference see: D.C. Walsh and R. H. Egdahl, "Treatment for Chemical Dependency and Mental Illness: Can This Utilization Be Managed?" *Health Affairs*, pp.128-136, Fall 1985.

<sup>5</sup>J. A. Califano, *The 1982 Report on Drug Abuse and Alcoholism*. New York: Warner Books, 1982.

<sup>6</sup>W. N. Burton, P. R. Eggun, and P. J. Keller, "High Cost Employees in an Occupational Alcoholism Program," *Journal of Occupational Medicine* 23 (April):259-262, 1981.

<sup>7</sup>J. A. Califano, 1982.

<sup>8</sup>R. Berry, J. Boland, C. Smart, and J. Kanak, *The Economic Cost of Alcohol Abuse-1975*. Brookline, MA: Policy Analysis, Inc. 1977.

<sup>9</sup>A. Cruze *et al.*, 1981.

<sup>10</sup>REAP is the acronym for Railroad Employee Assistance Program.

<sup>11</sup>As reported in Timothy A. Mannello, *Problem Drinking Among Railroad Workers: Extent, Impact, Solution*. Washington, DC: University Research Corporation, 1979.

<sup>12</sup>See James W. Schreier, "A Survey of Drug Abuse in Organizations." *Personnel Journal*, June, 1983.

<sup>13</sup>Reported in Cocaine. Research Monograph No. 50. DHHS (ADM) 84-1326l. Rockville, MD: National Institute on Drug Abuse, 1984.

# The Role of Employee Assistance Programs In Dealing With Employee Substance Abuse

*Judith Vicary*

## Introduction

It is now widely recognized that drug and alcohol abuse are major problems in America, ones that affect all ages and segments of society. The pervasive use of substances can be seen in the workplace, with 29 percent of employed 20-40 year olds recently reporting having used an illicit drug within the past year, and 19 percent having used in the past month. It is important to remember that alcohol is still the most widely abused drug for all age groups, with an estimated 5 to 10 percent of the workforce suffering from alcoholism and related problems. The misuse of prescription and over-the-counter medications is also of serious concern, with many people not realizing the problems that can be caused by legal drugs used inappropriately. In addition, polydrug use or the use of alcohol in combination with other drugs can be especially dangerous.

For many years a number of companies recognized the problems and costs associated with alcohol abuse among their employees and developed occupational alcoholism programs designed to help workers with these problems. Today these efforts are known as Employee Assistance Programs (EAPs), and have been expanded far beyond the initial approach to include drug abuse, mental health problems, financial difficulties, and family/marital crises.

An EAP can be defined as a program operated under the auspices of a work setting to help employees deal with a range of personal problems that may affect their job performance. Corporations as well as unions may provide needed services. The major goal is to return a valued worker to full productivity while reducing the costs of poor work quality to the employer. There is a direct financial benefit sought by companies in providing help, although cost effectiveness can be difficult to determine. However, other intangible measures are also part of the corporate decision to provide services to employees, such as improved morale, loyalty to the employer, and a method of avoiding conflict in employment decisions. Basically corporations agree that "An employee's personal problems are private unless they cause the employee's job performance to decline and deteriorate--when that happens, the personal problems become a matter of concern for the company. A trained employee is valuable and represents an asset to be protected if possible."<sup>1</sup>

In the past, drinking problems were viewed as a weakness or immoral. Alcoholics Anonymous (AA) brought sobriety successes through its program of peer help, and employers saw the results in improved work performance from valued employees. The change to a disease concept of alcoholism also contributed toward promoting a

helping rather than a punitive, response among employers. More recent changes in corporate attitudes regarding how to deal with employees' drug and alcohol behavior can be attributed to three factors: increased knowledge and awareness of the problem and its outcomes; changed perspectives regarding employees, leading to view that employees were not consummable assets but capital assets in which there is an investment to be protected; and legal and insurance factors which mandate or support a helping approach.

Current concerns with increased worker substance abuse and litigation regarding hiring, supervising and firing decisions have certainly prompted a rapid increase in the number and scope of programs offered in the past five years. For example, the majority of *Fortune* 500 companies now provide EAPs. It should be noted, however, that most of today's workers are not yet covered by employee assistance programs.

Employers concerned about the welfare of their employees as well as their social responsibility in the community believe that helping programs are good business from a variety of standpoints. A broader approach, with a focus on job performance rather than on a specific problem, e.g. alcoholism, reduces the stigma of seeking help, and provides supervisors with a method of confronting employees about their poor work and directing them to a helping rather than punitive solution.

Unions have also been significantly involved in the development of programs to assist their members, although early efforts did not always result in a cooperative approach with management. While unions wanted services to be provided, company sponsored assistance was often seen as a way to undermine the role and strength of the union in helping workers. In addition, there has been a concern that corporate help focuses on increasing productivity rather than helping the individual. Sonnenstuhl and Trice<sup>2</sup> add, "Unions distrust the idea of constructive confrontation because they condemn formal rating and supervisory evaluation methods as inconsistent with the seniority principle" (p. 8). While these are very important issues, they have been overcome in a variety of programs, and joint efforts have successfully helped many troubled workers.

It has been estimated that "Because of personal problems that affect the employee, 18 percent of any work population is losing 25 percent of productivity,...a conservative estimate based on such measurable items as absenteeism, sick leave, accidents, and rising health benefits claims. It does not include the hidden costs of poor decisions, corporate theft, decrease in quality of work produced and costs of adverse action, early retirement, and workers' compensation claims."<sup>3</sup> While there is a wide range of personal problems seen among workers, a large majority are either directly or indirectly related to their, or a family member's, alcohol or drug use, and all the costs noted above can have their roots in substance abuse. The federal government has recently begun an initiative aimed at developing a drug-free workplace, with governmental leadership providing incentive and direction to the rapid development of private efforts. The worksite is seen as an appropriate and

effective intervention location to reach individuals with drug and alcohol concerns. Positive results can be attained--it has been shown that employment related access to treatment is a powerful motivator, with high recovery and rehabilitation success rates!

### **Ingredients of An Effective Employee Assistance Program**

Standards have been developed by the federal government for a comprehensive employee assistance program.<sup>4</sup> Services are designed to detect and provide help for problems harmful to the worker and his/her work behavior. "Such a program is designed to assist management and supervisors with alcohol, drug abuse, emotional or behavior problems resulting in a pattern of deficient work performance; (2) motivate such individuals to seek help; (3) provide short term professional counseling assistance and referral; (4) direct employees towards the best assistance possible; and (5) provide continuing support and guidance throughout the problem-solving period" (p.6).

Within these guidelines a wide variety of program options are possible. These may provide prevention/education, intervention, treatment/rehabilitation and reentry components designed to promote problem identification and resolution while protecting both the worker and the workplace. However, regardless of the actual services offered, certain general characteristics have been found to be associated with successful employee assistance programs.<sup>5</sup> These include:

- a written policy
- clear procedures
- top management endorsement
- union executive endorsement
- joint labor-management committee
- management and supervisory education
- union executive and steward education
- employee and family education
- good communication at all levels
- an active, committed coordinator
- informal and/or formal counselors
- active in-house health services
- active AA involvement
- back-up residential treatment service
- good liaison with community services
- periodic program assessment and update

In order to establish and evaluate an EAP, a needs assessment should be conducted to determine what services most critical to address the problems being experienced by a particular workforce. Age, gender, location, and education are all

examples of variables which affect those problems which are most likely to be seen among any group of workers. Decisions regarding program components should then be directly related to the assessment data. For example, younger employees are more likely than older workers to use cocaine, while alcohol is more of a problem among the latter. Gender has also been associated with some substance abuse patterns. Women use a significantly higher amount of physician-prescribed drugs, to deal with emotional problems, such as stress, or depression. This more extensive use of psychotropic chemicals should be recognized by EAPs serving a workplace with a large number of female employees. Women have also been less likely to be identified by supervisors as alcohol abusers. Such a protection orientation is especially harmful in that it delays getting a woman worker help until treatment is more difficult.

Another group found to be at special risk for substance abuse is adult children of alcoholics (ACOAs), representing one out of eight individuals in the United States. At the workplace, ACOAs represent a substantial percentage of the total labor force, estimated to be 15 to 30 million men and women. They are three to four times more likely than the general public to become alcoholic, and more vulnerable to psychosocial illnesses in adulthood.<sup>6</sup> These workers should be of special concern to employee assistance programs.

Executives are also susceptible to drug and alcohol problems, but they are often one of the most ignored groups of abusers. Many co-workers and staff can or must cover-up for executives' poor work performance. Power and influence associated with their positions prevent other employees from confronting executive substance-related behavior, even when it significantly affects decision making capacities. It is obvious that a needs assessment should be used to determine what services are appropriate for what groups of employees in order to better plan and target helping resources.

The next most critical step is the development of a clear policy statement regarding the philosophy, intent and procedures of the program. Among the points to be included are the recognition of human problems and how they can be reflected at the workplace, and the offer of help for employees through the EAP. Confidentiality and a non-punitive approach in dealing with problems should be guaranteed, and the responsibility of the employee, employer and union in the process must be described. Sonaenstubl and Trice<sup>7</sup> summarize three principles of such a policy:

1. The EAP is a job-based strategy for helping employees solve their problems.
2. Constructive confrontation is used to motivate employees to resolve their problems and to overcome denial.
3. Counseling is used to help solve problems when it is clear that they are beyond employees' control.

Procedures can then be developed for case handling from referral procedures and treatment options through record keeping and insurance coverage.

For utilization of services to occur there must be an extensive cooperative endorsement by both management and workers, reflecting a joint input and education process. On-going training of supervisors and other staff will also help communicate the availability of as well as the process for accessing the resources offered. All of these procedures should keep in mind the need to protect client anonymity and confidentiality, with ease of access and privacy for participants.

It is most important that any program development include provision for an evaluation of the effectiveness of services from both the clients' and the company's point of view. Utilization rates, client satisfaction and return to worksite productivity are examples of factors to be assessed. Medical costs, productivity measures, and absentee rates may be figured in the cost effectiveness on an on-going basis, with evaluation extending over time, including both short and long term measures. Financial savings may not be immediately visible, nor are they the sole measure of a successful program. Intangibles such as improved employee morale and lower turnover are also related to attitudes about the worksite, many of which can be directly influenced by the treatment of employees as reflected in an employee assistance program.

### Models of Service Delivery

There are a number of possible organizational ways through which services can be provided. In the past, medical departments of larger companies managed alcohol services. More recently, personnel or human resources departments have had this responsibility, although there is no single organizational location used for these services. The total health program, including health promotion, may be coordinated with an EAP as can be various personnel functions. The National Institute on Alcoholism and Alcohol Abuse notes that "with few exceptions, successful contemporary programs are personnel management oriented".<sup>8</sup> These address an employee's problem as one of job performance, thus acknowledging the role of an employer in intervention. In addition to considerations regarding the location of the program, it is important to have corporate decision makers from all relevant departments included in the planning process.

The size of a workforce, local community resources, availability of EAP vendors, possible costs and worksite facilities are among the factors affecting the structure of a program. The following examples are based on the models described by Phillips and Older.<sup>9</sup> In the first example, an internal model, the EAP staff are employed directly by the work organization and are located within their facilities. They can provide assessment and referral services, and in some cases provide counseling, usually of a short term nature. Outside resources are used for employees needing more extensive help, such as residential treatment or long-term counseling. The in-

house staff coordinates follow-up and reentry phases. In some cases outside sources may also assist in client assessment.

Another model is one in which a company contracts with an independent EAP service provider. The EAP staff are located off-site, that is, at the service center. Diagnosis, short-term counseling and referral to a network of treatment resources are included. These providers often also offer program and organizational development services as well as supervisor and employee education and training about the EAP. For smaller worksites there is more opportunity in this model for confidentiality regarding use of the program, and it is also generally less expensive than maintaining on-site facilities and staff, except for those in very large organizations. A modification of this plan includes an internal EAP staff person serving as a liaison with a contracted service provider.

Another similar model is one in which a company contracts with a treatment or social service agency within the community to provide certain EAP services. A hospital in a small community, for example, may provide the assessment and/or treatment when other more complete service providers are not available. Another program model variation has services provided directly under the auspices of a union, with referral to outside treatment facilities. In this system union coordinators as well as management may refer members for assessment and referral.

In general, larger worksites can consider an internal program, although this is not usually practical for businesses with less than 2,500 employees. Smaller workplaces must consider other options, among which is a consortium approach. With this method, several companies join together in a cooperative agreement to jointly support EAP services for all their employees, which a single company could not afford alone. Fee for service or a per employee assessment are methods used to equalize costs among participating companies.

A final point to be considered in choosing a service delivery system involves the appropriateness of treatment facilities, such as hospitals, offering a total EAP package. It would be expected, for example, that intake and diagnostic staff in such a program would most often refer an employee to their own agency for treatment. However, there are many different treatment modalities possible for drug and alcohol abuse patients, and their success is related to client characteristics such as age, type of drug used, gender, etc. For many people, an in-patient program may not be necessary, but if the provider is hospital-based, their residential program may be the only referral used. However, there is also a unique expertise possible in a treatment agency, as well as a range of services offered, that should not be overlooked. It is certainly necessary to question potential service providers about their total services, including supervisor training, referral procedures, emergency coverage and crisis intervention, educational components, and employee marketing methods.

Regardless of the provider, a complete program should include certain basic stages in order to be most viable. The first is identification and outreach, the means by which employees with problems can be brought to help. Supervisor training,

employee education and a helping climate all facilitate this process. The second component includes diagnosis and referral, the method by which a worker's problem is described and evaluated so that appropriate treatment or counseling can be determined and arranged.

The third component is the actual helping process, whether on an out-patient or residential basis, short or long-term. Usually less than 10 percent of cases need inpatient treatment, but if this is necessary, provision must be made for the employee to leave the job for a period of time, without penalty. Most residential programs last less than a month and are located in either hospital or other treatment facilities. The inpatient model is often used with later stage or more severe abuse cases, particularly when detoxification is also required. Insurance coverage frequently contributes to decisions regarding treatment. While there can be resistance to such therapy, particularly because of negative attitudes about confinement or hospitalization, or the difficulty for families when someone is in treatment, medical supervision, abstinence and inpatient care may make this necessary. The fourth stage involves the reentry and follow-up, when the employee's work behavior is reevaluated and he or she is assisted in returning to a productive role in the workforce. Alcoholics Anonymous (or its parallel, Narcotics Anonymous) has been found to be a most important factor in helping an individual maintain sobriety and many corporations sponsor meetings at the worksite. Throughout this sequence, a record keeping system must be in effect which provides for confidentiality for the employee while documenting work performance and actions taken; these records can protect both the worker and the employer if conflicts arise.

### Using An Employee Assistance Program

As noted previously, a program can have a variety of possible services although most companies have focused on intervention and treatment of "troubled employees." A most important aspect affecting the value of an EAP is how an individual enters into the helping system. An employee may access a program through several routes. Early efforts have focused on supervisor confrontation of an employee regarding his or her unsatisfactory job performance. The employee is then offered support for treatment and rehabilitation rather than face dismissal. It is important that the supervisor is not expected to be a diagnostician, that is, he or she does not suggest that poor performance is related to drug or alcohol use. Constructive confrontation is a nonjudgmental approach based on the employer-employee relationship and includes identification, documentation, confrontation and reintegration following EAP treatment services. The employee must seek help as a condition of continued employment.

Some problems have been suggested with this supervisory confrontation method. For example, supervisors may be hesitant to use such procedures if they feel inadequately prepared to handle the process, or they may be unwilling to "interfere"

in a fellow employee's personal life. It may also take a considerable amount of time to document deficient work performance before action may be taken. However, this method, when properly carried out, has been found to be an effective helping mechanism. Extensive training for supervisors as referral agents is essential.

An employee may also self refer to an EAP, voluntarily asking for help with his/her own, or a family member's, problem. Wrich identified five factors associated with increasing self referrals.<sup>10</sup> These include carefully maintained confidentiality of records; use of assessment and referral without a fee; assessment and referral staff recognized as capable helpers; recognition of the importance of self referral; and an open, supportive program. Other referral techniques also use "significant others" in constructive confrontation, with family members and/or a co-worker documenting an employee's behavior. This too can be a very powerful motivator for an individual who has previously denied having a problem.

### Program Outcomes

Outcome measures can include such diverse figures as penetration rates, theft or accident figures. It has been difficult to compare results across programs because of the wide range of services offered and the varied evaluation methods employed. However, there are many reports which do show that there is a strong cost benefit to providing employee assistance services. General Motors, for example, found that they had a savings of \$3,700 per year for every worker who successfully enrolled in their EAP.<sup>11</sup> This included reductions of 85 percent in lost man hours and 72 percent in accident and sickness disability benefits paid for alcoholics who had successfully been through its program.<sup>12</sup> Ohio Bell noted a \$4 million annual savings with a 60 percent recovery rate in its alcoholism treatment recovery program.<sup>13</sup> The New York Transit Authority reported a savings of over \$1 million per year in paid sick leave for 1,500 alcoholics who had been through their program,<sup>14</sup> and Kimberly-Clark had a 43 percent decline in absenteeism and a 70 percent decrease in on-the-job accidents among employees using their substance abuse services.<sup>15</sup> A major factor contributing to these outcomes is the fact that recovery rates for substance abusers entering treatment through workplace interventions are considered the highest of any referral source. Job based programs have proved their ability to get an abusing employee into and completing treatment, with high rates of recovery and rehabilitation.

### Issues and Guidelines

There are obviously a number of ethical and legal issues regarding drug and alcohol abuse by workers, either from use or sale of drugs at the worksite or as evidenced by job performance related to substances. One of primary concern currently is that of drug screening, the use of urinalysis and other measures to determine the presence of drugs in an individual. Many companies are adding drug testing to

their workplace efforts to combat substance abuse, often in conjunction with an EAP. There are generally five types of drug testing which are done. The first of these, pre-employment screening, is used with prospective employees during a physical. Many companies have a policy that they will not hire an applicant who is currently using illicit substances, although some allow a person to reapply at a later time.

The remaining methods are all used with current employees, and, therefore, may now be seen as another way in which a worker is referred to an EAP. Incident testing refers to tests that are done following a workplace event such as a fight or accident. Probable cause tests are similar in that they are required when there is a "reasonable suspicion" that an employee is using drugs or is intoxicated. Scheduled tests are routine requirements in high risk or safety-related jobs while random testing is unannounced, conducted with some or all employees at an unspecified time.

Although the legal aspects of such tests and their related procedures will be examined for some time in courts and grievance procedures, it is important in any case that employee assistance programs are included in a comprehensive approach to dealing with drug and alcohol abuse by employees. Policies should be developed in advance of testing so that both management and unions are aware of and endorse procedures to be followed. The goal of all such efforts should continue to be to help the individual worker as well as provide a safe and productive workplace.

### Summary

It is increasingly apparent that drug and alcohol abuse are major problems confronting every worksite today. There are excellent programs already in place which address these issues for a number of companies and unions and many more are being developed or restructured currently. New efforts have also been added to employee assistance programming, such as prevention, education and screening efforts. Each company and union must seek a joint resolution through cooperative efforts which best suit each workplace and workforce. Needs and resources should be developed and procedures established to identify workers with these problems, to motivate them to seek and use the help provided and to continue their employment during the rehabilitation process. Productivity factors can motivate corporate decision makers, as can a potential reduction in disciplinary actions. Labor unions benefit from non-arbitrary work performance criteria, problem assessment and follow-up procedures. Employees and their families are helped by the opportunity for on-going employment security and health care assistance. Obviously, both individual and corporate benefits will result from such efforts.

### NOTES

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<sup>3</sup>D. A. Masi, *Designing Employee Assistance Programs* (New York: American Management Association, 1934).

<sup>4</sup>U. S. Department of Health and Human Services, *Standards and Criteria* (Washington, D.C.: Public Health Service, Health Resources and Services Administration, 1986).

<sup>5</sup>Addiction Research Foundation, *Task Force Report on Employee Assistance Programs* (Toronto: Addiction Research Foundation, 1983).

<sup>6</sup>T. L. Cermak, "Children of Alcoholics and the Case for a New Diagnostic Category of Codependency," *Alcohol Health Research World* (Summer, 1984), pp. 38-42.

<sup>7</sup>Sonnenstuhl and Trice.

<sup>8</sup>Masi.

<sup>9</sup>D. Phillips, and Older, H. "Models of Service Delivery," in Dickman, Emener, and Hutchinson.

<sup>10</sup>J. Wrich, "Guidelines for Developing an Employee Assistance Program," *AMA Management Briefing* (New York: American Management Association, 1982).

<sup>11</sup>M. Korcok, "Returning Quality to the Job," *Focus on Alcohol and Drug Issues* 3(#2), p. 4.

<sup>12</sup>*Labor Management Alcoholism Journal* (1973). III, p. 3.

<sup>13</sup>D. Lanier, "Industrial Social Work in the Computer Age," *EAP Digest* (January-February, 1982),.

<sup>14</sup>*Labor Management Alcoholism Journal* (undated) I, 9, pp. 3-4.

<sup>15</sup>M. LeRoux, "Employee Assistance Programs Well Worth Their Cost, Employees Say," *Business Insurance*, September 27, 1982, pp. 3, 16.

The National Institute on Drug Abuse includes an Office of Workplace Initiatives and

a toll-free phone service (1-800-843-4971) to provide help to individuals, unions and companies concerned with employee substance abuse.

**RESOURCES**

**1. ALMACA - Association of Labor-Management Administrators and Consultants on Alcoholism**

1800 North Kent Street  
Suite 907  
Arlington, VA 22209  
702-522-6272

**2. EASNA - Employee Assistance Society of North America**

P. O. Box 3909  
Oak Park, IL 60303  
312-383-6668

**3. National Clearinghouse for Alcohol Information**

P. O. Box 2345  
Rockville, MD 20852  
301-468-2600

**4. National Council on Alcoholism**

733 Third Avenue  
New York, NY 10017  
212-986-4433

## Why Drug Testing is a Bad Idea

*Lewis L. Maltby*

The call keeps going out for mandatory drug testing of people in jobs ranging from truck driver to basketball player to investment banker. And nowhere is the call heard more often than in industries whose products or services affect the public's safety. My business, Drexelbrook Engineering Co., is one such company.

For 25 years we have designed and manufactured electronic systems that measure and control the levels of hazardous chemicals, and our equipment is installed in plants all over the world. If it doesn't work properly, toxic-chemical tanks overflow--and people die. The tragedy in Bhopal, India, is an example of what can happen when this type of equipment malfunctions. A single Drexelbrook employee working under the influence of drugs could cause such a disaster.

But we don't do drug testing, and we're not going to. When our top management considered the idea, we concluded that drug testing was not in the best interests of the company, would not make our products any safer, and would actually hurt our performance and our profits.

To our way of thinking, drug testing is not a serious workplace safety program. A sound program for dealing with the hazards posed by impaired workers would confront the most serious problem--alcohol abuse. Yet no one proposes that all employees be subjected to breathalyzer tests to keep their jobs.

Drug testing also suffers from accuracy problems. The most common type of testing, immunoassay, has been shown to have false positive results: "clean" samples are mistakenly labeled as "dirty" 20% to 30% of the time. While more accurate and more expensive tests are available, they don't solve the problem either. It's difficult to pin down estimates of the number of drug-impaired workers in an average company, but 5% is a generally accepted number. Say you have 100 employees, and 5 are drug abusers. Even with a test that's 99% accurate, 6 people could be fired for drug abuse, one of whom is innocent. A serious program cannot afford to be wrong that often, especially when someone's job is at stake.

But the fundamental flaw with drug testing is that it tests for the wrong thing. A realistic program to detect workers whose condition puts the company or other people at risk would test for the condition that actually creates the danger. The reason drunk or stoned airline pilots and truck drivers are dangerous is because their reflexes, coordination, and timing are deficient. This impairment could come from

This article originally appeared in the June, 1987 issue of *Inc.* magazine. Reprinted with permission.

many situations--drugs, alcohol, emotional problems--the list is almost endless. A serious program would recognize that the real problem is the worker's impairment, and test for that. Airline pilots can be tested in flight simulators. People in other jobs can be tested by a trained technician in about 20 minutes--at the job site.

Instead of testing for what really matters--impairment--drug testing looks for the presence of drug metabolites in the employee's urine which remain in the body for up to two months. So an employee who fails a drug test may not be impaired at all. Firing good, sober employees because of something they did last Saturday night does not increase safety.

Drug testing may even *decrease* safety. Any experienced manager knows that a safe quality product and a safe work environment do not come from a demoralized, unhappy work force. But this is exactly what drug testing produces.

To begin with, it's an act of distrust on the part of management. It requires the vast majority of employees to prove their innocence when there's no reason to suspect they've done anything wrong. It also violates their rights by reaching out from the employer's legitimate sphere of control at the workplace and telling employees what they can and can't do on their own time in their own homes.

Beyond this, experience has shown that the only way to prevent cheating on the tests is to make employees strip from the waist down and have someone watch at close range while they urinate into bottles. Drug-abusing employees who are not watched can substitute clean urine samples for their own, conceal small catheters of urine on their bodies, and dilute urine with tap water (to reduce drug concentration to below the cutoff point). The ultimate dodge, which no one knows how to prevent, is to slip a small amount of soap or salt into the sample. As Dr. William F. Hushion, medical director of Philadelphia Electric Co., put it after years of testing experience, "Any drug-testing program that doesn't include close observation is a joke."

The effect of all this on employee morale is obvious. How would you feel about being subjected to a strip search to prove your innocence--even at home--and being fired if you objected? Would you want your life resting on the performance of an employee who felt that way?

The failure of drug testing can be seen in its rejection by those whose profession is helping addicted workers. I have spoken at numerous conferences on drug testing, and a representative from an employee-assistance program is always included among the speakers. These people have been helping employees with substance-abuse problems for years--and have done so very effectively. And many of them actively oppose testing. Some go so far as to refuse to accept referrals from testing programs. What kind of program is drug testing when it is opposed by those whose profession is helping abusing employees?

At this point, you may be saying, "I didn't realize there were all these problems with drug testing, but we have to do something." That's right, you do have to do something. Our company doesn't tolerate drug abuse, and I'm certainly not advocating that others tolerate it either. Let me tell you about our program to combat workplace drug abuse.

We practice good management. We always say that people are our most important asset, and it's true. What we do at Drexelbrook is try to put that idea into practice.

We begin by trying to create a positive atmosphere. We want every employee to give us 100% every day. And we want each of them to make every decision with the best interests of the company at heart. And, by and large, we get that. But that kind of commitment doesn't come easily. We have to earn it.

One way we earn it is by treating our employees as adults. We trust them to do their jobs right and don't subject them to a lot of unnecessary rules. We trust our employees to know what working hours and style of dress are required for them to get their jobs done. Another way we earn that commitment is by respecting their rights. We scrupulously avoid prying into our employees' private lives. Finally, we care about them.

When they have problems at work or outside the workplace, we try to help. Sometimes we help by having our financial people arrange a personal loan at our bank. Sometimes we help by having our legal department straighten out a problem with an employee's landlord. Mostly we help just by listening and caring.

This approach to employee relations is not philanthropy--it's good business. Our employees routinely go above and beyond the call of duty to help our customers. Our service manager, for example, installed a ship-to-shore radio in his sailboat at his own expense, so he could keep in touch with the company--and any problems--while he was on his vacation.

We are also very selective in our hiring. Even with applicants for entry-level jobs, we conduct at least two in-depth interviews with different interviewers. We check references--thoroughly. And often not with the personnel department--all they ever give us is name, rank, and serial number--but with the candidate's previous supervisors. And we try to screen out the drug abusers. Not by anyone telling us directly, of course, but by learning about which applicants had chronic absenteeism, inconsistent quality, and bad work habits at their former jobs. And we find out with much more accuracy than we could with a hit-or-miss drug test.

After we hire people, we tell them what performance we expect from them--and then pay attention to their results. Most of our supervisors have taken a 36-week, intensive management-training course to help them in this. If any employee's performance consistently falls short of our expectations, then the supervisor sits down with him or her and discusses the problem. When employees are open with supervisors--as is often the case--and the problem is drugs or alcohol, we help get them into a treatment program.

That's our program--and it works. By doing good interviewing and reference checking, we almost never hire an employee with a drug or alcohol problem. We have had employees who developed such problems after we hired them, but our supervisor's noticed their declining job performance quickly, confronted them, and got them into treatment.

Overall, I estimate the rate of abuse at our company to be only about 1%. We have installed more than a quarter of a million systems around the world, handling some of the most hazardous materials known, and have never been involved in an industrial accident.

Our experience is confirmed by a recent American Management Association study that found that the most effective program to fight workplace drug abuse combines employee education with trained supervisors who know how to identify and constructively confront employees who fail to meet performance standards.

The truth is, most companies don't do drug testing. And, according to the AMA study, a third of those who do think there is no value in it.

Why, then, is there so much talk about drug testing? The answer, I believe, lies largely in politics and the power of the media. Despite the fact that workplace drug abuse is far less prevalent than alcohol abuse--which industry has survived, if not solved, for years--the media have portrayed it as an epidemic that is sweeping the country and will destroy our economy unless immediate emergency measures are taken. In this emotional climate is it any wonder that a manager who is already beleaguered, as we all are, can be convinced by a good salesperson who promises instant solutions with a simple, inexpensive test?

The truth, of course, is that managing people is never easy. Experienced managers for years have recognized that handling people is the most challenging part of their jobs, and that there are no shortcuts. And this, ultimately, is what drug testing is--a seductive gimmick that promises instant relief from the awesome responsibilities of management. The testing itself becomes a drug.

This is the choice managers face. They can fight workplace drug abuse with drug testing. It's easy, it's simple, and it's cheap. But it just doesn't work. Drug testing provides inaccurate and irrelevant information and alienates the vast majority of good employees, who resent being subjected to a strip search to keep their jobs. Or, they can fight substance abuse by choosing their people carefully, watching their performance, and getting involved when performance starts to slip. It's difficult, it's time-consuming, and it's expensive. But it does work. And not just in preventing workplace drug abuse, but in creating a safe and productive workplace.

## The Employer's Need to Provide a Safe Working Environment: The Use and Abuse of Drug Screening

Richard E. Dwyer

### Introduction

Media attention has heightened Americans' awareness of drug problems which plague our society. From the office of the President of the United States to corporate board rooms, urine screening technologies are heralded as a "panacea for the declining fortunes of industrial America." In March 1986, the President's Commission on Organized Crime issued its report entitled *America's Habit: Drug Abuse, Drug Trafficking and Organized Crime*. This report recommends that all employers, both public and private, require universal drug testing for all job applicants as well as current employees. While this is not the first war on drugs fought in the United States in this century, it is the first war that has found its battleground in the workplace. The very fact that this is not the first war should indicate that the country has lost its previous wars and that we are naive to believe that urine testing will eradicate society's problem in the latest attack on drug use and abuse. This article examines urine screens and analyzes why they fail to aid employers in providing a safe work place, and it then proposes alternative approaches. While these alternative approaches are not the "quick fix" sought by some employers, they are nevertheless an effective step in controlling drug abuse.

The questions raised and the debate fostered by testing technologies trigger emotional feelings on all sides. The major issues in the debate center on management's legal and moral obligation to provide a safe and secure workplace and the worker's perception of his or her individual right to privacy. To provide a safe workplace is not only the legal obligation of management, but it is also the desire of workers and their unions. Because the worker's very life often depends on a safe workplace, workers do not want to be on the same job site with someone impaired by a chemical substance, whether that substance is legal or illegal; the impaired worker presents a hazard both to him or herself and fellow workers.

Furthermore, workers in the United States depend on their company for their jobs and livelihood and they therefore maintain a high interest in their employer providing not only a safe but secure workplace. The most basic form of security is the company's remaining in business. To insure the company's solvency and his or her own safety, workers do not condone the impairment of fellow employees who are unable to perform their job on company time. Wholesale theft of company property

This article is scheduled for publication in the *Labor Studies Journal*, volume 12 (1987).

to support a habit and excessive absenteeism or tardiness as a result of abusing chemical substances go against the basic attitude of American workers. As a result, policies to eliminate large scale theft and prevent impaired workers from injuring themselves or fellow workers are in the interest of workers and in the interest of the unions that represent them.

The matter of drug screening in this context presents two major questions:

- (1) Do these screening technologies provide an employer the necessary data to ensure a safe and secure workplace?
- (2) Do these screening technologies infringe on the constitutional interpretation or the worker's notion of his or her individual privacy?

### Extent of the Problem

Mythical and emotionally charged numbers are being used to shock complacent Americans into acting on our illegal drug problem. While our industrial base struggles to regain its competitive edge, proponents of urine screening decry the cost of chemical abuse in industry as a major factor contributing to the decline of industrial America. Those same advocates of screening explain that chemical abuse negatively affects the workplace, causing increased absenteeism, shoddy workmanship, increased health care benefits utilization, theft to support a habit, and industrial accidents. Coupled with this explanation, urine testing gurus boldly and authoritatively place conflicting astronomical figures on the cost of drug use to industry. There is, however, no way any cost figure can be proved or even justified. Given our current ability to investigate the population, the number of substance abusers in the workplace and the cost to industry is at best a pretty poor guesstimate.

For example, consider the following data regarding workers who fall into various categories:

*alcoholics*--6.6 million (Research Institute of America, citing National Clearinghouse for Alcohol Abuse Information.)

*abusing drugs regularly*--6 million (RIA, citing National Institute on Drug Abuse.)

*drug abusers as percent of workforce*--6.5 percent (RIA, citing NIDA) (The Bureau of Labor Statistics says the total civilian workforce in 1986 was 118 million; 6.5 percent would be 7.7 million workers.)

*drug or alcohol abusers*--14 to 18 percent of workforce (ALMACA, citing NIDA and Business Research Publications) (This would mean that between 16.5 and 21 million workers are chemical abusers.)

*experimenting with illegal drugs--37 percent (NIDA) (That figure would mean 43.7 million workers.)*

*using drugs in the last year--19 percent (NIDA) (This would mean 22.4 million workers.)*

*using drugs in the past month--12 percent (NIDA) (This would mean 14.2 million workers.)*

*abusing drugs on the job--as many as 13 percent (Bruce W. Karrah, E. I. DuPont De Nemours & Co.) (This would mean 15.3 million workers.)*

*dependent on drugs as a way of life--3-5 percent (RIA, citing some studies, which would mean 3.5 to 5.9 million workers.)<sup>1</sup>*

As these figures indicate, the data on the extent of the problem in the United States appear inconsistent. Social science research has shown that the number of substance abusers has been vastly overestimated.<sup>2</sup> In fact, NIDA estimates indicate that drug use appears to have declined in the United States since 1979. Although we do have a serious substance abuse problem, it is not the only or even the major problem facing industrial America today. Substance abuse becomes the scapegoat for the industrial problems of America, from lack of competitiveness to the cause of all industrial accidents.

There is a chemical abuse problem in the United States. It is not of the magnitude the government states, but that fact does not relieve labor and management of the obligation to deal with chemical dependency as an illness. Chemical dependency, an illness, is treatable and controllable. Unions and companies are obliged to identify individuals who suffer from this illness and assist them in obtaining treatment.

### Accuracy Levels of Urine Screens

Companies that manufacture and distribute drug testing paraphernalia attest to the high levels of accuracy for their particular product. This fact should surprise no one, since the financial livelihood of the particular company depends first on there being a significant problem, and, second, on the belief that the test they manufacture can somehow provide a "quick fix" solution to the problem. For example, most companies manufacturing urine screens for drug testing claim that tests are 95 percent accurate. However, knowing a test is 95 percent accurate does not provide all of the information necessary. To determine the accuracy of a urine screen, one needs to examine two parameters for the percent of accuracy. The first is the accuracy level as

it relates to the screen's specificity. The specificity level of a urine screen is its ability to only register positive results when the substance in question is present (the ability to eliminate false positives). The second parameter determining the accuracy level is the screen's sensitivity. The sensitivity level is the screen's ability to identify only the substance in question and not to misidentify other substances as the one in question (the ability to eliminate false negatives).

In this example, the screen used is 95 percent sensitive and 95 percent specific. Therefore, when 10,000 workers are tested using a 95 percent accurate screen, 500 tests will be inaccurate. The following chart is illustrative.

10,000 workers to be tested 10 percent use drugs	95 percent sensitive 95 percent specific	
		POSITIVE    NEGATIVE
TRUE	950	8,550
FALSE	450	50
950 True Positives / 1,400 Identified as Drug Users =  67.8 percent accuracy level		

This chart provides a visual description of a drug screen advertised to be 95 percent accurate; however the test conducted on real people in the work force falsely labels one out of three (32.2 percent) positive for drugs.

Of course, screen manufacturers state that confirmation using a different testing methodology is essential to verify a positive screen. In the real world however, this does not always happen. Employers deny applicants jobs as a result of unconfirmed pre-employment screens. Discipline and discharge resulting from an employer's misplaced faith in the technology of urine screens affect thousand of workers. Some employers who confirm their drug screens use a second methodology such as Thin Layer Chromotography whose accuracy rate is lower than the original screen. Others confirm using the same screen that was originally administered, or they use a different manufacturer's screen (i.e., if the initial screen was Abuscreen they might retest with Emit or vice-versa).

The most accurate test available for confirmation of all positive screens is the Gas Chromatography/Mass Spectrometry (GC/Mass Spec) which claims a 99 percent accuracy rate. However, cost is one of the disadvantages of this test for employers. Even though GC/Mass Spec is a very reliable and accurate test, there are other variables that increase the error rate of even this test. Humans administer the test, humans monitor the chain of custody, and worst of all, humans interpret the results of the test. Laboratory technicians working with highly sophisticated equipment appear prone to errors. The U.S. Center for Disease Control rates laboratories with greater than 25 percent error rate as unacceptable. Their studies of laboratories that evaluate drug tests have shown error rates in the 30 percent category quite frequently.<sup>3</sup> Proponents of drug testing lament that this study is often cited to question laboratory accuracy. This study, they protest, reported a high rate of false negatives and that should not present difficulty for those who fear that workers will falsely be accused of doing drugs because of false positives. According to one of the authors of this study, Dr. D. Joe Boone of CDC:

*the false positive problem is what everyone is concerned about in the workplace setting. . . It was fairly reported that we found up to 67% error rate in false positive identification of drugs. That was only one lab and that was for methadone. Since all the samples coming to them were from methadone treatment programs, they naturally assumed the person would be on methadone. This particular lab didn't even test the samples.<sup>4</sup>*

If this CDC study standing alone does not question the capability of labs testing workers' urine, there nevertheless remains considerable evidence that should put doubts in the minds of cautious employers.

On April 1, 1987, the Federal Railroad Administration released documents from their drug testing laboratory the Civil Aeromedical Institute (CAMI) of Oklahoma City. These documents disputed earlier reports that marijuana was detected in members of the Conrail crew involved in the Amtrak-Conrail accident near Baltimore on January 4, 1987. In response to this laboratory error, the Federal Railroad Administration will in the future use a different laboratory.<sup>5</sup> In the last eighteen months, 38 railroad employees have lost their jobs as a result of positive drug tests from CAMI; if one test was in error, how many of the other thirty-eight workers lost their job because of lab mistakes?

William W. Manders, a retired U.S. Air Force Colonel and former Chief of the Division of Toxicology at the Armed Forces Institute of Pathology, testifying before the Subcommittee on Human Resources commented on laboratory reliability:

*I recently reviewed data from a laboratory in which the standard procedures required that all internal controls be within specific acceptable limits before any results could be reported. In data which was submitted as evidence in a court-martial, the cutoff control was analyzed three times and failed to meet the established criteria of acceptability each time; yet results from that group of specimens were still reported.<sup>6</sup>*

The *Chemical and Engineering News* for July 24, 1978 reported on a study of police crime laboratories conducted under the auspices of the Law Enforcement Assistance Administration. This study concluded that the reliability of these laboratories was very poor resulting from "carelessness or lack of experience; failure to use adequate or appropriate methodology; mislabeled, contaminated or non-existent standards to compare against an unknown substance or inadequate training of personnel."<sup>7</sup> This is an analysis of police crime labs. What then can we expect from laboratories that literally spring up overnight in response to the urine testing craze? With no standards for licensing or credentialing the technicians or monitoring the accuracy of their work, urine testing laboratories do not instill faith in their ability to provide error-free work. What then constitutes an acceptable error rate when the test results at least label an individual and could cost a worker his or her job?

### From Whence the Drug?

Once a positive test result appears, the next question arises as to how the substance got ingested into the individual's system. On the surface the answer may seem easy--this individual does drugs--but that may not be an accurate answer. Some levels of a controlled substance may be ingested because the individual simply stood in an enclosed space where someone else was smoking the substance. Small levels of a controlled substance can show up on a test as a result of passive inhalation.

There are other ways of obtaining detectable levels of a controlled substance in one's system. At least two different brands of herbal tea sold over the counter contain small amounts of cocaine that will show positive on a urine, blood, or hair test.<sup>8</sup> While the coca leaves in these herbal teas will trigger all of the urine tests, the caffeine in coffee provides more of a "buzz" than the cocaine in these herbal teas. To date, researchers have discovered twenty-five psychoactive substances in herbal products sold over the counter. Furthermore, some over-the-counter asthma medicines contain small amounts of phenobarbital, an illegal substance.

In the May 25, 1986 issue, the *Chicago Tribune* reported that the Syva Corporation, the manufacturer of the popular EMIT test, warned their customers that the assay used to detect marijuana can also produce positive readings in the presence of ibuprofen, the aspirin substitute contained in over-the-counter drugs such as Advil and Nuprin. More recently, the Syva Corporation is reported to have reformulated the reagents used in the screen to avoid such false reactivity. This makes the third time the reagents in EMIT have been modified to prevent the screen from falsely reacting with over-the-counter medicines. Positive tests, therefore, may result not only because of test error, and/or human error, but also because workers ingested a product thought to be completely safe, and the drug screen identified it as an illegal substance.

### Does Positive Screen Equal Impairment?

The next, and probably most important question asked is, what does a positive urine screen tell us? Mass screening, without probable cause, and then disciplining or even sending the worker whose specimen is positive for rehabilitation, as proposed by the President's Commission, will not provide the type of information necessary to secure a safe workplace. Traditionally, off-duty behavior does not come under purview of the employer. In order, therefore, to discipline worker misconduct, the employer must prove worker malfeasance, (i.e. consumption or possession of a chemical substance while at work) or worker dysfunction (i.e. intoxication or impairment on the job rendering the worker unable to function safely and effectively).

Urine screens, the most prevalent method of drug detection, only tell that the subject with a positive result has been exposed to the substance in question sometime in the recent past. The test cannot tell if the person was under the influence or even if the person used the substance at work. Urine screens detect marijuana ingested into the system from five days up until several weeks after use, depending on metabolism and/or frequency of use. Cocaine is detected in the urine for a couple of days after use.

Misunderstanding the capabilities of drug testing produces news articles such as the one that appeared in the March 17, 1986 issue of *Time* magazine, which attributed about 50 train accidents to drug-or alcohol-impaired workers since 1975. Alcohol impairment is established by law, but urine tests or blood tests cannot tell if a worker is impaired as a result of drugs. Blood concentration levels for drugs are not as exact as from alcohol and they present some unique problems. First, what levels of drugs in the system constitute impairment? Even for blood alcohol levels, disagreement exists as to what level constitutes impairment. For instance, in the District of Columbia the level is .05, while in New York State the level is .10. At least in alcohol testing, the level of blood alcohol concentration constituting impairment is . by law and is public knowledge. There is no similar law which sets an agreed-upon level of blood concentration for various drugs. In fact, the scientific community admits they do not know that blood level constitutes impairment for marijuana.<sup>9</sup>

Other problems surface when attempting to determine the drug level in blood. Someone impaired on valium will show relatively low levels in the blood while impaired, but several hours after the impairment has passed, the blood shows high concentrations. Marijuana, which shows up in the urine for days and even weeks after ingestion, remains in the blood for only a few short hours. Because of its strange effect PCP sometimes will not show up at all in the blood.

Post-accident urine screening therefore, becomes nothing more than a "probe to identify deviance, not dysfunction--a technique to investigate humans, not accidents."<sup>10</sup> These tests do not identify intoxicated dysfunction or malfeasance, the very behaviors that cause an unsafe work environment, but rather these tests identify only immoral and undesirable behavior.

Other tests in addition to urine tests are utilized in the area of controlled substances. Hair analysis shows the history of drug use, and by testing pubic hairs, can trace this history back as far as six years. Again, this method tests history of use; it does not prove malfeasance or impairment.

### Screening for Deterrence

Many urine screening advocates recognize the limitations of these tests; however, they point out that the deterrent value of being caught and suffering the consequences at work encourages many workers to refrain from using controlled substances. Some employers publish impressive statistics showing a reduced number of positive tests for controlled substances after a urine screening test is repeated several times. At least four reasons for these improved statistics are offered: (1) the program is working and the number of workers using a chemical substance has declined; (2) the employer raised the level of concentration of a drug which must be present in the specimen to decide if the screen is positive or negative; (3) significant numbers in the work force who used chemical substances have been eliminated from that place of employment; (4) or workers who utilize chemical substance have figured out ways to avoid detection. It should be realized that workers in general, and addicted individuals in particular, are very resourceful people. This last alternative occurs frequently.

In fact, urine screens probably catch mainly social users, those who show a false positive or those who ingested the substance unknowingly. Serious drug users are finding ways to avoid detection. For the past several years, articles published in *High Times* outline a variety of methods to "beat" the urine tests. Toward this end, some workers have begun carrying vials of "clean" urine, called "parking lot" samples. As employers became wise to this trick and started to test the temperature of the urine, workers simply added a "BIC" lighter to their kit and warmed up their specimen. With the advent of "urinal watchers," *High Times* recommends a colostomy bag taped under the worker's shorts with the tube extended through the fly. Filling the bag with salt or ammonia and squeezing some into the specimen can change the pH level of the urine and the screens will record the specimen as negative because the screen will not even recognize the specimen as urine.<sup>11</sup> Users who do not want to expend this much energy can simply switch to drugs more difficult to detect. For instance, many of the new designer drugs do not show up in either blood or urine screens. In fact, underground laboratories create new mind-altering chemical substances faster than the government can test and declare them controlled substances.

### Legal Versus Illegal Controlled Substances

Hospital and drug treatment center statistics indicate that the vast majority of people in treatment for drug abuse today are treated for alcohol abuse, and secondly,

for the abuse of prescription drugs. Even discounting those treated for alcohol abuse, many more patents are treated for abusing prescription medicines such as valium, percadan, and librium than are treated for the illegal substances tested for in workplace urine screens. Abuse of prescription drugs alters the state of mind and are every bit as addictive as illegal drugs. Yet urine screens only test for the illegal drugs, which represent less than 20 percent of the treatment population. This questions the seriousness of the effort to fight chemical abuse. Maybe the hidden agenda is to cut the demand for illegal drugs, and not to provide a safe and secure workplace.

### Safe and Secure Workplace

Based on the foregoing, it is clear that mass drug screening does not further the employer's objective of a safe work environment. Urine screens do not provide the employer with the information necessary to ensure a drug-free workplace. Namely, they lack sufficient reliability; they fail to identify those who use, who are impaired, or who possess a controlled substance at work; and they fail to identify the majority of substance abusers, those who abuse alcohol and/or prescription medicines.

Despite these obvious deficiencies, drug screens remain popular. Some of the reasons for their popularity include: (1) The results satisfy a powerful desire to know intimate and hidden details of moral human behavior; (2) Media hype causes mass hysteria, and these tests satisfy the American search for an immediate solution based on our belief that science can cure all of our ills; (3) There is a misguided notion that these tests provide answers that help to ensure a safe and secure workplace; (4) Our government is making an attempt to shift the responsibility of controlling illegal drug trafficking from ineffective law enforcement agencies to the employer. Unable to stop the supply of illegal drugs, the government hopes to reduce the demand, a classic case of shifting the blame from the criminal to the victim; and (5) Those in positions of power are individuals over 40 years old. As a group their drug of preference remains alcohol, which is not only more pervasive in the workplace, but also more tolerated.

### Privacy and Other Legal Issues

Legally, the issue of individual privacy developed from common law and is not statutorily granted. The United States Constitution does not explicitly provide for the right to privacy, but the Supreme Court has held that such rights are implicit in the Bill of Rights. Public sector suits challenging an employer's drug testing policies tend to base their case on the Fourth Amendment prohibition against unreasonable search and seizure. The Supreme Court has ruled that blood sampling is a search and seizure protected by the Fourth Amendment. Several lower courts have ruled that urine sampling is also a search and seizure covered by the same amendment. While

the definition of "unreasonable" is determined on a case by case basis, the courts appear to allow testing where a fairly objective reason exists to conduct the screen on an individual or group of individuals. For example, random testing of firefighters was struck down by a federal district court in New Jersey, while another federal court upheld drug testing where the test was prompted by reasonable suspicion that a worker on high voltage electric lines used drugs on the job.<sup>12</sup>

Fourteenth Amendment considerations of due process surfaced in at least one public sector case. While no court's ruling on the reliability of urine screens is definitive, other questions of due process have been addressed. The judge in the New Jersey firefighters' case found due process violations because the city imposed testing as a condition of employment without prior notice or any opportunity for affected workers to object or seek advice. Furthermore, no standards for governing the testing and no provisions for ensuring confidentiality of the workers were established.<sup>13</sup>

It remains too early in the legal process of drug testing cases to state with certainty what the legal outcome will look like. This appears to be a matter that will wind its way to the Supreme Court before the final decision is rendered.

While constitutional issues pertain to public sector employees, and do not cover private sector employees, many state constitutions do contain privacy provisions that may apply to private sector workers. State common law tort principles such as defamation, including slander (oral defamation) and libel (written defamation) may be a problem if the employer acts maliciously and does not honor the issue of confidentiality in the implementation of the drug testing policy.

However, the employer might encounter a bigger problem dealing with workers' perception of their rights to privacy. While this might not result in legal difficulties, it might have longer lasting impact on the morale and productivity level of the employees thus effecting workplace security in the long run.

Workers make decisions on what is "fair" and then react in their organization accordingly. The following story is an example of worker response to perceived unfairness. A plywood plant in a small town employed some particularly abusive foremen. The workers resented the abusive actions of these foremen but could not quit their jobs because alternative work opportunities were not available. Instead, when the foremen were not looking, these workers fed perfectly good pieces of plywood into the giant scrap wood shredder named "the hog." These workers retaliated against perceived injustice by dumping the company's profits into the shredder.<sup>14</sup> Likewise, if workers perceive drug testing as unfair they will exercise their perceived right to feed the equivalent "hog" in their workplace.

Consequently, while private sector employers may circumvent the legal issues of privacy, the workers' own perception of justice should remain a major issue for employers concerned about a secure workplace. The real issue in drug screening is that the tests do not provide the employer with the information necessary to provide a safe and secure workplace because they can not identify workers who are impaired or under the influence of drugs on the job.

Further, individuals who are chemically dependent upon alcohol or other drugs may be protected under the Federal Rehabilitation Act of 1973. This act covers all federal employees and the employees whose employers accept federal funds. Thus, this act can apply to most state and municipal workers. In addition, many states enacted mini-rehabilitation acts that may list alcoholics and drug addicts as handicapped people. These state acts may also extend coverage to private employees in the particular state. Briefly, these rehabilitation acts list chemical dependency as a handicap and instruct the employer to "make reasonable accommodation" for the handicapped individual. Translated, this could obligate the employer to provide rehabilitation options rather than discipline or discharge. This act covers only those individuals who are dependent upon a chemical substance and is not applicable for the user or even the abuser who is not addicted. At the same time, these pieces of legislation typically cannot force an employer to hire or keep an individual who is not capable of performing the job in question. Therefore, the federal statute may be interpreted to cover only those individuals who are recovering from their substance abuse. State statutes, however, may be more liberal.

With regard to workers' protections, the legal ramifications of rights to privacy, while not fully developed, appear to indicate that the public sector employer may have difficulty imposing random screening. In the private sector, case law presently appears to allow random screening. However, the real difficulty for the employer may not be legal but rather organizational. If workers perceive drug screening as unfair and respond by subversive tactics, the employer's interests might be jeopardized.

#### Alternatives to Screening

Many people in government, business, media and education contend that screening is the only alternative if drug abuse is to be confronted in the workplace. Reacting to labor's opposition to random urine screening for example, Senator Danforth (R-Mo.) said that the union's view is "the most ludicrous position I have heard in my 10 years in the U.S. Senate."<sup>15</sup> Danforth and others, capitalizing on media attention, conveniently overlook the success of other methods of drug abuse detection currently used in the workplace.

Not only are there alternatives to urine screening available, but organized labor has been promoting such alternatives for years. The AFL-CIO and its affiliates have long encouraged prevention and rehabilitation programs in the workplace and the community. In the early 1950s, the Congress of Industrial Organization (CIO) Community Services Committee established a formal relationship with the National Council on Alcoholism. Labor unions continually sponsor institutes on alcoholism and drug use, as well as train union volunteer counsellors to act as referral agents at their workplace. These programs prepare union counsellors to help union members who need assistance by referring them to community resources capable of dealing

with their particular problem. In addition, organized labor supports community facilities for treating victims of drug and alcohol addiction and has established on-the-job treatment programs. Since 1963, the Central Labor Council of New York City has supported its Rehabilitation Council, which employs full-time social workers who accept as clients union members and their families referred by trained union peer counsellors.

It appears that labor's efforts to identify and refer addicted individuals for treatment enjoys some level of success. A report issued by the Blue Cross of Greater Philadelphia describing the medical insurance program covering the Philadelphia AFL-CIO reveals that hospital admissions for treatment of drug or alcohol problems among subscribers rose dramatically in the period 1980 through 1984. According to the report, "the percentage of all days used for alcohol treatment has remained fairly stable since 1982; however, the percentage of days used for treatment of drugs rose steadily."

The American Management Association studied the issue of urine screening and treatment referrals of addicted individuals. Their analysis of 1,090 questionnaire responses and more than 100 interviews with representatives of *Fortune* 100 companies indicate that training supervisors to spot signs of drug abuse and to confront employees for rehabilitation is three times more effective in generating referrals for rehabilitation than screening urine to identify drug users. In fact, those companies that did nothing about drug abuse in their facilities had about the same number of referrals as those companies that screened urine. Thus, identifying those individuals whose abuse of chemicals constitutes a threat to workplace safety remains a central problem.

The solution to this problem is that a worker who exhibits symptoms of addiction at work must be identified and sent to professionals trained to diagnose the worker's difficulty and establish a plan for treatment. Workers have a problem when a supervisor can identify actions that are different from the employee's normal behavior. Indicators might include increased lethargy, slurred speech, and problems performing normal work functions. Other recognized signs are absenteeism, tardiness, shoddy and/or decreased productivity. A "field sobriety test" consisting of an evaluation of alertness and responsiveness, a measurement of certain physiological symptoms (including pulse rate, blood pressure, oral temperature, pupil size, et.), and a behavioral test similar to those used by police to test for alcohol impairment could assist the supervisor's identification of workers with problems. Even if this field sobriety test leads to suspicion of impairment, diagnosis of the problem is not within the purview of supervisory expertise; rather, supervisors should be trained only to identify and confront the employee with difficulty and refer him or her to the appropriate expert for diagnosis and treatment if necessary.

### Assistance Programs

Many companies and unions have instituted Employee Assistance Programs to assist "troubled employees" in their attempt to find solutions for their problems. Most EAPs are prepared to handle a wide range of difficulties that manifest themselves at the workplace. In the last forty years, these programs have increased a hundred-fold, from as few as 100 in 1950 to 10,000 in 1987. These programs function best when administered by the union, or are truly a joint labor--management undertaking, because their success depends upon the workers' having full trust in the program. Unionized workers have experienced a whole range of difficulties with some unilaterally established EAPs which in reality are nothing more than one step in the employer's disciplinary system. An EAP program that is genuinely attempting to provide help for a worker is a positive undertaking. Identifying work related problems and then directing the worker to professional help is the answer to protecting employee rights in the workplace and at the same time ensuring a safe workplace for the employer.

### Conclusion

Even aside from questions of accuracy, the facts do not support urine screening as a mechanism for the employer to utilize to provide a safe and secure workplace. Urine screens cannot identify impairment, intoxication or use of illicit substances on company property, which are the very issues crucial to providing a safe and secure workplace.

Urine screening is so fraught with difficulties as to be almost useless in a campaign to eliminate drug abuse from the workplace. Not every individual who does drugs is abusing or addicted to the substance. Research indicates that for some people, their drug of choice in a social setting may not be alcohol, but they are able to engage in controlled use of their drug in much the same way as the social drinker. There is a long tradition in the United States that in most instances, off-duty misconduct does not fall under the control of the employer. Therefore, illegal activity which does not affect the ability of the worker to perform his or her tasks should not interfere with the employment relationship.

In the long run, training supervisors and workers regarding chemical addiction in the workplace is the first phase in the war on drugs. In the second phase, supervisors should be trained in determining probable cause for impairment from chemical substances and then instructed in confronting troubled workers and directing them to professional assistance. The third phase is to develop a sufficient competent professional staff in the treatment area to handle truly troubled employees.

Our society has struggled with chemical abuse for decades, and there is no "quick fix" cure. Education and rehabilitation are the first steps in the long road to combatting this illness.

NOTES

<sup>1</sup>Jack Gordon, "Drug Testing as a Productivity Booster?" *Training*, March, 1987, pp.26-27.

<sup>2</sup>Peter Reuter, "The (Continued) Vitality of Mythical Numbers," *The Public Interest*, Spring, 1984, pp. 135-147, and Max Singer, "The Vitality of Mythical Numbers," *The Public Interest*, Spring, 1971.

<sup>3</sup>H. J. Hansen, S. P. Caudill and D. J. Boone, "Crises in Drug Testing: Results of a CDC Blind Study," 253 *Journal of the American Medical Association* (April 16, 1985), pp. 2382-2387.

<sup>4</sup>Interview with Dr. Joe Boone, quoted in David J. Hanson, "Drug Abuse Testing Programs Gaining Acceptance in the Workplace," *Chemical and Engineering News*, June 2, 1986, p.19, (emphasis added).

<sup>5</sup>"House Panel to Investigate 'Mishandled' Railroad Testing," *The National Report on Substance Abuse*, April 15, 1987, p.8.

<sup>6</sup>Testimony of William W. Manders before the Subcommittee on Human Resources, U.S. House of Representatives, March 18, 1987.

<sup>7</sup>"Crime Labs not doing too good a Job," *Chemical and Engineering News*, July 24, 1978, p.16.

<sup>8</sup>Ronald K. Siegel et al., "Cocaine in Herbal Tea," 255 *Journal of the American Medical Association* (January 3, 1986) p.40.

<sup>9</sup>Robert V. Blake, et al., "Drug Concentrations and Driving Impairment," 254 *Journal of the American Medical Association* (November 8, 1985), pp. 2618-2621.

<sup>10</sup>John P. Morgan, "Problems of Mass Urine Screening for Misused Drugs," 16 *Journal of Psychoactive Drugs* (October-December, 1984), p.306.

<sup>11</sup>Dean Lattimer, "Big Bosses' Guide to Piss Tests," *High Times*, January, 1986, pp. 57-60,66,68,72.

<sup>12</sup>*Capua v. City of Plainfield*. No. 86-2992, Slip op. at 8 (D. N.J. September 18, 1986).

<sup>13</sup>*Ibid.* In the case of *McDonell v. Hunter*, 617 F.Supp. 1122, 1130 (S.D. Iowa, 1985) a federal district court ruled the tests to be so unreliable as to question the due

process rights of the custom service employees. This decision has been overturned by The Fifth Circuit Court of Appeals.

<sup>14</sup>Gordon, p.26.

<sup>15</sup>"Senators Denounce Labor's Mandatory Test Opposition," *The National Report on Substance Abuse*, March 4, 1987, p.5.

<sup>16</sup>J. Michael Walsh and Stephen C. Yohay, *Drug and Alcohol Abuse in the Workplace: A Guide to the Issues* (Washington, D.C.: The National Foundation for the Study of Equal Employment Policy, 1987), p.5.

<sup>17</sup>"Management Group Survey Highlights Value of Drug Testing for Supervisors," *Daily Labor Report*, January 2, 1987, p. A-3.

## Managerial Control, Employee Assistance Programs, and the Medical Disease Ideology of Alcoholism

Richard M. Weiss

### Introduction

Although the publicity concerning job-based alcoholism and employee assistance programs has been overwhelmingly favorable, reasons for skepticism remain. Three reviews of the literature on these programs (Edwards, 1975; Kurtz, Googins, and Howard, 1984; Weiss, 1986) agree that there is no systematic evidence to confirm that they cause improvements in the drinking behavior of alcoholics. Certainly, there is a wealth of anecdotal evidence that EAPs make a substantial impact. Nevertheless, there is by no means a unanimous consensus that all of their effects are desirable. For example, the administrator of the program at Boston Edison reported (Ravin, 1975) that in implementing their program union officials and stewards "expressed the feeling that we were 'starting a purge' to rid the company of 'loafers' and 'trouble makers' under the guise of medical treatment" (p.208). A report for the World Health Organization (Makela, et al., 1981) contended that "notwithstanding the medical vocabulary adopted by [alcoholism and employee assistance] programs, they usually also imply a more continuous surveillance and control by the employer" (p.105). Sociologist Paul Roman has argued:

*At first blush these programs appear both constructive and benign. . . . A closer look at these programs, however, raises important concerns. For example, the programs have the potential for a considerable transformation of social control in the workplace. This transformation is based on the nature and consequence of medicalization and the extent to which medicalized frames of reference and procedures seem impervious either to criticism or to alternative approaches (1980, p. 409).*

Common to all of these cautionary remarks is a concern with the consequences of treating alcoholism as a medical disease. In recent decades there has been a great deal of substantially successful proselytization for the view that alcoholism is a medical problem. This perspective presents a more sympathetic view of alcoholics than does the notion that they are victims merely of their own "weak moral character." Unfortunately, the growing acceptance of this perspective on alcohol problems has been paralleled by the growth of a body of systematic research data indicating that virtually all aspects of the medical model of alcoholism are inaccurate.

Portions of this article are adapted from materials in Richard M. Weiss, *Managerial Ideology and the Social Control of Deviance in Organizations* (New York: Praeger, 1986).

This article will attempt to describe how this seemingly humane approach to dealing with those suffering from alcohol problems has the potential to be transformed into an instrument that can facilitate management's control not only over alcoholic employees, but also over employees whose job performance is substandard for any of a wide range of reasons. Because the medical disease perspective is a set of ideas that is both inaccurate and that has the potential for use by groups and individuals to advance their interests over those of others, it will be referred to here as an ideology.

In implementing alcoholism and employee assistance programs, companies issue a variety of written materials, including inserts for policy and procedure manuals and special brochures and pamphlets. These writings not only provide instructions in the operation of the program, usually they also attempt to convey the company's philosophy about alcohol problems. Excerpts from a collection of such documents are presented below. However, because of the confidentiality promised to the companies that provided these materials the specific source of each cannot be identified by name.

#### Alcoholism in the Workplace as a Crisis

As serious and as recalcitrant as are the problems associated with alcohol abuse, it would seem that little promotion of the problem's significance would be necessary, beyond merely reporting the facts. Nevertheless, writing on this topic frequently includes overstatements of the dimensions of the problem. The medical director of General Motors' executive offices offered the frequently-cited (although probably inaccurate) figure of nine million as the number of adult alcoholics in the U. S., and then stated (Pace, 1981, p.24): "some experts indicate that there are now 3.4 million teenage alcoholics in the United States, and their ranks are expanding at an alarming rate." In light of the fact that there are approximately 27 million teenagers and 160 million adults in the United States (U. S. Bureau of the Census, 1983) at the time of his writing, his experts (who were not cited) apparently believe that the incidence of the disease of alcoholism is more than twice as great among teenagers as among adults. This distressing warning is especially surprising in light of the clear evidence (Vaillant, 1983) that alcoholism is a disease that only strikes those who have been heavy drinkers for many years.

Although typically not as dramatic, company program literature often begins by making the point that alcoholism is a problem of the highest magnitude. These pamphlets often state that the United States has a serious and widespread problem--called alcoholism--and that the company's employees are not less susceptible to this problem than anyone else. A major chemical firm writes that alcoholism "is the nation's fourth leading killer, outranked only by cardiovascular diseases, cancer, and mental disorders" and "that about 500,00 new victims join the ranks each year" because "alcohol is a poison for some ten percent of the drinking population."

However, the idea that some individuals are unable, by dint of some physiological difference, to control their alcohol consumption has been amply refuted (see Armor, Polich, and Stambul, 1978; Pattison, Sobell, and Sobell, 1977). Similarly, because there is neither a clear consensus on a definition of alcoholism nor on how many alcoholics there actually are, it is highly speculative to assert how many of alcoholism's "new victims join the ranks each year."

Nevertheless, companies' program literature frequently cites as factual information figures that are no more than alarmingly high "guesstimates" of the severity of many aspects of alcohol's impact on the workplace. An oil corporation states that "there are approximately ten million alcoholics in this country and their behavior directly affects another 40 million persons. Alcoholism costs industry \$25 billion a year in absenteeism, disability payments and poor performance."

A somewhat lower national cost figure is found in the program literature of a metal producer, in which it is then connected directly to costs for that particular company:

*Alcoholism is a health problem that affects from six to ten percent of industry work forces. According to the National Council on Alcoholism, problem drinking costs the economy \$10 billion in lost work time; \$2 billion for health and welfare services; and \$3 billion in property damage, medical expenses, and insurance claims.*

*Naturally [this company] pays its share of the \$15 billion annual hangover. It is estimated that, in lost time and poor job performance alone, alcoholism costs the company more than \$9 million each year!*

Statements such as those above may well serve to impress upon employees the putatively calamitous dimensions of this problem. Problematically, though, the health problem said to affect 6 to 10 percent of workforces is "alcoholism," a term that is likely to be interpreted as referring to a long-term uncontrollable addiction to alcohol. Yet the cited claims about costs to the economy refer to the costs of problem drinking--alcohol consumption by *anyone*, alcohol addict or not, that creates some sort of problem. Attributing these enormous expenses to individuals engaged in a wide range of drinking behavior, rather than to those relatively few addicts, may increase the credibility of the figures. However, in the quote above, the national figures on the costs of problem drinking are scaled down to the size of the company and labeled as their losses due to *alcoholism*. Although this company's choice of words may reflect pure chance, it fits a pattern of definitions and assertions that, together, construct a situation of crisis proportions.

Another element of that pattern is evidenced in an interview carried in the house organ of another major corporation in the same metal industry. Asked about the seriousness of the company's alcoholism problem the director of their "Health Assistance Program" (90 percent of whose clients were diagnosed as alcoholics)

stated that "the statistics indicate that between five and ten percent of the U. S. workforce are alcoholics," and although he believed the company's problem to be about average, he added that "we've only reached the tip of the iceberg so far."

Although such "statistics" on the prevalence of the problem frequently are cited, they do not exist. Research on the prevalence of alcoholism among employed persons has never given credible evidence that as many as 5 percent of the workforce are alcoholics (see Cahalan, 1970; Parker, et al., 1983). Nonetheless, for the program director interviewed here, claims that such statistics do exist may prove very useful as a justification for his continuing employment. From his comments, it is clear that far fewer than 5 percent of the workforce had been referred into his alcoholism program. Rather than considering the possibility that the 5 to 10 percent figure is too high, he simply asserts that the prevalence of alcoholism within "the plant is about average." By explaining that "so far," "we've only reached the tip of the iceberg," he implies that more complete success is a matter largely of continued vigorous effort.

The supposed facts about the prevalence of alcohol problems are echoed, but with some added creativity, by a communications company: "Most people can drink socially without becoming alcoholics, but about five percent to ten percent cannot. Therefore, in our company, about five percent to ten percent of employees will have a drinking problem." The inference made here, that the percentage of employees who become alcoholic is the same as the percentage of drinkers who become alcoholic, rests on the assumption that all of the company's employees do indeed drink. This is highly unlikely, however--the best evidence on this question (Cahalan, Cisin, and Crossley, 1969) indicates that only 68 percent of the adult population drinks.

The most modest pronouncement on the prevalence of alcohol problems available to this writer was provided by a large bank that stated, "Our employees are no more immune to this disease than any other (national estimates place the average incidence at five percent in any corporation)."

Potentially, the hyperbole and apparently misleading information sampled here might help to persuade those with supervisory responsibilities that some of their very own subordinates (indeed, one out of each 10 or 20) are likely to have this serious problem. Although the statement that 5 to 10 percent of a company's employees are alcoholics is a major component of that thrust, such a claim has a problematic corollary. The fact that virtually none of these programs comes close to identifying that high a percentage of the company's employees as alcoholics (Weiss, 1980) would seem to imply that they are failing. However, the claim that alcoholism is a very prevalent problem and that the company has "only reached the tip of the iceberg" counsels greatly increased vigilance on the part of supervisors. Perhaps as importantly, it also justifies labeling up to ten percent of the employee population as alcoholics--even if that diagnosis does not seem to fit some "alcoholic" employees all that well--because that, supposedly, is the national prevalence and (as a major petroleum company put it), "We believe national statistics on the incidence of alcoholism can be applied to us."

### Describing Alcoholism and its Consequences

Attempting to explain why programs fail even to approach full identification of the supposed population of alcoholics, companies assert that it is a result of the tragic ignorance surrounding the "true" nature of alcoholism. At least in part to account for this seeming failure, literature that companies distribute to introduce these programs frequently is directed at dispelling this "ignorance" with the explanation that alcoholism is a medical disease. Apparently a major objective in this general strategy is to disavow the moral model of alcoholism, that is, the notion that alcoholism constitutes a shameful failure of personal moral character. For example, a mineral company's brochure makes the blanket statement that "the social stigma often associated with this illness has no basis in fact," although it provides no substantiation of this assertion. Another firm does attempt a more detailed explanation of this position (which they broaden into a disclaimer of the moral model's relevance for drug abuse as well) with the somewhat confusing declaration that: "the social stigma often attached to alcoholism and drug abuse has no basis in fact since these are medical illnesses which are either physical and/or medical in nature."

Company literature sometimes opposes the moral model not only on the grounds that it is invalid, but also because they view the consequences of that belief as counterproductive. A major oil corporation asserts that it "recognizes that the social stigma often associated with alcoholism and other medical/behavioral illnesses is erroneous and destructive." A metal producer writes, "The moral stigma often associated with alcoholism is out-of-date and unproductive." A public utility company does not bother to claim that the moral model is incorrect, but simply that its consequences for changing the problem drinker are undesirable: "The social stigma associated with behavioral-medical disorders often discourages a person from accepting proper consultation and treatment." The purpose that can be served by the disavowal of the moral model's accuracy is made most clearly in this particular quote; calling the alcoholic a sinner or a weakling decreases the likelihoods that employees will voluntarily identify themselves to the program and that their supervisors will be willing to refer them.

After refuting what might be more "common sense" understandings of alcohol problems, literature on alcoholism distributed through corporate programs usually proceeds to a description of the nature of this problem that is claimed to affect 5 to 10 percent of the workforce. Defining the phenomenon of alcoholism, however, has always posed a considerable dilemma.

Jellinek (1952), who is most frequently cited as the source of the disease concept, cautioned against broad definitions of the disease of alcoholism:

*The lay public uses the term alcoholism as a designation for any form of excessive drinking, instead of as a label for a limited and well-defined area of excessive*

*drinking behavior. Automatically, the disease conception of alcoholism becomes extended to all excessive drinking, irrespective of whether or not there is any physical or psychological pathology involved in the drinking behavior. Such an unwarranted extension of the disease conception can only be harmful (pp. 673-74).*

Most corporate alcoholism and employee assistance programs give little attention to the complexities of defining alcoholism. A few, however, go through the medical disease ideology in some detail, such as this dramatic presentation from chemical firm's program literature:

*Alcoholism is a chronic, progressive disease that occurs in a person who has developed a morbid and uncontrollable craving for alcohol. It affects the nervous system, beclouding judgment and destroying the brain so that the brain loses control of bodily functions, gradually resulting in death. Alcoholism is a chronic disease because, like diabetes, it is a permanent disability that demands constant attention to keep it under control. It is addictive because the patient has a compulsive, irrational need to drink, as a narcotics addict craves dope. The "alcohol addict" drinks even when he knows that liquor has wrecked his health and perhaps cost him his family, his friends, his job, and his self-respect.*

*It is progressive in that, like cancer, the ravages of the disease will steadily increase in severity and the degenerative process cannot be reversed.*

Having argued forcefully that a serious disease is being dealt with in their program, the next page of their pamphlet imputes disease characteristics not only to the alcohol addict but to the "problem drinker" as well, stating that "a problem drinker or an alcoholic drinks because he *has to*."

An even broader usage of the disease ideology is evident in a brochure, distributed by a number of EAPs, that was written by a clergyman who has organized a private treatment facility. Appearing to be a description simply of alcoholism, this brochure starts out with the typical contention that in the past "the alcoholic was looked upon as a weak-willed individual." It continues, stating that "today, of course, medical doctors, clergymen and other professionals have come to realize that alcoholism is a disease," and then goes on to assert that recognition of alcoholism as a disease has a number of specific corollaries:

1. The illness can be described.
2. The course of the illness is predictable and progressive.
3. This disease is primary--that is, it is not just a symptom of some other underlying disorder.

4. It is permanent.
5. It is terminal--if left untreated, it inevitably results in premature death.

Although the American Medical Association and other medical professional groups have labeled alcoholism a disease, none have defined it as including this list of characteristics. Rather, the research literature suggests that the list is highly inaccurate. More specifically, the onset of an alcoholic drinking pattern is as likely to be followed by a resumption of normal drinking as by a progressive decline into death (Clark and Cahalan, 1976). Although abusive overconsumption of alcohol is one of the most serious health problems facing the United States, the fact that its course is far more strongly affected by major life events such as divorces or job changes (Saunders and Kershaw, 1979; Miller and Hester, 1981) than by all forms of therapy suggests that it is a symptom of some other problem.

The particular significance of the above list, however, is that in the later pages of the clergyman's brochure it is referred to as having been not simply an enumeration of the characteristics of the "disease of alcoholism," but of the characteristics of the "disease" of "chemical dependency" as well. Undeniably, society's view of individuals having problems with alcohol is more sympathetic than in the past, and the opening paragraphs of this brochure play on that sympathy with the plausible view of "alcoholism as a disease." It is also undeniable that alcohol is a chemical and that addiction to it therefore constitutes a "chemical dependency." Perhaps this more general term is inserted in the hope that the sympathy-arousing disease concept will be extended to the reader's attitude towards those who abuse other drugs.

These examples illustrate how the disease concept of alcoholism serves the broad purposes of justifying the vigorous search for not only alcohol addicts, but for those with other chemical dependencies, as well as for individuals whose non-addicted, relatively controllable alcohol use is deemed a problem. Creative extensions of the disease concept, they also illustrate the typical inattention to Jellinek's injunction that the concept of alcoholism as a disease should be applied to only a strictly delimited group of excessive drinkers. For management to be able to identify many employees as in need of their watchful "assistance," alcoholism may need to be defined as broadly as possible. Interspersing terms such as chemical dependency, problem drinking or alcohol abuse in discussions of alcoholism may help to increase the credibility both of claims of the magnitude and ubiquity of alcoholism, and of claims of the chronicity of "chemical dependency" and "problem drinking."

Even with the questionable logic of the definitions given above, they actually may underutilize the possibilities of the disease ideology of alcoholism for managerial control. Most companies go into much less detail in defining or describing alcoholism, yet their definitions allow even greater opportunity for various forms of substandard job performance to be defined as evidence of alcoholism. Generally, companies state that they consider alcoholism to be a "treatable disease" or a "treatable illness"

that they regard sympathetically, and for which they wish to provide the same treatment as for any other disease or illness. They then typically offer a simple operational definition of alcoholism.

An influential source for such a definition has been a widely distributed pamphlet from the Kemper Insurance Companies entitled *What to Do About the Employee with a Drinking Problem* (Rouse n.d.). It quotes Professor Harrison Trice of Cornell University as observing: "Recurrent poor job performance due to the use of alcohol becomes a simple, direct and clear definition of alcoholism....Alcoholism is simply repeated poor work because of the way the employee uses alcohol" [ellipses in original].

This definition, which describes a dread disease whose only symptom is a loss of productivity and profits, reads like a Marxist's caricature of medicine in capitalist society. Nevertheless, it has considerable currency. For example, a chemical company's manual on alcoholism states: "A definition [of alcoholism] that has found good acceptance in industry is: continued or repeated drinking in an amount or manner that interferes with the efficient performance of one's duties." Similarly, a magazine well known for an editorial policy upholding "traditional American values" and a personnel policy emphasizing welfarist measures writes: "For the purpose of this policy, alcoholism exists when the employee's consumption of any alcoholic beverage repeatedly interferes with job performance."

Definitions such as these, however, have the potential to strain the credulousness of the uninitiated, who are first told that this is a ruinous disease and shortly thereafter informed that its direct consequence is a hampering of work efficiency. Perhaps because of this problem, some companies' literature makes semantic adjustments to provide a smoother logical fit. For example, a public utility company, although using the term *alcoholism* everywhere else in its pamphlet, writes, "The Company defines *problem drinking* [emphasis added] as drinking to the extent that it affects job performance." Certainly, there is an adequate internal logic to such a statement; drinking that (adversely) affects job performance is obviously a problem (for the employer, if not for others).

The most common definition of alcoholism found among the company policies available to this writer do acknowledge that the disease of alcoholism may have something to do, at least secondarily, with peoples' health. Most typically they state: "For the purpose of this policy, alcoholism is defined as the consumption of alcoholic beverages which definitely and repeatedly interferes with an employee's job performance and/or health." Also quite common are amendments of the above statement that add on other "illnesses," perhaps hoping to gain the coattails of alcoholism's credibility as an illness. This is illustrated by the statement of a farm equipment manufacturer: "For the purposes of this policy, alcoholism, drug abuse and emotional problems are defined as illnesses which repeatedly interfere with an employee's job performance and/or his health."

An automobile manufacturer provides a definition that is so broadened that it borders on doubletalk: "For purposes of this policy, behavioral-medical problems

are defined as illnesses in which the employee's behavior definitely and repeatedly interferes with his or her job performance and/or health." This statement, which asserts that those whose behavior is interfering with their job performance are victims of the illness of "behavioral-medical problems," has a compelling internal logic. It is difficult to imagine what about an employee, other than his or her behavior, that would cause job performance problems. This definition's phrasing might appear ludicrous, but potentially it could justify the labeling of an employee deviating from company standards as an appropriate client for the employee assistance program.

Many of the other operational definitions, such as those stating that the disease condition exists when consumption of alcohol impairs job performance, appear to give management a less broad license for the impressment of clients into the program. However, such a narrow and seemingly self-interested specification of what constitutes alcoholism might leave companies open to the charge that they are not genuinely concerned about employee welfare. To reduce exposure to such charges, program literature frequently includes the explanation that this narrowness is proof that the company is not guilty of any inappropriate paternalism. This strategy is illustrated in a mineral company's statement that: "The company's concern is strictly limited to its [alcohol's] effects on the employee's performance on the job. It is not concerned with social drinking. Whether an employee who is not an alcoholic chooses to drink or not drink is of concern only to the individual."

Using deficient job performance as the criterion for placing alcoholic employees into a program seems, at first glance, to provide an appropriate justification for the company's intervention. Nonetheless, the practical implementation of programs basing this decision on poor job performance confronts two major dilemmas. The first and more readily addressed is that of establishing that individuals whose job problems can clearly be connected to misuse of alcohol are "alcoholic" rather than simply "drunk." The second and far more complex dilemma is determining that alcohol is in fact the specific cause of a particular work problem.

It is likely that much of the public views the "alcoholic" sympathetically, that is, as having a condition that is not necessarily under an individual's control. The term "drunk," on the other hand, now appears to be reserved for those who abuse alcohol voluntarily. Consequently, although occupational alcoholism and employee assistance programs generally broaden the definition of alcoholism to cover a wide range of behaviors, program literature does not employ the specific term "drunk." These programs profess a sympathetic understanding of, and concern for, what they justifiably characterize as a grave health problem; without such a premise, it seems improbable that many employees would voluntarily enter a program. More importantly for managerial control of non-alcoholic poor performers, it also seems unlikely that many supervisors would refer their subordinates to a program not overtly premised on sympathetic concern. A claim of such sympathy for employees who, by choice, frequently overindulge on weekends and are hung over on Mondays would have little credibility. Despite the terminology used in company literature, however, the prob-

lem that remains for programs using the definitions given here is that alcohol clearly can be responsible for adversely affecting the job performance of individuals who are neither "alcoholic" (with its supposedly attendant symptoms, such as craving, loss of control, and dependence), nor even problem drinkers (except in a very short term sense), but simply drunk or hung over.

The difficulty of disentangling the effects of alcoholism from those of drunkenness is demonstrated by research that has been reported by Mannello (1979). He found that among railroad workers, the 28 percent of the non-abstinent workforce who are problem drinkers account for one-third of drinking rule violations, while the remaining 72 percent, who are not considered to be problem drinkers, account for the remaining two-thirds of these violations. These data suggest that the preponderance of drinking rule violations are not attributable to those employees who have fallen victim to a treatable illness; rather, it appears that the number of problems caused by "problem drinkers" are not all that disproportionate to their prevalence in the non-abstinent population.

By defining alcoholism as alcohol consumption that interferes with job performance, those employees whose work has been impaired as a result of even one to two episodes of drunkenness can be labeled alcoholics. For example, in a conversation with a former director of the alcoholism program for one of the armed services, this author expressed surprise in response to his statement that he believed one-quarter of the people in that service to be alcoholics. The question was posed as to whether he included in that estimate, for example, the 19-year-old recruit, away from home for the first time, who returns from a weekend pass with a hangover and has a minor accident. The response was that such a person is an alcoholic and should be mandatorily referred into the alcoholism program and made to attend meetings of Alcoholics Anonymous.

Labeling as alcoholic an individual who may merely have come to work while suffering the after-effects of a "big weekend" can threaten a program's credibility. Some programs seem to be aware of this dilemma; Wagner (1982), for example, described a program in which neither management nor their agents do the labeling. Rather, "the employee rates whether he has an alcohol problem and to what extent, not the counselor" (p.61). Explaining how this is accomplished, he wrote that "a short 26 question yes-no quiz is read to the employee and the results indicate if alcohol is a problem and to what degree" (p.61). What he did not mention, however, was that this widely-used quiz includes such relatively innocuous items as "Do you drink because you are shy with other people?", and that answering yes to one item is interpreted as a definite warning of alcoholism, yes to two is said to indicate a probability of alcoholism, and answering yes to three is taken as confirmation of the presence of alcoholism. Individuals responding to a counselor administering this quiz (but who are unaware of the scoring system) might wish to make it clear that they were not denying a problem and therefore might be inclined to admit, for example, that they mix themselves one martini when they come home from work every day, and drink it

whether or not their spouse is home. But the result of providing candid, affirmative responses to questions about having a drink the same time every day and drinking alone would be that, according to the test's criteria, they had diagnosed themselves as alcoholic.

An insurance company also makes use of the disease model to avoid the appearance of imposing the label of alcoholic on employees. The company's medical director explained to this writer how supervisors are trained to make referrals to the program on the basis of job performance, and how program counselors attempt to determine the source of an employee's difficulties. In cases where employees disagree with an initial diagnosis of alcoholism, they are entirely free to decline participation in the program. However, if their poor work performance (supposedly symptomatic of alcoholism) reoccurs, and if they still refuse to accept the company's help, the medical director stated that he felt obligated to mandate such employees' participation in the program. He reasoned that their continued poor job performance, "denial," and obvious "loss of control" confirmed not only the accuracy of the original diagnosis but the advanced stage of the disease's progression.

The legitimacy of alcoholism and employee assistance programs among a company's workforce rests, substantially, on convincing the organization's members that it is rehabilitating individuals who are suffering from an illness, not just sanctioning employees who misbehave. Labeling as alcoholic an employee whose poor work performance can be associated with overconsumption of alcohol adds some "face validity" to the diagnosis. Nevertheless, it is an inaccurate basis for concluding that that individual is indeed an alcoholic, and these examples suggest that some programs have attempted to develop procedures to avoid the appearance of making such diagnostic errors.

### Connecting Poor Performance to Alcoholism

Probably the more significant difficulty with defining alcoholism as consumption that affects job performance is that the actual cause of the deficient behavior is not always apparent. This dilemma is made especially problematic by the notion, held by many EAP directors, that alcohol abuse has subtle yet pervasive effects on individuals' behavior. That is, the concerns of most programs are not limited merely to obviously drunk or hung over employees. Whereas the old-fashioned alcoholism programs of the 1940s counseled supervisors to be vigilant for evidence of employees with alcohol on the breath, bloodshot eyes, and an unsteady gait, modern programs pointedly eschew such tactics. Nor are searches conducted, in modern occupational programs, for liquor bottles hidden in desks or lockers or for any concrete evidence (or even an oral statement in many cases) that an employee has been engaged in inappropriate consumption of alcohol. In general, there need be no evidence of drinking before coming to work, on the job, or at lunch to conclude that the disease of alcoholism is the proximate cause of deficient job performance. Rather, it is argued that

employees may be moody, uncooperative, and in general unproductive because of alcohol problems that do not necessarily manifest themselves in overt physical symptoms.

The question, then, is how the company determines that employees' use of alcohol is what has caused their deficient job performance. For a great many corporate alcoholism programs, the medical disease ideology provides the answer. As discussed previously, the disease ideology argues that alcoholism is progressive and fatal unless there is a therapeutic intervention. Typically, the prognosis for a disease is more favorable if it can be arrested at an early stage, and this is said to be the case of alcoholism as well. In the early 1970s the National Council on Alcoholism (a voluntary group closely linked with Alcoholics Anonymous) announced that it had discovered just what the early symptoms of alcoholism were--making early therapeutic intervention possible. The NCA claimed that its research had found that these early symptoms happened to be the job-related problems of "absenteeism, poor judgment, erratic performance, excessive material spoilage, decreasing productivity, departures, customer complaints, failure to meet schedules, and countless other instances of poor performance" (Von Wiegand 1974, p.83). Indeed, they asserted that 60-80 percent of employees exhibiting those symptoms were victims of the disease of alcoholism.

The elegance of this viewpoint--for purposes of managerial control--is that it virtually eliminates the problem of demonstrating the connection between work performance deficiencies and alcoholism. *By definition*, employees are in the early stage of the disease of alcoholism if they exhibit any of various manifestations of deteriorating job performance. As outlandish as this idea appears, companies do promote it. Indeed, this list of symptoms is found, usually with just a deletion or two, in many companies' program procedure manuals.

Also frequently reproduced in such company documents is a chart that purports to show the "Behavioral Pattern of Employee with Drinking Problem." In the early stage of the disease, the alcoholic is shown as functioning at 75 percent of job performance, with such observable signs as "absenteeism," "lowered job efficiency," "errors due to inattention or poor judgment," "misses deadlines" and "makes untrue statements." By the middle stage the alcoholic employee is claimed to be at 50 percent of job performance standards, as indicated by, for example, "spasmodic work pace," "repeated minor injuries on and off the job," and "unreasonable resentments." The "late middle stage" alcoholic employee is supposed to be functioning at 25 percent of appropriate job performance, with observable signs such as "seems to lose ethical values" and "will not discuss problems."

Companies whose literature does not include this chart frequently provide a description of a behavioral pattern to watch out for, as in this excerpt from the program guidelines of an aircraft manufacturer:

*The employee was seldom absent or tardy--now his absences and tardies are increasing in frequency, especially Friday p.m., Monday a.m., and the day before and*

*after a holiday. You see a pattern developing. [The] Employee was safety conscious-- now he is careless and has needless accidents or near accidents on the job with which he is familiar.*

Although a great many employed people do develop terrible difficulties because of overconsumption of alcohol, the above views of this very serious problem are not accurate. As discussed earlier, alcoholism does not progress inexorably through set stages. Other than the NCA study (which has been alluded to but never revealed) research on the job behavior of alcoholics (Maxwell, 1960, Trice, 1957, 1962, 1964) indicates that the NCA's list of symptoms is highly unreliable. For example, Maxwell (1960) found that accidents on the job in which work time was lost was the least likely of forty-four signs of drinking problems, having been a serious or moderate problem for only 5 percent of the former alcoholics he studied.

A more recent study by Shirley (1985), director of industrial programs for the NCA's New York City affiliate, describes the work experiences of 62 business executives who were formerly active alcoholics and continued to be members of A. A. His respondents averaged almost 20 years between the first onset of their drinking problem and their eventual recovery, and he admitted that "all 62 of our subjects had progressed to a state of debilitation typical of late stage alcoholism before seeking the help that brought them to recovery." Concerning the effects of their long term addiction on their work performance, he also admitted that "it's true that 43% of our subjects did advance in their careers during their drinking years." Apparently searching for evidence that would be at least somewhat consistent with views such as the claim, noted above, that "late middle stage" alcoholics function at only 25 percent efficiency, Shirley described the effects of his subjects' drinking on work performance in their last days before finally seeking treatment. He wrote that "nir-ty-two percent of our subjects were driven, finally, to come in early, stay late and to work on weekends in a desperate effort to compensate for their growing inability to accomplish their work during normal hours" (p.26). Although this experience undoubtedly was a very painful one for these addicted executives, evidence that employees in the late stages of this virulent disease come in early, stay late, and work on weekends is not consistent with contentions that late-stage alcoholics are only one fourth as productive as nonalcoholics.

By advancing the idea that alcoholism is a rampant disease, and therefore a problem deserving of sympathetic concern, the medical disease ideology of alcoholism enhances the credibility of rather overstated assertions about the prevalence and consequences of the problem. That these definitions of the disease of alcoholism and the accompanying diagnostic criteria are palpably crude, seemingly self-interested, and highly unreliable may not be merely the result of corporate personnel functionaries failing to get the facts straight. Rather, this set of pseudofacts may serve the interests of managerial control in the workplace, by legitimating the search for, and sanctioning of, employees whose job performance is not up to management's standards.

### Getting Employees into the Program

Not only can various components of the disease model serve to legitimate social control of poor performers by corporate management and those they employ specifically as agents of social control, but they may serve to motivate others to be participants (perhaps unwittingly so) in this process of identifying and disciplining those who deviate from managements' performance expectations.

By asserting that alcoholism is a serious, yet diagnosable and treatable problem, the disease model of alcoholism and its corollaries can attack what many program administrators consider to be the major impediment to identifying those who they consider to be alcoholics. In discussions with this writer administrators often have mentioned the dilemma of supervisors covering up for their poorly-performing subordinates. However, perhaps because programs do not wish to direct accusations at supervisory personnel, whose cooperation is crucial to a program's success, the issue of the supervisory cover-up generally is not raised specifically in program literature. Nevertheless, it often is alluded to, as in a manufacturer's program pamphlet that warns, "You should make no attempt to conceal the impaired job performance or intentionally overlook evidence of a problem on the job," or a telephone company's advice, "Do not let friendship or sympathy mislead you into covering up for the employee with the idea that you are being helpful." The booklet describing a chemical firm's program devotes a full page to a listing of possible reasons for reluctance to identify alcoholic employees, including: "Reluctance to invade an employee's privacy," "The unpleasantness of facing up to the alcoholic," and "No one likes to stigmatize an employee--it's like calling him or her a communist."

A solid basis for the successful undermining of this supervisory coverup is formed by the description of alcoholism as a disease that is progressive and fatal unless someone recognizes its symptoms and helps its victims receive treatment. Nevertheless, many company promotional efforts make specific pleas for the supervisor's cooperation. One of the points frequently emphasized is that referring a subordinate to the alcoholism program is not an act of betrayal, but the most humanitarian possible response to the situation.

To advance this view, some companies unleash what is perhaps the most powerful semantic weapon in management's attack on employees whose productivity is deficient--the promotion of a very remarkable "symptom of the disease of alcoholism." As this writer was told by one of the country's most prestigious consultants on occupational alcoholism programming, "The number one symptom of alcoholism is denial." Thus, according to this Catch-22-type tenet, the best basis on which to positively identify someone as an alcoholic is for that person to deny having problems with alcohol.

Actually, the only research bearing on this issue of denial directly contradicts this view. Trice (1964) asked his subjects, work supervisors of alcoholics, to describe a number of symptoms of their subordinates' alcoholism in addition to those on

Maxwell's (1960) original list. According to Trice, the supervisors offered these new clues:

*First, they expressed the belief that the developing alcoholic is a chronic liar. Second, they noted his docility and willingness to admit his problem when directly approached about it. In the experience of these supervisors, alcoholic employees not only invented excuses for absences; they were also persistently untruthful about a host of work-related matters. At the same time, they readily and needily admitted their problem, tending to throw themselves on the mercy of the boss if they were confronted with concrete evidence, outwardly, at least, accepting chastisement (1964, p. 23).*

Notwithstanding the absence of evidence supporting the existence of this symptom (and, indeed, the presence of Trice's contrary evidence), many EAPs promote the view that "denial" is a symptom of alcoholism, as illustrated by the program guidelines distributed to supervisors in a chemical company: "Alcoholics are practiced at cover-ups to their colleagues, family and selves. There is a pattern of rationalization that allows the individual to deny completely that a problem exists. He may thus fool both supervisors and himself." Similarly, a metal company states: "It is important to keep in mind that a problem drinker is usually least able to recognize his problem. This is a characteristic of alcoholism--it is an illness of self-denial."

The notion that denial is a symptom of alcoholism and similar "diseases" sets the stage for the highly unusual therapeutic regimen that, along with the job performance diagnostic criteria, is at the heart of the managerial control strategy that these programs can support. It is argued that to break through "the denial pattern" it is necessary to *force* victims of the disease of alcoholism to accept the help that can save them from the miserable death that is otherwise inevitable. Thus, companies use a procedure--originally called "constructive coercion" (Trice, 1969), but known as "constructive confrontation" (Trice, 1972)--that consists primarily of telling program clients that if their work performance does not improve they will be terminated. Research on the effectiveness of this "treatment" indicates that the majority of employees do work harder after receiving this threat (see Weiss, 1986). However, no evidence yet exists that it leads to reduced levels of alcohol consumption. Certainly, management may attempt to motivate supervisors to refer poor performers to the program with the logic that the company has a right to expect good job performance. However, the supervisory coverup seems likely to be dealt with more successfully if management's perspective can appear not merely self-interest, but as reflecting concern for employee health as well. The following excerpt from a chemical firm's program brochure, describing supervisory procedures, illustrates the attempt to make the point that putting severe pressure on alcoholics is just what the doctor ordered.

*Since alcoholism is an illness of denial, persons may not be motivated to recovery until the circumstances of their continued drinking become more intolerable than the circum-*

stances of abstinence. In other words, they must hit bottom before they are receptive to treatment. Experience has shown that a bottom can be artificially created before it normally would be reached if the illness was left to itself. This factor is one reason for our company program. When an employee's job performance is affected by the abuse of alcohol, he is surrounded by the facts of his condition. Thus, through a carefully planned effort, the employee is led to accept the facts of his illness and there is a good chance of persuading him to start a program of treatment.

The brochure provided to supervisors does not describe the details of the "carefully planned effort." In fact, the effort that this particular company carefully plans consists of the process of constructive confrontation, emphasizing "crisis precipitation" through the use of the "job threat." That is, by surrounding an employee with "the facts of his condition" (i.e., telling the employee that his job performance has been poor) he will "hit bottom" and can then be "led to accept the facts of his illness" (i.e., told that he will either shape up or be fired).

Other companies emphasize that referring one's subordinates to the program is both ethical and humanitarian by attempting to impress upon supervisors the dire consequence for an alcoholic of not receiving the program's aid. This interview with the administrator and the consultant for a utility company's program, published in the company's house organ, transmits this message with dramatic, even *macho* imagery:

*[The program administrator] tells it flat: "Alcohol, uncontrolled, is a killer, and the alcoholic who fails to arrest the disease is killing himself as surely as if he put a gun to his head. Those who can help him toward arresting the disease and don't are helping him toward an early death--and not a pleasant one." It is not pleasant news, for alcoholics, but there is no soft way to face the problem, in [the consultant's] view. "We call it 'tough love,'" says [the program administrator], "and I think it is often the only thing that can work."*

The in-house newsletter of a major petroleum company also takes up this theme of referral as a humanitarian imperative. Although employing more gentle language, the following passage also implies that a supervisor who fails to refer an alcoholic subordinate is an accessory to suicide:

*Most problem workers won't act until a supervisor stands up to their performance and explains that it's time to seek some help. That, says [the program administrator], is the "key step" in starting an employee back in control of his life. The supervisor has to get the ball rolling. But often convincing the supervisor that he should do something is equally as difficult as convincing the person with a problem to do something. "Supervisors are like everyone else. They don't like to have these unpleasant talks. Their first reaction is to let things lie--to see what happens. But when something more serious occurs, they let it slide again."*

*"By doing so," [the program administrator] says, "the supervisor provides the alcoholic time to get more involved with alcohol. By coercing up this problem or procrastinating they're contributing to a potentially fatal disease. This is the severity of alcoholism supervisors must realize. Once they do, they'll see that the only humanitarian solution is to immediately confront it."*

Similarly, the house organ of a major banking institution, after explaining the nature of "constructive confrontation," concludes that "These are stern methods...but the supervisor must understand if he is to help the staff member, their rigorous application is *the kindest thing he can do*--that anything less is a grave disservice to a seriously sick human being."

Once supervisors have been convinced that identifying a subordinate for referral to the alcoholism program is not an act of betrayal but one of helpfulness, they must then be convinced that they are competent to make such an identification. The approach to this issue in various companies' program literature appears to be fairly consistent. In response to the objections raised by supervisors in early programs to being placed in the role of medical diagnosticians, companies now specifically deny this to be their intention. Rather, they maintain that the basic responsibility of supervisors under the program is to do precisely what they are expected to do as supervisors--monitor job performance. The following examples are illustrative:

*It is recognized that supervisors are not expected to distinguish behavioral or medical problems an employee is having, just as they are not qualified to diagnose any other illness. Referrals for diagnosis and treatment will be based strictly on unsatisfactory job performance which results from an apparent behavioral-medical problem in a previously competent worker.*

*--a farm equipment company*

*Your Job as a Supervisor: THE TROUBLED EMPLOYEE WITH A DRINKING PROBLEM CAN BE IDENTIFIED ON THE BASIS OF POOR WORK PERFORMANCE. Poor work performance includes tardiness, absenteeism, poor performance on the job, on-duty accidents, unexplained absence from assignments, and difficulty with fellow employees and customers.*

*Accompanying job-performance deterioration may be personality changes such as moodiness, irritability and chronic griping. There may be changes in physical conditions such as carelessness in dress and poor personal hygiene. You may hear rumors of financial problems and family difficulties. These symptoms may also be the result of health problems other than alcoholism. However, as a supervisor, you will remain on safe ground if you avoid the role of diagnostician and counselor and make your decision to confront the employee only on the basis of work performance.*

*--a public utility firm.*

*It is not a function of managers and supervisors to diagnose alcoholism or drug abuse. Therefore, all referrals are based on job performance.*

### *I. Identification*

#### *Supervisor:*

- monitors job performance and attendance*
- documents any deterioration;*
- informally discusses with employee a need for improvement;*
- gives a time limit by which improvement must be demonstrated;*
- discusses case with department manager.*

*-- an insurance company*

*Job performance is the focal point of this policy. It is the responsibility of officers and supervisors to refer to the medical department any employee whose unsatisfactory job performance does not respond to normal corrective action and results from apparent behavioral or medical problems, whatever their nature. It is not the officer's or supervisor's function to diagnose or make any judgment as to the nature of the problem.*

*-- a bank*

The proscription against supervisors' involvement in diagnosis is sometimes presented as part of a list of "Supervisory Don'ts," such as a bank that advises:

- 1. The supervisor should not play the role of "amateur diagnostician." He is not qualified to judge whether or not a staff member is an "alcoholic" or a "drug dependent" person. The supervisor must stick to job performance.*
- 2. The supervisor should not play the role of "lay counselor." He should not discuss whether or not the staff member has a drinking or drug "problem" or attempt to counsel him in this regard. This is a job for specialists.*

Although such policies might seem to be reasonable responses to the complaints of supervisors about their role requirements in the earlier, medically-oriented programs, it does seem odd that, beyond the point of referral, supervisors have absolutely no role in the diagnostic process. Employees' immediate supervisors, after all, presumably are the individuals most cognizant of the symptoms being exhibited by

all, presumably are the individuals most cognizant of the problems being exhibited by program clients, a fact that should render them extremely helpful in breaking through the "denial pattern" of the alleged alcoholic.

Conversely, it could be argued that it is just this intimate knowledge of employee's behavior that makes some companies decidedly uninterested in supervisors' participation in the diagnostic process. That is, it seems likely that in many cases supervisors will have some idea of the reasons behind a subordinate's poor work performance. For example, an employee frequently may be late and absent and exhibit poor productivity because of frustration in performing at a task that has been designed to maximize the potential of capital rather than human resources, a situation that the employee's supervisor may be not only aware of, but sympathetic toward. However, to the extent that an employee's problem is something other than alcoholism or some similar "behavioral-medical" problem such as drug abuse, it may be in the EAP's interest not to receive such information. If, as the critics cited at the beginning of the article suggest, management is using the medical disease ideology to control a wide range of poor performers, keeping supervisors out of the diagnostic process may be in the company's interest as well. Additionally, as Roman (1980) has implied, managements intending to enhance their control might prefer to construe poor person-job fits as the result of individuals' deficiencies (even if pitiable ones), rather than failings on their part.

The typical program's policy appears to fit their strategy rather well; the supervisor is told to provide the program with *nothing more* than evidence of an employee's poor job performance. Furthermore, supervisors are told that they are extremely incompetent at diagnosis and that the company has specialized professionals for just that purpose. If these programs are falsely labeling individuals as alcoholic in order to facilitate controlling them, restricting immediate supervisors' contact with the program could be especially helpful for management in situations that have the potential to undermine the credibility of the program and the diagnoses it makes. One can imagine, for example, a situation in which an employee was diagnosed as alcoholic even though the supervisor was quite certain that the problem was a conflict with a co-worker.

To further motivate supervisors to refer subordinates to the program, companies also appeal to supervisors' own self-interests. This tactic is illustrated by the following statement from a consumer products company:

*It is the supervisor who has to put up with the absenteeism, errors, personality problems, and deteriorating job performance of the developing alcoholic. It is the supervisor who ultimately may have to make the painful decision to recommend terminating a once valuable employee because drinking has destroyed the ability to function on the job. And it is the supervisor, second only to the alcoholic employee, who has the most to gain from a program which couples early identification of the problem with an understanding attitude and a prompt referral to a competent source of assistance.*

Finally, and perhaps most importantly, program literature and training sessions emphasize that supervisors have, by far, the most central role in the identification process, and that their help is absolutely crucial. Statements such as the following are found in a number of company brochures:

*Often you are the only person who can motivate the employee to seek counseling. He probably has failed to heed friends and family urging him to "do something." Telling him to stop drinking is like telling a person with hay fever to stop sneezing. If he could control his drinking he would, and may have made repeated attempts to stop. The alcoholic has difficulty facing his problem. As the condition progresses, he becomes increasingly aware that his drinking is more and more uncontrollable. He only may be stimulated to action when confronted with the realization that his job may be at stake.*

**AN EMPLOYEE WILL RARELY ACCEPT TREATMENT UNLESS THE CONSEQUENCES OF NOT ACCEPTING TREATMENT CREATES A SITUATION WHICH IS MORE INTOLERABLE THAN HIS FEAR OF THE RESULTS OF EXPOSURE.**

—a telephone company

*The most important aspect of a successful recovery from alcoholism or other drug dependence is the MOTIVATION TO ACCEPT treatment, rather than treatment itself. The supervisor has one of the most effective motivational tools known to date—that is, the desire of employees to hold their jobs. The role of the supervisor, then, is to identify the alcoholics or other drug dependents through the company program, where they can get the specialized treatment essential to their recovery.*

*The key to the successful motivation of employees to seek help lies in the fair and constructive use of the supervisor's authority. Experience has shown a mere offer of treatment is as ineffectual as giving lectures or repeated "chances." The employees must be made to understand that unless the problem (whatever it is) is corrected and performance is brought up to standard, they will be subject to existing penalties for unsatisfactory job performance. They will also need assurance that acceptance of treatment will not jeopardize their job or opportunities for promotion.*

*Experience has shown that about half of those approached in this manner respond immediately. That is, they agree to accept help under a company program. About half of these need no further motivation by the supervisor. They cooperate with treatment from the beginning and solve their problem with a minimum of difficulty. For the others, who did not accept help or initially agreed to accept help and then faltered, the supervisor follows normal administrative procedures, which exist for unsatisfactory job performance situations, based on the facts of the poor job performance and tailored to fit the individual case. This process is known as "forceful coercion" or "crisis precipitation."*

— a public utility firm

In their desire to convince supervisors that they should refer subordinates who perform poorly to the EAP, the excerpts above from companies' program materials go beyond the facts, and indeed, beyond internal consistency. The notion in the telephone company's brochure that one can exercise no more cognitive control over abusive drinking patterns than over hay fever is patently untrue, as is demonstrated by, for example, the many thousands of individuals who have stopped drinking through affiliation with Alcoholics Anonymous. Making the point that alcoholics' loss of control has rendered them unable to act on the basis of conscious, willful decision-making, the brochure first states that "telling [the alcoholic] to stop drinking" will not work. What it then claims *does* work, however, is telling the alcoholic to stop drinking or "his job may be at stake". The second paragraph of that brochure emphasizes that threatening "alcoholic" employees is necessary because, otherwise, they "will rarely accept treatment." However, the results from a number of studies of the sources of referral in company alcoholism programs (e.g., Erfurt and Foote, 1977; Schlenger, Hallan and Hayward, 1976) suggest that roughly one third of program clients are self-referrals.

The second brochure excerpted above notes that "motivation to accept treatment" is a far stronger predictor of successful rehabilitation than is "treatment itself" Much research evidence does, in fact, support the view that the threat of dire consequences for failure to recover is more significant than whatever "treatment" is, or is not, applied to the "alcoholic" employee (see Miller and Hester, 1981). The utility company quoted above would seem anxious, however, not to lose whatever added motivation for referring poorly-performing subordinates can be achieved by appealing to supervisors' humanitarian sensitivities. Despite their earlier downplaying of the role of "treatment itself," the brochure goes on to emphasize the importance of supervisors actually making the referrals, by pointing out that the company program is where employees "can get the specialized treatment" that is described as "essential to their recovery."

### Love and Pain

An attempt has been made here to demonstrate that the disease model of alcoholism helps management to find employees whose job performance is below their standards. Perhaps as importantly, after clients have been identified, the disease model's explanation of the "progressive," "fatal" nature of the "illness of denial" that poor performers are claimed to have serves to justify the coercive sanctions utilized in the putative treatment of program clients. For example, program material from a manufacturing firm explains why severe sanctions are an integral part of their "enlightened" approach to helping victims of this disease:

*The present method of dealing with problem drinkers is with enlightened confrontation that helps motivate the drinker to change and with the offer of treatment where it is*

*indicated or desired. These alternatives to punishment are definite procedures that should be carried out conscientiously and uniformly and with them we can solve most of these problems and restore troubled employees to health and productivity. Problem drinker employees usually are more powerfully motivated to overcome alcohol abuse when their job is at stake if they do not change their unacceptable patterns of behavior. It is well known in the alcoholism professions that the rehabilitation rates of industrial programs are amazingly high and it is agreed that it is principally due to the fact that constructive coercion is possible when the job is really in jeopardy.*

*Even so, not all problem drinkers will cooperate in their rehabilitation so that termination of employment will be the only solution in some cases. When it is necessary to terminate it is done in the hope that this final step will provide the necessary shock to turn the employee to sobriety. It has long been known that a very high percentage of the most stable members of Alcoholics Anonymous report that it was the final loss of a valued job that finally brought them to this remarkable successful program.*

Similarly, a metal company explains how firm punishment is the most efficacious technique for successfully dealing with this disease:

*Strong intervention is necessary to break through the denial often associated with the disease of alcoholism. Supervisors are in an excellent position to make this intervention because they control employment. While it may seem harsh, the prospect of job loss frequently motivates a problem drinker into treatment when nothing else will. The employee needs the job not only for the income that it provides but also for the "respectability" that it offers. The rationale is that having a job is tangible evidence that drinking is still within acceptable limits. This is not to say that employees with suspected drinking problems should be treated differently from anyone else. When the supervisor encounters performance deficiencies of any type, he or she should apply corrective procedures firmly and consistently. With those people who do not respond, progressively more severe steps are necessary up to and including the possibility of termination. Frequently, conditions must reach this rather drastic stage before the poor performer who has a drinking problem will recognize that something must be done.*

The view that would appear to serve a philosophical underpinning for such harsh policies was expressed by the administrator of an insurance company's alcoholism program. Interviewed in the company magazine he explained that, "I've now learned what love is...I've come to believe it is really giving someone else the freedom to experience his own pain, and to take on the responsibility of his own actions." A statistical evaluation of this program indicated that 43 percent of those entering with a diagnosis of alcoholism leave employment with the company, a finding that suggests that the program administrator is indeed generous in expressing his love.

Many program's supervisor procedure manuals specify the conditions under which employees will be given the opportunity to experience their own pain. As

*If the individual refuses an appointment with the [alcoholism program's] coordinator, explain that his future with the bank will be seriously jeopardized if the problem continues.*

*-- a bank*

*If the employee indicates an unwillingness to attempt rehabilitation or if at any time the Medical Director feels further treatment or efforts at rehabilitation should be discontinued, the employee should be dismissed as indicated in Policy A-41.*

*-- a dairy products company*

*If an employee refuses or fails to respond to treatment, he or she will be subject to appropriate disciplinary action.*

*-- an aerospace manufacturer*

*An employee's continued refusal to accept diagnosis and treatment or continued failure to respond to treatment, will be handled in exactly the same way that similar refusals or treatment failures are handled for all other illnesses, when the results of such refusal or failures continue to affect job performance.*

*-- a farm equipment company*

What is usually not stated among these written procedure is precisely what constitutes a "failure to respond to treatment." The job performance criteria for diagnosing the medical disease of alcoholism, however, provide an unambiguous answer to this question. A program client's sincere cooperation with the treatment the company has offered (consisting, modally, of referral to a local A. A. group) is demonstrated by remission of the symptoms of the disease. Because the symptoms of "early-stage alcoholism" are said to be such job behaviors as absenteeism, lateness, and low productivity, the operational definition of "failure to respond to treatment" very clearly means "lack of improvement in attendance, punctuality, and productivity."

### Conclusion

Although it is undoubtedly true that a great many alcoholism programs act in good faith and do in fact deal with alcoholic employees, the materials reviewed in this article suggests that the medical disease ideology of alcoholism gives these programs considerable potential for less benign uses. The operating principles described in this chapter could, if management chose, facilitate the implementation of programs in which employees are labeled alcoholics, subjected to severe sanctions (in the guise of therapy), and in many cases pronounced recovered from alcoholism, all without a single reference, at any point in the process, to their consumption of alcohol.

Recently, Hingson, Lederman, and Chapman (1985) found that only four percent of a random sample of employed persons with self-reported drinking prob-

percent of a random sample of employed persons with self-reported drinking problems had availed themselves of an EAP's services. Regrettably, until there is evidence that reliably demonstrates the effectiveness of job-based alcoholism and employee assistance programs in leading to the rehabilitation of troubled employees, the use by many programs of the medical disease ideology leaves room for skepticism such as the remark by Hingson et al. that perhaps the low usage occurs because the programs "are in some way too unpalatable for the vast majority of these employees to use" (p. 303).

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## **Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights**

*Thomas E. Geidt*

Employers seeking to cope with the increasing frequency of drug and alcohol abuse in the work place face a variety of dilemmas shaped, in part, by recent legal developments. More and more commonly, employees are challenging discipline for drug or alcohol abuse as well as employers' methods used to detect such abuse. They are doing so on the basis of the protections of privacy rights, federal and state statutes recognizing chemical dependency as a handicap, the doctrine of reasonable accommodation, and wrongful discharge principles. In the following article, the author discusses some of these cases and explores recent trends in arbitral decisions. He also proposes practical guidelines for developing an approach toward substance abuse that balances rehabilitation efforts against disciplinary measures, while protecting the privacy and safety of both substance abusers and their co-workers.

### **Introduction**

Although alcohol and drugs have always been part of American life, their use and abuse in the work place have only recently gained recognition as a problem of staggering proportions. The costs of alcohol and drug abuse are monumental. In human terms they include lost jobs, morale problems, injuries, illnesses, and deaths. In economic terms they include property damage, tardiness, absenteeism, lost productivity, quality control problems, increased health insurance costs, increased workers' compensation cost, the cost of replacing and training new employees, and employee theft. Every profession, every occupation, every level in the labor-management hierarchy, and every geographic region of the country is affected by alcohol and drug abuse.

Much has been written about the magnitude of the problem and the tens of billions of dollars it is costing the American economy annually. Because solutions are so elusive, not nearly as much has been written for employers about how to combat the problem.

More and more employers are using new investigative measures to detect employee substance abuse, such as blood or urine testing, polygraph testing, random searches, video surveillance, undercover personnel, and even trained dogs.<sup>1</sup> The use of these techniques raises novel and difficult legal issues relating to employee privacy, particularly in view of the potential criminal consequences of drug involvement.

This article first appeared in *Employee Relations Law Journal*, volume 11, number 2, Autumn 1985. Copyright 1985, Executive Enterprises, Inc. Reprinted with permission.

Over the years, medical and personnel experts have differed over whether the primary emphasis in dealing with substance abusers should be on rehabilitation or discipline. Employers have been uncertain whether to fire substance abusers or to try to rehabilitate them. Recently, as the problem has magnified, employers have opted for a tougher approach toward substance abusers that does not necessarily abandon traditional concepts of rehabilitation, but gives employees an early ultimatum that they must rehabilitate themselves or face termination. This is the approach recommended by many drug rehabilitation experts.<sup>2</sup>

At the same time, the recent emergence of "wrongful discharge" lawsuits in many states has restricted employers' free reign to discipline employees who violate company drug and alcohol rules. The prospect of a large jury verdict if a discharge is found to violate an implied "just cause" agreement, an implied duty of "good faith and fair dealing," or of public policy, requires that employers exercise extreme care in the handling of such cases. Employees disciplined for substance abuse are also using state and federal handicap-discrimination statutes to challenge disciplinary action.

As a result of these developments, employers must simultaneously engage in three difficult and delicate balancing acts. First, they must select investigative techniques that will be effective and reliable, yet will avoid the creation of a police-state atmosphere alienating to the work force or in violation of employees' privacy rights. Second, in deciding how to deal with identified abusers, they must walk the fine line between rehabilitation and discipline. Finally, they must weigh the need for discipline against the risks of costly litigation or arbitration.

Although courts and legislatures have not fully addressed these issues, a number of significant legal developments have recently occurred. In the following pages, several of these legal developments are discussed, including the recognition of chemical dependency as a "handicap" under various state and federal employment-discrimination laws, the duty to "reasonably accommodate" employees who have this handicap, as well as employees' privacy rights, new developments in the duty to prevent intoxicated employees from harming others, and new theories of workers' compensation liability. The ways in which arbitrators have dealt with drug and alcohol cases are also examined. Finally, practical guidelines for employers are suggested.

### Chemical Dependency as a Protected "Handicap"

It is now well established that alcoholism and drug addiction are protected "handicaps" under various federal and state employment-discrimination laws. This means, in essence, that employers who are governed by these laws may not discharge, refuse to hire, or otherwise discriminate against employees because of an alcohol or drug dependency if, after reasonable accommodation is made to their condition, the employees are qualified to perform the job in spite of the handicap.

The federal Rehabilitation Act of 1973 prohibits government contractors from discriminating against "qualified handicapped individuals."<sup>3</sup> A "handicapped individual" is defined in the Rehabilitation Act, 29 USC, section 706(7)(B), as

*(a)ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. . . . (S)uch term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs 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.*

The latter sentence was added by Congress in November 1978 to make clear that, although alcoholics and drug abusers are "handicapped individuals" for purposes of the Act, employers are not required to employ them if they cannot perform the job properly or if they present a threat to property or safety. Thus, the "catch-22" for employees is that they must simultaneously prove that they are handicapped by their chemical dependency, but not so handicapped as to be unqualified to perform their job.

The Rehabilitation Act has been enforced in favor of alcohol and drug abusers in a variety of contexts. For example, the city of Philadelphia was found to have violated the Act by maintaining a blanket policy against the firing of current and former drug abusers.<sup>4</sup> A college professor who claimed he was denied tenure due to his alcoholism was found to have stated a valid claim under the Act.<sup>5</sup> In another case, a teacher who alleged that he was harassed, given poor evaluations, and then discharged after disclosing his diagnosis and treatment for alcoholism was also found to have a valid claim.<sup>6</sup>

In addition to the federal Rehabilitation Act, there are laws in most states prohibiting employment discrimination by private-sector employers based on one's handicap. Although the statutes vary from state to state, and relatively few reported cases have arisen under them so far, it is likely that alcoholism and drug addiction are protected "handicaps" under many of those statutes.<sup>7</sup>

The California Legislature has taken a different approach, which may soon be adopted in other states. Although California's handicap-discrimination statute does not cover alcohol or drug abusers, the state legislature recently enacted an "alcoholic rehabilitation" law that requires all employers having twenty-five or more employees to reasonably accommodate alcoholic employees by giving them the opportunity to take time off from work to enter and participate in an alcoholic rehabilitation program, provided that this will not impose an undue hardship on the employer's operations. The time taken need not be paid for by the employer, although employees must be allowed to use their accrued sick leave while participating

in the program. The statute further provides that employers are not prohibited from discharging or refusing to hire employees who, because of their current use of alcohol, are unable to perform their job duties, or would endanger their own safety or the safety of others while performing their duties (California Labor Codes, sections 1025-28, 1985).

### The Duty to Make "Reasonable Accommodation"

In the context of substance-abuse cases, what exactly does the duty of reasonable accommodation require? Most statutes do not spell out the requirements, and court decisions have yet to shed much light on this subject. Within the past year, however, the courts have begun to grapple with this question in the context of public-sector employment.

One such decision, *Whitlock v. Donovan*, 598 F. Supp. 126 (D.D.C. 1984), is potentially far-reaching in its implications. The case involved an employee of the U.S. Department of Labor whose alcoholism seriously affected his work performance and caused him to be repeatedly absent from work. His unauthorized absences, which totaled nearly 500 hours during his last year of employment, caused severe problems for his department. His employer took extensive steps over a four-year period to accommodate his condition. The employer permitted him to reduce his hours and offered him a transfer to a less stressful job. It counseled him and referred him to various rehabilitation programs. The employee was hospitalized several times for detoxification treatment and participated in a variety of outpatient rehabilitation programs, but his problems persisted. After a final warning, he was terminated.

Surprisingly, a federal judge found that the department had not done enough to reasonably accommodate the employee's handicap. According to the court, the department displayed too much indecision in its handling of the employee's problems, did not give him a "firm choice" between rehabilitation or discipline early enough, and should have given him one more opportunity to rehabilitate himself before terminating his employment.

In another recent case, *Walker v. Weinberger*, 600 F. Supp. 757 (D.D.C. 1985), a federal judge overturned the discharge of an alcoholic employee of the U.S. Department of Defense who had been repeatedly absent from work. Prior to his termination, the employee had undergone treatment for his alcoholism. Following the treatment, he was again absent without authorization on several occasions, although the latter absences were unrelated to his alcoholic condition. In discharging him, the department considered his pretreatment and posttreatment absences cumulatively. The court ruled that the department should have forgiven, and not considered at all, the absences that predated the employee's treatment for alcoholism. The court found that, utilizing the employee's "alcohol-induced pretreatment transgressions" as a factor, the department failed to reasonably accommodate his condition.

Because federal employers are governed by a different set of laws and regulations protecting handicapped workers than are employers in the private sector, the reasonable-accommodation requirements found applicable in these two cases are not necessarily coextensive with those binding on private employers. However, these decisions may foreshadow the kinds of measures that will be considered necessary in the private sector.

At minimum, the duty of reasonable accommodation probably requires employers to give employees who are willing to acknowledge a chemical dependency an adequate opportunity to rehabilitate themselves through appropriate employee assistance programs (EAPs) or community resources, unless the granting of such an opportunity would impose an undue hardship on the employer. Presumably, the obligation also requires, as the California law states, that employees be allowed to use their accrued sick leave and disability leave benefits for this purpose. It is unlikely that employers are required to contribute directly to the rehabilitation financing unless they so choose, except to the extent that their existing EAPs, or sick leave or medical insurance benefits may provide for such coverage. (Many states have enacted statutes requiring that employers' group health insurance plans include coverage for alcohol and/or drug rehabilitation).

Other possible means of reasonable accommodation may include adjustments in employees' job duties, transfers, and reassignments or scheduling changes designed to alleviate stressful conditions that may be contributing to the chemical dependency.

### Protecting Employees' Privacy Rights

Another issue that frequently arises in drug and alcohol cases is that of employee privacy. In recent years there has been a surge of interest in employee privacy rights, attributable in part to the technological advances brought on by the computer and other sophisticated methods of collecting and processing information. This has resulted in a proliferation of new state laws that restrict employers' rights to obtain, use, and disclose information about employees. In addition, more employees are seeking court relief under common-law privacy theories, such as "tortious invasion of privacy" and defamation, and even under state constitutional provisions, such as California's Article I, section 1, which guarantees all Californians the "inalienable right of privacy."<sup>8</sup>

Employees obviously have a reasonable expectation that information about their drug or alcohol use, including their participation in rehabilitation programs, will not be unnecessarily disclosed to any third person. Indeed, strict confidentiality is the cornerstone of all employee assistance programs, for without assurances that their participation will be kept confidential, many employees will forego needed treatment. Therefore, employers confronted with problems of substance abuse must be sensitive to employees' rights of privacy and dignity.

This does not mean, however, that employers' hands are tied in investigating and enforcing their rules pertaining to drugs and alcohol. Employers have a broad legal right to investigate suspected violations of their legitimate rules, and employees have a corresponding duty to cooperate in such investigations. Moreover, the constitutional protections available to persons who are formally charged with criminal conduct (the Fifth Amendment privilege against self-incrimination, the Fourth Amendment protection against unreasonable searches and seizures, and the due-process rights governing criminal proceedings) are not applicable in private-sector employment, since the federal Bill of Rights protects only against government action. In balancing employees' privacy rights against employers' legitimate needs to protect their property and maintain proper discipline, the courts have given employers considerable latitude.

### *Privacy Rights and Investigative Measures*

As mentioned, employers are using a variety of information-gathering techniques in the war against substance abuse. Polygraph (lie-detector) examinations are one such method. Although widely used by employers, polygraphs remain highly controversial, due to disputes over their reliability and concerns that they unduly intrude upon employees' rights of privacy and dignity.

Recently, a bill was introduced in Congress by Representative Williams of Montana (H.R. 1524, 99th Cong., 1st Sess. (1985)) that would prohibit employers from requiring employees or applicants to submit to a lie detector test as a condition of employment and would prohibit employers from using the results of a test for *any* purpose. Employers would also be prohibited from discharging or otherwise disciplining employees for refusing to take a polygraph test. [H.R. 1524, 99th Cong., 1st Sess. (1985).]

Several states already prohibit the use of polygraph tests in employment. Approximately half the states prohibit employers from requiring employees to take a polygraph test as a condition of becoming or remaining employed, but permit testing if it is strictly voluntary. Other states limit the questions that may be asked in a polygraph examination.

Sobriety and drug tests, such as breathalyzer tests, urinalyses, and blood tests, are being used more frequently by employers, both in screening applicants and in spot-checking current employees. Technological advances have produced testing devices that are believed to be extremely reliable.

The use of such chemical tests is largely unregulated by state or federal law. Although these tests obviously intrude upon one's privacy to some extent, the courts have not yet found their use to constitute an unwarranted invasion of privacy, so long as they are conducted in a reasonable, confidential, and nondiscriminatory fashion for legitimate business reasons. Thus, an employee's refusal to submit to a test under appropriate circumstances may be grounds for disciplinary action or denial of employment. However, lawsuits challenging the use of these tests are pending.

Technological advances have also enabled employers to use sophisticated electronic surveillance techniques. The Federal Omnibus Crime Control And Safe Streets Act of 1968, and statutes in about half the states of the U.S., restrict employers' right to use electronic eavesdropping devices to intercept employees' conversations, including telephone conversations.<sup>9</sup> The use of *visual* surveillance devices, such as closed-circuit television cameras, is generally permissible, so long as the cameras are not used in places where employees have a reasonable expectation of privacy, such as restrooms, employee lounges, or locker rooms.

Similarly, the use of undercover personnel, whether posing as employees or customers, is essentially unregulated by law and is therefore permissible. A few states prohibit employers from disciplining employees on the basis of an undercover investigator's report unless the employee has first been given a copy of the report or has been given an opportunity to confront the investigator regarding the accusations.

Privacy laws in over a dozen states, as well as many state and federal equal employment laws, prohibit employers from asking applicants or current employees whether they have ever been arrested for drug-related (or any other) offenses. Ordinarily, information about drug convictions may be obtained, although some states restrict inquiries about misdemeanor convictions. California, for example, prohibits inquiries about convictions for marijuana possession that are more than two years old.

State legislatures and courts have not clearly defined the parameters of an employer's right to search employees or their packets, handbags, lockers, desks, and other belongings. The main issue in such cases is whether the employee has a reasonable expectation of privacy in the particular circumstances. If so, that expectation must be balanced against the employer's need to conduct the search. Thus, if employees are issued lockers, desks, or other places in which they may have an expectation of privacy, and the employer wished to reserve the right to enter or search those areas if necessary, the employer must inform employees at the outset, through appropriate written rules or policies, that such areas may be subject to search.

For example, in *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 Tex. Ct. App. 1984), an employee whose locker and purse were searched without her consent as part of an investigation of theft sued for invasion of privacy and was awarded \$108,000 by a jury. On appeal, a new trial was ordered because of erroneous jury instructions, but the appellate court found that the jury award was fully supported by the evidence. In this case, the employee had supplied her own lock for the locker, thus evidencing that she had a reasonable expectation of privacy. The appellate court suggested that if the employer had provided the locks and kept a master key, or if the employer had clearly notified employees that their lockers were subject to search, a different result would be warranted under Texas law.

Thus, regular exit-and-entry searches and other types of periodic or random searches are generally permissible if conducted for a legitimate purpose and pursuant to a well-defined rule or policy that has been communicated to all employees in advance. Likewise, where there is reasonable cause to believe that an employee is in

possession of drugs or other contraband, an employer may normally ask the employee to reveal the contents of his or her pockets, purse, desk, locker, or other containers. If an employee refuses to cooperate with a reasonable search request, this may itself be grounds for discipline.

In sum, there are a variety of methods available to employers in investigating suspected substance abuse, should they wish to use them. However, in doing so, employers must be extremely careful not to intrude upon employees' legitimate privacy interests.

### Protecting Co-Workers and Others against Substance Abusers

Under the Occupational Safety and Health Act (OSHA) and related state safety laws, employers are under a strict duty to provide a safe workplace. Thus, the employee rights and protections discussed above must be counterbalanced against the duty to protect the safety of employees and others from injuries that may be caused by employees who are under the influence of drugs or alcohol. These competing policies are difficult to reconcile, for the more compassionate or tolerant an employer is in employing someone with a chemical dependency, the more likely it is that an injury or accident will ultimately occur.

A recent decision of the Texas Supreme Court graphically illustrates the dilemma faced by employers. In *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983), a machine operator was discovered to be intoxicated on the job. Recognizing this condition as a safety hazard, the supervisor sent the employee home early. While escorting the employee to the parking lot, the supervisor asked him if he was all right and if he could make it home. The employee answered that he could. While driving home, the employee had an accident, killing himself and several occupants of another vehicle. He was found to have a blood alcohol content of 0.268 percent. The families of the other victims sued the *company* for the wrongful death.

Employers have traditionally been held vicariously liable for employees' acts committed during employment. In this case, however, the employee was off duty when the accident occurred, and therefore the company could not be held vicariously liable. Instead the plaintiffs' theory was that the company was directly liable to the victims' families because of the supervisor's negligence in failing to control the intoxicated employee.

The Texas Supreme Court upheld the families' right to bring the suit under this novel theory, saying that it was for the jury to decide whether the company acted negligently in failing to control the actions of the intoxicated employee. The court reasoned that "changing social standards and increasing complexities of human relationships in today's society justifying imposing a duty upon an employer to act reasonably when he exercises control over his servants." Thus, the court implied that the supervisor may have had an affirmative duty to restrain the intoxicated employee,

even against his will, from leaving the company premises, or to arrange alternate transportation. Rarely, if ever, has such an obligation on the part of an employer been found to exist.

Few states impose "dram shop" liability, that is, liability of a bartender or social host who supplies alcohol to a person who, in turn, causes injury to a third person. Nevertheless, as a result of the *Otis* decision, employers may face liability to such third persons, even though they, unlike bartenders, did not contribute to or condone the employee's intoxication.

Whether the reasoning behind *Otis Engineering* will be adopted by other states remains to be seen. In the meantime, employers should be prepared to take ample measures to protect employees and third persons from harm caused by employees who are noticeably impaired by alcohol or drugs.

### New Theories of Workers' Compensation Liability

An obvious result of employee alcohol and drug abuse is an increase in industrial accidents, which has, in turn, caused an increase in employer liability for workers' compensation benefits. It has been estimated that substance abusers file five times as many workers' compensation claims as persons who are not so afflicted.<sup>10</sup> Even more ominous for employers is the possibility, under new workers' compensation theories, that employers will bear liability for causing employees to develop alcohol or drug dependency.

For example, in 1980, the California Workers' Compensation Appeals Board (WCAB) awarded benefits to an employee who claimed he was disabled as a result of a drinking problem that was caused or aggravated by the stresses and strains of this job.<sup>11</sup> The employee was a nondrinking alcoholic when he started his job as a mailroom clerk. Over the next several years, as the company grew in size, the employee's workload increased. He requested additional staffing, but his employer felt he should be able to handle the job alone. He then started drinking at lunch and after work. His alcohol consumption gradually increased in amount, and he eventually attempted suicide while intoxicated. After a brief hospitalization he returned to work, again became intoxicated, and again was hospitalized. The employee was diagnosed as suffering from depression and organic brain damage that rendered him totally disabled. The California WCAB awarded him benefits on the ground that he had suffered an industrial injury--nervous tension--that caused his drinking problem and ultimately caused his total disability. The WCAB's decision was upheld by the California courts.

This decision may portend a general recognition of drug and alcohol dependency as "industrial" illnesses--or at least as by-products of compensable industrial stress--thus expanding employees' entitlement to compensation and treatment within the framework of the workers' compensation laws.

Under the same rationale, employees who are absent for prolonged periods while seeking drug or alcohol treatment may claim protection from discharge under those state workers' compensation laws that prohibit discrimination or retaliation against employees based on their being industrially injured or disabled.<sup>12</sup> To date, the courts have not squarely resolved these complex issues.

### Arbitrators' Handling of Drug and Alcohol Cases

In determining how employers--union and nonunion--should handle disciplinary cases involving alcohol and drugs, it is instructive to examine arbitrators' handling of such cases pursuant to grievance-arbitration procedures. If a discharge would not constitute "just cause" under a collective bargaining agreement, it may not withstand a wrongful discharge suit.

#### *Drug Cases*

One striking fact revealed by a review of the recent arbitrations reported in the Labor Arbitration Reports is that arbitrators have overturned more drug-related discharges than they have sustained. Thus, from March 1980 through January 1985, discharges were sustained in only twenty-one of forty-six cases (excluding those involving the sale of drugs).<sup>13</sup> Moreover, one arbitrator, in a 1983 opinion, cited his own study of arbitral decisions from 1973 to 1982, in which he found that arbitrators set aside approximately two-thirds of all the discharges involving employee possession or use of drugs on company premises.<sup>14</sup>

#### *Standards of Proof*

Thus, ironically, although drug abuse is now recognized as one of our society's greatest employment problems, it appears to be difficult for unionized employers to sustain disciplinary action for drug-related conduct. This can be explained partly by the stricter standards of proof applied by arbitrators in drug cases. Ordinarily, an employer need show by only a "preponderance of the evidence" that the events that would support the termination actually occurred. In drug cases, however, arbitrators hold employers to a higher standard of proof. Some arbitrators require employers to establish the employee's guilt of the rule infraction by proof "beyond a reasonable doubt," the same standard applied in criminal trials. Others require that the employer's evidence be "clear and convincing," a standard that is still more stringent than the preponderance-of-the-evidence standard.

The rationale for applying these standards is that matters carrying the "stigma" of criminal conduct or of general social disapproval must be applied with an especially high degree of fairness supported by strong proof. Arbitrators have also noted that an employee discharged for such an offense may have greater difficulty

finding another job, thus making it imperative that the employer be correct in its accusations.

In drug cases, therefore, arbitrators tend to resolve all reasonable doubts in favor of the employee. They also generally require the employer to produce corroborating witnesses to the drug usage, rather than relying on one witness alone. This compounds the employer's difficulties of proof, since, in drug situations, other employee-witnesses are particularly reluctant to testify against co-workers.

Thus, of the twenty-five arbitrations, previously referred to, that were won by the employees, over 40 percent were decided on the basis that the employers had insufficient evidence to establish the employees' guilt under these strict standards of proof. In another 40 percent of the cases, arbitrators found that the employees did violate the employers' rules against drug usage, but that the punishment was too severe to fit the crime. In these cases, the arbitrators felt that the employee should be given one more chance before "industrial capital punishment" was imposed, especially where the employee had many years of service and a good work history.

In a few of these cases, arbitrators felt that the employee should be given the opportunity to undergo drug rehabilitation treatment before the termination was finalized. Thus, reinstatement was made contingent upon successful treatment.

Even when an employee, while high on drugs, has an accident causing severe property damage, this will not necessarily constitute just cause for termination. For example, an employee of the Chicago Transit Authority was discharged after operating a rapid-transit train in the wrong direction while under the influence of drugs and colliding at high speed with another train. The accident caused massive damage to all the cars on both trains. Nevertheless, the arbitrator set aside the discharge and ordered the employer to admit the employee into its drug rehabilitation program. The arbitrator concluded that the enormity of the damage was an "irrational and arbitrary standard" on which to terminate the employee in view of the existence of an employee assistance program that other employees were ordinarily permitted to enter in lieu of termination.<sup>15</sup>

The remaining handful of cases won by employees were decided on a variety of grounds. In some instances it was found that the employees did not have adequate notice of the rules. In other cases, the rules were disparately enforced. In at least two cases, arbitrators found that drug use was so widespread at the employers' facilities that the employers in each case were not entitled to "crack down" on drug use without giving employees advance warning of their intention to do so.<sup>16</sup>

In a few cases, discharges were overturned because the employer had not clearly spelled out which substances were prohibited under its posted rules. Finally, the discharge of an employee who admitted selling illegal drugs to other employees was overturned because the employee had been denied his contractual right to have a union steward present during the disciplinary meeting with company representatives.<sup>17</sup>

Even though most drug use is a crime, employers have been singularly unsuccessful in arguing to arbitrators that on-the-job use or possession of drugs should be treated as a more serious contract violation than on-the-job alcohol consumption. Instead, arbitrators have pointed out that some illegal drugs, such as marijuana, have become nearly ubiquitous in our society, that alcohol is still considered the nation's number-one drug problem, and that there is no rational basis to treat the two types of drugs differently in the work place. Therefore, in facilities where alcohol use is widely condoned, arbitrators have generally refused to uphold discharges based on the possession of drugs.<sup>18</sup>

### *Off-Duty Drug-Related Conduct*

Another frequent issue is whether, and under what circumstances, employees may be disciplined for drug-related conduct occurring away from company premises while employees are on their own time. It is a widely accepted principle of arbitral law that what employees do on their own time is their own business and is not an appropriate subject of disciplinary action, unless the conduct could reasonably be said to affect the company's business, reputation, or product; render the employee unable to perform properly the duties of the job; or affect other employees' morale or willingness to work with the employee.

Some arbitrators have recognized that off-duty drug-related conduct, especially where selling is involved, may justify disciplinary action.<sup>19</sup> Usually, however, an employee's arrest or conviction for off-duty possession or use of drugs has not been considered just cause for termination. Even felony convictions for the off-duty sale or distribution of drugs have been held, in some cases, to be an insufficient basis for termination.<sup>20</sup>

### *Investigative Measures*

Finally, arbitrators usually recognize investigative techniques, such as chemical testing devices, undercover agents, trained dogs, video surveillance, and reasonable searches, as being within management's inherent prerogative, unless, as is rarely the case, these techniques are expressly prohibited by the collective bargaining agreement. Similarly, an employee's refusal to submit to a reasonable search or a chemical test to detect the presence of drugs is generally recognized by arbitrators as an act of insubordination sufficient to sustain disciplinary action, so long as the employer's conduct was reasonable under the circumstances.<sup>21</sup>

### *Alcohol Cases*

Interestingly, employers seem to have a greater success rate in arbitrating cases involving employees abuse of alcohol than in arbitrating cases involving drugs.

Thus, from March 1980 to January 1985, of forty-nine disciplinary cases involving alcohol reported in Labor Arbitration Reports, the discipline was upheld in thirty-two cases and overturned in only eighteen.<sup>22</sup>

One possible explanation for the disparity between arbitration decisions in alcohol and drug cases is that drug infractions are simply harder for employers to prove, particularly under the strict standards of proof discussed previously. Moreover, employees are more careful to conceal their involvement in drugs, due to the potential criminal consequences. Employees will also go to greater lengths to contest accusations of drug use, more often retaining their own attorneys to assist them in processing their grievances.

Comparing alcohol and drug arbitrations, there is a noticeable difference in the tenor of the two types of cases. In alcohol-related cases, there are fewer hair-splitting evidentiary battles over the sufficiency of the evidence. In nearly all of the forty-nine cases already referred to, the arbitrators found sufficient evidence that the employees had, in fact, consumed alcohol on the job, reported to work under the influence of alcohol, or allowed their attendance or work performance to suffer as a result of an alcohol problem. In only two of the cases were the discharges set aside based on "insufficient evidence" of a rule violation.<sup>23</sup>

In alcohol cases the main focus tends to be on the severity of the discipline. In sixteen of the eighteen cases won by employees, the arbitrators found that discharge was too severe a punishment, due to a variety of mitigating circumstances. In many of the the cases, the employer's disparate or lax enforcement of the rules was cited as a factor. In other cases, the absence of prior warnings or the employee's exemplary work history was cited. In one case, the discharge was set aside based on a violation of the employee's right to have his union steward present during the disciplinary interview.

### *Discipline versus Rehabilitation*

In many of the cases, arbitrators believed that the employees' careers might be salvageable through rehabilitation. In fact, the issue of rehabilitation comes up much more frequently in alcohol cases than in drug cases. It is not entirely clear why this is so. There simply appears to be a greater willingness by arbitrators to recognize that alcohol dependency is a treatable illness than to recognize drug dependency as one. This makes it all the more paradoxical that drug-related discharges are more often nullified than are alcohol-related discharges.

Arbitrators are not of one mind on the issue of discipline versus rehabilitation. Some arbitrators apply traditional principles of progressive discipline even where a condition of alcohol dependency may exist. Sometimes they do so on the rationale that their authority is limited to deciding whether a contract violation occurred, and thus, that they lack authority to order rehabilitation. At other times the arbitrator's explanation is that alcohol abuse is a serious problem, and only through a

firm disciplinary approach is it likely that employees will face up to the problem and modify their behavior.

Many other arbitrators believe that extreme leniency should be shown toward employees who may have a problem of alcohol dependency. They premise this belief on the notion that alcohol is an illness that renders the employee unable to control his or her conduct. In a majority of the situations where an employee is willing to acknowledge an alcohol dependency, arbitrators will expect that the employee be given at least some opportunity to receive treatment in the hope that his or her career may be salvaged.

Often, before an employee is terminated, the employer, union, and employee will enter into an agreement that the employee must participate in certain rehabilitation efforts, with the understanding that if the employee drops out of the treatment or is otherwise unsuccessful in curing the problems, his or her employment will be terminated. Where the employee violates such a "last-chance" warning or agreement, arbitrators will usually, but not always, uphold the termination.

In a case recently decided by the U. S. Court of Appeals for the Sixth Circuit, an arbitrator found that an alcoholic employee had violated the terms of a last chance rehabilitation agreement by failing to attend two outpatient treatment sessions. Nevertheless, the arbitrator set aside the discharge and directed that the employee be given one more opportunity to salvage his job. The Sixth Circuit held that the arbitrator had acted beyond his authority in disregarding the explicit terms of the grievance settlement agreement. According to the court, the strong public policy favoring the finality of arbitration must yield to the broader policy in favor of encouraging and honoring the parties' chosen method of nonjudicial dispute resolution.<sup>24</sup>

Occasionally, employees assert at the arbitration hearing that their attendance or performance problems were attributable to a previously undisclosed drinking problem. Although arbitrators will sometimes set aside such a termination pending alcoholism treatment, they more often uphold the disciplinary action, so long as it appears that the employer was not given notice of the employee's chemical dependency prior to the termination.<sup>25</sup>

Finally, where no apparent alcohol dependency is involved, but rather, an ordinary violation of company rules against drinking on the job or reporting to work under the influence of alcohol, arbitrators normally apply traditional principles of progressive discipline. Unless the contract explicitly provides to the contrary--and sometimes, even when it does--arbitrators ordinarily will not uphold discipline for a first offense. Among the factors considered by arbitrators in deciding such cases are the clarity of the employer's rules; the consistency of rule enforcement; the type of industry (i.e., whether it is one in which employee alcohol abuse would present special dangers to the public or co-workers); the history of prior warnings; the employee's length of employment and work history; and any other mitigating circumstances that may exist.<sup>26</sup>

### Practical Suggestions for Employers

Dealing with employee drug and alcohol abuse is a complex and difficult problem. Moreover, experts differ over approaches, especially regarding the question of strict discipline versus rehabilitation. The suggestions that follow are not intended to be all-inclusive and are not based on any expertise in medicine, psychiatry, or social work. However, they should provide a useful starting place for employers in developing an approach to the problem that is both effective and legally sound.

■ *Address the problem of alcohol and drug abuse squarely.* The "ostrich approach" is no longer advisable. Employers should educate themselves in the problem of substance abuse. And employers, including top management, should be committed to the establishment of a comprehensive policy or approach to the problem. Each employer's approach can be tailored to fit its circumstances--its size, type of industry, the nature and composition of its work force, the extent to which problems of substance abuse have been manifested in the past; its "corporate culture;" and so forth.

■ *Ascertain the applicable statutes and regulations.* Each employer should determine whether it is subject to a state or federal handicap-discrimination or rehabilitation statute obligating it to make reasonable accommodation toward or to take affirmative action to protect persons having chemical dependencies. Similarly, employers must ascertain whether there are any state privacy laws in their business locality that limit the techniques employers may use to investigate or detect employee substance abuse. If necessary, legal counsel should be consulted for this purpose.

■ *Develop a policy on rehabilitation or employee assistance.* All employers who have not already done so should give careful thought to the establishment of some program through which chemically dependent employees can receive appropriate assistance or treatment. A sophisticated in-house employee assistance program will not be feasible for small employers, but a variety of outside resources are available in most localities. A preventive approach stressing early intervention is most likely to foster success.

Apart from humanitarian considerations and potential legal obligations, an effort to salvage employees through rehabilitation may be cost-effective for employers, since it is generally believed that the expense of rehabilitation (whether underwritten through medical insurance or some other program) is less than the cost of hiring and training new employees to replace experienced, productive employees who have lost their jobs.

■ *Establish clear rules and enforce them consistently.* Rules should be promulgated that clearly set forth the types of conduct prohibited and the penalties for

violation. The rules should cover at least the following matters; the use and possession of alcohol or drugs on company premises; selling or providing drugs to other employees on company premises; and reporting to work, or working, while intoxicated or impaired by alcohol or drugs. In addition, if an employer wishes to reserve the right to administer sobriety or drug tests or to search employees' lockers, desks, or handbags, the policy should clearly advise employees that such tests or searches may be conducted.

The employer should also identify clearly the substances prohibited by the rule and the physical locations covered. For example, a reference to "company premises" or "company property" should delineate whether adjacent areas, such as the parking lot, are included.

The rules must be widely disseminated, so that all employees are on notice of what conduct is proscribed and have the opportunity to conform their conduct to the rules. The rules should be consistently enforced among all employees. Widespread condonation of drug or alcohol use may render the rules unenforceable.

■ *Train supervisors and educate employees.* Managers and supervisors, especially first-line supervisors, should be knowledgeable about the company's rules and policies pertaining to drug and alcohol abuse, and should be fully trained in how to implement the policies and enforce the rules. They should also be trained in how to constructively confront employees who may need assistance for a drug or alcohol problem. According to most experts, supervisors should not attempt to diagnose the underlying causes of an employee's performance or attendance problems. However, they should be able to spot the performance drop-off at an early stage and to confront the employee with the possible need for assistance, putting the employee on notice that discipline will result if the company's performance standards are not met.

In addition to supervisory training, employers should consider a program of educating employees to the problems of substance abuse by means of seminars, staff meetings, articles in company newsletters, and the like.

■ *Conduct proper investigations of suspected rule violations.* Bearing in mind the strict standards of proof applied by arbitrators (and likely to be applied by courts), employers should thoroughly investigate suspected drug/alcohol violations before finalizing discipline. Rather than make a hasty judgment on incomplete information, it is better practice to suspend an employee pending further investigation. If the investigation does not reveal sufficient evidence of an infraction, the employee can be reinstated with pay. Employers should be as certain of the facts as is reasonably possible under the circumstances.

As discussed previously, investigations may include, among other things, reasonable searches, sobriety or drug testing, undercover agents, video surveillance, and polygraph examinations, unless prohibited by state law. Whether to employ these techniques is a decision each employer must make for itself, bearing in mind the privacy and employee-relations ramifications.

■ *Follow appropriate disciplinary guidelines.* An employee should never be terminated because he or she is an alcoholic or has become dependent on drugs, nor should this be *stated* as the reason. Rather, discipline should be based on performance reasons (even if the poor performance is attributable to substance abuse) or the violation of clear company rules or policies. All employees, including substance abusers, should be held to the same performance, productivity, and attendance standards. Normally, principles of progressive discipline should be followed, as with other rule infractions.

Employees manifesting a dependency on alcohol or drugs ordinarily should be given a firm choice between rehabilitation and discipline. And it is important that employees be given clear, unequivocal, and uncompromising notice of possible discharge if their conduct does not change. Experts seem to agree that alcoholics and drug dependents will often go to extraordinary lengths to deny the existence of a problem. Thus, without the threat of imminent discharge, such persons may not be impelled to face up to the seriousness of the problem and the urgent need to correct it. Thus, indecisive handling of such situations, or benign toleration of conduct that does not conform to the employer's standards, will not serve the best interests of the employer or the employee.

■ *Be sensitive to employee's privacy rights.* Special care should be taken to respect employees' rights of privacy and confidentiality in all matters relating to drug and alcohol abuse. An employee's participation in an employee assistance program or any other form of rehabilitation should be kept in strictest confidence. Medical records relating to any such treatment should never be disclosed to third persons without the employee's written authorization.

When an employee is disciplined for conduct related to drug or alcohol abuse, information about the reasons for the discipline should not be divulged to prospective employers or others--even to the employee's co-workers.

Investigations, reasonable searches, and the administration of chemical tests should be handled in as confidential and dignified a manner as possible under the circumstances and should be conducted away from the presence of other employees. An employee's written consent normally should be obtained before a drug screen or other chemical test is administered. Every effort should be made to ensure the reliability of such tests. If possible, additional confirming tests should be conducted or other corroboration obtained before an employee is terminated on the basis of a test result.

Consent to a search should be sought in advance. Preferably, another manager should be present as a witness, to protect against later accusations of assault or other improper conduct. Employees should never be physically touched without their consent, for such touching may constitute assault and battery.

If an employee refuses a reasonable request to take a test or submit to a search, and the surrounding circumstances indicate a high probability that the rules

pertaining to drugs or alcohol have been violated, the refusal may justify discharge or other disciplinary action.

■ *Take reasonable steps to protect employees and others from harm caused by substance abusers.* Employees who are noticeably "under the influence" of alcohol or drugs should be prevented from engaging in further work that might endanger themselves or others. Principles of common sense and reasonableness should govern. Where the employee appears to be severely impaired, he or she should be prevented from driving home, and if practicable, alternate transportation arrangements should be made.

■ *Practice good employee relations techniques generally.* Work is highly stressful for many employees. The strains of a difficult working environment can contribute substantially to an employee's abuse of alcohol or drugs. Therefore, an employer's sensitivity in exercising good employee relations practices--that is, by treating employees with dignity and respect; being sensitive to their needs and concerns; being fair and evenhanded in discipline, evaluation, and promotion; communicating well; and taking reasonable measures to alleviate unduly stressful working conditions--can have only a positive effect in minimizing employee substance abuse.

#### NOTES

<sup>1</sup>See, for example, "Taking Drugs on the Job," *Newsweek*, Aug. 22, 1983, pp. 52-60, Getting Tough on Worker Abuse of Drugs, Alcohol," *U. S. News & World Rep.*, Dec. 5, 1983, p. 85; "Silicon Valley Trying to Kick Cocaine Habit," *San Francisco Examiner*, March 24, 1985.

<sup>2</sup>c.g., "Discipline Called Key in Treating Workplace Drug and Alcohol Abuse," *BNA Empl. Rel. Weekly*, 21 November 1983, 355-56.

<sup>3</sup>There are various unresolved issues concerning the circumstances in which government contractors or recipients of federal funds are covered by the various provisions of the Rehabilitation Act and the procedures that must be followed by employees who claim a violation of the Act.

<sup>4</sup>*Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978).

<sup>5</sup>*Whitaker v. Bd. of Higher Educ. of the City of New York*, 461 F. Supp. 99 (E.D. N.Y. 1978).

<sup>6</sup>*Athanas v. Bd. of Educ. of School Dist 111, Highwood-Highland Park, Ill.* 28 Fair Empl. Prac. Cas. 569 (N.D. Ill 1980).

<sup>7</sup>e.g., *Conn. Gen. Life Ins. Co. v. Dep't. of Indus., Labor and Human Relations*, 86 Wis. 2d 393, 273 N.W. 2d 206 (Wis. 1979).

<sup>8</sup>e.g., *Payton v. City of Santa Clara*, 132 Cal. App. 3d 154, 183 Cal. Rptr. 17 (1982) (employee allowed to bring private suit against employer under constitutional privacy provision, based on employer's bulletin-board posting of reasons for employee's termination).

<sup>9</sup>In March 1985, the California Supreme Court interpreted California's eavesdropping statute as prohibiting persons from even listening in on an extension telephone without the knowledge and consent of all parties to the conversation. *Ribas v. Clark*, 696 P.2d 637(1985).

<sup>10</sup>From studies reported in "Taking Drugs on the Job," *Newsweek*, note 1, *supra*; and "Managerial Responses to Alcohol and Drug Abuse Among Employees," *Personnel Administrator*, June 1984, pp. 134-39.

<sup>11</sup>*Californiz Microwave, Inc. and Pacific Indemnity Co. v. Worker's Compensation Appeals Bd.*, 45 Cal. Comp. Cas. 125 (1980).

<sup>12</sup>See, for example, California Labor Code, §132a, as interpreted by the California Supreme Court in *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 586 P. 2d 584, 150 Cal. Rptr. 250 (1978).

<sup>13</sup>Discipline was upheld in 74 Lab. Arb. 163, 1012; 75 Lab. Arb. 301, 642, 816; 76 Lab. Arb. 379; 77 Lab. Arb. 721, 1085; 78 Lab. Arb. 545, 749, 753, 921, 1104, 1334; 79 Lab. Arb. 69; 80 Lab. Arb. 419, 1292; 81 Lab. Arb. 174,, 1169; 82 Lab. Arb. 558; 83 Lab. Arb. 270. Discipline was overturned or reduced in 74 Lab. Arb. 953, 1032, 1103; 75 Lab. Arb. 1081; 76 Lab. Arb. 144, 308; 77 Lab. Arb. 1001; 78 Lab. Arb. 274, 697, 1299, 1309; 79 Lab. Arb. 1185, 1327; 80 Lab. Arb. 663, 1074, 1261, 1292; 81 Lab. Arb. 974, 988; 82 Lab. Arb. 6, 150, 360; 83 Lab. Arb. 580, 635, 680.

<sup>14</sup>*Mallinckrodt, Inc.* 80 Lab. Arb. 1261, 1265 (1983) (Seidman, Arb.).

<sup>15</sup>*Chicago Transit Authority*, 80 Lab. Arb. 663 (1983) (Meyers, Arb.).

<sup>16</sup>*Lockhead Corp.*, 75 Lab. Arb. 1081 (1980) (Kaufman, Arb.); *Watauga Indus., Inc.*, 78 Lab. Arb. 697 (1982) (Galambos, Arb.).

<sup>17</sup>*Aeronca, Inc.*, 71 Lab. Arb. (1978) (Smith, Arb.).

<sup>18</sup>See, for example, *Mallinckrodt, Inc.*, note 14, *supra*; *Hooker Chemical Co.*, 74 Lab. Arb. 1032 (1983) (Green, Arb.).

<sup>19</sup>e.g., *Martin-Marietta Aerospace, Baltimore Div.*, 81 Lab. Arb. 695 (1983) (Aronin, Arb.); *Group W Cable, Inc.*, 80 Lab. Arb. 205 (1983) (Chandler, Arb.).

<sup>20</sup>e.g., *Vulcan Asphalt Refining Co.*, 78 Lab. Arb. 1311 (1982) (Welch, Arb.).

<sup>21</sup>e.g., *Mich. Consol. Gas Co.*, 80 Lab. Arb. 693 (1983) (Keefe, Arb.); *Prestige Stamping Co.*, 74 Lab. Arb. 163 (1980) (Keefe, Arb.).

<sup>22</sup>Discipline was upheld in 74 Lab. Arb. 25, 316, 641, 75 Lab. Arb. 699, 899, 901, 958; 76 Lab. Arb. 163, 845, 1178; 77 Lab. Arb. 448, 854, 1052, 1064, 1180; 78 Lab. Arb. 89, 302; 79 Lab. Arb. 182; 80 Lab. Arb. 503, 639, 851, 875; 81 Lab. Arb. 243, 318, 344, 449, 630, 733; 82 Lab. Arb. 420, 861; 83 Lab. Arb. 760. Discipline was set aside or reduced in 74 Lab. Arb. 664, 972; 75 Lab. Arb. 255, 518; 76 Lab. Arb. 758, 1005; 77 Lab. Arb. 289, 775; 78 Lab. Arb. 793, 1060; 79 Lab. Arb. 196, 529; 80 Lab. Arb. 193; 81 Lab. Arb. 917, 1083; 82 Lab. Arb. 31; 83 Lab. Arb. 211. In one other case, 75 Lab. Arb. 1147, the arbitrator upheld the discharge of six employees but set aside the discharge of two others.

<sup>23</sup>*Hayes-Albion Corp.*, 76 Lab. Arb. 1005 (1981) (Kahn, Arb.); *General Felt Indus., Inc.*, 74 Lab. Arb. 972 (1979) (Carnes, Arb.). Even in these two cases the employees were acknowledged to have been drinking before reporting for work, but it was not demonstrated to the arbitrator's satisfaction that the employees were intoxicated or "unfit" to work. In *Hayes-Albion*, the employee had consumed approximately twenty-four beers in the early morning hours, had gone home and slept for five hours, and then had reported for his swing-shift job.

<sup>24</sup>*Bakers' Union Factory No. 326 v. ITT Continental Baking Co., Inc.*, 749 F. 2d 350 (6th Cir., 1984).

<sup>25</sup>e.g., *Bemis Co., Inc.*, 81 Lab. Arb. 733 (1983) (Wright, Arb.); *Western Gear Corp.*, 74 Lab. Arb. 641 (1980) (Sabo, Arb.).

<sup>26</sup>A fuller discussion of arbitrators' handling of alcohol cases is contained in Michael Marmo, "Arbitrators View Alcoholic Employees," 37 *Arbitration J.* 17-27 (March 1982).

## Screening Workers for Drugs: A Legal and Ethical Framework

Mark A. Rothstein

One of the most controversial of the management strategies employers have adopted in trying to come to grips with drug abuse in the work place is the practice of urine screening to detect the presence of drugs. Critics of the routine use of drug screening point to its alleged intrusiveness, inaccuracy, and potential for discrimination. Proponents argue that drug screening is the most effective way to deter employee drug use and to prevent drug-related injuries and property damage. In the following article, the author weighs these concerns and proposes criteria for a legal, ethical, and effective drug screening program.

### Introduction

The abuse of drugs (alcohol, prescription medications, and controlled substances) is a major social problem in the United States that has permeated all aspects of American society, including the work place. According to some estimates, drug abuse costs the economy as much as \$25 billion annually in lost productivity (e.g., absenteeism, mistakes, and sick leave),<sup>1</sup> not to mention increased insurance costs and loss of good will.

Employees convicted of drug-related crimes long have been subject to employer discipline, as have been employees visibly intoxicated on the job. However, these policies for dealing with drug-abusing employees operate after the fact. To prevent the consequences of employee drug abuse it is necessary to identify employee drug users before a problem arises. This is difficult to do. Many employees work alone. Others may be impaired but not visibly intoxicated.

Some employees may actually take the drugs during work or on break time. Conditioning discipline on an employee's drug-related conviction or on "visible intoxication" may not be sufficiently protective of employer or societal interest. The potentially tragic consequences for the employee, the employer, and society are obvious when the intoxicated workers are, for example, truck drivers, school bus drivers, or fire fighters.

Research regarding fatalities and injuries caused by intoxicated employees indicates that there are more alcohol-related accidents than accidents caused by all of the illicit substances combined.<sup>2</sup> Yet, mass and random screening programs frequently focus only on controlled substances. There are three possible explanations for this. First, the metabolites of controlled substances can be detected for longer

This article first appeared in *Employee Relations Law Journal*, volume 11, number 3, Winter 1985-1986. Copyright 1986, Executive Enterprises. Reprinted with Permission.

periods of time following exposure than can the traces of alcohol. Second, use of controlled substances is illegal. Third, there is less social stigma attached to the use of alcohol, particularly in small amounts. In this regard, the screening programs may reflect the values of the screeners rather than those of the screenees.

Despite generally inadequate alcohol control measures, screening employees for illicit drug use has increased dramatically in recent years. About 25 percent of the Fortune 500 companies currently perform drug screening, a sharp rise from only three years ago, when the figure was 10 percent.<sup>3</sup> By all accounts, drug screening is certain to become increasingly common.<sup>4</sup> In fact, some experts predict that within five years drug testing may be a standard requirement for getting a job.<sup>5</sup>

This increase in drug testing can be traced to the combination of a growing drug-abuse problem and the introduction of new test procedures that permit fast and inexpensive drug testing. Tests to detect amphetamines ("speed"), barbiturates (sedatives, benzodiazepines (tranquilizers), cocaine metabolite, ethyl alcohol, marijuana metabolite, methaqualone (Quaaludes), opiates (codeine, heroin, methadone, morphine), and phencyclidine (PCP) are now being widely marketed. Already, millions of urine and other drug screens are performed each year by employers in a variety of enterprises. Initially, drug screening was required of transportation, industrial, public safety and health-care workers. Recently, testing has been required of school teachers, retail employees, and major league baseball personnel, and other employees.

The federal government also has been concerned with employee drug use. Millions of screens are performed each year in the military. Federal Aviation Agency regulations prohibit airlines from employing any flight crew member for at least one year following a drug conviction<sup>6</sup> and prohibit the carrying of a controlled substance on any aircraft.<sup>7</sup> Department of Transportation regulations provide that an individual may not be an interstate truck driver if that individual uses amphetamines, narcotics, or any habit-forming drug, or if the individual is an alcoholic.<sup>8</sup> In August 1985, the Federal Railroad Administration published a final regulation requiring pre-employment drug screens for, at a minimum, alcohol, opiates, cocaine, barbiturates, amphetamines, cannabis, hallucinogens, and other drugs in frequent use in the locality.<sup>9</sup>

### Essential Elements of a Drug Screening Program

Drug screening programs raise significant legal and ethical concerns. Some screening tests are of questionable accuracy, and all tests raise issues regarding invasion of privacy, relevance to effectiveness performance, risk of undue disclosure of results, and deterrence of participation in rehabilitation programs. Unfortunately, in their haste to deal with the problem of drugs in the work place, some employers have not given sufficient attention to these concerns. Consequently, there is an urgent need for guidelines for employers contemplating the implementation or continuation of drug screening. This article puts forth and examines six criteria that are essential considerations in developing a legal, ethical, and effective drug screening programs.

### *A Substantial Danger*

By their nature, drug screening procedures are intrusive. First, they may involve obtaining blood, urine, or breath samples. Second, many of the tests, such as screens for marijuana, do not measure intoxication, only the presence of the metabolites of the substance. Yet, marijuana metabolites remain detectable for days or weeks after exposure.<sup>10</sup>

Therefore, by using these tests to measure exposures that do not affect the present ability of employees to perform their job safely and efficiently, employers are, in effect, invading the off-work time of employees and are attempting to regulate their private lives.

If there is a justification for performing drug screening on unimpaired employees to detect prior exposure rather than intoxication, it is that the consequences of working while intoxicated are so severe that they outweigh the privacy interests of the employees being tested. For certain job classifications it is prudent to err on the side of public safety, even at the expense of individual privacy. Moreover, it is reasonable to assume that employees with detectable prior drug exposures are more likely to be impaired by drugs in the future than are employees with no detectable prior exposure. Consequently, an important criterion in a drug screening program should be that the workers in the program be persons who, if working while intoxicated, would pose a substantial danger to themselves, other persons, or property. Without a showing of "substantial danger" in the employee's work, the need for drug screening would not outweigh employees' privacy interests. In other words, while a screening program for airline pilots or chemical plant operators might be justifiable, a program for clerical or retail employees would not.

In practical terms, a substantial-danger criterion means that an employee in any job classification who is intoxicated, suspected of being intoxicated, or involved in an accident could be asked to submit to a drug screen and could be disciplined or discharged by the employer. Employees and applicants in "Critical" or "safety-specific" jobs would be subject to routine drug screening. However, employees and applicants in "non-critical" jobs would not be given routine drug screening. If an employee in a noncritical job were reassigned or promoted to a critical job, the employee could then be subject to preassignment, periodic, or random drug screening.

This suggested approach represents a compromise between two extremes. Some people favor screening *all* workers (even if the worker is not acting as though he or she were intoxicated and is seemingly performing well) because: (1) the use of a controlled substance is illegal and employee use could lead to an embarrassing arrest; (2) the need for additional money could lead the employee to engage in theft or accept a bribe; and (3) screening will deter employees from starting to use drugs in the first place. These justifications are valid concerns, but they can be satisfied with effective drug awareness programs and good supervision, without the intrusiveness of drug screening.

On the other hand, it has been argued that *no* workers should be screened routinely for drugs and that only intoxicated individuals should be subject to employer sanctions. But, clearly, a nursery school bus driver should not be under the influence of any drug, even if not *visibly* intoxicated. In such a situation, waiting until there is evidence of visible intoxication may be waiting too long. Even without empirical data, it is fair to infer that employees who use drugs off the job are more likely to use them on the job. In short, for employees who are in critical jobs, the risks outweigh the intrusiveness. In addition, for these workers, a drug screening program may have a deterrent effect.

### *Accurate Test Procedures*

The test procedures used in employee drug screening must be accurate and must be performed by trained professionals under laboratory conditions. Indeed, employers should take particular care in selecting testing methods. Employee drug testing has become a \$100-million-a-year business.<sup>11</sup> New testing products are marketed as being portable, fast, cheap, and accurate. Unfortunately, some of the tests perform as advertised only in the first three of these four categories. Thus, for example, new saliva tests and brain wave tests for drug intoxication have been marketed without proof of their accuracy. Other tests are so sensitive that they can give a positive reading from mere passive inhalation if the cutoff point is set too low.<sup>12</sup>

Even accurate tests are only as good as the people doing the testing. From 1972 through 1981, the Centers for Disease Control, an agency of the Department of Health and Human Services, conducted a blind study of thirteen laboratories for their accuracy in detecting samples containing amphetamines, barbiturates, cocaine, codeine, methadone, and morphine. The error rates are shown in the [following] table[.]

While there were higher percentages of false negatives than of false positives, both categories had remarkably high error rates. (A high rate of false negatives means that the test is unable to do what it is supposed to do--identify specimens containing the tested-for substance. A high rate of false positives means that the specimens are incorrectly identified as containing the tested-for substance. For employees this often translates into unfair discipline.) Moreover, this recent study is consistent with similar studies of laboratory proficiency.<sup>13</sup>

Equally troubling is the fact that many drug screens are marketed for use in the work place rather than in the laboratory. Equipped with a \$300 kit, Acme Company's deputy assistant personnel trainee can go into the restroom and attempt to become an instant toxicologist. Contamination, mishandling, sabotage, and other factors can ruin the test. Obviously, the accuracy of results achieved under nonlaboratory conditions can be seriously questioned.

An additional problem involving test accuracy is that to be considered valid, many of the drug tests require confirmation by an additional test. For example, the

**Range of Error Rates for 13 Laboratories in Detecting  
Presence or Absence of 6 Substances**

	False Positives (%)	False Negatives (%)
1. Amphetamines	0-37	19-100
2. Barbiturates	0-06	11-94
3. Cocaine	0-06	00-100
4. Codeine	0-07	00-100
5. Methadone	0-66	00-33
6. Morphine	0-10	05-100

Source: Hansen, Caudill, and Boone, "Crisis in Drug Testing," *Journal of the American Medical Association*, 253(1985); 2382.

two most common tests for the presence of marijuana metabolites are Syva's Fluorimetric enzyme immunoassay and Roche's Roche Screen radio-immunoassay. Although both tests cost at most only a few dollars to use, neither is accurate unless confirmed by gas chromatography/mass spectrometry, tests that may cost from \$50 to \$80 each. Some employers take the cheap shortcut of simply relying on the initial immunoassay drug screen, or repeat the first test without using a confirmatory test.

### *Valid Employee Consent*

During pre-employment medical examinations, applicants are often asked to consent to urine, blood, or other tests. The applicants need not consent, but the failure to do so precludes their further consideration for employment. The purpose of the consent is to eliminate possible physician or employer liability for battery. Some employers do not tell the applicants what laboratory testing procedures will be performed on the specimens, the results of the tests, or the effect of test results on their employability. Although such practices could be questioned from an ethical standpoint,<sup>14</sup> there is no legal requirement to provide this information, because, among other reasons, legally, there is no physician-patient relationship between an applicant or employee and an employer-retained physician.<sup>15</sup> Consequently, some applicants may be denied employment on the basis of a drug screen when they were unaware that they were being tested for drugs.

Other employers have adopted the more desirable approach of informing applicants and employees about the nature and results of all tests, including drug tests.<sup>16</sup> This approach conveys the employer's respect for individual dignity and privacy, allows individuals to refuse the test without incurring potential long-term consequences of a positive test, allows individuals with positive tests to explain them, and demonstrates the employer's concern for the problem of drug abuse.

Some employers provide applicants with advance notice--of days or even weeks--that a drug screen will be performed. The one drawback of this approach is that it permits applicants to abstain before being tested and then to resume drug use after being hired. This problem, however, may be outweighed by two considerations. First, company resources will be saved because habitual drug users will not proceed further with their application. Second, individuals genuinely interested in employment will cease using drugs before the test, and surveillance and retesting will ensure that they do not resume drug use.

Once an individual is hired, the consent to future drug testing may be made a valid condition of employment. (This requirement is subject to collective bargaining agreements and other considerations discussed further on in this article.) Some employers conduct follow-up drug screening on employees periodically, randomly, after an accident, when drug use is suspected, when an employee is undergoing drug treatment, and at other times. Employees refusing to cooperate with the drug testing may be subject to disciplinary action. Specific consent should be obtained for each subsequent drug test.

### *Confidentiality*

Drug testing results should be regarded in the same way as other medical records. Specifically, the data should be stored in the medical department and access should be limited to medical personnel. Supervisory and managerial employees should be notified of the results only on a "need-to-know" basis. When an initial drug screen is positive and a confirmatory test is scheduled, there should be no disclosure of the initial test result of the fact that a confirmatory test is to be done until after the final test results are in.

Although employers are protected against liability for defamation by a limited privilege to disclose employee personnel records,<sup>17</sup> the privilege will be lost if the disclosure is made with reckless disregard for the truthfulness of the disclosure or if there is excessive publication of the defamatory information. In addition, some jurisdictions recognize an independent cause of action for the negligent maintenance of personnel files.<sup>18</sup>

In *Houston Belt & Terminal Railway v. Wherry*, 548 S.W.2d 743 (Tex. App. 1977), a railroad employee was tested for drugs after fainting following an accident on the job. The initial test result showed a "trace" of methadone, but a follow-up test showed the presence of a normal compound whose characteristics resemble methadone. The employee was later discharged for failure to report his accident in a timely manner. The railroad wrote a letter to the Department of Labor stating that the employee "passed out and fell" and that "traces of methadone" were present in his system. The Texas Court of Civil Appeals affirmed an award of \$150,000 in compensatory damages and \$50,000 in punitive damages based on this and other statements. The court stated, "We think the jury was entitled to conclude from the evidence that

they made false statements in writing that he was a narcotics user when they knew better."

### *Conformity with Legal Requirements*

Personnel actions should not violate applicable collective bargaining agreements, antidiscrimination laws, or common law rights of employees.

#### **Collective Bargaining Agreements**

In implementing and enforcing a drug screening program, employers must comply with a variety of legal requirements that may be directly or indirectly relevant to drug screening. To begin with, if the employees are represented by a union, sections 8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act (NLRA)<sup>19</sup> require that the employer and the union bargain in good faith with respect to wages, hours, and other terms and conditions of employment. A drug screening program would be considered a "working condition" and therefore a mandatory subject of bargaining. Hence, employers may not implement drug screening unilaterally without giving the union the opportunity to bargain. In a recent case, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 117 LRRM 2739 (D. Mont. 1984), it was held that an employer could not even begin to use dogs to detect the presence of controlled substances at work because such a practice constituted a unilateral change in working conditions.

An increasing number of collective bargaining agreements contain specific provisions relating to drug possession, use, detection, discipline, and rehabilitation. In some instances the provisions are vaguely worded and arbitrators are required to interpret terms such as "intoxicated" or "under the influence."<sup>20</sup> The arbitrator may even see fit to add conditions to a drug screening rule. For example, in *Griffin Pipe Products Co.*, 83-1ARB para. 8616 (1982)(Daly, Arb.), the company adopted a rule requiring a drug screen urine test of all employees reporting for medical treatment. The purpose of the rule was to reduce accidents. The arbitrator upheld the rule, but added two conditions. First, employees suspended under the rule where the test is later found to be negative were to be reimbursed for lost wages. Second, employees taking prescription medication were not subject to discipline. Arbitrators also have upheld discharges based on the failure to submit to a drug test.<sup>21</sup> In one case, an arbitrator found discharge appropriate only if the employees were on duty at the time.<sup>22</sup>

In arbitration cases involving drugs, many arbitrators require a higher standard of proof than in other discharge cases. (This standard is often "clear and convincing evidence" rather than simply a "preponderance" of the evidence).<sup>23</sup> The main reasons for this higher standard are that possession of a controlled substance is a crime and discharge for a drug offense will make it very difficult for the employee to obtain another job.<sup>24</sup>

In meeting this burden of proof, the employer often will need to prove the test's accuracy, the chain of custody of the specimen, corroboration of impairment, and other matters specifically applicable to drugs. As a general rule, arbitrators often consider the following to be prerequisites for valid employer discipline: (1) the employee must have had notice of the rules; (2) the rule must have been applied fairly; (3) management must have investigated the charges and given the employee a reasonable chance to answer them; and (4) the punishment must fit the crime.<sup>25</sup> In drug cases, arbitrators also frequently look at whether the use of drugs affected job performance, safety, or customer relations.<sup>26</sup> As a result of these limitations, employers have a difficult time sustaining drug-based discharges in subsequent arbitration proceedings.<sup>27</sup>

#### Handicapped Discrimination Laws

Other laws affecting employer treatment of drug users include the laws prohibiting employment discrimination against the handicapped. The Rehabilitation Act of 1973<sup>28</sup> is the primary federal law prohibiting employment discrimination against handicapped individuals. This law applies to the federal government, government contractors, and recipients of federal financial assistance. The 1978 amendments to the Act explicitly recognize that the denial of employment opportunities on the basis of alcohol or drug use is justified only under limited circumstances. As the Act states, "[The term handicapped individual] does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drug abuse, would constitute a direct threat to property or the safety of others." The purpose of the amendment is to prohibit discrimination against individuals who are able to perform a job.<sup>29</sup> Therefore, former drug addicts and alcoholics currently under control are certainly subject to the Act's protection.<sup>30</sup>

It is not clear whether an employer could refuse to hire or could discharge an employee who was found to have drugs in his or her system but who had not indicated any difficulty in performing job duties. The key question would appear to be related to the nature of the job and whether the employer could demonstrate that the mere employment of the individual "would constitute a direct threat to property of the safety of others." These Rehabilitation Act considerations lend further support to the "substantial danger" requirement for drug screening discussed earlier in this article.

In addition to the federal law, there are laws in forty-five states and the District of Columbia prohibiting discrimination against handicapped individuals in private employment, and laws in three other states prohibit discrimination against the handicapped in state employment. The state laws vary considerably--both statutorily and in the case law--in their coverage of alcoholics and drug abusers.

## Title VII

Another possibly relevant federal law is Title VII of the Civil Rights Act of 1964,<sup>31</sup> which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. If an employer were to adopt a drug screening program that had a disparate impact along lines proscribed by Title VII, the employer would have to prove that the screening program was compelled by a business necessity and was the least onerous means of achieving those ends.

In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1978), the New York City Transit Authority (TA) had a policy of not hiring drug users, including individuals receiving methadone maintenance treatment for curing heroin addiction. The plaintiffs attempted to prove this rule's discriminatory effect by showing that 81 percent of employees referred to the TA's medical consultant for suspected drug violations were black or Hispanic, and that between 62 percent and 65 percent of all methadone-maintained persons in New York City are black or Hispanic. The United States Supreme Court rejected the plaintiffs' Title VII claim and held that, even if the statistics established a *prima facie* case of discrimination, "it is assuredly rebutted by the TA demonstration that its narcotics rule is "job related". The Court also rejected a challenge to the rule based upon the equal protection clause of the Fourteenth Amendment. The Court said, "No matter how unwise it may be for TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision."

### Common-Law Rights

The employer also must not violate any of the employees' common-law rights based on contract or tort. The contract protection afforded employees not subject to a collective bargaining agreement may be based on an express written contract, an express oral contract, an implied contract based on a personnel manual or handbook, or a judicially implied contractual obligation of "fair dealing". These requirements may limit employer discipline to instances where "just cause" is shown by the employer, or may imply a "fair dealing" obligation on the part of the employer. Under tort law, the wrongful discharge of an employee--for instance, where the discharge violates public policy--is actionable. Examples would include firing an employee for refusing to take a polygraph in connection with a drug investigation, or firing an employee for using sick leave to receive drug rehabilitation treatment. Other tort actions that could be raised by drug screening include invasion of privacy and defamation. For private-sector employees, however, actions for invasion of privacy are unlikely to be successful because the employee is under no compulsion to submit to the test even though refusal may mean discharge.<sup>32</sup>

### Constitutional Rights

Public-sector employees, because they are subject to constitutional protections, may have more success with invasion of privacy and other arguments, but even their success is hard to predict. In *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985), six public employees suspected of smoking marijuana on the job were told they would be fired unless they submitted to an urinalysis drug test. All six submitted to the test, tested positive, and were discharged. In a subsequent legal action brought by the six former employees, the district court held that, even though the urinalysis was a search and seizure, subject to the Fourth Amendment, it was not unreasonable. Other legal theories that public employees are likely to raise include violations of due process, equal protection, self incrimination, and invasion of privacy rights.

### A Comprehensive Drug Abuse Program

If an employer complies with the preceding legal requirements, it may lawfully discipline an employee on the basis of drug screening. This does not necessarily mean, however, that such action is wise or effective. Many experts believe that a drug-abusing employee should be given rehabilitation rather than punishment.<sup>33</sup> Nevertheless, regardless of the consequences, drug screening should be only one part, and indeed should be the least important part, of a comprehensive drug abuse program. The other two components of the program should be drug awareness and employee assistance.

Drug awareness programs are educational activities aimed at supervisors and employees. Supervisors need to be trained to recognize some of the "suspect changes in employee job performance and behavior that may portend a drug abuse problem."<sup>34</sup> They also need to be trained in how to respond to employees suspected of having a drug abuse problem.

Employees also should be involved in a separate drug education program. Although there are several different models of programs, all programs teach employees to recognize the signs of drug abuse in themselves, family, friends, and co-workers. All programs also discuss the dangers of drug abuse and describe company and community services available for dealing with drug abuse.<sup>35</sup>

The other essential part of a drug abuse program is an employee assistance program (EAP). There are over 5,000 EAP's today. Some are run in-house, others are run on a contract basis. Both types work the same way. An employee may voluntarily enter the program or may be referred by a supervisor. The employee contacts the EAP and works out an individual treatment program. Participation in an EAP is kept confidential. In some instances, employer discipline is waived on the condition that the employee complete the EAP.

Many EAP's were originally started to deal with alcohol abuse, and have subsequently added drug abuse programs. The number and size of these programs

have grown considerably in the last five years. For example, at General Motors about 1,000 employees are treated each year. The results at virtually all the EAP's have been extremely positive. For example, a study by Illinois Bell of 306 employees in its EAP showed an estimated savings of \$459,000 in reduced absence, accidents, and medical and disability benefits following rehabilitation.<sup>36</sup> Kennecott Copper's program had an initial investment of \$90,000 and reportedly saves the company \$500,000 per year.<sup>37</sup> Besides the cost savings, of course, are the human savings--the ability to rehabilitate and restore employees to a healthful and productive status.

### Conclusion

Although drug abuse in the work place ranges from the shop floor to the executive suite, screening workers for drugs is acceptable only under certain limited circumstances. Even then, the practice should not be viewed as a single cure to the problem of employee drug abuse. Indeed, even a three-part program involving awareness, detection, and rehabilitation does not begin to deal with this complex problem. We must explore other methods for identifying workers with drug problems--for example, examination of medical histories and reference checks. And we must explore ways of preventing such work related causes as stress, repetitive work, and boredom. In short, employers must take a broader view of employee drug abuse and must also analyze carefully their particular circumstances before implementing a drug screening program.

### NOTES

<sup>1</sup>"How Drugs Sap the Nation's Strength," *U.S. News & World Report*, May 16, 1983. p. 55 (\$25 billion); "Taking Drugs on the Job," *Newsweek*, August 22, 1983, p. 55 (\$16.6 billion).

<sup>2</sup>See, e.g., Mason and McBay, "Ethanol, Marijuana, and Other Drugs in 600 Drivers Killed in Single-Vehicle Crashes in North Carolina, 1978-1981," *29 Journal of Forensic Sciences* 987 (1984).

<sup>3</sup>Chapman, "The Ruckus Over Medical Testing," *Fortune*, August 19, 1985, pp. 57-58. A recent telephone survey of the top thirty-five Fortune 500 companies reported that 29 percent of the companies performed pre-employment drug screening and 26 percent of the companies tested employees under certain conditions. Many of the companies implemented drug screening during the last two years. Gampel, "Drug Testing in the United States," presented at National Organization for Reform of Marijuana Laws 15th Anniversary National Conference, Washington, D.C., May 18, 1985.

<sup>4</sup>See O'Boyle, "More Firms Require Employee Drug Tests," *Wall Street Journal*, August 8, 1985 p. 6.

<sup>5</sup>Brown, "Employment Tests: Issues without Clear Answers," *Personnel Administrator*, Sept. 1985, pp. 43-48 (quoting Michael Walsh, chief of clinical and behavioral pharmacology, National Institute of Drug Abuse).

<sup>6</sup>14 CFR §61.15 (1985).

<sup>7</sup>*Id.* §91.12.

<sup>8</sup>49 CFR §391.41 (1985).

<sup>9</sup>50 Fed. Reg. 31, 508 (1985).

<sup>10</sup>Dakis, Pottash, Annitto, and Gold, "Persistence of Urinary Marijuana Levels After Supervised Abstinence," 139 *American Journal of Psychiatry* 1196 (1982); "Urine Testing for Detection of Marijuana: An Advisory," 32 *Morbidity & Morality Weekly Report* 467, 470 (1983).

<sup>11</sup>Chapman, note 3 *supra* at 62.

<sup>12</sup>See Zeidenberg, Bourdon, and Nahas, "Marijuana Intoxication by Passive Inhalation: Documentation by Detection of Urinary Metabolites," 134 *American Journal of Psychiatry* 76 (1977); "Passive Inhalation of Marijuana Smoke," letter to the editor, 250 *Journal of the American Medical Association* 898 (1983).

<sup>13</sup>Hansen, Caudill, and Boone, "Crises in Drug Testing," 253 *Journal of the American Medical Association* 2382 (1985).

<sup>14</sup>See Rothstein, "Legal Issues in the Medical Assessment of Physical Impairment by Third-Party Physicians," 5 *Journal of Legal Medicine* 530, 538-42 (1984).

<sup>15</sup>See Rothstein, "Medical Screening of Workers," 4-8, (1984).

<sup>16</sup>See "Is Special Consent Needed from Applicant for Preemployment Drug Screening?" 231 *Journal of the American Medical Association* 659 (1975).

<sup>17</sup>See *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 341 A.2d 856 (1975); *Harrison v. Arrow Metal Prod. Corp.*, 20 Mich. App. 570, 174 N.W.2d 875 (1969). See generally Comment, "Qualified Privilege to Defame Employees and Credit Applicants," 12 *Harvard Civil-Rights-Civil Liberties Law Review* 143 (1977).

<sup>18</sup>See *Quinones v. United States*, 492 F.2d 1269 (3d Cir. 1974).

<sup>19</sup>29 USC §158 (a), (b)(3), (d)(1984).

<sup>20</sup>See T. Denenberg and R. Denenberg, *Alcohol and Drugs: Issues in the Workplace* (Washington, D.C.: BNA, 1983).

<sup>21</sup>*Wabco Div. of Am. Standard* 77 Lab. Arb. 1085 (1981) (Katz, Arb.).

<sup>22</sup>*Texas Util. Generating Co.*, 84-1 ARB para. 8025 (1984) (Edes, Arb.).

<sup>23</sup>See, e.g., *Bell Helicopter Co.*, 69-2 ARB para. 8608 (1969) (Abernethy, Arb.).

<sup>24</sup>Levin and Denenberg, "How Arbitrators View Drug Abuse," 31 *Arbitration Journal* 97 (1976).

<sup>25</sup>Wollett, "What an Arbitrator Looks for from Management in Discharge Cases," 9 *Employee Relations Law Journal* 525 (Winter 1983-84).

<sup>26</sup>See Wynns, "Arbitration Standards in Drug Discharge Cases," 34 *Arbitration Journal* 29 (1979).

<sup>27</sup>Dufek and Underhill, "Arbitration Can Thwart Employer No-Drug Policy," *Legal Times*, March 18, 1985, p.21; Geidt, "Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights," 11 *Employee Relations Law Journal* 181 (Autumn 1985). But see *Misco v. United Papersworkers Int'l. Union*, 768 F.2d 739 (5th Cir., 1985)(arbitrator's reinstatement of employee discharge for breach of drug rule violated public policy).

<sup>28</sup>29 USC §701-96 (1984).

<sup>29</sup>See 124 *Congressional Record* §19,002 (daily ed. Oct. 14, 1978)(remarks of Sen. Williams).

<sup>30</sup>See *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978).

<sup>31</sup>42 USC §2000e (1984).

<sup>32</sup>*Cf. Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977)(psychological stress evaluation test); *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982)(personal questionnaire). See also *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985)(state tort action for invasion of privacy preempted by collective bargaining agreement).

<sup>33</sup>See, e.g., Nelson, "Drug Abusers on the Job," *23 Journal of Occupational Medicine* 409 (1981); Redfield, "Drugs in the Workplace--Substituting Sense for Sensationalism," *63 American Journal of Public Health* 1064 (1973).

<sup>34</sup>Nelson, note 44, *supra* at 406.

<sup>35</sup>See McLatchie, Grey, Johns, and Lomp, "A Component Analysis of an Alcohol and Drug Program: Employee Education," *23 Journal of Occupational Medicine* 477(1981).

<sup>36</sup>Gaeta, Lynn, and Grey, "AT&T Looks at Program Evaluation," *EAP Digest*, May-June 1982, pp. 22-23.

<sup>37</sup>Nelson, note 44, *supra* at 405.

**Substance Abuse in the Workplace:  
Managerial Authority, Employee Rights, and the Common Law**

*Raymond L. Hogler*

**Introduction**

Alcohol and drug use by employees poses an increasingly severe and complex problem for employers. According to one recent survey, more than 25 percent of American workers regularly use illegal drugs, and between 10 and 23 percent do so in the workplace.<sup>1</sup> The costs of alcohol and drug abuse to the national economy have increased dramatically in the past several years; predictions are that the trend will continue. Indeed, newer and more addictive forms of drugs such as "designer drugs" threaten an epidemic of drug use.<sup>2</sup>

For employers, one practical method of responding to substance abuse is the traditional avenue of discipline and discharge. If an employee is unable properly to perform his or her job because of impaired ability resulting from drug or alcohol abuse, that is, the employer may correct the inappropriate behavior by job sanctions. A disciplinary approach has been advocated by leading scholars in the field. Harrison Trice and Roman Belasco, for example, argued in an influential early study that "constructive confrontation" and the threat of job loss was often necessary to overcome an employee's denial of drug or alcohol addiction.<sup>3</sup> Discipline, accordingly, may be in the best interest of both employer and employee.

The present legal environment surrounding employment relationships in this country raises a number of important considerations relative to the administration of discipline. Unionized employees may have the protection of a "just cause" standard in a collective bargaining agreement, in which even arbitral principles will govern the imposition of discipline for the use or possession of prohibited substances.<sup>4</sup> In addition, legislative provisions may protect certain groups of employees, such as those covered by federal or state laws pertaining to fair employment.<sup>5</sup> A third source of protection for employee rights, and perhaps ultimately the most significant, is the evolving common law.

This article examines common law restrictions on an employer's disciplinary prerogatives in the specific context of drug and alcohol abuse. The two major areas examined are the contractual and the tort limitations on managerial discretion to discipline.<sup>6</sup> Included within the first category is precedent holding that personnel manuals and policies may constitute enforceable contracts binding on the employer. The second aspect deals with judicial decisions restricting the right to discharge where the termination contravenes an important governmental policy, such as an employer's

This article appears in a revised form in the *Employee Relations Law Journal*, volume 13, number 3 (Winter 1987-1988), and is used with permission.

right of privacy, and also with the more traditional areas of tort law such as defamation.

### The Substance Abuse Policy as a Contractual Commitment

Historically, employers in the United States enjoyed the legal right under the doctrine of employment at will to fire employees without reason or explanation, and until the 1970s, at will employment remained the accepted rule.<sup>7</sup> One corollary of the employment at will rule was that an offer of job security in a personnel manual did not in fact constitute an enforceable obligation on the part of the employer. That view is illustrated in the case of *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (A76) in which the employer's handbook stated that "[n]o employee shall be dismissed without just cause." The Kansas Supreme Court held that the manual "was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy." Therefore, the discharged employee had no legal recourse against the employer.

In contrast to the reasoning set forth in *Johnson* a decade ago, a significant number of jurisdictions currently reject the theory that personnel manuals are unilateral, non-binding documents promulgated at the pleasure of the employer. One recent survey concludes that "[t]he courts in 25 states and the District of Columbia have called handbooks a contract or have indicated in one way or another that they might rule that way in future cases."<sup>8</sup> For that reason, the legal implications of substance abuse policy should be carefully considered before a policy is promulgated. The cases analyzed below illustrate developing views regarding the contractual nature of personnel policies.

#### *The Trend of Recent Decisions*

A leading decision holding that an employer's handbook may create contractual rights in employees is *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985). In its opinion, the New Jersey Supreme Court reviewed precedent both within New Jersey and nationally. It conceded that "most of the out-of-state cases demonstrate an unwillingness to give contractual force to company policy manuals that purport to enhance job security" but noted an emerging trend which sounded a "different note on the subject." Because of the "sound policy" of protecting the contractual rights of workers in the modern industrial setting, the court determined that "the termination clauses of [Hoffman-LaRoche's] Personnel Policy Manual, including the procedure required before termination occurs, could be found to be contractually enforceable." The court continued with the admonition that "when an employer of a substantial number of employees circulates a manual that, when fairly

read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of 'grudgingly' conceding the enforceability of those provisions...should construe them in accordance with the reasonable expectations of the employees."

Regarding the technical aspects of contract law, the *Wooley* opinion emphasized that the policy manual had been widely distributed and covered all employees of Hoffman-LaRoche. The job security provisions were "attractive inducements" to the workforce, and the employees might reasonably have understood those provisions as "a promise not to fire them except for cause." By continuing to work for the employer, individual employees accepted the employer's promise of job security. Consequently, the manual sought the formation of a "unilateral contract" which was completed upon the employee's providing services to the employer. The benefit of a loyal, motivated workforce constituted sufficient consideration to support the agreement.<sup>9</sup>

A more recent case reaching a similar result is *Wagner v. City of Globe*, 150 Ariz. 82, 722 P.2d 250 (1986), where the Arizona Supreme Court held that a personnel rule might create a binding contractual limitation on an employer's right of discharge. The court characterized the employment relationship as a "unilateral contract" which "does not require mutuality of obligation." Consideration is present "in the form of services rendered," and, the court continued, "[t]his is true despite the fact that the employee may quit at any time."<sup>10</sup> Whether or not at-will employment relation had been modified by a personnel policy was a question of fact to be decided by the jury. The court further stated: "Evidence relevant to this decision includes the language of the personnel manual, any representations made by the employer, and the course of dealing between the employer and the employee...Reliance is not an essential predicate to the action, but is only one of the several relevant factors."<sup>11</sup> Therefore, the discharged employee's contractual claim was held to state a cause of action.

In another recent case, which involved discipline for possession of drugs, the Hawaii Supreme Court ruled that the employer's discretion to terminate was limited by the provisions of a personnel manual.<sup>12</sup> The plaintiffs were discharged following their arrest for possession of drugs, but despite *hauāloko* provisions affording employees a right to appeal personnel decisions within the company, the employees were not permitted an appeal "because of the gravity of their misconduct." The Ninth Circuit Court of Appeals certified the issue of an employment contract to the state supreme court.

Citing a modern trend toward protecting employee rights, the Hawaii court espoused the view that where an employer "creates an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship." The employer in the case had encouraged employees to rely on its manual during two

earlier union organizing campaigns which the company had won. Therefore, it was unnecessary for an individual employee to prove he was aware of the employer's promises or had bargained for them; rather the agreement was a standardized one "treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the written contract."<sup>13</sup>

### *Opposing Precedent*

While the cases analyzed above indicate a judicial tendency toward interpreting handbooks and policies as a contractual undertaking, it should be noted that not all courts support such a view. The contrary reasoning is exemplified in the 1986 opinion of the Pennsylvania Superior Court in *Martin v. Capital Cities Media*, 511 A.2d 830 (Pa. Super. 1986). There, the court refused to enforce a specific provision in the employer's handbook which listed certain offenses and "other just causes" as warranting disciplinary action.

To support its holding, the Pennsylvania court relied on the presumption that employment is an at will contractual relationship which can only be overcome by clear and definite evidence of modification. The employer's handbook, according to the court, was merely "an aspirational statement by the employer listing actions that generally will not be tolerated." Construing general language into a just cause standard for discharge would "be a modification of immense proportions," and such an intent "must be stated with clarity." Further, the handbook was unilaterally promulgated by the employer and the employer retained the right unilaterally to alter its terms. The discharged employee rendered no extraordinary services to the employer, and the lack of additional consideration buttressed the presumption of at will employment.

Addressing the policy issues raised in the case, the court stated that its duty was to effect the "reasonable expectations of the parties, not to craft an interpretation solely for the purpose of benefitting one of the parties alone." A contrary result in the court's view would have "the seriously deleterious effect of causing employers to for[e]go publication and distribution of handbooks for fear that their intentions would be misconstrued by the courts." The judiciary, moreover, "is ill-equipped to determine what effect such a sweeping policy change would have on society," and any modification of the at will rule should be undertaken by the legislature.

Despite its conclusion, the court in *Martin* did acknowledge that under some circumstances a handbook will give rise to contractual obligations. An employee will be entitled to rely on promises of job security "when the handbook, or oral representations about the handbook, in some way clearly state that it is to have such effect." Thus, the presumption of at will employment may be overcome by a showing of reasonable reliance on the part of the employee.<sup>14</sup>

### *Consequences of a Policy*

Leading authorities recommend that employers implement written policies in order to deal effectively with the problem of drug and alcohol abuse. A clear and widely promulgated statement regarding discipline and rehabilitation assists supervisors in administering company rules and encourages employees to seek treatment voluntarily. Typically, a drug and alcohol policy offers confidentiality and an opportunity for rehabilitation to the employee. If the addicted employee elects rehabilitation, an assurance of reinstatement is usually made; and should drug or alcohol abuse be the cause of poor job performance, the employee will be referred to an assistance program. Discipline is threatened for violation of company rules or a failure to complete treatment.<sup>15</sup>

By promulgating a substance abuse policy and encouraging employee reliance on its provisions, the employer may have assumed contractual commitments. The cases analyzed above indicate that an unambiguous expression of intent disseminated to employees, coupled with their reliance on the statements contained in the policy, may well be legally enforceable. The ensuing obligations of the employer would probably include the following: 1) a duty to apprise employees of the policy so that they could avail themselves of its protections prior to discharge for some other offense attributable to substance abuse, such as fighting, theft, poor performance or absenteeism; 2) a period of treatment and rehabilitation as specified in the policy; and 3) all job security provided by the policy. A failure to satisfy those duties could result in liability for breach of contract.

Even if the employer declines to issue a formal drug and alcohol policy, a handbook providing job security in the form of a just cause standard for termination could result in similar requirements. Arbitrators have developed a significant body of precedent regarding discipline for substance abuse and the requisites of "just cause."<sup>16</sup> Generally, arbitrators will require the clear and unambiguous communication of employer rules before an employee can be disciplined for their violation.<sup>17</sup> The employer must afford fair procedural treatment as an incident of discipline, including an opportunity for the employee to present any pertinent evidence prior to punishment.<sup>18</sup> Finally, an employee suffering from drug or alcohol addiction may be entitled to a chance of rehabilitation.<sup>19</sup> Altogether, then, principles of "just cause" may impose duties no less onerous than those contained in a substance abuse policy. To illustrate, in the case of *Renny v. Port Huron Hospital*, 427 Mich. 415, 398 N.W.2d 327, the Michigan Supreme Court developed guidelines dealing with whether the "just cause" provision in an employee handbook had been breached by the employer. According to the court, it is the function of a jury to determine "whether the employee committed the specific misconduct for which he was fired, whether the firing was pretextual, whether the reason for discharge amounted to good cause, or whether the employer was selectively applying the rules. It is not enough that an employer acted in good faith or was not unreasonable."

*Alternative Strategies*

One method by which the employer may avoid contractual duties is simply to dispense with handbooks and drug and alcohol policies in the first instance. But such an extreme measure would be ill advised. Handbooks are a valuable device for communicating information to employees and eliciting their loyalty and support.<sup>20</sup> Without a written substance abuse policy, discipline for drug and alcohol offenses will be arbitrary, punitive, and counter-productive. Capricious and unequal treatment of employees could result in charges of unlawful discrimination on grounds of race or sex.<sup>21</sup> In any case, harsh penalties for individuals suffering from a recognized disease such as alcoholism is hardly consistent with modern concepts of human resource management. Thus, to forego written policies as a means of protecting managerial discretion is not genuinely conducive to sound employee relations.

A second alternative might be to include an explicit statement in the handbook or substance abuse policy that no modification is intended of an employee's at will status. In *Dell v. Montgomery Ward Co.*, 811 F.2d 970 (6th Cir. 1987), the employer had stated in its handbook that certain procedures would be followed in administering discipline, but the manual then continued: "These procedures should not be interpreted as constituting an employment contract, however. Employment with the company is not fixed in length and may be terminated at any time by any employee or by the company with or without cause." Affirming summary judgment for the employer, the federal court of appeals stated that the disclaimer "means what it says and is binding upon the parties." But, while negations of any genuine commitment to explicit protections for employees may be legally enforceable in some jurisdictions, that strategy may also be detrimental to the employer.

In one recent article, the authors assert that disclaimers of an employment contract are of "no significance" because "[t]hey will not overcome valid claims for discharge based on a violation of public policy, intentional tort, oral and implied promises of employment, and even written employment contracts, since, if any contract exists as to an employee handbook or other personnel policy document, that at-will disclaimer is a contract of adhesion."<sup>22</sup> Moreover, the authors continue, a statement confirming that employees are subject to discharge at will erodes employee morale, increases the employer's vulnerability to union organizing campaigns, leads to higher turnover, and defeats the employee's legitimate expectations of fair treatment. They accordingly recommend that the use of a disclaimer of contractual intent be given the most serious consideration.

As the above analysis illustrates, the disadvantages associated with efforts to maintain contractually an at will employment relationship may be much greater than any perceived advantage. Particularly in dealing with substance abuse, the preferable course of action would appear to be the formal development of, and adherence to, fair and consistent policies. While those policies could give rise to contractual commitments, they are quite likely to be cost effective from a human resources standpoint.

### Public Policy Exceptions to the at Will Rule

In the area of tort law, a major incursion on the managerial power to discharge and discipline is based on the notion that a worker "should not be without legal recourse when fired because of the worker's exercise of a legal right or performance of a legal duty."<sup>23</sup> If a discharge violates some public policy of the state, the employer may be liable in tort for damages. Among the potential public policy concerns in substance abuse cases are an employee's privacy interests, his or her due process rights, and protection against discrimination because of handicap.

Initially, it should be observed that "public policy" may derive from a number of sources. For example, statutory provisions may give rise a policy protecting certain employee activities such as filing a workers' compensation claim<sup>24</sup> or serving on a jury,<sup>25</sup> and a discharge for engaging in those activities is unlawful. A second possible source of public policy is found in the provisions of state and federal constitutions. While federal constitutional protections do not extend *per se* to workers in the private sector where no "state action" is present, the leading case of *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983), holds that constitutional guarantees may manifest a public policy warranting judicial recognition. A third source of public policy may be embodied in judicial decisions articulating such general societal standards as the protection of a "commonly recognized sense of public privacy and decency,"<sup>26</sup> or prohibiting an employer from acting in "bad faith" when terminating an employment relationship.<sup>27</sup>

#### Privacy Interests

An employee's legitimate expectation of privacy will be violated by an unreasonable search. In the leading case of *K-Mart Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex. App. 1984), the employee sued her employer for invasion of privacy when the employer cut the employee's lock from her locker and searched the contents of her purse. The Texas appellate court ruled that the employee had a "legitimate expectation of privacy" as evidenced by the use of her own lock. The search was a wrongful invasion of her privacy and was conducted with "malicious disregard for both the [employee's] rights of privacy and the rights of privacy of her co-workers." The employee was awarded \$100,000 in damages.

More recent cases recognizing privacy rights have focused on the question of drug testing. Although the relevant decisions involve public employees protected by the Fourth Amendment, the reasoning and results in those cases may be applicable by analogy to private sector claims for wrongful discharge under the *Novosel* theory. That is, an "unreasonable" search under the Fourth Amendment might also as a matter of public policy violate a private sector employee's privacy rights. One commentator states, for example, that "it is anticipated that the same principles will be used in the private sector to form the basis for privacy claims, primarily using common-law tort theories."<sup>28</sup>

In *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.C. N.J. 1986), the employer conducted surprise urinalysis tests of all city fire fighters. Those who tested positive for illegal drugs were immediately terminated without pay. The federal district court found that the tests were violative of the employees' constitutional rights and ordered reinstatement and injunctive relief.

According to the district judge, the taking of urine constitutes a search within the meaning of the Fourth Amendment, and a mass urinalysis program subjected the fire fighters to "a relatively high degree of bodily intrusion....[Urine] is generally discharged and disposed of under circumstances that warrant a legitimate expectation of privacy." Even though the employer had a managerial interest in eliminating drug abuse among its fire fighting personnel, that interest did not justify the testing of individuals regarding whom the employer had no specific suspicions. The court explained: "[t]he burden was shifted on to each fire fighter to submit to a highly intrusive urine test in order to vindicate his or her innocence. Such an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the Constitution. Although plaintiff's privacy and liberty interests may be diminished on the job, these interests are not extinguished and must be accorded some constitutional protection."

Subsequent cases have elaborated and refined the principles in *Capua*. The Fifth Circuit, to illustrate, held in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), that "compulsory urine testing by the government constitutes a search for purposes of the fourth amendment." To determine whether the testing constituted an unreasonable search, the court weighed the manner and justification for the search against the employee's legitimate expectation of privacy. Because the Customs Service had a strong interest in the integrity of its agents, the testing was conducted in a reasonable manner, and it was limited to employees seeking to transfer to sensitive positions, the appeals court found no fourth amendment violation.

Similarly, in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987), the court permitted limited uniform and random urine tests for designated prison employees.<sup>29</sup> Conceding that urinalysis is a "search", the court nonetheless perceived a strong interest on the part of the employer that "prison guards are not working while under the influence of drugs or alcohol." The prison guards, moreover, were deemed to have a diminished expectation of privacy while employed in the prison environment. Thus, guards having regular contact with prisoners could be tested on a systematically random basis, and other personnel could be tested on the grounds of "reasonable suspicion" of drug or alcohol use based on specific objective facts. Last, with regard to forms required by the employer in which the employee consented to a urinalysis or blood test "when requested by the administration," the court stated that the employer could not insist on the waiver of constitutional rights as a condition of employment.

The U. S. Supreme Court has also recently addressed a public employee's expectation of privacy in the workplace. In *O'Connor v. Ortega*, 55 U.S.L.W. 4405 (March 31, 1987), the Court emphasized that there are "societal expectations of privacy in one's place of work" and rejected the employer's argument to the contrary. However, employers may engage in searches when justified by "the efficient and proper operation of the workplace." Such work-related intrusions need not be based on probable cause; rather "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." Reasonableness is determined in the first instance by whether the search was justified at its inception; if so, the scope and manner of the intrusion must be evaluated in light of the justification. Ordinarily, the Court continued, a search is justified if there are reasonable grounds to believe that it "will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." In those circumstances, no fourth amendment violation occurs.

The relevant precedent establishes that urinalysis is a "search" within the meaning of the fourth amendment. Even so, employees may be required to submit to a search which is reasonable under all the circumstances. Employees do not forego all expectations of privacy in the workplace, but the nature of the particular employment may diminish their reasonable expectations. And in any event, the employer's interest in regulating conduct may outweigh those privacy expectations.

Assuming that the principles developed under the U. S. Constitution will eventually be absorbed into the evolving common law of wrongful discharge, employers may take several precautions to avoid potential liability. The employee's expectation of privacy may be conditioned by means of policies articulating the basis and scope of drug and alcohol testing, as well as searches of work areas. In applications for employment, during annual examinations, or where grounds for individualized suspicion exist, there will be less legitimate expectation of privacy. Even if there is a legitimate expectation of privacy, the employer's interest in some circumstances may be so great that the intrusion is reasonable, as when the work is particularly hazardous or involves substantial responsibility.

### *Due Process Safeguards*

In a line of cases culminating with *Cleveland Board of Education v. Loudermill*, 450 U.S. 532 (1985) the U.S. Supreme Court has determined that an individual cannot be deprived by the state of liberty and property interests in employment without a predetermined hearing. The Court emphasized that even though the governmental employer has an interest in "the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, such interest is outweighed

by the employee's interest in retaining employment and the possibility of an erroneous discharge". Permitting the employee to present his or her version of the facts or any mitigating circumstances is of "obvious value in reaching an accurate decision." The rationale of *Loudemill* has particular relevance in drug and alcohol cases.

The *Capua* decision, discussed above, relied on due process as well as privacy grounds to invalidate the employer's testing program. Because the New Jersey statute protected fire fighters against discharge except for cause, the judge in *Capua* held that they had a property interest in their employment. In addition, the employees had a liberty interest in their individual reputation and good names. Both of those interests would be affected by a discharge for drug use; and the employer's mass urinalysis "was completely lacking in procedural safeguards." The court pointed out: "There were no standards promulgated to govern such department-wide drug tests, nor any provisions made to protect the confidentiality interests of the fire fighters whose personal physiological information unexpectedly came into the hands of government authorities. Defendants precipitously exercised their unbridled discretion exhibiting a total lack of concern for the constitutional right of their employees."<sup>30</sup>

A similar analysis was applied to the discharge of an individual school bus attendant for her alleged use of marijuana. In *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C.), the employer administered a single urine test to the employee and terminated her when the test showed positive for THC metabolites. The federal district court ordered reinstatement on various grounds, including due process. Regarding that issue, it stated: "In this case plaintiff had no hearing before she was terminated and her post-discharge hearing was limited to a written submission....It is enough to establish her procedural due process claim that plaintiff was afforded no hearing before she was discharged. This deprivation violated her constitutional right to procedural due process and affords a second ground for decision in her favor."<sup>31</sup>

Where state action exists and the employee possesses a liberty or property interest, the employee must as a constitutional matter be afforded a hearing prior to discharge. Arbitrators have likewise recognized procedural due process as an integral component of "just cause."<sup>32</sup> For private sector employees not covered by a collective bargaining agreement, the right to a pre-termination hearing may well be recognized in the near future as an adjunct of "public policy" under the *Novosel* theory of wrongful discharge. The U.S. Supreme Court has described liberty and property rights as "broad and majestic terms" which are among the "great constitutional concepts,"<sup>33</sup> and those rights are particularly implicated in disciplinary situations involving drug and alcohol.

Even if private sector employees were deemed not to have property rights in employment, discharge for alcoholism or drug addiction stigmatizes the employee. Tests are sufficiently unreliable that the employee should be afforded an opportunity to re-take the test or to explain the results.<sup>34</sup> Moreover, because chemical dependence is a disease, the fact of addiction might be offered in mitigation by the employee

if he or she is given a hearing. Accordingly, procedural due process arguably constitutes a "compelling societal interest" on a level with the political expression protected in *Novosel*.<sup>35</sup>

### Protection of the Handicapped as a Public Policy

Provisions of both federal and state law pertaining to the handicapped may be pertinent to an employer's drug and alcohol policy. The federal Rehabilitation Act specifically recognizes alcoholism and drug addiction as a handicap.<sup>36</sup> By its terms, the Act applies to employers involved in a "program or activity receiving Federal financial assistance," and covered employers may be obliged to make "reasonable accommodation" for employees whose dependence does not prevent them from performing the job or who do not pose a threat to safety.<sup>37</sup> Many states have similar laws prohibiting discrimination on the basis of handicap.<sup>38</sup>

Courts have held that a public policy exception to employment at will may be premised on statutes prohibiting various forms of discrimination, even if those statutes themselves provide a remedy for the employer's wrongful conduct.<sup>39</sup> On that basis, it has been argued that the discharge of an alcoholic employee in The Montana Supreme Court, for example, permitted a handicapped worker to claim punitive damages in a suit against his former employer where Montana law prohibited discrimination because of handicap.<sup>40</sup> The absence of a legitimate, job-related justification provides viable grounds for a wrongful termination suit.<sup>41</sup> Under such a theory, common law liability for discharge of employees who are alcoholics or drug addicts would depend on a balancing of the employer's managerial concerns, including "the capabilities of the individual to perform the job, safety, and undue hardship caused by accommodation."<sup>42</sup>

There are, at the same time, a number of recent decisions which preclude common law actions for wrongful discharge if an adequate remedy is provided by statute. As one federal district court stated: "If the employee already has some protection, either because of an employment contract or through another cause of action, the tort [of wrongful discharge] will not be recognized."<sup>43</sup> That principle has been applied specifically to claims involving alleged discrimination because of the handicap of alcoholism. In *Northrup v. Farmland Industries, Inc.*, 372 N.W. 193 (Iowa 1985), the Iowa Supreme Court interpreted its statute to preclude the wrongful discharge claim of a discharged alcoholic. The court agreed that alcoholism was a disability within the protection of the act, but it ruled that no suit could be brought without the consent of the state administrative agency. Consequently, if the state offers an administrative avenue through which the chemically dependent employee could challenge a discriminatory discharge, the employee's common law action may be dismissed.<sup>44</sup>

*Protection against Defamation*

Similar to the "public policy" decisions are a number of cases dealing with the employer's common law liability for false statements regarding drug or alcohol abuse. In *O'Brien v. Papa Gino's*, 780 F.2d 1067 (1st Cir. 1986), an employee was allegedly discharged because of his drug use. He sued his former employer claiming that the employer's insistence on a polygraph test violated his right of privacy and the employer's accusation of drug use was defamatory. A jury awarded \$448,200 in damages, and the First Circuit upheld the award on both grounds.

With respect to the defamation claim, the evidence supported the jury's finding that the employee was discharged because of a "personal grudge" and not solely because of drug abuse; thus, the stated reason for the discharge was false. Further, the employer's defense of conditional privilege based on the employment relationship was defeated by the employer's malicious and purposeful misrepresentation concerning plaintiff's use of drugs.

A similar result was reached in *Houston Belt & Railway Co. v. Wherry*, 548 S.W.2d 743 (Tex. Appl. 1977), where the worker was discharged after a screening test showed positive for methadone. The employer prepared a report indicating that the plaintiff was an unsafe employee because of his drug use. A jury found the employer's statements to be false and made in bad faith. Affirming an award of \$150,000 actual and \$50,000 punitive damages, the Texas appellate court concluded that there was sufficient evidence to support the jury's determination.

Employers, accordingly, must exercise caution in investigating and disseminating accusations of drug or alcohol abuse. Defamatory statements in connection with a discipline or discharge which are false and published maliciously or in bad faith may result in tort liability. Moreover, if the employer's conduct toward the employee is extreme and outrageous, and either intentionally or recklessly causes severe emotional distress to the employee, liability may result.<sup>45</sup> At the same time, an employer does not defame employees merely by undertaking an investigation into drug use, even if its suspicion of individual employees becomes known throughout the plant. An inquiry conducted in "routine and proper ways" without malice on the employer's part was sufficient in *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985) to defeat the defamation claims of two employees.

### Conclusion

Alcohol and drugs pose a serious threat to the safety and efficient operation of a business enterprise and the health of its employees. An effective program of control requires the threat of disciplinary sanctions; however, evolving principles of common law have rendered discharge an extremely problematical course of action. Through written policies, the employer may incur contractual obligations toward non-unionized, at will employees. Similarly, expanding bases of tort liability may protect

employees from intrusions of privacy, procedural unfairness, discrimination because of the handicap of alcoholism or drug addiction, and defamation.

The most efficacious response by employers is to implement formal procedures dealing with substance abuse. Those procedures should address clearly and specifically the respective areas of potential tort liability. A sound policy, for example, would set forth circumstances in which drug testing or other searches would be appropriate and dispel any expectation of privacy in those instances. The opportunity for a hearing should be given an employee prior to discipline. If the employee admitted his or her alcoholism or addiction, then an effort at reasonable accommodation to the handicap would be advisable. Any statements concerning the employee's condition should be accurate, based on reliable information, and not used with malicious intent.

Quite obviously, common law developments have circumscribed the employer's discretion to discipline employees. But a humane and rationale system for identifying and treating employees who suffer from the illness of alcoholism or addiction will significantly alleviate the threat of litigation. It may also assist in maintaining a loyal, stable and productive work force, which is an objective in the interest of all concerned.

#### NOTES

<sup>1</sup>"Battling the Enemy Within," *Time*, March 17, 1986, p. 53.

<sup>2</sup>Helen Axel, "Drugs of Abuse: Public Attitudes, Politics and Business," in *Corporate Strategies for Controlling Substance Abuse* (Conference Board Report No. 883, 1986), p.10.

<sup>3</sup>*Spirits and Demons at Work: Alcohol and other Drugs on the Job* (Ithaca, NY: ILR Press, 197x).

<sup>4</sup>See generally, Tia Denenberg and R. S. Denenberg, *Arbitration of Drug and Alcohol Disputes* (Washington, DC: BNA, 1983).

<sup>5</sup>Title VII of the federal Civil Rights Act of 1964, for example, prohibits employment discrimination because of race, color, religion, sex, or national origin. 42 U.S.C. 2000e *et seq.*

<sup>6</sup>An excellent general study of the subject is William Holloway, *Employment Termination: Rights and Remedies* (Washington, DC: BNA 1985).

<sup>7</sup>See Theodore Olsen, "Wrongful Discharge Claims Raised by At Will Employees: A New Legal Concern for Employers," 32 *Labor Law Journal* 265 (May 1981).

<sup>8</sup>Ideas and Trends in Personnel," 103 *CCH Human Resources Management* 176 (Nov. 4, 1985). See also *CCH Human Resources Management--Employment Relations* §446 *et seq.* (state-by-state listing of developments in employment at will); Kurt Decker, "Reinstatement: A Remedy for an Employer's Violation of a Handbook or Written Employment Policy," 3 *Hofstra Labor Law J.* 1 (1985); Note, "Employee Handbooks and Employment-at-Will Contracts," 1985 *Duke Law J.* 196.

<sup>9</sup>491 A.2d at 1266. See also *Leithead v. American Colloid Co.*, 721 P.2d 1059 (Wyo. 1986).

<sup>10</sup>722 P.2d at 253. Unilateral employment contracts are discussed at length in note, *Duke Law J.* (1985), *supra*, note 8.

<sup>11</sup>722 P.2d 254. For other cases discussing the factual context in which an employment manual may result in a binding employment contracts, see *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876 (Minn. 1986); *Continental Airlines v. Keenan*, 731 P.2d 708 (Colo. 1987).

<sup>12</sup>*Kinoshita v. Canadian Pacific Airlines*, 724 P.2d 110 (Haw. 1986).

<sup>13</sup>*Id.* at 116-117 (emphasis in original).

<sup>14</sup>For an instructive comparison, See *Spero v. Lockwood, Inc.* 111 Idaho 74, 721 P.2d 174 (1986) and *Watson v. Idaho Falls Consolidated Hospitals*, 111 Idaho 44, 720 P.2d 532 (1986). In *Spero*, the Idaho Supreme Court affirmed a district court finding that the personnel manual did not constitute a contractual commitment. In *Watson*, the court affirmed a jury verdict in favor of the employee; the personnel manual was intended by the employer to be a contract and was relied on as such by the employees.

<sup>15</sup>See *Conference Board Report*, *supra* at note 2, at 32-33 (policy of a computer products manufacturer). In Executive Order 12564 (Sept. 15, 1986), President Reagan directed that federal agencies "shall initiate action to discipline any employee who is found to use illegal drugs," unless the employee voluntarily identifies himself as a user or obtains counseling through an assistance program and thereafter refrains from drug use.(5(b))

<sup>16</sup>Roger Abrams and Dennis Nolan, "A Theory of Just Cause," 1985 *Duke Law J.* 504; Denenberg and Denenberg, *supra* at note 4.

<sup>17</sup>Denenberg, *supra* note 4.

<sup>18</sup>See Raymond Hogler, "Employee Discipline and Due Process Rights: Is There an Appropriate Remedy?" 33 *Labor Law J.* 783 (Dec. 1982).

<sup>19</sup>See, e.g., *Navistar International Corp.*, 88 LA 179 (Archer, 1987). The arbitrator ruled that the company improperly discharged an employee suffering from alcoholism when it failed to offer her a "last chance" at rehabilitation consistent with its announced program.

<sup>20</sup>See, e.g., Note *Duke Law J.* (1985), *supra* note 8.

<sup>21</sup>If a woman received stricter punishment for an alcohol-related offense that did a man in similar circumstances, for example, the employer could be required under Title VII to "articulate some legitimate, nondiscriminatory reason" for the employment decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

<sup>22</sup>Julius Steiner and Allan Dabrow, "The Questionable Value of the Inclusion of Language Confirming Employment at-Will Status in Company Personnel Documents," 37 *Labor Law Journal* 639, 642 (Sept. 1986).

<sup>23</sup>Theodore Olsen, "The Public Policies Against Public Policy Wrongful Discharge Claims Premised on State and Federal Fair Employment Statutes," 62 *Duquesne U. Law Rev.* 447, 449 (1985).

<sup>24</sup>e.g., *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

<sup>25</sup>e.g., *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

<sup>26</sup>e.g., *Wagneseller v. Scottsdale Memorial Hospital*, 147 Ariz. 730, 710 P.2d 1025, 1034-35 (1985).

<sup>27</sup>e.g., *Ponsock v. K-Mart, Inc.*, 732 P.2d 1364 (Wev. 1987).

<sup>28</sup>Barry Hartstein, "Drug Testing in the Work Place: A Primer for Employers," 12 *Employee Relations Law Journal* 577, 589 (1986).

<sup>29</sup>For other recent decisions, see *Rushton v. Nebraska Public Power District*, 653 F.Supp. 1510 (D. Neb. 1987), upholding testing in a variety of instances, including random urinalysis, for workers in a nuclear power plant, and *National Association of Air Traffic Specialists v. Dole*, 2 IER cases (BNA) 68 (D. Alaska 1987), upholding routine urine testing for flight service specialists during their annual physical examination.

<sup>30</sup>*Capua*, 543 F.Supp. at 1521.

<sup>31</sup>628 F.Supp. at 1507. See also *Lowom v. City of Chattanooga*, 647 F.Supp. 875 (E.D.Tenn.1987).

<sup>32</sup>A number of cases are analyzed in Hogler, *supra* note 18.

<sup>33</sup>*Board of Regents v. Roth*, 408 U.S. 546, 571 (1972).

<sup>34</sup>See *Air Traffic Specialists*, *supra* note 29 at 87-88 for a discussion of procedures which satisfy due process standards.

<sup>35</sup>721 F.2d at 899. See also *Wagner v. City of Globe*, *supra* 14, 722 P.2d at 258. ("No exhaustive canvass of authority is necessary to support the proposition that there is no public policy more important or fundamental than the one favoring the effective protection of the lives, liberty and property of our people.")

<sup>36</sup>29 U.S.C. 790-794 (1982).

<sup>37</sup>29 U.S.C. 706(7)(B) (1982); *Walker v. Weinberger*, 600 F.Supp. 757 (1985).

<sup>38</sup>e.g., Pa. Stat. Ann. tit. 43, 951 *et seq.* (Purdon Supp. 1982).

<sup>39</sup>For an analysis, See Olsen, *supra* note 23, at 454-59.

<sup>40</sup>*Owens v. Parker Drilling Co.*, 676 P.2d 162 (Mont. 1984).

<sup>41</sup>Roger Sullivan, "Balancing the Rights of the Alcoholic Employee with the Legitimate Concerns of the Employer: Reasonable Accommodation vs. Undue Hardship," 46 *Montana L. Rev.* 401 (1985).

<sup>42</sup>*Id.* at 418.

<sup>43</sup>*Salazar v. Furr's Inc.*, 629 F.Supp. 1403 (D.N.M. 1986).

<sup>44</sup>*c.f.* also, *Krushinski v. Roadway Express, Inc.*, 627 F.Supp. 934 (M.D. Pa. 1985); *Horabaczewsky v. Spider Staging Sales Co.*, 621 F.Supp. 749 (D.C. Ill. 1985); *Melley v. Gillette Corp.* 19 Mass. App. 511, 475 N.E.2d 1227 (1985), *aff'd*, 397 Mass. 1004, 491 N.E.2d 252 (1986).

<sup>45</sup>Compare *Northrup*, *supra*, 372 N.W.193, with *Ford v. Revlon, Inc.* 734 P.2d 580 (Ariz. 1987). The Iowa Supreme Court said that the discharge of a plant supervi-

sor for alcoholism, without more, "does not exceed 'all possible bounds of decency'" and is not "outrageous." The Arizona decision affirmed a jury verdict of \$100,000 in punitive damages against the corporate employer arising out of a supervisor's sexual harassment of the plaintiff.

## Arbitration Standards in Drug Discharge Cases

*Pat Wynns*

### Introduction

Discharge cases involving drug-related misconduct are a relatively new phenomenon and, consequently, until recently, little attention has been given to the standards arbitrators have used in deciding them.<sup>1</sup> To provide insight into the prevailing standards in drug discharge cases, this article provides a detailed analysis of forty post-1960 drug discharge and suspension cases reported in the Bureau of National Affairs' Labor Arbitration Reports.

Drug discharges fall into two distinct groups: (1) discharges for drug-related misconduct on company premises and (2) discharges and suspensions for off-premises, off-duty drug-related offenses that result in arrests, indictments, or convictions. Since the problems of proof and other factors affecting arbitrators' decisions differ in the two classes of cases, each issue will be discussed as it relates to both on- and off-premises cases.

### Problems of Proof in Drug Cases

#### *On Company Premises*

Sufficiency of proof is of foremost importance in drug discharge cases. Before a discharge will be granted, the employer must prove with sufficient evidence that the employee possessed, used, sold, or was under the influence of drugs on company premises. Discharges for drug-related misconduct present questions of proof not present in the majority of discharge cases. Where the discharge is prompted by criminal conduct, as in drug-related cases, arbitrators differ about the degree of proof required to sustain the company's action.

In most discharge cases, arbitrators use a "preponderance of evidence" standard. In cases involving conduct that violates the criminal code, it has been suggested that arbitrators should hold employers to a "beyond a reasonable doubt" standard of proof required in criminal proceedings. A close reading of drug discharge cases indicates, however, that the beyond a reasonable doubt standard was not widely used; in those drug cases where it was (two), the arbitrator did not explain why it was required.<sup>2</sup>

In a few cases, the arbitrator rejected the notion that the employer had to prove its case beyond a reasonable doubt, claiming that such a standard was inappro-

This article originally appeared in *The Arbitration Journal* 34(1979). Reprinted with permission.

appropriate in a noncriminal proceeding.<sup>3</sup> The arbitrator in *General Portland, Inc.*<sup>4</sup> suggested that the procedural difference in an arbitration hearing and a criminal proceeding dictated a need for different standards of proof. In a criminal case, the jury bases its decision on the guilt or innocence of the defendant only on the evidence the defense and prosecution are allowed to offer into evidence. To find the defendant guilty, the jury must find that the evidence supports a guilty verdict beyond a reasonable doubt--that is, "a fair doubt, based upon reason and common sense, and growing out of the testimony in the case."<sup>5</sup> Since the rules of evidence are not applied as strictly in arbitration cases, most of the available evidence is heard and, therefore, the burden of proof need not be as strict. In rejecting the higher standard, however, the arbitrator concluded that the employer should prove guilt beyond a mere preponderance of the evidence and, thus, required clear and convincing proof of the grievant's misconduct.

The arbitrators in *TRW, Inc.* and *Mississippi River Grain Elevator*<sup>6</sup> also called for that standard. In some instances, arbitrators have relied on a preponderance of the evidence standard,<sup>7</sup> while in still others, it is not clear what standard of proof was required. For example, arbitrators have spoken about the need for the employer to establish persuasive and convincing evidence or overwhelming evidence.<sup>8</sup>

The lack of consistency in the standards applied makes it impossible to say with any degree of certainty that a majority of arbitrators abide by a particular one. Rather, as noted by an arbitrator in 1977 case, "it is more instructive to look to the evidence and the manner in which the evidence is weighed. . . ."<sup>9</sup>

In examining the evidence, the arbitrator's first task is to determine the relative credibility of the grievant and the witnesses for the company and the union.<sup>10</sup> The circumstances in some cases are such that sheer logic obviates any real credibility problems. One of the grievants (Grievant Q) in *Jeep Corporation*,<sup>11</sup> for example, testified that he passed a knit cap to his fellow grievant (Grievant E), rather than the package of marijuana that the Guard Captain asserted he saw, and soon thereafter retrieved from Grievant E. The arbitrator quickly dismissed Grievant Q's story saying that "the phantom cap, seen by no one, comes unravelled when the possibility of its existence is measured to fit circumstances of this total incident." Similarly, in *Howmet Corporation*,<sup>12</sup> the grievants told such an unlikely story that the arbitrator not only accepted the foreman's testimony, but commented that the grievant's testimony as to what took place was "an insult to anyone's intelligence."

Credibility is not always so easily discernible, however, and often the arbitrator will examine the motives that might have led the parties to fabricate. In *Stansteel Corp.*,<sup>13</sup> for example, the conflict in the testimony was such that only one of the two--the grievant or an eyewitness--could be telling the truth. Since the grievant had an obvious incentive for lying and could suggest no reason why the informant would make a false and malicious accusation, the arbitrator concluded that the grievant's testimony must be discredited.

In most cases, however, a more thorough appraisal of the parties' integrity is necessary. As suggested in *Pepsi-Cola Bottlers*, the arbitrator should:

*carefully scrutinize, analyze and study the appearance of each witness upon the stand, his manner of testifying, the reasonableness of his testimony, the opportunity he had to see, hear and know the things about which he testified, his frankness, interest and bias, if any, together with all the facts and circumstances surrounding his testimony.*<sup>14</sup>

The arbitrator's implementation of these guidelines in this case is instructive. The night supervisor testified that he observed three men inside a compactor and that, upon investigation, he found them smoking marijuana. The grievants not only denied smoking marijuana, but denied every other aspect of the supervisor's testimony. In finding the supervisor's testimony credible the arbitrator noted that (1) he "testified in a frank, straightforward manner"; (2) he had no bias or animosity toward the grievants that would motivate him to discharge them; (3) his testimony was consistent, reasonable, and logical; and (4) his demeanor and manner of testifying left no doubt as to the truthfulness of his testimony.

Even where the informant's credibility is established, the company still may be unable to establish sufficient proof if there are no other witnesses or corroborating evidence. For example, in *General Portland, Inc.*,<sup>15</sup> the problem was not with an undercover agent's credibility or integrity, but rather with the fact that the company had offered no evidence other than the agent's testimony to counter the five grievants' emphatic denials of possession of marijuana.<sup>16</sup> Thus, the arbitrator concluded that without corroborating evidence, the agent's testimony did not provide the clear and convincing proof needed to sustain the discharge. In reaching this conclusion, the arbitrator suggested that the company could have corroborated the agent's testimony by the use of hidden cameras, recording devices, or marked money. In addition, the arbitrator suggested that the testimony would have been corroborated if a supervisor had testified that the grievants' work habits indicated they had been smoking or that he had found a partially smoked marijuana cigarette in the work area. The strongest corroborating evidence the arbitrator suggested was proof that marijuana had been found either on any of the grievants' persons or in their lockers, lunch pails, or automobiles.

In *S. W. Shattuck Chemical Co.*,<sup>17</sup> the arbitrator found the manager's testimony credible and thus concluded that marijuana was present and being burned on the day in question. It was not, however, until after the arbitrator received corroborating evidence that he was willing to go one step further and hold that the grievants actually smoked the marijuana.<sup>18</sup> The informant's credibility was also established in *Inland Steel Container Co.*,<sup>19</sup> but the arbitrator refused to draw the necessary inferences to find the grievants guilty, holding instead that the company had failed to establish the necessary evidence.

Although the officer's credibility was never clearly established in *Babcock & Wilcox Co.*,<sup>20</sup> the case demonstrates that in drug discharge cases, arbitrators may be strict in limiting the type of evidence they will accept as sufficient to establish guilt. In that case, the arbitrator concluded that a laboratory report received in evidence was insufficient to corroborate the officer's testimony that the disputed substance was marijuana. The arbitrator's primary objection to the sufficiency of the report was the failure to call the two lab technicians who identified the substance to testify, even though the laboratory was only located 15 miles away.

Although arbitrators may use different labels for the standard of proof they require, they clearly are cognizant of the serious impact that a discharge has on an employee's life. Consequently, it seems that most arbitrators adhere to the view expressed in *New Jersey Bell Telephone Co.*<sup>21</sup> and do not uphold the discharge if they are not satisfied that the alleged misconduct was established by "competent evidence, as distinguished from mere suspicion, assumption and conjecture."<sup>22</sup>

### *Off Company Premises*

If employers discharge employees because they are arrested, indicted,<sup>23</sup> or convicted for drug-related conduct that did not occur on company property, arbitrators generally are not bound by the same stringent standards of proof required for offenses on company premises. When an incident occurs at the company, the company must first prove the possession, use, sale, or influence of narcotics on its premises. When an incident resulting in an arrest or conviction for drug offenses takes place away from the company, proof of that offense does not automatically justify a discharge, for it is well established that what employees do on their own time and off the employer's premises are generally not the employer's concern.<sup>24</sup> To sustain a discharge for drug-related conduct off company premises, arbitrators usually require the employer to show that the employee's conduct "has created an adverse effect upon [the] employer-employee relationship, or that the actions have adversely affected the employer's business, or when the offense gives rise to a legitimate fear for the safety of their employees or of property. . . ."<sup>25</sup>

Although it is difficult to discern any hard and fast rules regarding sufficiency of proof of adverse effects, it is clear that in the case of the use of hard drugs or the sale of soft drugs, employers do not have to prove the existence of a drug problem on company premises before the arbitrator will find that a legitimate fear of potential drug abuse justified the discharge.<sup>26</sup> Significantly, when the arbitrator accepted the company's contention that the discharge was required to protect other employees or to prevent drug problems on company premises, the employee had either used or sold hard drugs or had been arrested or convicted for selling marijuana. Some arbitrators note that drug dealers are motivated by the prospect of high profit and undoubtedly would not reject opportunities to expand their market or broaden their product line. Since drug dealers are disinclined to sell to strangers, arbitrators reason that fellow

employees would be a likely target for sale opportunities.<sup>27</sup> Thus, even without proof of a drug problem on the premises, arbitrators have sustained the discharge so as to enable the employer "to prevent the creation of a drug problem among its employees or to combat effectively an existing problem that may have arisen."<sup>28</sup>

In *Arco-Polymers, Inc.*,<sup>29</sup> the grievant was arrested for possession of heroin and the arbitrator could only infer from the facts that the grievant intended to sell the drug. Moreover, the company did not prove that a drug problem existed among company employees. Nonetheless, the arbitrator sustained the discharge, finding that the arrest apprised the company of the possibility of a drug problem.

In a nonsale case, *Chicago Pneumatic Tool Co.*,<sup>30</sup> the employee was convicted of attempting to obtain cocaine by fraud and deceit, and subsequent medical tests indicated that the employee was an addict. The arbitrator sustained the discharge on self-protection grounds, concluding that at some point the employee's craving could cause serious safety hazards to fellow employees.

Arbitrators reinstated employees in three cases involving the sale of marijuana. In two arrest cases, *Michigan Power Co.* and *Lucky Stores, Inc.*,<sup>31</sup> the arbitrators reasoned that when the court dismissed the charges against the grievants, the company no longer could justify the discharge on self-protection grounds. The arbitrator in *Intalco Aluminum Corp.*<sup>32</sup> reinstated the grievant even though he had been convicted of unlawful delivery of marijuana, because the company failed to produce "hard, specific, and compelling evidence" to show how the conviction adversely affected the company. Although the arbitrators in the other cases accepted the same arguments on the possible adverse effects, the arbitrator in this case found the arguments to be speculative or hypothetical. It is significant, however, that he felt a need to fashion a conditional reinstatement that would allow the company to protect itself from future drug-related activity.

The cases involving arrests or convictions for possession of soft drugs turned not so much on whether the discharge was justified as a protective or preventive measure, but on whether the company could show that the off-duty, off-premises conduct directly harmed the employer's business.<sup>33</sup> Specifically, arbitrators required employers to show that the grievants' conduct (1) harmed the company's reputation or product; (2) prevented the grievants from performing their duties or appearing at work; or (3) led to fellow employees' refusal, reluctance, or inability to work with them. In applying these standards to discharges based on possession outside company premises, arbitrators required specific evidence of adverse effects.<sup>34</sup> It was not enough for the company to suggest possible adverse implications of the arrest or conviction; rather, it had to produce evidence to support the implications.<sup>35</sup> It is significant that the conviction cases in which the arbitrator failed to find proof, the convicted grievants had been put on probation.<sup>36</sup>

The difficulty in these cases is that employers may have to demonstrate adverse effects in different degrees of specificity depending on the circumstances of the case. It is fair to conclude, for example, that employers only have to prove a

probable adverse effect if the grievant's conviction or arrest was for the possession or sale of hard drugs or the sale of soft drugs. Where the criminal offense was simply possession of soft drugs, however, arbitrators tend to require specific evidence.

### Factors Affecting Decisions

In the case of drug-related misconduct on company premises, once arbitrators have decided who is telling the truth and whether the company has established with sufficient proof that the grievant possessed, smoked, sold, or was under the influence of drugs during working hours, they must then decide if the misconduct justified a discharge. This determination necessarily depends on the circumstances of the particular case. The factors that arbitrators must often consider are (1) applicable plant rules, their availability to employees, and the company's previous history of enforcement, (2) the employee's past work and disciplinary record; (3) adverse effects the misconduct had on the company; and the severity of the offense.

#### *Plant Rules*

In the majority of discharge cases involving drugs on company premises arbitrators sustained the discharge if the grievant's conduct violated a published company rule.<sup>37</sup> The arbitrator sympathized with the grievant's right in at least two of these cases, but, nonetheless felt compelled to enforce the plant rules.<sup>38</sup> Arbitrators especially were inclined to uphold the discharge if the employer had consistently discharged employees who violated the company rule prohibiting drugs.<sup>39</sup> Even if the employer had no published rule, a few arbitrators have read in a drug prohibition as a normal condition of employment, reasoning that because drug-related misconduct is a criminal offense, the employee should know the seriousness of such conduct and reasonably should expect discharge.<sup>40</sup> In the two reported cases in which the arbitrator reinstated the grievant even though a company rule prohibited the grievant's conduct, the arbitrator found mitigating circumstances. In the most recent of those, AMF, Inc.,<sup>41</sup> the company proved to the arbitrator's satisfaction that the grievant had sold marijuana on company premises in violation of company rules. The arbitrator believed, however, that the grievant had learned his lesson, and because of his youth felt that he should be given another chance.

In *Great Lakes Steel Corp.*,<sup>42</sup> the grievant was enrolled in a methadone maintenance program and was discharged for violating the company rule prohibiting employees from being under the influence of drugs on company premises. The arbitrator reinstated the grievant, finding that the methadone had no adverse effects on the grievant and did not interfere with the effective performance of his tasks as a mill janitor.

Significantly, in at least two cases in which the arbitrator reinstated the grievant, the arbitrator placed considerable emphasis on the absence of a plant rule.

In *Southwestern Bell Telephone Co.*,<sup>43</sup> the company contended that possession of illegal drugs was such a serious offense that a company rule was not necessary to justify the discharge. The arbitrator, on the other hand, believed that "the absence of applicable definite published rules to indicate what penalty might be imposed for a first offense of illegal conduct," and the fact that the company had given consideration in past discipline matters to extenuating and mitigating circumstances" necessitated a finding that the discharge was unreasonable.

In *Aber Corp.*,<sup>44</sup> the company had no rules prohibiting the possession or use of drugs, but did have rules providing that anyone guilty of possessing or drinking any alcoholic beverage on company property would, for the first offense, be given a warning and three-day suspension. The arbitrator believed that it was unfair to expect the employee to know that the company would impose a stronger penalty for drug offenses than for alcohol offenses.

Discharges for off-duty, off-premises conduct often will be based on a company rule authorizing the employer to discharge an employee who is convicted of a crime, or who engages in unlawful or immoral conduct.<sup>45</sup> In a number of cases, the rule incorporated the basic precept that an employee's off-premises conduct did not justify a discharge unless the conduct adversely affected the company.<sup>46</sup> In those cases, the employer necessarily had to show adverse effects to comply with the rule; thus, the arbitrator did not discuss whether proof of adverse effects would have been necessary if the requirement had not been part of the rule, as was the situation in some other cases. The arbitrators in *Port Terminal and National Floor*<sup>47</sup> required no evidence of adverse effects to sustain the discharges. In *National Floor*, the arbitrator recognized that the general rule required the company to show adverse effects, but reasoned that a company rule, also a part of the contract, negated that requirement.

The arbitrator in *Kentile Floors*,<sup>48</sup> on the other hand, not only refused to sustain the discharge solely because a company rule authorized such discharge, but also found the rule arbitrary and unreasonable. The arbitrator reasoned that an "a priori determination that every employee convicted of a crime should automatically be discharged" was unreasonable because it failed "to take into account the relationship between the crime and the employment situation."

On the basis of these two decisions, it is difficult to draw conclusions as to how arbitrators, in general, view "a priori determinations." In reviewing other discharges based on convictions, the arbitrator in *Kentile*, however, made a compelling argument for requiring proof of adverse effect even if a company rule authorized discharges upon conviction.<sup>49</sup> For example, he noted that where the employee was convicted of forcible rape, as in *McDonnell Douglas Corp.*, or of narcotics addiction as in *Chicago Pneumatic Tool Co.*,<sup>50</sup> the arbitrator had a basis for believing the grievant's return to work might adversely affect other employees.<sup>51</sup> Thus, unless the employer proved otherwise, there was no basis for assuming that possession of marijuana off company premises would adversely affect the company.

*Work Record*

In a few cases involving misconduct on company premises, the employee's work record was discussed either as a mitigating factor, or as support for sustaining the discharge.

In reinstating the grievant in *Southwestern Bell Telephone Co.*,<sup>52</sup> for example, the arbitrator considered, among other things, the employee's satisfactory and clean work record. In *United States Steel Corp.*,<sup>53</sup> on the other hand, the arbitrator used the employee's prior disciplinary record to support his decision to sustain the discharge--the employee had been suspended four times within the seven months prior to his discharge. And although the arbitrator in *Pacific Telephone & Telegraph Co.*<sup>54</sup> did not accord significant weight to the employee's record in sustaining the discharge, the arbitrator did note that the employee's record included two suspensions and numerous subscriber complaints about his conduct.

In determining whether the use of marijuana affected the safety of the grievant and other employees, the arbitrator in *MacNaughton-Brooks, Inc.*<sup>55</sup> placed considerable weight on the fact that the grievant performed his work satisfactorily, had a clean record except for one warning for lateness, and had never been given a disciplinary layoff.

In cases involving off-premises, off-duty conduct, the determinative factor is whether the conduct adversely affects the company. In a few cases, however, the arbitrator placed significant weight on the employee's record. In *Aeromotive Metal Products, Inc.*,<sup>56</sup> the company failed to show that the grievant's conviction had a direct and harmful effect on the company. Nevertheless, the arbitrator sustained the discharge because of the employee's cumulative misconduct.

The employee in *American Welding & Mfg. Co.*<sup>57</sup> was discharged not because of his conviction, but because of his absence from work while in jail. The arbitrator considered the grievant's long and satisfactory service of 21 years to be a "highly significant factor" in concluding that the absences did not warrant the severe penalty of discharge.

The impact of an employee's work record on an arbitrator's decision is illustrated in *Intalco Aluminum Corp.*<sup>58</sup> The company did not prove that the grievant's conviction adversely affected the company, and thus failed to meet the burden established by the contract. Hence, the arbitrator had to reinstate the grievant. In doing so, however, the arbitrator considered the employee's past record of seven unexcused absences, seven unexcused tardies, and two neglects of duty, and fashioned a conditional reinstatement giving the employer the right to discharge at will on the occurrence of specified acts.

### *Adverse Effects*

In the majority of discharge cases involving drug-related conduct on company premises, adverse effects on the employer's business were not discussed. In the few cases where they were, they were but one of many factors considered in determining the validity of the discharge. In *Pepsi-Cola Bottlers*,<sup>59</sup> for example, adverse effects were discussed only in the context of concluding that the grievant's supervisor had no ill motive for discharging the grievant. Rather, he discharged the grievant because the grievant's conduct violated a company policy as well as state laws, and, in addition, created a risk of harm to other company employees and to company property. As part of his regular duties, the grievant drove vehicles on company premises, and the arbitrator reasoned that the supervisor was justified in believing that smoking marijuana would impair the grievant's ability to drive.

In *Great Lakes Steel Corporation*,<sup>60</sup> the arbitrator contrasted the effects of methadone to those of heroin and concluded that while a true addict may represent a "clear threat to the security of the plant and the work force," a methadone user does not. And in *Mississippi River Grain Elevator*,<sup>61</sup> the arbitrator found the employer's large grain elevator to be hazardous, and thus concluded that an employee under the influence of marijuana could be dangerous to himself and others. In addition, the arbitrator reasoned that because vessels engaged in foreign commerce were constantly at the elevator, a narcotics problem on company premises conceivably could involve an illicit smuggling operation.

The limited number of on-premises cases in which adverse effects are discussed should not be construed to mean that arbitrators do not consider effects on the company in fashioning their award. As was demonstrated in the discussion of off-premises, off-duty cases, adverse effects can be a significant factor in the arbitrators' decision. Moreover, Edward Levin and Tia Denenberg report in a 1976 article that 84 percent of the eighty-seven arbitrators responding to their questionnaire said that they would be influenced by the nature of the business activity involved, and 63 percent thought the effect that drug misconduct had on job performance was crucial.<sup>62</sup>

### *Severity of Misconduct*

**Hard vs. Soft Drugs** Significantly, none of the reported discharges for drug-related conduct on company premises involved hard drugs.<sup>63</sup> If they had been involved, certain arbitrators indicated that their decisions might have been different. In *Great Lakes Steel Corp.*,<sup>64</sup> for example, the arbitrator reinstated a company janitor who had been discharged for being under the influence of methadone on company premises. Yet, the arbitrator stated unequivocally that management would have been within its rights to discharge a heroin addict. In explaining why a true addict is unfit for employment, the arbitrator stated:

*He requires heroin at least once a day and often more than that. His reaction to the drug initially is euphoria, then drowsiness, then a period of relative "normality," and finally withdrawal symptoms. Because heroin is not long-lasting, a fix may give an addict no more than a six- to eight-hour respite. He then is hungry for the next fix. This endless craving for heroin dominates his day, his every thought. Most experts seem to agree that addicts in such a state are functionally disabled. The addict may be able to get to the plant. But he can hardly concentrate on his work and his responsibilities to his fellow employees if he is euphoric, drowsy or suffering from withdrawal pain. He is, at such times, a menace to himself and others. Moreover, he represents a clear threat to the security of the plant and the work force. I take notice of the fact that addicts frequently steal or sell narcotics to others in order to support their own drug habit.<sup>65</sup>*

The arbitrator found, on the other hand, that methadone causes no adverse effects once the intake is stabilized and the body has developed a tolerance for it. Moreover, the methadone user does not have withdrawal symptoms and does not crave the drug. Consequently, the arbitrator concluded that, unlike a heroin addict, a methadone user could perform his duties safely and effectively.

Among the factors that contributed to the arbitrator's decision to reinstate the grievant in *Southwestern Bell Telephone Co.*<sup>66</sup> was the nature of the drug possessed. Upon finding one amphetamine pill in the grievant's possession, the company had discharged the grievant "for possession of narcotics on the job." The arbitrator contended that it was a mistake to classify amphetamines as narcotics, noting that narcotics usually refer to addictive drugs such as heroin and cocaine. Amphetamines, he explained, could be habit forming but were not truly addictive, and their possession, therefore, was not as reprehensible as possession of cocaine or heroin.

In the three cases in which the employee was discharged for an arrest or conviction for off-premises conduct involving hard drugs, the arbitrator sustained the discharge. In *Chicago Pneumatic Tool Co.*,<sup>67</sup> the earliest of these cases, the company discharged the grievant after he pled guilty to a charge of attempting to obtain narcotics by fraud or deceit. In sustaining the discharge, the arbitrator concluded that at some point the grievant's craving for cocaine might pose a serious danger to the health and safety of fellow workers and company property.

Although the grievant in *Whatong Industries*<sup>68</sup> had been arrested and indicted for possession of heroin with intent to sell, he had not stood trial at the time of the arbitration. Nonetheless, the arbitrator held that the company had just cause for discharging the grievant, noting that the sale of hard drugs was the type of misconduct demanding immediate action. In a similar case, *Arco-Polymers, Inc.*,<sup>69</sup> the discharged grievant had been arrested, but not yet convicted, for possession of heroin. The arbitrator deemed the grievant's possession of heroin to be a "very significant factor," and in sustaining the discharge implicitly placed this case in that class of cases warranting "immediate and positive action."

Based on the limited number of drug discharge cases involving hard drugs, it is fair to conclude that arbitrators view the offense to be far more serious if it involves hard rather than soft drugs, and often will classify the offense as one demanding immediate and strict attention. Consequently, discharges for conduct involving hard drugs are likely to be sustained.

**Possession, Use, or Sale** In cases not involving a concurrent arrest, indictment, or conviction, arbitrators do not place undue significance on whether the misconduct was possession, use, sale or being under the influence of narcotics. In all the cases where the discharge for possession of marijuana was based on a plant rule, the arbitrators sustained the discharge after finding no mitigating circumstances that would justify reinstatement.

In *Southwestern Bell Telephone Co.*,<sup>70</sup> however, there was no plant rule prohibiting possession of drugs on company premises, and after considering all the circumstances, the arbitrator determined that the discharge was unjust. The arbitrator believed that in the absence of a plant rule, the employee should have some reasonable expectation of the penalty that might result from his misconduct. After distinguishing between the possession of one amphetamine pill and the sale of or use of illegal drugs on company premises, the arbitrator concluded that it was unreasonable to expect the penalty of discharge for the possession of one pill.

In those cases where the company sustained the burden of proving the grievant had smoked marijuana while on duty, the arbitrator upheld the discharge.<sup>71</sup> In two instances, the company discharged the employees for being under the influence of drugs in violation of plant rules.<sup>72</sup> One of the discharges was not sustained, however, because the drug was methadone and did not affect the employee's work performance. Two employees discharged for selling marijuana on company premises were both reinstated. In *TRW, Inc.*<sup>73</sup> there was insufficient proof that an employee had sold marijuana on company premises, and in *McNaughton-Brooks, Inc.*<sup>74</sup> the company failed to show that alleged use and sale of marijuana affected the other employees' safety.

In a few cases involving a concurrent arrest or conviction, the arbitrators stated specifically that possession was a less serious offense than the sale or use of narcotics. In *National Steel Corp.*,<sup>75</sup> the arbitrator argued persuasively that the sale of narcotics is a more serious offense than mere possession of narcotics. The distinction [between possession and sale] is important, for however tolerant society may be towards personal possession and use of marijuana by individuals, there is no indication that such tolerance extends to individuals who engage in the sale of the substance for profit. This is shown in the current trend in state laws which set for possession only a considerably lesser penalty for that offense as against the sale of marijuana. In West Virginia possession is classified as a misdemeanor, while possession with intent to sell is treated as a felony.

Furthermore, what studies have been made indicate that a person who will use marijuana will not necessarily become a user of hard drugs. On the other hand, there is no evidence available to indicate that persons who would sell marijuana for profit, will necessarily limit themselves solely to that product, and will not also satisfy the demand of other customers for the more dangerous drugs, if and when the opportunities to do so arise. For such reasons the conclusion must be reached that possession of marijuana for purposes of sale for profit constitutes a far more serious violation than mere possession and use.<sup>76</sup>

In a recent case, *Joy Manufacturing Co.*,<sup>77</sup> the arbitrator concurred with approval the analysis in *National Steel*, and provided the following additional insights as to why the sale of narcotics should be a more egregious offense than mere possession:

One engaged in selling drugs for profit is already beyond the law. The profit motive will be a strong incentive to expand the market and broaden the product line. Few, if any drug dealers could be caught if they refrained from selling to unknown customers. Opportunity for profit led the Grievant to deliver drugs to an unknown undercover agent. An even stronger incentive would exist to sell to those well known, such as fellow employees.<sup>78</sup>

One arbitrator suggested that possession also should be treated as a less serious offense than use. In refusing to sustain the company's discharge of an employee convicted of possession of amphetamines, the arbitrator in *Kentile Floors, Inc.*<sup>79</sup> noted that he would have sustained the discharge without hesitation if the company had shown that the grievant was a drug user. The arbitrator's meaning of "use" is somewhat obfuscated, however, by his statement that the grievant's offense should not be in the same class as "narcotics addiction." It is unclear, however, that he believed addiction deserved a more serious penalty than possession.

### Disposition of Criminal Charges

Three factors that may be significant in discharges for off-premises, off-duty conduct, but which have no relevance to discharges for drug-related conduct on company premises, are: (1) whether the grievant was arrested or convicted; (2) if arrested, whether the charges were dismissed; and (3) if convicted, whether the grievant was given a suspended sentence or put on probation.

#### *Conviction vs. Arrest*

Arbitrators discussed the issue of arrest versus conviction in only two cases, both of which involved an arrest and indictment for possession of narcotics with intent to distribute. In each case, the arbitrator acknowledged that "indictment on a criminal charge is not the same as being guilty of the charge, and for many criminal indictments there would not exist a justification for the company to suspend an employee or take other disciplinary action against him until after he had been found

guilty." The arbitrators,<sup>80</sup> however, concluded that the seriousness of the drug problem, coupled with the company's need to protect its employees from the possibility that the grievant might try to sell narcotics on company property, warranted a finding that the company acted properly in refusing to allow the grievant to return to work. In sum, an examination of the cases does not indicate that arbitrators followed a particular pattern in sustaining or not sustaining the discharge, depending on whether the grievant was arrested or convicted. Other factors seemed to weigh more heavily in the arbitrators' decisions.

### *Dismissal of the Charges*

Dismissal of the charges was the sole basis for reinstating the grievants in *Lucky Stores, Inc.*<sup>81</sup> and *Michigan Power Co.*<sup>82</sup> In *Lucky Stores*, the company suspended the grievants after they were arrested for selling drugs on company property. The arbitrator reasoned that since the arrests were the only basis for the suspensions the company no longer had proper cause for continuing the suspension once the charges were dismissed.

The arbitrator in *Michigan Power* explained in more detail why the grievant had to be reinstated once the charges were dismissed. In that case, the company had shown that the arrest adversely affected the company. Nevertheless, the arbitrator believed not only that the damage that the company incurred was mitigated by the dismissal, but also that continuing damage should not be likely.

### *Suspended Sentence or Probation*

It is equally difficult to ascertain the weight arbitrators attach to a suspended sentence or probation. In six of the ten cases in which the grievant was given a suspended sentence or put on probation, the arbitrator did not discuss that fact in rendering his decision,<sup>83</sup> and in four of those six cases the arbitrator sustained the discharge or suspension.<sup>84</sup> But in three of the four cases in which the arbitrator discussed the significance of the probation or suspended sentence, the grievant was reinstated.<sup>85</sup> In each case, the grievant's discharge was based entirely on his conviction for possession of marijuana. The arbitrators believed, however, that the probation order was an inseparable element of the judgment, and if the employer was going to rely on the judgment of conviction, it could not close its eyes to the probation order. The basis for this conclusion was twofold. In granting probation, the court chose to hold the conviction in abeyance to allow the grievant to pursue employment opportunities, if the company were allowed to discharge the grievant, the court's decision not to brand the grievant would be invalidated. Second, judges presumably do not order probation unless a thorough investigation of the grievant establishes that with proper supervision the grievant should be a safe and useful member of society. Thus, absent contrary findings by the company, the arbitrator should not undermine the court's determination by refusing to reinstate the grievant.

The arbitrator in *National Steel Corp.*<sup>86</sup> also noted the probationary factor, but refused to reinstate the grievant. The grievant had been convicted, not for possession, as in the three cases discussed above, but for selling marijuana. The arbitrator concluded that the greater seriousness of the sale of marijuana warranted a discharge, notwithstanding the judge's grant of probation.

From the foregoing analysis, it is clear that arbitrators analyzed the propriety of discharges for drug offenses occurring off premises in a somewhat different manner than discharges for drug-related misconduct on company premises. In off-premises cases, the arbitrators' primary concern was whether the arrest or conviction would have an adverse effect on the employer. If the arrest or conviction was based either on the grievant's involvement with hard drugs, or on their distribution of soft drugs, arbitrators generally were more lenient in the degree of proof required, and often upheld the discharge or suspension on the grounds that the discharge was necessary to protect the company from possible drug abuse on company premises. In other types of off-premises drug offenses, specifically those involving the use or possession of safe drugs, arbitrators were much more strict in requiring clear evidence of adverse effects. In a few cases in which adverse effects were shown, arbitrators considered the existence of a plant rule and the employee's work record, but in most of these cases the arbitrator found neither to be determinative.

In most cases where the grievant was given a suspended sentence or probation, arbitrators did not discuss the suspended sentence or probation order; consequently, it was difficult to tell what weight, if any, the arbitrators gave to them in making their decisions. Three of the four arbitrators who did discuss the issue, however, reinstated the grievant, finding that the adverse effects were mitigated by the probation order. Similarly, in the two cases in which the charges against the grievant were dismissed, arbitrators found that the dismissal obviated the need for a discharge.

In on-premises cases, on the other hand, questions of proof were much more important. While there was no prevailing standard, it was equally clear that most arbitrators required something more than a preponderance of the evidence, and, in any event, required credible evidence that went beyond mere suspicion and conjecture. Once the employer sustained its burden of proof, arbitrators then considered a number of factors in determining whether the discharge was proper. Of foremost importance was the existence of a plant rule or contract language prohibiting the conduction in question. In those cases arbitrators felt bound to enforce the contract language and, in most cases, the plant rule, and gave only cursory attention to other factors. Conversely, if there was no plant rule or contract language, arbitrators were disinclined to uphold the discharge, suggesting that employees had not been given fair notice of the consequences of their misconduct. Where arbitrators considered other factors, however, these usually included the employee's work record, the type of drug involved, and any adverse effects the grievant's misconduct had on the employer's business.

## NOTES

<sup>1</sup>It has been only in the past two years that arbitration of drug cases has been discussed in professional journals. See Kenneth Jennings, "Arbitrators and Drugs," *Contemporary Drug Problem* 5(1976):593; and Edward Levin and Tia Denenberg, "How Arbitrators View Drug Abuse," *The Arbitration Journal* 31(1976):97.

<sup>2</sup>In two cases the arbitrators commented that the employer had proved its case beyond a reasonable doubt. See *United States Steel Corp.*, 62 LA 146 (1974); and *Pepsi-Cola Bottlers*, 68 LA 792 (1977). In *Pepsi-Cola Bottlers*, the arbitrator noted that although the parties had raised the question of the proper burden of proof, the issue was moot because the evidence did convince him beyond a reasonable doubt.

<sup>3</sup>*Stansteel Corp.*, 69 LA 776 (1977); *TRW, Inc.*, 69 LA 214 (1977); *General Portland, Inc.* 62 LA 709 (1974); *Inland Steel Container Co.*, 60 LA 536 (1973); and *Bamberger's* 59 LA 879 (1972).

<sup>4</sup>62 LA 709 (1974).

<sup>5</sup>*Ibid.*, quoting 30 *Am. Jur.* 2d 351.

<sup>6</sup>69 LA 214 (1977); 62 LA 200 (1974).

<sup>7</sup>*Inland Steel Container Co.*, 60 LA 536 (1973); and *Bamberger's* 59 LA 879 (1972).

<sup>8</sup>*Babcock & Wilcox Co.*, 60 LA 778 (1972); and *General Portland Cement Co.*, 58 LA 1299 (1972).

<sup>9</sup>69 LA 776 (1977).

<sup>10</sup>Employers must guard against charges of entrapment. In *New Jersey Bell Telephone Co.*, 61 LA 253 (1973), the arbitrator reprimanded the company for prodding the employee into acts of misconduct. The arbitrator warned that the company had an obligation to deter drug offenses, not to encourage them by preying on individual weaknesses.

<sup>11</sup>67 LA 828 (1976).

<sup>12</sup>60 LA 1160 (1973).

<sup>13</sup>69 LA 776 (1977). See, also, *General Portland, Inc.*, 62 LA 709 (1974); and *United States Steel Corp.*, 62 LA 146 (1974).

<sup>14</sup>68 LA 792 (1977). See, also, *Inland Steel Container Co.*, 60 LA 536 (1973); and *B. Green Co.*, 65 LA 1233 (1975).

<sup>15</sup>*Op. cit.*

<sup>16</sup>The union had criticized the agent's integrity because he enthusiastically socialized with the employees, and even drank intoxicants and smoked marijuana when the employees offered it on company premises. The arbitrator reasoned that such conduct was necessary for effective undercover work--the other employees must not doubt that he was a regular employee.

<sup>17</sup>67 LA 773 (1976).

<sup>18</sup>In *United States Steel Corp.*, 62 LA 146 (1974), the arbitrator upheld the discharge because the eyewitness's testimony was buttressed by minutes taken at the third step of the grievance procedure.

<sup>19</sup>60 LA 536 (1973).

<sup>20</sup>60 LA 778 (1972).

<sup>21</sup>61 LA 253 (1973).

<sup>22</sup>In *Abex Corp.*, 64 LA 721 (1975), the company realized it lacked hard evidence and discharged the grievant for "possession of marijuana and reasonable suspicion he was using it." The arbitrator refused to consider whether the grievant smoked marijuana, explaining that "suspicion--whether reasonable or unreasonable--is no basis for disciplinary action, especially discharge."

<sup>23</sup>The terms arrest and indictment are interchangeable, since both represent stages in the criminal process in which guilt has not yet been established.

<sup>24</sup>*National Steel Corp.*, 60 LA 613 (1973); *Accord Arco-Polymers, Inc.*, 69 LA 380 (1977); and *Wheaton Industries*, 64 LA 826 (1975).

<sup>25</sup>*Arco-Polymers, Inc.*, 69 LA 380 (1977); *National Steel Corp.*, 60 LA 613 (1973); *Brown & Williamson*, 60 LA 502 (1973)(suspension); *Kentile Floors, Inc.*, 57 LA 919 (1971); and *Aeromotive Metal Products, Inc.*, 43 LA 170 (1964).

<sup>26</sup>See, for example, *Arco-Polymers, Inc.*, 69 LA 379 (1977); *Wheaton Industries*, 64 LA 826 (1975); and *National Steel Corp.*, 60 LA 613 (1973).

<sup>27</sup>*Joy Manufacturing Co.*, 68 LA 677 (1977); *National Steel Corp.*, 60 LA 613 (1973).

<sup>28</sup>*National Steel Corp.*, 60 LA at 617.

<sup>29</sup>69 LA 379 (1977).

<sup>30</sup>38 LA 891 (1961).

<sup>31</sup>68 LA 183 (1977); and 59 LA 559 (1972).

<sup>32</sup>68 LA 66 (1977).

<sup>33</sup>See, for example, *Kentile Floors, Inc.*, 57 LA 919 (1971); *Aeromotive Metal Products, Inc.*, 43 LA 170 (1964).

<sup>34</sup>See, for example, *Ward School Bus. Mfg. of Pa.*, 60 LA 183 (1973); *Kentile Floors, Inc.*, 57 LA 919 (1971); *Vulcan Materials Co.*, 56 LA 469 (1971); *Linde Co.*, 37 LA 1040 (1962). In a few cases, the arbitrator upheld the discharge solely because a company rule provided for discharge upon conviction. In *National Floor Product Co.*, 58 LA 1015 (1972), the arbitrator concluded that the existence of the company rule precluded the need for the company to prove adverse effects.

<sup>35</sup>*Linde Co.*, 37 LA 1040 (1962).

<sup>36</sup>*Vulcan Materials Co.*, 56 LA 469 (1971); *Kentile Floors, Inc.*, 57 LA 919 (1971); and *Linde Co.*, 37 LA 1040 (1962).

<sup>37</sup>See, for example, *Stansteel Corp.*, 69 LA 776 (1977); *Pepsi-Cola Bottlers*, 68 LA 792 (1977); *Jeep Corp.*, 67 LA 828 (1976); *S. W. Shattuck*, 67 LA 778 (1976); *Sherwin-Williams Co.*, 66 LA 273 (1976); *United States Steel Corp.*, 62 LA 146 (1974); *Howmet Corp.*, 60 LA 1160 (1973); *Gen. Portland Cement Co.*, 58 LA 1299 (1972); and *Pacific Telephone and Telegraph Co.*, 56 LA 1191 (1971).

<sup>38</sup>*Stansteel Corp.*, 69 LA 776 (1977); *Sherwin-Williams Co.*, 66 LA 273 (1976).

<sup>39</sup>*Pepsi-Cola Bottlers*, 68 LA 792 (1977); *Jeep Corp.*, 67 LA 828 (1976). See, also, Levin and Denenberg, *op. cit.*, p. 100.

<sup>40</sup>*B. Green Co.*, 65 LA 1233 (1975); *Miss. River Grain Elevator*, 62 LA 200 (1974). But cf. *Southwestern Bell Telephone Co.*, 59 LA 709 (1972).

<sup>41</sup>69 LA 987 (1977).

<sup>42</sup>57 LA 884 (1971).

<sup>43</sup>59 LA 709 (1972).

<sup>44</sup>64 LA 721 (1975).

<sup>45</sup>*Michigan Power Co.*, 68 LA 183 (1977); *Intalco Aluminum Corp.*, 68 LA 66 (1977); *Wheaton Industries*, 64 LA 826 (1975); *Brown & Williamson Tobacco Corp.*, 60 LA 502 (1973); *Port Terminal Railroad Ass'n.* 60 LA 430 (1973); *Kentile Floors, Inc.*, 57 LA 919 (1971); and *National Floor Products Co.*, 58 LA 1015 (1972).

<sup>46</sup>See, for example, *Intalco Aluminum Corp.*, 68 LA 66 (1977); *Michigan Power Co.*, 68 LA 183 (1977); *Wheaton Industries*; 64 LA 826 (1975); and *Brown & Williamson Tobacco Corp.*, 60 LA 502 (1973). In the last three cases, the arbitrator sustained the company's action on self-protection grounds. In *Intalco*, however, the arbitrator concluded that the company failed to show specific, compelling evidence of adverse effects.

<sup>47</sup>60 LA 430 (1973); and 58 LA 1015 (1972).

<sup>48</sup>57 LA 919 (1971).

<sup>49</sup>He made no reference to rules that were also a part of the contract. In such a situation, the arbitrator has little choice but to uphold the discharge. The parties have bargained for the rule and the arbitrator is bound by the contract.

<sup>50</sup>50 LA 274 (1968); and 38 LA 91 (1962).

<sup>51</sup>*Kentile Floor Products.*, 57 LA 919 (1971).

<sup>52</sup>*Op. cit.*

<sup>53</sup>62 LA 146 (1974).

<sup>54</sup>56 LA 1191 (1971).

<sup>55</sup>60 LA 125 (1973).

<sup>56</sup>43 LA 170 (1964).

<sup>57</sup>60 LA 310 (1973).

<sup>58</sup>*Op. cit.*

<sup>59</sup>*Op. cit.*

<sup>60</sup>*Op. cit.*

<sup>61</sup>*Op. cit.*

<sup>62</sup>*Op. cit.*, pp. 102-103.

<sup>63</sup>Heroin, cocaine, and opium derivatives are considered hard drugs, while marijuana, tranquilizers, amphetamines, and barbiturates are considered soft drugs. *Ibid.*, pp 103-104.

<sup>64</sup>*Op. cit.*

<sup>65</sup>*Ibid.*, pp. 886-887.

<sup>66</sup>*Op. cit.*

<sup>67</sup>*Op. cit.*

<sup>68</sup>*Op. cit.*

<sup>69</sup>*Op. cit.*

<sup>70</sup>*Op. cit.*

<sup>71</sup>*Mississippi River Grain Elevator*, 62 LA 200 (1974); *Howmet Corp.*, 60 LA 1160 (1973); *Pacific Telephone & Telegraph Co.*, 56 LA 1191 (1971).

<sup>72</sup>*Sherwin-Williams Co.*, 66 LA 273 (1976); and *Great Lakes Steel Corp.*, 57 LA 884 (1971).

<sup>73</sup>*Op. cit.*

<sup>74</sup>*Op. cit.*

<sup>75</sup>*Op. cit.*

<sup>76</sup>Ibid., p. 617.

<sup>77</sup>Op. cit.

<sup>78</sup>Ibid., p. 701.

<sup>79</sup>Op. cit.

<sup>80</sup>*Wheaton Industries*, 64 LA 826 at 828 (1975); and *National Steel Corp.*, 60 LA 613 at 618 (1973).

<sup>81</sup>Op. cit.

<sup>82</sup>Op. cit.

<sup>83</sup>*Joy Manufacturing Co.*, 68 LA 697 (1977); *Intalco Aluminum Corp.*, 68 LA 66 (1977); *Brown & Williamson Tobacco Corp.*, 60 LA 502 (1973); *National Floor Products Co.*, 58 LA 1015 (1972); *Kentile Floor, Inc.*, 57 LA 919 (1971); and *Aeromotive Metal Products, Inc.*, 43 LA 170 (1964).

<sup>84</sup>The discharges or suspensions were sustained in *Joy Manufacturing*, *Brown & Williamson*, *National Floor* and *Aeromotive*.

<sup>85</sup>*Port Terminal Railroad Ass'n.* 60 LA 430 (1973), *Vulcan Materials Co.*, 56 LA 469 (1971); and *Linde Co.*, 37 LA 1040 (1962).

<sup>86</sup>Op. cit.

## Development of Comprehensive Language on Alcoholism in Collective Bargaining Agreements

Carl J. Schramm

### Introduction

**MANAGEMENT AND LABOR** are increasingly viewing alcoholism as a problem demanding greater attention. During the last few years major business publications, including the *Wall Street Journal*, *Forbes*, *Business Week* and *Fortune*, have carried feature articles on alcohol problems among employees. Several labor unions have hired staff members with expertise in alcoholism and have promulgated model contract language. Both management and labor efforts have been encouraged by recently published statistics which estimate that over \$9 billion is lost annually in productivity because of work-related alcohol misuse.<sup>1</sup> As this concern grows, labor contracts will increasingly contain language governing the discharge of workers for alcohol-related offenses and detailing their rights. In addition, contracts will provide for varied amounts of medical coverage for alcoholism treatment, reflecting both labor's concern for the job security of alcoholic employees and management's concern for minimizing the loss of experienced manpower.

As one response to this awareness of alcoholism in the work place, the Johns Hopkins University, in cooperation with the Baltimore Area Council on Alcoholism, the Baltimore Council of AFL-CIO Unions, and twelve metropolitan employers initiated a demonstration and research project to help problem-drinking workers retain their employment. The project, begun in the fall of 1972, was funded for a three-year period by a grant awarded to the University by the Office of Research and Development of the Manpower Administration of the United States Department of Labor. Conceived as a demonstration project to test the feasibility of providing outpatient alcoholism treatment in a single facility shared by several employers and unions, the project operates a multi-treatment clinic for workers referred by the participating employers. In addition to employer referrals, the unions also make direct referrals to the clinic. In order to stimulate referrals, the project provides liaison services, such as training programs designed to increase awareness among foremen and shop stewards about the problems of alcoholism among workers, to both unions and employers.

The operating arm of the project is the Employee Health Program (EHP). This name was given to the clinic in order to mask its identity as an alcoholism treatment program and to minimize the stigma surrounding referral to the project. The project operates with a high level of professional services, including college-

This article was previously published in volume 38, Number 7 of the *Journal of Studies on Alcohol* (1977). Reprinted with permission.

trained counselors, physicians and a consulting psychiatrist. Liaison personnel have been drawn from the ranks of management and labor, and in the latter case serve as official representatives of the Metropolitan Labor Council.

One of the project's many demonstration tasks was to provide the expertise necessary to assist management and labor in developing contract language governing alcoholism among employees and its treatment. This has proved to be an area of delicate balance in labor relations. On the one hand, unions have claimed that alcoholism has often served as an excuse to terminate employees whom management found unsatisfactory for other reasons. On the other hand, where contract language existed which provided for medical treatment of alcoholism and a "second chance" before discharge or termination, managements have reported union abuse, claiming that unions often insist on the protection provided for alcoholic employees for workers who are not actually alcoholics.

Through an examination of the existing language in major collective bargaining agreements in general, and in agreements between EHP-participating managements and unions in particular, this article will attempt to shed light on the dynamic process by which comprehensive language on alcoholism is incorporated into labor-management contracts.

Accordingly, the paper is divided into three sections. The first surveys the language in selected major collective bargaining agreements. The second section reports on the state of language among the participants of the Baltimore EHP. Based on the review of nationwide trends and on the experiences of EHP employers and unions, the third section identifies four stages in the process of developing comprehensive contract language on alcoholism in industry, with emphasis on the role of EHP in encouraging and facilitating this process.

### **Contract Language on Alcoholism in Selected Collective Bargaining Agreements**

The contract language described in this section was surveyed in order to determine the present state of language on alcoholism as well as to identify the possible approaches for handling the problem of alcoholism in the workplace. This section is restricted to a description of the existing language and does not attempt to assess the adequacy or the success or failure of the various provisions or programs.

In 1973 the Bureau of Labor Statistics (BLS) began to study contract language relating to occupational health and safety. This study, commissioned by the Occupational Safety and Health Administration (OSHA), involved an inventory of contract clauses relating to health and safety in 1972 and subsequent years to determine the amount of new language appearing after passage of the Occupational Safety and Health Act of 1970. The results of this study will appear as a BLS Bulletin, 1425 series.

Included for study were contracts from a list of "priority industries" which OSHA had selected for special monitoring. This list is as follows (with Standard Industrial Classification codes):

*Mining:* 10. Metal mining; 12. Bituminous coal mining; 14. Nonmetal mining.

*Building Construction:* 151. General building Contractors.

*Contract Construction:* 16. Heavy construction contractors; 161. Highway and street construction; 162. Heavy construction.

*Construction--Special Trade Contractors:* 171. Plumbing, heating, air conditioning; 173. Electrical work; 174. Masonry, stonework, and plastering; 175. Carpentry and flooring; 176.<sup>2</sup> Roofing and sheet metal work.

*Manufacturing:* 201<sup>2</sup> Meat products; 202. Dairy products; 203. Canned and preserved foods, except meat; 204. Grain mill products; 205. Bakery products; 206. Sugar; 2086. Bottled and canned soft drinks; 22. Textile mill products; 23. Apparel and related products; 24.<sup>2</sup> Lumber and wood products except furniture; 241. Logging camps and logging contractors; 242. Sawmills and planing mills; 243. Millwork, plywood, and related products; 2433. Prefabricated wooden building and members; 244. Wooden containers; 25. Furniture and fixtures; 251. Household furniture; 26. Stone, clay and glass products; 327. Concrete, gypsum, and plaster products; 332. Iron and steel foundries; 336. Nonferrous foundries; 34. Fabricated metal products; 344. Fabricated structural metal products; 35. Machinery, except electrical; 3642. Lighting fixtures; 3732. Boat building and repair; 379.<sup>2</sup> Miscellaneous transportation equipment; 3791. Trailer coaches.

*Transportation and Public Utilities:* 41. Local and interurban passenger transit; 42. Motor freight transportation and warehousing; 421. Trucking, local and long distance; 4463.<sup>2</sup> Marine cargo handling.

*Wholesale Trade:* 504. Groceries and related products.

The priority industries are similar to the OSHA "target industries" in that they have exceptionally high accident and mortality rates and therefore have become the focus of many OSHA programs.

Included in the OSHA sample are 500 contracts which cover 1000 or more workers and were in force in 1973. As part of the BLS analysis contracts were coded by types of clauses relating to occupational health or safety. Fortunately one of the clauses coded related to the use of alcohol at the workplace. At my request the BLS provided a list of 46 contracts in the OSHA sample which had language pertaining to alcoholism or to alcohol and drug use. These contracts were examined in detail using the contract files of the BLS in Washington, but only 29 of the contracts, or approximately 6 percent of the 500 contracts analyzed by BLS, contained specific clauses dealing with the use of alcohol by employees.

Table 1 summarizes the language found in the contracts. The spectrum of contractual arrangements for handling alcohol use by employees ranges from immediate discharge at one extreme to a system of warnings leading to discharge at the other. Of the 29 contracts with language on alcohol, 12 provide for immediate discharge for a number of fairly specific drinking offenses. These include "the use or possession of intoxicating beverages at work," "drinking on the job," "drunkenness," "being intoxicated on the job," "drinking or being under the influence of alcohol on the job," or for "bringing intoxicating beverages onto the premises."

Fourteen contracts contain language which provides for disciplinary action other than mandatory firing for drinking on the job. Here, too, a wide variety of language exists. Typical clauses are "discharge for proven drunkenness or drinking," "discharge or suspension for intoxication or impairment resulting from consumption of alcohol," "discipline for bringing intoxicants into the plant," "disciplinary action for reporting under the influence," or "30-day suspension for first offense of bringing intoxicants to work or being under the influence."

Only one contract provides for a system of warning, reprimand and discharge for either reporting to work under the influence of alcohol or for possessing alcoholic beverages on company property. This type of provision is usually found for lesser

Table 1

## Inventory of Contract Language on Alcohol in Contracts Covering 1000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
0243	Pet Milk	IBT Locals 22, 23, 28, 61, 71, 322, 391, 509, 592, 822	Immediate discharge for drinking, under the influence
0246	Associated Producers & Packers	IBT Locals 231, 252, 599, 788	Immediate discharge for intoxication on the job
0274	New England Bakers	IBT	Immediate discharge for drunkenness
0365	Dairy Industry Industrial Relations Association (Los Angeles) Master Agreement	IBT Locals 92, 166, 186, 572, 683, 871, 898, 952, 982	Immediate discharge for drinking on job

(Continued)

Table 1 (Continued)

## Inventory of Contract Language on Alcohol in Contracts Covering 1000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
0342	Ice Cream Council (Chicago)	IBT, Local 717	"Discharge for drunkenness while on duty or proven under influence or possession of illegal drugs while on duty"
0380	Seabrook Farms Co., Inc. (Bridgeport, NJ)	Amalgamated Food; Aluminum Workers Union, Local 56	Immediate discharge for use or possession of intoxicating beverages
1110	Lumber & Mill Employers Assoc.	Millmen, Locals 42, 262,550,2095	Discharge or suspension for intoxication or impairment resulting from consumption of alcohol or drugs
0387	Soft Drink Bottlers (Chicago)	IBT, Local 744	Immediate discharge for drunkenness, drinking alcoholic beverages while at work or unlawful use or possession of drugs or narcotics while at work

(Continued)

Table 1 (Continued)

## Inventory of Contract Language on Alcohol in Contracts Covering 1000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
1200	Consolidated Papers, Inc. Consoweld Corp. (WI)	Paperworkers, Locals 187, 116,359,94, 306,81,1985, 102; International Brotherhood of Electrical Workers, Local 1147	Immediate discharge for being under the influence of intoxicating beverage
1204	Brown Co.	International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 78	Warning, reprimand and discharge for (1) reporting under the influence of liquor, (2) drinking or possession of alcoholic beverages on company property
1222	Nekoosa Edwards	Paperworkers, Locals 59,52; Machinists, Local 1543; Plumbers, Local 807; Electricians, Local 1786	Discipline or discharge for being intoxicated, or having narcotics, dangerous drugs on company property or reporting to work under the influence of liquor, narcotics or dangerous drugs provided that such prohibition shall not include drugs taken according to the prescription of a licensed physician

Table 1 (Continued)

Inventory of Contract Language on Alcohol in Contracts Covering 1000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
1205	Great Northern Paper Co.	Papermakers Locals 27,37 Pulp, Sulphite and Paper, Local 12; Plumbers and Pipefitters, Local 485; IBEW, Local 471; Firemen and Oilers, Locals 69,261, 362; Machinists, Local 156; Carpenters, Locals, 685,1612	Immediate discharge for bringing intoxicating beverages onto the premises
1231	Thilmany Pulp & Paper Co.	Paperworkers, Locals, 20,147	"Discharge for just and proper cause...including alcoholism"
1233	Westvaco Corp. (VA, MD, PA Mills)	United Paperworkers International Union, Locals 675,676,677	Discharged for "(b) Bringing or having intoxicants in the mill; (c) Reporting for duty so under the influence of liquor as not to be capable of performing his duties"
1257	Bowaters Southern Paper	UPWIU, Locals 788, 789,790,653; IBEW, Local 175	Discipline or discharge for bringing intoxicants into mill and reporting under the influence of intoxicants or narcotics
	(Continued)		

Table 1 (Continued)

## Inventory of Contract Language on Alcohol in Contracts Covering 1,000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
1258	Inland Container Corp.	UPWIU, Locals 31, 114,1046,993, 4658,737,954, 828	Discipline for bringing intoxicants into plant, consuming intoxicants in plant or on premises, reporting under the influence of alcoholic beverages causing interference with productive efficiency
2962	Fisher Controls Co. (IA)	International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 893	Disciplinary action for reporting under the influence of intoxicants or narcotics or consuming same during work day or bringing onto premises
3291	Midwest Manufacturing Corp. (Galesburg,IL)	International Association of Machinists and Aerospace Workers, Local 2063	Prohibited: Intoxicants on duty or under the influence, using or possessing--First offense: 30 days' suspension. Second offense: discharge

(Continued)

Table 1 (Continued)

## Inventory of Contract Language on Alcohol in Contracts Covering 1000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
5036	Greyhound Corp.	Council of Western Greyhound, Amalgamated Division and the Amalgamated Transit Unions covering Divisions 1055, 1222, 1223, 1225, 1384, 1471, 1508	Discharge for intoxication or use of drugs
5216	Household Goods Moving & Storage	IBT, Locals 186, 235, 389, 467, 542, 672, 871	Discharge for drunkenness or drinking on the job
5249	United Parcel Service	IBT, Local 542	Immediate discharge; no notice to union; use on job, reporting under the influence
5265	Western States Area Office Employers, Employed by Private, Common and Contract Carriers	IBT	Discharge without notice for drunkenness
5266	Western States Area Automotive Shop and Truck	IBT	Immediate discharge for drunkenness

(Continued)

Table 1 (Continued)

## Inventory of Contract Language on Alcohol in Contracts Covering 1,000 or More Workers in 1973

BLS Contract #	Company	Union	Contract Provisions
5276	Merchant East Motor Lines, Inc.	Union of Transportation Employees, Local 102870	Discharge without warning for drinking or being under the influence of intoxicating beverages or for possession on duty or on property
5431	Savannah Maritime Assoc.	Longshoremen's Association, Local 1414	Discipline or discharge; intoxication prohibited
8448	General Contractors Assoc. in New York	Laborers International Union of North America, Local 737	Immediate dismissal for use of intoxicants or illegal drugs
8550	Employing Metallic Furring and Lathing Assoc. of NY	Wood, Wire and Metal Lathers International Union, Local 46	Alcoholic beverages not permitted on job
8871	Retail Maintenance Resident Floor Coverers Agreement, Dock-builders Agreement, Outside Building Construction Agreement	Carpenters District Council of NY Local 1456	Immediate dismissal; consumption of alcohol on the job site
8887	Association of General Contractors of America (West Coast Florida)	UNA, Locals 512, 1297, 1240	Discipline and discharge; no drinking

employment infractions than drinking at work. One other contract has vague language pertaining to alcohol use, stating only that alcoholic beverages are not permitted on the job but not providing for discipline or discharge.

While virtually all the contracts examined above deal with the job security of individuals committing an alcohol-related offense, none of the 29 contracts contain language explicitly providing for the medical treatment and care of alcoholic workers, nor for insurance coverage for such care. In an attempt to examine contracts which might contain more inclusive language on alcoholism, the assistance of the Labor Office of the National Council on Alcoholism (NCA) was sought. In reply the NCA forwarded four contracts: three United Auto Workers (UAW) agreements and the United States Postal Service National Agreement. While the latter is limited in its alcoholism coverage (and will be described in an examination of the Baltimore Post Office Agreement in Part II), the UAW contracts do contain comprehensive alcoholism language.

In December 1972 the UAW took an aggressive position on the problem of workers and alcoholism. The union formulated a policy on the subject and presented it to several of the major automobile and aerospace companies with which it bargains. Presented below is an analysis of the language existing between the UAW and General Motors Corporation (company-wide), Deere and Company (company-wide) and American Motors, Kenosha, Wisconsin (plant-wide).

The contractual provisions on alcoholism which exist between the UAW and the three companies are practically identical. Each includes a joint statement of policy between labor and management regarding alcoholism and employment. The major features of the statement can be summarized as follows: alcoholism is a highly complex illness which is treatable; the concern of the company and of the union is limited to drinking problems which affect the employee's performance or attendance; the decision to seek treatment is the individual's responsibility, but he must seek treatment or improve his job performance, as he would with any other illness; all supervisory employees are responsible for following the joint union-management policy and procedures and for assuring the employee that his security or promotional opportunities will not be jeopardized by a request for diagnosis or treatment; all treatment and handling of the individual's case will be done in confidence; the objectives of the joint alcoholism treatment program are to provide the employee an opportunity to help himself early in his illness so as to retain his employment; the program is not intended to circumvent normal disciplinary procedures.

Beyond the joint policy statement, the agreements with American Motors and Deere establish a national policy-making committee, made up of equal representation from the company and the union. The committee is intended to meet annually, or at the call of the chairman, to review, make recommendations and approve changes in the operation of the alcoholism program. The committee also performs more specific functions which include monitoring the progress and effectiveness of the program at each local plant; assisting in solving problems which may arise in plant-

level programs; investigating and approving rehabilitation hospitals for the use of employees; keeping abreast of new developments, techniques, resource materials and referral agencies; developing and issuing a brochure on the company-union program; assisting in the establishment of an orientation program for new employees, and a procedure for instructing supervisors about the program; and obtaining opportunities for seminars and scholarships on a continuing basis to keep local level committee members constantly informed.

All three agreements provide for the establishment of local committees on alcoholism composed of equal numbers of management and labor personnel. The duties of the local committees include the implementation of the joint alcoholism policy and program. To this end the committees are empowered to sponsor orientation programs for new employees, to develop procedures for referring the employee to community resources for treatment, and to train supervisors in methods of making referrals. The committee is responsible for establishing liaison with the various community treatment facilities; and for monitoring their effectiveness in treating referred alcoholics.

Finally, the UAW agreements spell out procedures to be used in handling alcoholic employees. Four steps are involved: identification, review, discussion with the employee and employee acceptance or refusal.

According to the contracts, the earlier the employee with a drinking problem is identified, the better are the chances that he can be helped. Once a strong suspicion exists that an individual employee has a drinking problem, either on the part of the supervisor, the union official of the department or the employee himself, the observations regarding the employee's affected job performance are reported to the chairman of the plant committee. He and the committee's secretary then document all relevant data and prepare a case history for review by the committee.

At the second step, it is the task of the local alcoholism committee to review the case and to decide whether the individual's problem is most likely alcoholism. If necessary the committee may call upon the plant physician for assistance in making its determination.

If the committee has decided that an individual has a problem with alcohol, the third step provides for discussion with the employee. At the time of the interview, either the supervisor or the union committeeman presents the established facts to the employee. The thrust of the interview is that the individual's work performance or attendance has not been satisfactory and that it might have been caused by an addiction problem. The employee is told that the joint labor-management program might be of use and is also told of his health plan benefits. At this point, the employee is instructed that unless his problem, whatever it is, is identified and corrected, he will be subjected to the existing penalties for unsatisfactory job performance.

After the employee has been confronted with the evidence, he may either "accept" or "refuse" to undergo treatment. If he accepts the advice of the committee, the committee refers him to a recognized community resource for the treatment of

alcoholism. If after the committee's discussion the employee denies his drinking problem, the committee takes no further action. However, the committee documents the respondent's denial and refusal of treatment for future action. If he continues his unsatisfactory job performance, the company may act to have him disciplined or discharged.

The above UAW language appears to be the most comprehensive alcoholism clause actually in force. However, the Community Services Department of the AFL-CIO has promulgated model contract language on alcoholism which provides for equally thorough identification and treatment of alcoholic employees.<sup>3</sup> The model language of the AFL-CIO, first circulated in 1972, which contains five labor provisions, appears as an appendix to this article. Suggested guidelines for a joint labor-management agreement upon which the model language is based contain the following provisions:

1. A joint policy statement on the problems of alcoholism and employment, issued by labor and management.
2. A joint committee of equal membership from union and management to implement the program. If the program is company-wide, additional subcommittees might be established to run local programs.
3. The objective of the program must be clear and positive: to provide treatment and to rehabilitate the alcoholic employee, not to eliminate him from employment.
4. Caution must be taken to avoid setting up a detection mechanism likely to enlist disinterested persons in the process of identifying problem-drinking employees. Thus, secret documentation should not be a part of any agreement or understanding.
5. A check of all company services and facilities to be used in treating an alcoholic worker should be made to ensure (a) that all sick leave benefits and medical plans are available to employees who participate in the program; (b) that services, assistance and facilities within the community may also be used; (c) that steps are taken to bring items (a) and (b) up to satisfactory level if they are not so.

#### Contract Language in EHP-Participating Management and Union Agreements

The examples of agreements presented above illustrate the range of language in collective bargaining agreements. This section will describe the language now

Table 2

## Participating Employers and Unions in the Employee Health Program

Company	Date of Initial Participation	# of Employees Covered	Recognized Bargaining Agents
Bethlehem Steel-Steel Mills	5 March 1973	22,005	United Steelworkers of America, Locals 2509 and 2610 (AFL-CIO)
Social Security Administration	9 March 1973	20,961	SSA-Local 1923, American Federation of Government Employees (AFL-CIO)
State of Maryland (Baltimore Area)	27 March 1973	42,445	Maryland Classified Employees Association and American Federation of State, County and Municipal Employees, Council 67 (AFL-CIO)
Lever Brothers	28 March 1973	1,200	International Chemical Workers Union, Local 217 (AFL-CIO)
General Motors Corporation	13 April 1973	6,015	United Auto-workers of America Local 239
Montgomery Ward	6 June 1973	2,500	International Brotherhood of Teamsters, Local 590

(Continued)

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General Motors Corporation	13 April 1973	6,015	United Autoworkers of America Local 239
Montgomery Ward	6 June 1973	2,500	International Brotherhood of Teamsters, Local 590

(Continued)

Table 2 (Continued)

## Participating Employers and Unions in the Employee Health Program

Company	Date of Initial Participation	# of Employees Covered	Recognized Bargaining Agents
United States Post Office (Baltimore Area)	7 June 1973	6,252	American Postal Workers Union, Baltimore Area Local (AFL-CIO) National Association of Letter Carriers Oriole Branch, Local 176 (AFL-CIO); National Post Office Mail Handlers, Division of Laborers International Union Local 145 (AFL-CIO)
Bethlehem Steel-Ship Building	7 August 1973	3,650	Industrial Union of Marine and Ship Building Workers of America, Local 33 (AFL-CIO)
Baltimore Gas & Electric Company	18 October 1973	8,067	No collective bargaining agent
AAI (Aircraft Armaments Inc.)	1 February 1974	1,037	No collective bargaining agent
City of Baltimore (Sanitation Department)	18 April 1974	18,372	American Federation of State, County and Municipal Employees, Council 67, Local 44 (AFL-CIO) and Classified Municipal Employees Association
Kennecott Copper Company	15 March 1973	647	United Steel Workers of America, Local 5977 (AFL-CIO)

Table 3

**State of Labor Agreements Between Participating Managements and Unions  
with Regard to Language on Alcoholism as of August 1974**

Agreement	Date of Contract	Expirations Date	I II III IV V				
			I	II	III	IV	V
U.S. Post Office	21 July 1973	20 July 1975	Y	Y	Y		
Social Security Administration	29 July 1974	Open	Y				
City of Baltimore	17 July 1974	30 June 1976			Y		
Lever Brothers	29 March 1974	13 March 1976	Y	Y	Y	Y	
State of Maryland	(Personnel Policy Statements 14 & 16)	Open	Y	Y	Y	Y	Y
General Motors	10 December 1973	14 September 1976	Y	Y	Y	Y	Y

Y Yes  
 I Alcoholism Policy Statement  
 II Treatment Provided by Employer  
 III Job Security Contingent on Treatment  
 IV Sick Leave for Alcoholism Treatment  
 V Health and Medical Coverage for Treatment

agreement states that any voluntary effort at self-help will be regarded favorably in the event of disciplinary process. As provided in Department of Personnel Policy Statement #14, the alcoholism recovery program of the State of Maryland.

*"will introduce procedures under which an employee with a drinking problem is offered rehabilitative assistance before charges are preferred. If the employee refuses to avail himself or herself of assistance and the abuse of alcohol impairs work performance, attendance, conduct or reliability, regular disciplinary procedures for dealing with problem employees will be used."*

Similarly, the Lever Brothers contract states that if an employee receiving treatment for alcoholism in an institution leaves the institution before completion of the approved treatment, he shall be subject to disciplinary procedures contained in the agreement. Since the joint labor-management committee as provided for in the contract supervises and pays for treatment, it expects workers referred to treatment to continue through the course. The clause implies, as the practice is in fact, that men who cooperate in the company's efforts of rehabilitation will be protected from the disciplinary process. The GM contract also provides for a limited form of job protec-

tion for alcoholic workers who make an effective contribution. The contract states that among its responsibilities, the local alcoholism committee should:

*"help the employee understand that he may consult on a confidential basis with the plant medical director, or an outside qualified facility or agency, concerning his alcoholism tendencies without fear of disciplinary action based on such discussion" [Interpretation, Statements and Memorandums of Understanding, p.14].*

Five of the contracts provide for varying amounts of counseling or treatment of alcoholism by the employer. As noted above the postal agreement establishes the Postal Alcoholic Recovery Program, which is designed to be an inhouse treatment program. The program only provides for counseling of alcoholic workers and not for detoxication or more sophisticated forms of rehabilitation.

The agreement of the City of Baltimore provides that the city

*"shall designate and train employees as Counseling Referral Officers among the several Departments and Agencies. Officers shall consider affected employees' counseling needs and refer those employees with problems such as alcoholism...to the appropriate agency, and/or resources for proper counseling and treatment. The Union shall assist in the administration of this program. Employees designated as Counseling Referral Officers shall be trained and shall assume the aforesaid duties in the course of their employment."*

The State of Maryland Department of Personnel provides a network of counseling services through which an alcoholic employee can be referred to community agencies for appropriate treatment. As stated in Department of Personnel Policy #14, if an employee's job performance suggests alcoholism, his agency's personnel officer will make an appointment for him with a counselor in the Office of the State Medical Director within the State Department of Personnel. Upon determining that the possibility of alcoholism exists, the counselor refers the employee to the Coordinator of Alcoholism Programs in the Health Department where the employee lives, who will determine the community services in which the employee should be engaged for treatment.

A similar program of counseling exists within the Social Security Administration but is not provided for in the AFGC contract. The provisions of care under the UAW-GM Baltimore Assembly Division contract is similar to that outlined in the UAW language above.

As Table 3 shows, two contracts in Baltimore provide for sick leave for the treatment of alcoholism or related medical problems, General Motors and Lever Brothers, as do the personnel policies of the State of Maryland.

Two contracts provide for full coverage of health and medical costs attendant on the treatment of alcoholism. The Lever Brothers contract is specific as to the nature and extent of coverage.

*"The Lever hospital-medical-surgical plan shall provide coverage, subject to the limitations below, for an employee for expenses incurred in an institution other than a recognized hospital, for the care and treatment of alcoholism. Such treatment must be recommended by the local joint union-management alcoholism and drug abuse committee, and the local plant physician. Only institutions and period of treatment which have the prior approval of Lever Brothers Company and the Travelers Insurance Company shall be covered. The following limitations shall apply: Initial Confinement. One hundred percent of coverage expenses per day for the period of treatment and lasting up to thirty-one days. In no event will payment exceed a maximum limit of fifty dollars per day. Second Confinement. Fifty percent of covered expenses per day for a period of treatment lasting up to thirty-one days. In no event will payment exceed a maximum of twenty-five dollars per day."*

The GM-UAW contract states the situation under which an employee will be eligible for coverage of alcoholism treatment costs:

*"when a leave of absence is necessary so that an employe may undergo medical treatment for alcoholism in or from an appropriate facility in accordance with this program, and when the employe has voluntarily submitted himself for such treatment and his seniority has not already been broken, he will be granted a sick leave of absence and he will be eligible for benefits in accordance with the GM Insurance Program as negotiated with the International Union."*

The contract specifically states that the local alcoholism committee will

*"Arrange for the local insurance program administrator or the local union insurance representative to be available to explain to the employee and others who maybe involved the extent to which recommended treatment qualifies for payment under the GM Insurance Program."*

Under the Baltimore City contract, City workers are covered under the City Blue Cross package providing for thirty days of inpatient rehabilitation care. This package is probably unique to Baltimore since Maryland is one of two states that have Blue Cross plans which offer inpatient care for alcoholism treatment.

### The Process of Developing Contract Language on Alcoholism

The development of contract language is a long and difficult process with a dynamic of its own. On the basis of the review of developments nationwide and in light of the experience of EHP unions and employers it appears that there are at least four steps involved in the bargaining. The first is the introduction of alcoholism as a significant topic which merits attention in the joint decision-making arena of collective

bargaining. This, of course, means that the parties must be convinced that alcoholism is a problem in their work force, that its handling involves a potential conflict of union-management interest, and that both parties will or should have a similar interest in the problem. Without all of these conditions, little action will transpire. The most important point during the first step of bargaining is that the parties envision problems of job rights arising out of potential discipline and discharge proceedings involving alcoholics. The second step is the development of political support for bargaining language. This is a problem for both parties as it requires that either "higher-ups" or the membership be convinced of the importance of formalizing the treatment of alcoholic workers into the bargaining language.

Any bargaining process is marked by trade-offs between the parties. As a result each party to the process must know the limits of support for any given demand. For management, the process is primarily one of developing a rationale for formulating joint language in a contractual form over new nonwage or nonfringe demands. Management must conclude that it will gain more by the presence of contract language (a healthier, more contented and productive work force) than it will lose by having traditional management rights limited by contractually binding language. Labor on the other hand, must develop two positions within its membership. First, the rank and file must be educated as to the need for collective bargaining on alcoholism. This is not always an easy task since many workers are suspicious of any new and specific language relating to an area of behavior where definitions of deviance vary widely. Union leadership must assure the membership that its welfare will be maximized by specific language guaranteeing job rights and a formal discipline and discharge process to any worker identified as being alcoholic. The second task of labor is to develop this individual education in such a way that a firm membership consensus will support a demand for contract language on alcoholism.

The third and fourth steps of the bargaining involve the development of actual language on alcoholism for insertion in existing labor contracts. In the third step, it appears that for the term of the contract the parties will first reach an agreement which deals with issues of jurisprudence or job rights. Language reached during the first bargaining step generally outlines the process of discipline and discharge provided for in the case of an employee found to be intoxicated or in the possession of alcoholic beverages at the workplace. It may or may not be accompanied by a policy statement or the establishment of a program for intervention and treatment. This is the stage which would best characterize the status of most contracts between management and unions participating in the EHP.

The fourth stage involves the development of language that provides for medical coverage for the treatment of alcoholism. As the final stage of the bargaining dynamic, or the second step of actual language development, these clauses will provide for medical care or treatment of several varieties. Generally, inpatient detoxification is provided first. Then as a secondary step outpatient care, including both chemotherapy and counseling, is included. The degree of difficulty involved in

reaching this final stage in the development of contract language varies with the nature of the treatment program. For single-company programs operated inhouse, expenses are absorbed by a department, most often medical or personnel, and insurance coverage may be expanded to include inpatient treatment as required. However, for single-party programs that rely on community treatment resources, and for multiparty programs such as EHP, an independent means for financing outpatient services is generally required. This has proved to be an obstacle to establishing such programs because third-party reimbursement for outpatient alcoholism treatment is virtually nonexistent.

The contract language existing among EHP unions and employers represent varying stages of development. Several companies have had corporate-wide alcoholism programs that predate their participation in EHP. In at least two of these cases, EHP has corresponded to the intent of the preexisting language regarding the use of community treatment resources and has functioned as the first operating program. The existence of written but nonfunctioning programs is a common phenomenon, and the project's existence has brought the intent of several of these "paper" programs into operating reality. Some participants have negotiated contract changes, with new language on alcoholism appearing since the program began. Other participants have yet to develop contract language.

The development of new language in the contracts of EHP's participating managements and unions in Baltimore has also been furthered by pressures at the national level. For example, both GM and the UAW have had a long-standing corporate-union position on alcoholism. This has been communicated downward via corporate memoranda in the case of the company, and the development of alcoholism leadership seminars for union personnel conducted by the UAW's education department.

Although the majority of EHP-participating unions and employers have yet to develop contract language, at this writing the AFL-CIO Baltimore locals, which represent employees of eight EHP companies, are actively working toward inclusion of comprehensive language on alcoholism during upcoming negotiations. The Baltimore Council of AFL-CIO Unions, which assumed ownership of the clinic after the expiration of federal funding in October 1975, hopes that many contracts negotiated in 1976 will include most or all of the provisions contained in the model language on alcoholism proposed by the National AFL-CIO Community Services Department<sup>4</sup>.

The role of the EHP in this bargaining has been primarily in the areas of fostering awareness of the problem that alcoholism presents to both employers and unions, as well as in providing one vehicle for employers and unions to exchange ideas regarding how best to handle the problem. Moreover, as the project has succeeded in producing referrals, managements and unions are faced with the real questions of how individual job rights are to be protected. Some unions and managements have reported that as a result of participating in the actual referral process, the need for language has become evident.

While the parties' recognition of the need for formalizing procedures for discipline and discharge is a crucial step in the development of contract language, comprehensive language would also include provisions establishing a program for therapeutic intervention and treatment, as well as full insurance coverage for such treatment. EHP has served an important role in securing third-party reimbursement of outpatient services in Baltimore, thus facilitating bargaining for comprehensive language on alcoholism. From the inception of the project, EHP program planners had recognized the need for an independent source of funding for the clinic upon termination of government support after the demonstration phase. Consequently, a representative of the major insurance carrier in the state--Maryland Blue Cross--was included on the project's advisory board. Impressed by the need and demand for the outpatient alcoholism treatment services provided by EHP, and spurred by the presence of persons (notably EHP-participating unions) ready to purchase such services, Blue Cross developed three outpatient plans using the EHP fee schedule as the basis for determining premium levels. EHP unions will gain for this insurance coverage for their memberships at upcoming negotiations.

These observations on the bargaining dynamic as observed in Baltimore suggest that employers and unions are increasingly willing to develop collective bargaining language on alcoholism due to growing public awareness of the magnitude of drinking problems among workers, the existence of formal and professional treatment programs, and an increasing concern for the problem in higher levels of management and at the national level of union organizations.

When joint labor-management efforts for alcoholics are proposed and agreed upon it appears that they may be the most beneficial approaches to the treatment of alcoholism. The interest and support shown to the alcoholic workers by both supervisors and union leaders stress the importance of successful rehabilitation. In addition, the interest of labor and management demonstrates to the individual a sense of his value to his employer and to his union. This feeling of self-worth has often been noted as important to successful treatment.

In summary, the EHP has functioned to stimulate management and labor interest in alcoholism, some of which has been formalized into contract language. It is anticipated that as the project proceeds, the bargaining over this subject will become more complex as unions seek to protect the jobs of workers and as management attempt to build a productive but humanitarian relationship with its work force.

#### NOTES

<sup>1</sup>U.S. National Institute on Alcohol Abuse and Alcoholism, *Alcohol and Health: New Knowledge*. Second Report to the Congress (DHEW Publication No. ADM-75-212, Washington, D.C.: U.S. Government Printing Office, 1975).

<sup>2</sup>OSHA Target Industry.

<sup>3</sup>*Labor-Management Alcoholism Newsletter* (AFL-CIO, Community Services Department, January-February 1972).

<sup>4</sup>*Labor-Management Alcoholism Newsletter, supra*, note 3; Carl J. Schramm, "Development of a Successful Alcoholism Treatment Facility" in Carl J. Schramm, ed., *Alcoholism and its Treatment in Industry* (Baltimore: Johns Hopkins University Press, 1977). The Baltimore AFL-CIO ran the clinic for another year. The history of the project has been described by Schramm.

## APPENDIX

### Model Contract Language on Alcoholism Proposed by AFL-CIO

#### I. *Suggested Joint Policy Statement*

The [union] and [company] jointly recognize alcoholism and drug abuse as illnesses which are treatable. It is also recognized that it is for the best interests of the employee, the [union] and the [company] that these illnesses be treated and controlled under the existing collective bargaining contractual relationship.

Our concern is limited to alcoholism and drug problems which cause poor attendance and unsatisfactory performance on the job. Our sole objective is to help not harm. This program is designed for rehabilitation and not elimination of the employee.

Any employee who participates in this program will be entitled to all of the rights and benefits provided to other employees who are sick, in addition to specific services and assistance which the program may provide.

It shall be the responsibility of all employees in a supervisory position to follow the joint union-management alcoholism and drugs problem policy and procedures. It shall also be their responsibility to assure any employee with an alcohol or drug problem that a request for diagnosis or treatment will not jeopardize his job rights or job security and that confidential handling of the diagnosis and treatment of these problems is an absolute fact--not just an assertion.

To coordinate a program and to implement this policy the [union] and the [company] agree to establish a joint committee on alcoholism and drug abuse at [location of facility]. If the program is company-wide, there should be a company-wide joint committee with local committees at each plant or other company facility. The company-wide committee would not be involved in cases. However, the company-wide committee should:

1. Be composed of equal representation from management and the union. Preferably six or eight local committee membership.
2. Review the effectiveness of the program periodically. See that the reasonable uniformity is maintained.
3. Assist local committees with their problems when requested.
4. Check and report on suitability of medical and hospital facilities in each community and for each company facility.
5. Approve uniform training program for company supervisors and union stewards and union counselors.
6. Continue to seek means to improve over-all program, utilizing education, new developments and techniques, and assistance from agencies.
7. Engage in other activities (which the union and company approve) that will be beneficial to this program.

## II. *Local Joint Plant Committee on Alcoholism and Drug Abuse*

The committee should be composed of four or six members. The union and the company shall have equal representation. One member shall serve as Committee Chairman. This office shall be rotated on a scheduled basis between the union and the company. Sufficient time shall be allowed the committee to develop a local plant program. (If there is a company-wide program the local program must be submitted to the company-wide committee for final clearance.)

This committee shall consider cases that are referred and review cases that are in process

(subject to limitations pointed out in the section on procedures for case handling).

In addition this committee shall be responsible for developing and promoting educational information on the program, working with other agencies within the community who can assist in making programs more effective, developing procedures for referral to and use of community services for treatment, and making recommendations for program improvement.

### *III. Procedures for Case Handling*

1. The earlier a drinking or drug abuse problem can be identified, the more favorable are the chances for a satisfactory solution.

2. The local plant committee will always be available to consider an alcohol or drug abuse case. The employee involved may directly make his own referral. Referrals may also be made by the supervisor or by the union representative.

3. When a supervisor, through daily contact, observes an employee is experiencing difficulties in maintaining his performance, he will discuss the apparent difficulties with the employee. If the employee is unable to correct his job performance difficulties through his own efforts, the supervisor will notify the appropriate union representative and then arrange to offer the employee confidential assistance and services that are available as outlined in the following procedures.

4. The focus of corrective interviews is restricted to the issue of job performance and opinions or judgments on alcoholism or other drug use are prohibited. It must be re-emphasized that all referrals must be made on objective and factual bases rather than on any unsupported assumptions or judgments of the supervisor.

5. The employee(s) shall be afforded the right to have appropriate union representative(s) present at each such interview. In all instances the union representative(s) shall be notified that such an interview is scheduled.

6. If, following this discussion, it is felt by the supervisor, the employee, or his representative that the matter should be brought directly before the joint review committee, the committee chairman shall arrange a meeting as expeditiously as possible.

At the meeting with the committee and the employee these steps should be taken:

- a. Give the employee a clear, positive statement pointing out all the evidence which indicates that a job performance problem is involved.
  - b. Explain the function of the joint program and the benefits available in detail.
  - c. Emphasize that help for the existing problem is covered under the program and handled on a confidential basis.
  - d. Remind the employee that unless his problem is identified and corrected, he is subject to existing penalties for unsatisfactory job performance and attendance.
7. If the matter cannot be satisfactorily resolved by the joint review committee, disposition of the matter will proceed under the existing collective bargaining contractual relations between the union and the company.

#### *IV. Treatment*

It is recognized that supervisors, union representatives, and committee members are not professional diagnosticians in the field of alcoholism and drug abuse. Neither are they medical experts. However, the committee will select and approve the qualified physicians, therapists or personnel of other treatment resources and facilities whose recommendations for needed treatment and rehabilitation services will be followed.

#### *V. Miscellaneous*

It shall be the policy of the company to inform any employee subject to discharge or discipline, of his rights to a review before this committee to determine if the source of his problem falls within the corrective and treatment procedures offered by the program.

**SUMMARY.** The processes by which language on alcoholism is incorporated into labor-management contracts are surveyed. Provisions for disciplining and treating alcoholic employees are found to vary widely.

**ACKNOWLEDGMENTS.**--The preparation of this report benefited from the cooperation of Leon Lunden of the Bureau of Labor Statistics and the assistance of Ed Prewitt, a research assistant with the project.

## Appendix A

*Capua v. City of Plainfield*, 643 F. Supp. 1507

(D.C. N.J. 1986)

**SAROKIN, District Judge:**

### Introduction

In the face of widespread use of drugs and its intrusion into the workplace, it is tempting to turn to mass testing as a solution. The issue presented by this case is the constitutionality of such testing of current employees by governmental entities. Whether such testing may be done in the private sector or be imposed as a condition of accepting employment, even in the public sector, is not here presented. Government has a vital interest in making certain that its employees particularly those whose impairment endangers their co-workers or the public, are free of drugs. But the question posed by this litigation challenges the means by which that laudable goal is attained, not the goal itself.

Urine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public. The proposed test, in order to ensure its reliability, requires the presence of another when the specimen is created and frequently reveals information about one's health unrelated to the use of drugs. If the tests are positive, it may affect one's employment status and even result in criminal prosecution.

We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" Society come to life.

To argue that it is the only practical means of discovering drug abuse is not sufficient. We do not permit a search of every house on a block merely because there is reason to believe that one contains evidence of criminal activity. No prohibition more significantly distinguishes our democracy from a totalitarian government than that which bars warrantless searches and seizures. Nor can the success of massive testing justify its use. We would not condone the beatings of suspects and the admissibility of their confessions merely because a larger number of convictions resulted.

In this matter, long time employees were coerced into testing without notice, without standards and without probable cause or reasonable suspicion. Even if such testing were justified without such individualized basis, it nonetheless, would be illegal because of the flagrant violation of plaintiffs' due process rights in this instance.

Assuming a program of drug testing is warranted, before it may be implemented, its existence must be made known, its methods clearly enunciated, and its procedural and confidentiality safeguards adequately provided.

The harassment, coercion and tactics utilized here, even if motivated by the best of intentions, should cause us all to recognize the realities of government excesses and the need for constant vigilance against intrusions into constitutional rights by its agents. If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.

### *Facts*

On May 26, 1986 all fire fighters and fire officers employed by the defendant, City of Plainfield, were ordered to submit to a surprise urinalysis test. At 7:00 A.M. on May 26, the Plainfield Fire Chief and Plainfield Director of Public Affairs and Safety entered the city fire station, secured and locked all station doors and awakened the fire fighters present on the premises. Each fire department employee was required to submit a urine sample while under the surveillance and supervision of bonded testing agents employed by the city. Defendants repeated a substantially similar procedure on May 28 and June 12, 1986 until approximately all of the 103 employees of the Plainfield Fire Department were tested.

Prior to May 26, the Plainfield fire employees had no notice of defendants' intent to conduct mass urinalysis. Such urinalysis had not been provided for in the collective bargaining agreement between the fire fighters and the City. Nor was any written directive, order, departmental policy or regulation promulgated establishing the basis for such testing and prescribing appropriate standards and procedures for collecting, testing, and utilizing the information derived.

Between July 10 and July 14, 1986, sixteen firefighting personnel were advised that their respective urinalysis had proved positive for the presence of controlled dangerous substances. They were immediately terminated without pay. Those who tested positive were not informed of the particular substance found in their urine or of its concentration. Neither were they provided copies of the actual laboratory results. Written complaints were served ten days later on July 24, 1986, charging these fire fighters with numerous violations including "commission of a criminal act."

At about the same time, employees of the Plainfield Police Department were subjected to similar urine testing. On May 26, plaintiff Monica Tompkins, a communications operator for the Plainfield police was ordered to submit a urine sample under the surveillance of a female testing agent. On July 10, Ms. Tompkins was advised by the Chief of Police that her urinalysis had been positive. As a result, Ms. Tompkins was informed that she could either resign without charges being brought or she would be immediately suspended.

Plaintiff fire fighters instituted this action on July 30, 1986, by way of an Order to Show Cause and Verified Complaint. Plaintiff Monica Tompkins filed a related action which will be considered jointly. The Court issued a Temporary Restraining Order mandating the immediate reinstatement of the suspended Plainfield fire fighters and prohibiting further urine testing by defendant pending a plenary determination in this case.

On July 31, 1986 defendants moved to vacate the restraining order. The court denied defendants' motion, but granted leave to re-apply if specific, individualized evidence could be produced demonstrating that a particular fire fighter's job performance was impaired as a result of drugs. To date, no such evidence has been brought before the court.

Plaintiffs bring this action pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief. They seek to have the urine testing declared unconstitutional and to enjoin the City of Plainfield and its agents from further conducting standardless, departmentwide urine testing in violation of the Fourth Amendment. The parties have agreed to submit the matter for a final determination on the record before the court conceding that no factual issues exist which would require a hearing.

#### *Discussi...*

The Fourth Amendment to the United States Constitution states:

*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 essential purpose of the Fourth Amendment is to "impose a standard of reasonableness upon the exercise of discretion by government officials" in order to "safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *Camara v. Municipal Court*, 387 U.S. 523 528 (1967). "The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'" *Id.,...* The constitutional issue here arises only if the Fourth Amendment is implicated by defendants' conduct. The threshold question then is whether urinalysis constitutes a search and seizure within the meaning of the Fourth Amendment.

Courts have clearly established that individuals retain an expectation of privacy and a right to be free from government intrusion in the integrity of their own bodies. See *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Ramsey*, 431 U.S. 606 (1978). The "taking" of urine has been likened to the involuntary taking of blood which the Supreme Court found to constitute a search and seizure within the Fourth Amendment. See *Schmerber, supra*. Though urine, unlike blood, is routinely discharged from the body so that no actual intrusion is required for its collection, it is normally discharged and disposed of under circumstances that merit protection from arbitrary interference.

Both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including, but not limited to recent ingestion of alcohol or drugs. "One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds." *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985). As with blood, each individual has a reasonable expectation of privacy in the personal "information" bodily fluids contain. For these reasons, governmental taking of a urine specimen constitutes a search and seizure within the meaning of the Fourth Amendment. See *McDonnell v. Hunter*, *supra*; *Allen v. City of Marietta*, 601 F. Supp. 482, 288-89 (N.D. Ga. 1985);.... Most recently, the Third Circuit implicitly confirmed the applicability of Fourth Amendment prohibitions to the taking of urine samples, invoking Fourth Amendment doctrine to determine the constitutionality of urine testing of race horse jockeys. *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d. Cir. 1986) ("the question that arises in this case is whether the administrative search exception extends to warrantless [urine] testing of persons").

Having determined that urine testing constitutes a search and seizure, this court must now evaluate defendants' search under the Fourth Amendment's dictates. The fundamental command of the Fourth Amendment is that searches and seizures be "reasonable." *New Jersey v. TLO*, 469 U.S. 325, 105 S.Ct. 733, 743 (1985).... What is reasonable depends upon the context in which a search takes place. Ordinarily a search requires both a warrant and probable cause to qualify as constitutionally reasonable. Yet the Supreme Court has stated that neither element is "an irreducible requirement of a valid search." *New Jersey v. TLO*, *supra*, at 743. Instead, the ultimate determination of a search's reasonableness requires a judicious balancing of the intrusiveness of the search against its promotion of a legitimate governmental interest. See *Illinois v. Lafayette*, 462 U.S. 640 (1983); *United States v. Villamonte-Marques*, 462 U.S. 579 (1983). The Supreme Court has explained:

*The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.*

*Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

*Even in the limited circumstances where the Supreme Court has created explicit exceptions to the stringent Fourth Amendment probable cause requirements--e.g. administrative and regulatory searches--the Court has held such exempted searches to a reasonableness standard in order to protect individuals from the abuses possible when government officials are entrusted with "almost unbridled discretion...as to when...and whom to search."*

*Marshall v. Barlow's Inc.*, 436 U.S. 307, 323 (1978) (invalidating warrantless administrative searches by OSHA where professed enforcement needs were outweighed by privacy interests of employers subjected to inspections); see also *Delaware v. Prouse*, 440 U.S. 648 (1979).

This Court must determine whether the intrusion occasioned by compelling members of the Plainfield Fire Department to submit to compulsory urine testing is sufficiently justified by the governmental interest in ferreting out drugs so as to be "reasonable" within the meaning of the Fourth Amendment.

### *Expectation of Privacy*

The degree of intrusion engendered by any search must be viewed in the context of the individual's legitimate expectation of privacy. The test for determining when an expectation of privacy is "legitimate" was articulated by Justice Harlan in *Katz v. United States*: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. 347, 361 (1967).

Courts have used this standard to differentiate between levels and degrees of intrusiveness among searches and seizures. As measured by the expectation of privacy, inspections of personal effects are generally least intrusive, while breaches of the "integrity of the body" result in the greatest invasion of privacy.

Applied to the facts at hand, defendants' mass urine testing program subjected plaintiffs to a relatively high degree of bodily intrusion. As stated earlier, while urine is routinely discharged from the body, it is generally discharged and disposed of under circumstances that warrant a legitimate expectation of privacy. The act itself, totally apart from what it may reveal, is traditionally private. Facilities both at home and in places of public accommodation recognize this privacy tradition. In addition, society has generally condemned and prohibited the act in public. The "interests of human dignity and privacy" which compelled Justice Brennan to find mandatory blood extractions greatly intrusive. *Schmerber, supra*, at 770, are implicated with equally compelling force when individuals are directed to urinate in the presence of a government agent. The requirement of surveillance during urine collection forces those tested to expose parts of their anatomy to the testing official in a manner akin to strip search exposure. Body surveillance is considered essential and standard operating procedure in the administration of urine drug tests. (See Brief Submitted on Behalf of Defendants' at 3), thus heightening the intrusiveness of these searches. A urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience. See *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (*en banc*).

Furthermore, compulsory urinalysis forces plaintiffs to divulge private, personal medical information unrelated to the government's professed interest in discovering illegal drug abuse. Advances in medical technology make it possible to uncover disorders, including epilepsy and diabetes, by analyzing chemical compounds in urine. Plaintiffs have a significant interest in safeguarding the confidentiality of such information whereas the government has no countervailing legitimate need for access to this personal medical data. The dangers of disclosure as a result of telltale urinalysis range from embarrassment to improper use of such information in job assignments, security and promotion.

Both the Supreme Court and the Third Circuit have recognized a right of privacy in medical information. See *Whalen v. Roe*, 429 U.S. 589, 602 (1977); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d. Cir. 1980). In *Shoemaker v. Handel*, the Third Circuit acknowledged that the medical disclosure resulting as a by-product of urinalysis created cause for grave confidentiality concern. 795 F.2d 1136 (1986). The Shoemaker court nonetheless upheld the urine testing of jockeys as constitutionally reasonable. But it based its ruling on the fact that such confidentiality concerns had been carefully addressed in statutory regulations strictly limiting the use and publication of test results so as to guarantee the jockeys utmost confidentiality. 795 F.2d at 1144. The court's decision in Shoemaker is thus readily distinguishable from the case at hand. Plainfield had not established any procedural guidelines to govern the urine testing, and in particular had not taken any precautions to vouchsafe confidentiality. Quite to the contrary, following the suspension of those fire fighters who had tested positive for drugs, the City of Plainfield publicized its actions to the media. While no individuals were identified by name, the exposure had subjected all Plainfield fire fighters to public suspicion and degradation.

There can be no doubt on this record that the members of the Plainfield Fire Department reasonably expected to be free from intrusive government urine testing while on the job. No provisions for mass urine testing were included in the collective bargaining agreement signed by the fire fighters and the City. No directive of policy statement authorizing the City of Plainfield to conduct such tests was ever written or communicated to the plaintiffs. There was absolutely no warning prior to the rude awakening on May 26, 1986 that submission to compulsory employee urine testing would become a condition of continued employment. Plaintiffs' reasonable expectations of privacy fell subject to the unbridled discretion of their government employer, contrary to the very tenet of the Fourth Amendment. See *Delaware v. Prouse*, *supra*, 440 U.S. at 654 (Fourth Amendment safeguards are necessary "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field'").

### *The State's Interest*

Defendants contend that fire fighters, as public servants, have a diminished expectation of privacy, or in fact, no expectation of privacy at all with respect to job-

related inquiries by the municipality. As employer, the City bears ultimate responsibility for insuring that its firefighting force is fully capable of protecting the welfare and public safety of Plainfield's citizenry. Consequently, defendants claim that their interest in the discovery and elimination of drug abuse among fire personnel overrides any privacy rights fire fighters may have.

Defendants urge the court to find that theirs was an exempted search properly within the "employment context searches of government employees" exception to the Fourth Amendment. See, e.g., *United States v. Collins*, 394 F.2d 863 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966); *Allen v. City of Marietta*, 601 F.Supp. 482 (N.D. Ga. 1985). This emerging body of case law suggests that the government as employer "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." *Allen v. City of Marietta*, 601 F.Supp. at 941.

The fundamental distinction between *City of Marietta* and this case, is that the warrantless search in *City of Marietta* was nevertheless based upon some reasonable, individualized suspicion that the employees subjected to urinalysis were under the influence of drugs while on the job. In *City of Marietta*, certain employees of the Board of Lights and Water had been observed smoking marijuana on the job. Only those employees toward whom a reasonable suspicion of drug use on the job was established were compelled to submit urine samples or resign. Similarly, in another employment contest case involving urine testing of government employees, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, (8th Cir. 1976), the court upheld warrantless testing of city bus drivers who were involved in serious accidents or suspected of being intoxicated on the job, but only after two supervisory employees concurred as to the necessity of the test based on individualized, reasonable suspicion.

In each of these cases the city was able to insure the public welfare while still respecting individual employee's Fourth Amendment rights. The intrusiveness of the search was minimized because the government established an individualized basis for its need to search and carefully circumscribed the search's scope.

The City of Plainfield proceeded in its urine testing campaign without any specific information or independent knowledge that any individual fire department employee was under the influence of drugs. None of the 103 individual fire fighters compelled to submit to urine testing had received prior notice that their job performance was below standard. None of the 103 fire fighters tested were under investigation for drug use on the job. There was not an increased incidence of fire-related accidents or complaints of inadequate fire protection from the community. Defendants had no general job-related basis for instituting this mass urinalysis, much less any individualized basis.

*The Constitutional Standard*

The deleterious effects of drug consumption upon public safety officers' ability to properly perform their duties is undeniably an issue legitimately within the City's concern. But the merits of the City's efforts to assure that all fire fighters are free from drug induced impairments and capable to perform their public service is not at issue in this case. Rather the question to be answered is whether the means chosen by the City to achieve this laudable goal are "reasonable" within the meaning of the Fourth Amendment. This court is compelled to conclude that they are not.

As justification for undertaking the department-wide search, defendants explain that the widespread, large scale drug use in all segments of the population leads to the "reasonable and logical inference that some of those affected may ultimately be employed in a public-safety capacity." See Brief Submitted on Behalf of Defendants at 14. Defendants contend that mass round-up urinalysis is the most efficient way to detect drug use.

It is beyond dispute that the taking and testing of urine samples achieves the city's desired goal, namely the identification of employees who use drugs. But under the law, the results achieved cannot justify the means utilized and the constitutionality of a search cannot rest on its fruits. See *McDonnell v. Hunter*, 612 F.Supp.1122 (D. Iowa 1985).

The sweeping manner in which defendants set about to accomplish their goals violated the fire fighter's individual liberties. As to each individual tested the search was unreasonable because defendants lacked any specific suspicion as to that fire fighter. See *e.f. Terry v. Ohio*, 392 U.S. 1,20 (1968) ("[F]irst, one must consider 'whether the...action was justified at its inception.'...second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place'").

The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. The City of Plainfield essentially presumed the guilt of each person tested. The burden was shifted onto each fire fighter to submit to a highly intrusive urine test in order to vindicate his or her innocence. Such an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the Constitution. Although plaintiff's privacy and liberty interests may be diminished on the job, these interests are not extinguished and therefore must be accorded some constitutional protection.

The Fourth Amendment speaks in terms of individual guarantees. Every individual has the absolute right to be free from searches and seizures absent the establishment of some degree of reasonable suspicion against him or her. Even with respect to law enforcement investigations at the scene of a crime, courts have refused to permit police agents to transfer reasonable suspicion established against one

individual to other individuals also present at the crime site. In these situations the court has reasoned that "fourth amendment does not permit any automatic or casual transference of 'suspicion'". *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978). "Reasonable suspicion' must be specific, directed to the person to be searched." *Id.*, at 1331. "An investigatory search will be found constitutionally permissible only when supported by reasonable suspicion directed to the person to be searched." *Ybarra v. Illinois*, 444 U.S. 85, 89-91 (1979); See *United States v. Clay*, 640 F. 2d 157, 160 (8th Cir. 1981). If we cannot impute suspicion from one individual legitimately under investigation to others in his presence, we cannot impute suspicion to an entire fire fighter force when no reasonable suspicion exists as to any one of the individuals to be searched.

Defendants undertook this search driven by the mere possibility of discovering that some fire fighters were using drugs and therefore might be impaired in their job performance at some future time because of this drug use. Such attenuated protestations of concern for the welfare of the Plainfield community, without more, cannot render the seizure of urine specimens constitutionally reasonable.

The Fourth Amendment allows defendants to demand urine of an employee only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience. *Id.*, at 1130; *Division 241 Amalgamated Transit Union (AFL-CIO v. Suscy)*, 538 F.2d 1264, 1267 (7th Cir. 1976). The reasonable suspicion standard requires individualized suspicion specifically directed to the person who is targeted for the search.... Divorcing the requirement of individualized suspicion from the reasonable suspicion standard, would leave "no readily apparent limitation on ... public officials' power to search" *U.S. v. Davis*, 482 F.2d 893, 905-08 (9th Cir. 1973). Absent a requirement of individualized suspicion, the Fourth Amendment would cease to protect against arbitrary government intrusion.

Defendants argue that "mere suspicion" rather than "reasonable suspicion" should be the standard for urine testing of government employees given the weighty interest the state has in protecting the general public from the danger of impaired, unfit fire fighters. Concededly the state's interest is a weighty one, but the Fourth Amendment requires that it be balanced against the significant intrusion analysis imposes upon the individual fire fighters. In this case it has been demonstrated that the intrusion engendered upon the many dedicated fire fighters and fire officials of Plainfield was severe. The humiliation experienced by governmental intrusion into, and surveillance of, a highly private bodily function; the compelled disclosure of personal physiological data not properly within the government's possession, without any confidentiality safeguards; the complete absence of notice or opportunity to refute such testing; the implied presumption of guilt borne by each individual fire fighter; the compulsion exercised upon threat of discharge-- for all these reasons, the government may not continue to usurp unregulated and standardless discretion, but must instead comply with the minimal constitutional mandates.

The state's interest will not be significantly impaired by the individualized reasonable suspicion standard. The standard is not unduly burdensome. It does not leave the City without means of combatting the influence of drugs upon employees while on duty. Police officers and fire fighters are subject to constant observation by their superiors and co-workers. Certainly one so under the influence of drugs as to impair the performance of his or her duties must manifest some outward symptoms which, in turn, would give rise to a reasonable suspicion. Further, the imposition of an individualized, reasonable suspicion standard rather than the more stringent probable cause standard is already a significant concession of deference to the state's legitimate interest. By mandating the individualized, reasonable suspicion standard, courts have recognized the government's legitimate need to diminish employee's privacy rights in certain limited situations in order to better serve the public welfare.

Finally, defendants contend that the recent third Circuit ruling *Shoemaker v. Handel*, 795 F.2d 1136 (1986), upholding the constitutionality of breathalyzer and urinalysis testing of race horse jockeys absent any requirement of individualized suspicion, provides controlling precedent for the case at hand. This court disagrees.

In balancing the state's interest against that of individual jockeys, the considerations before the *Shoemaker* court differed dramatically from those in the instant case. First, horse racing unlike fire fighting, is an intensely regulated industry within the administrative search exception to the Fourth Amendment. See, e.g. *Donovan v. Dewey*, 452 U.S. 594, 602-05 (1981) (coal mines); *United States v. Birwell*, 406 U.S. 311, 316-7 (1972) (gun selling); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (liquor industry).

Such persuasive regulation puts jockeys on notice that they will be subject to the intrusive authority of the Racing Commission. As explained in *Shoemaker*, the Commission has historically exercised its rule making authority in ways that reduce the justifiable privacy expectations of participants in the horse racing industry, most notably by endorsing warrantless searches of stables. The *Shoemaker* court held that jockeys who become involved in this pervasively regulated industry do so with full knowledge that the Commission will exercise its authority to assure public confidence in the integrity of the races. Therefore, the court concludes, consent to personal searches is implied by each jockey's participation.

Although *Shoemaker* creates an exception to the individualized suspicion requirement, it is instructive that the expectation created is very narrowly tailored. The court explicitly ties its decision to the unique circumstances surrounding "closely regulated industries." In the court's own words: "Our holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry." To read this exception broadly would violate the court's apparent intention. Precisely because fire fighting is not a pervasively regulated industry, the determination of what constitutes a "reasonable" invasion of a fire fighter's privacy cannot be informed by the standards applied in *Shoemaker*.

Traditionally, the Plainfield Fire Department has not invoked intrusive regulatory authority in supervising its fire fighters, persons and effects. Plaintiffs in

this case had no notice or warning that they would be subject to intrusive personal searches by Fire department officials or other City officials. Nothing in the initial employment agreement nor any civil service requirements permits the conclusion that these fire fighters voluntarily forfeited their privacy interest in the same way as jockeys. Plaintiffs were not afforded an opportunity to make an informed employment decision based on the knowledge that they might be required to submit to intrusive government intervention on the job. Given these facts, the plaintiffs do not qualify as "voluntary participants in a highly regulated, industry". The circumscribed ruling in *Shoemaker* cannot be applied to the instant search.

The reasonableness of a search is arrived at by balancing the interests of the state in conducting the search against the individual's privacy interest. That the Plainfield fire fighters retain a greater privacy interest on the job than do race horse jockeys is evident from the fact that racing is a closely regulated industry and fire fighting is not. What remains then is to compare the state's interest in the two cases.

The Third Circuit's determination in *Shoemaker* was largely influenced by concerns specific to the horse racing industry. For instance, the Court afforded great deference to the state's interest in "assuring the public of the integrity of the persons engaged in the horse racing industry" because the state had a direct financial stake in the revenue generated by public wagering on horses and because the court recognized the industry's unique vulnerability to "untoward influences". *Id.*, at 1141. Drug testing was the only "effective" means that state could employ in its effort to dispel long standing public suspicion of criminal influences permeating the organized gambling associated with horse racing.

In *Shoemaker*, the court placed great emphasis upon the public's "perception" of the industry's integrity because, "[p]ublic confidence forms the foundation for the success of an industry based on wagering". *Id.*, at 1142. Although there may exist ways to detect drug use among jockeys, other than subjecting them to mandatory urinalysis, what was at stake in *Shoemaker* was the appearance of propriety. The state's interest was to demonstrate to the public that drug abuse was not interfering with racing. Mandatory, mass urinalysis provided such a demonstration.

Clearly, no one can deny that the public has an interest in the integrity of its fire fighting forces. Yet, the ability of fire fighters to perform their jobs is not dependent upon the public's "perception" of this integrity in the same way as the racing industry's. In other words, fire fighters can still continue to serve the public effectively, even in the face of unpopular public "perception". For the municipality of Plainfield then, it is not the demonstration of propriety that is essential but rather the determination of job-related capability. Such determination does not require mandatory, mass urinalysis, but can be safely accommodated by an individualized suspicion standard.

The Plainfield Fire Department has a long record of satisfactory service in protecting the safety of its citizenry. The citizens of Plainfield have not voiced any concern regarding their performance or their efforts. The public is well aware of the

careful screening tests and exhaustive training undergone by all firefighters. The civil service test and, the physical capacity requirements, all attest to the meticulous and conscientious manner in which fire fighters are selected. It is this process that establishes and ensures public confidence in its fire fighters.

The City of Plainfield is not seeking to combat public perception of "un-ward influence" undermining its fire force. On the contrary, these fire fighters daily prove their ability and their commitment on the job. Therefore, the state's interest in this case does not require the use of departmentwide urinalysis. Having determined that both the fire fighter's privacy rights in this case are greater than those of the jockeys, and that the state's interest is less than that of the Racing Commission, this court finds that the search in question does not fall within the *Shoemaker* exception.

Perhaps the most critical distinction between these two searches though, is the very careful procedural protections built into the *Shoemaker* testing system and the complete absence of procedural safeguard in defendants' urinalysis program. The jockeys in *Shoemaker* were assured that the results of their tests would be published only to a very few Commissioners. Specific agreement was obtained to keep such information confidential from enforcement agents.

The City of Plainfield is in an entirely different posture. Governmental agents, once they possess incriminatory information concerning drug use, may not have the authority to withhold such information from prosecuting agents, even if that is their desire. More specifically, in the instant case. Plainfield charged the plaintiffs with "acts of criminal misconduct" in their formal written complaints. The potential for criminal prosecution that exists vis a vis the Plainfield fire fighters poses a greater intrusion than that faced by the *Shoemaker* jockeys."... [G]overnment investigations of employee misconduct always carry the potential to become criminal investigations." *Allen v. Mariettas, supra*, at 491. In balancing the government's interest in conducting the search against the intrusiveness and potential harms plaintiffs may suffer, it is clear that Plainfield defendants must meet a much higher burden of reasonableness to justify subjecting plaintiffs to potential criminal charges. For these reasons, *Shoemaker* is not controlling on the present facts.

A balancing of the state's interest against the significant invasion of privacy occasioned by the urine testing requires a determination that defendants' conduct was unreasonable and violative of the Fourth Amendment.

### *Due Process Claims*

As civil servants employed by the Plainfield Fire Department, plaintiffs are endowed with constitutionally protected property interests in their tenure pursuant to the New Jersey statutory scheme governing municipal fire fighters. .... Specifically, N.J.S.A. §40A:14-19 confers upon plaintiffs, as fire department employees, a reasonable expectation of continued employment unless and until "just cause" is established for their termination. N.J.S.A. §40A 14-19 provides in pertinent part as follows:

*Except as otherwise provided by law no permanent member or officer of the paid or part-paid fire department or forces shall be ... suspended, removed, fined or reduced in rank ... except for just cause as herein above provided and then only upon a written complaint, setting forth the charge or charges as against such member or officer so charged, with notice of a hearing ... which shall be not less than 10 nor more than 30 days from the date of service of the complaint. A failure to substantially comply with said provisions as to the service of the complaint shall require a dismissal of the complaint.*

This statutory scheme bestows a property interest upon plaintiffs which cannot be abrogated by their government employer without due process. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 E.Ed.2d 494, 1 IER Cases 424 (1985); *Johnson v. United States*, 628 F.2d 187, 194 (D.C. Cir. 1980); *Jones v. McKenzie*, 628 F. Supp. 1500, 1504, 121 LRRM 2901 (D. D.C. 1986).

Furthermore plaintiffs have constitutionally recognized liberty and property interest in their individual reputations, and in the honor and integrity of their good names. Such protected reputational interests derive directly from plaintiffs' employment status as fire fighters and cannot be arbitrarily or capriciously infringed by government officials either. See, e.g., *Paul v. Davis*, 424 U.S. 693, 78-09 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 654, 573; *Jones v. McKenzie*, 628 F.Supp. at 1505.

It is beyond argument that discharge on charges of drug abuse could severely affect these interests. The deprivation of plaintiffs' liberty and property interests trigger constitutional requirements of procedural due process. Defendants' actions impermissibly violated these protected liberty and property interests without due process of law.

The unannounced mass urinalysis testing that took place on May 26, 1986 and subsequently, was completely lacking in procedural safeguards. Such testing was unilaterally imposed by defendants as a condition of employment without prior notice to plaintiffs and without opportunity for plaintiffs to voice objection or seek the advice of counsel. There were no standards promulgated to govern such department-wide drug raids, nor any provisions made to protect the confidentiality interests of the fire fighters whose unexpectedly came into the hands of government authorities. Defendants precipitously exercised their unbridled discretion exhibiting a total lack of concern for the constitutional rights of their employees.

By compelling plaintiffs to participate in the urine testing under the threat of immediate discharge, defendants effectively coerced a waiver of any rights, including the right against self-incrimination, plaintiffs may have had under the collective bargaining agreement to challenge such unilateral actions. Defendants' conduct was a flagrant violation of the due process rights that insure to plaintiffs under both the New Jersey statutory regulations and the Fourteenth Amendment of the United States Constitution.

Defendants' actions are cause for particular concern given numerous reports challenging the reliability and accuracy of the urinalysis tests themselves. The procedural dangers inherent in relying on the results of such tests are well documented in both legal and medical literature. See e.g., *Jones v. McKenzie*, 628 F.Supp. at 1505-06 and authorities cited therein; see also, M.K. Divoll and D.J. Greenblatt, "The Admissibility of Positive EMIT Results as Scientific Evidence: Counting Facts, Not Heads," 5 *Journal of Clinical Psychopharmacology* 114-116 (1985). In light of these concerns, defendants' refusal to afford plaintiff a full opportunity to evaluate and review their personal test results or to have their own specimens re-tested by a technician of their choice offends traditional notions of fundamental fairness and due process.

On its face, N.J.S.A. §40A:14-19 explicitly mandates that no suspension shall occur until an opportunity has been provided for the presentation of charges, hearing, opportunity for defense and an adjudication of guilt or innocence. This statute has been interpreted by the New Jersey courts to permit pre-hearing suspension where the suspension is clearly "procedural"--a temporary measure pending further investigation and due process hearing--but impermissible where pre-hearing suspension is invoked as a punitive measure prior to the adjudication of guilt. .... In the instant action, defendants conducted and terminated their investigation with the urinalysis testing conducted in late May and early June. The terminations without pay that followed for those who tested positive were unquestionably punitive in nature. Defendants gave no indication that they would conduct second tests to corroborate their initial finds, nor was mention made of a hearing procedure in the written complaints served upon the plaintiffs. Absent a sufficient procedural framework defendants' delay in issuing the written complaints setting forth the charges against those terminated is unjustifiable.

Having held that defendants' search violated plaintiffs' Fourth and Fourteenth Amendment rights, this court finds that plaintiffs' termination was without just cause and therefore violative of due process. Apart from the constitutional adjudication, defendants' complaint is hereby dismissed pursuant to N.J.S.A. §140A:14-19.

### *Permanent Injunction*

This court finds that plaintiffs having met their burden of demonstrating that defendant City of Plainfield and its agents violated their constitutional right by instituting compulsory, departmentwide, urine testing absent individualized reasonable, suspicion.

The invasion of Fourth Amendment privacy rights and Fourteenth Amendment substantive and due process rights as a result of defendants' conduct warrants the issuance of injunctive relief.

Absent injunctive relief, plaintiffs face the threat of immediate termination from their jobs without pay and without an opportunity for a due process hearing.

Any opportunity for other employment has been jeopardized by the adverse publicity generated by this action, which has left each Plainfield fire fighter vulnerable to the suspicion of being a "drug abuser". Such harm cannot be adequately remedied at law.

Further, this court finds that requiring individualized, reasonable suspicion will not unduly burden the defendants' ability to insure its citizens a safe, unimpaired fire fighting force.

Title 42 Section 1983 of the *United States Code*, creates a federal statutory cause of action against any person "who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws [of the United States]." Defendants' by their actions have violated Title 42 Section 1983, depriving plaintiffs Plainfield Fire Fighters and Plaintiff Monica Tompkins, a Police Department employee, of the constitutional rights and privileges secured to them. See, e.g., *McKinley v. City of Eloy*, 705 F.2d 1110, 1116 (9th Cir. 1983) (cities and their officials and agents may be held liable under Section 1983 for causing violations of the constitutional or civil rights of other city employees).

### Conclusion

The threat posed by the widespread use of drugs is real and the need to combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections. A combination of interdiction, education, treatment and supply eradication will serve to reduce the scourge of drugs, but even a reduction in the use of drugs is not worth a reduction in our most cherished constitutional rights.

The public interest in eliminating drugs in the work place is substantial, but to invade the privacy of the innocent in order to discover the guilty establishes a dangerous precedent; one which our Constitution mandates be rejected.

For the foregoing reasons final judgment shall be entered in favor of the plaintiffs and an appropriate injunction shall issue against the defendant forthwith.

Counsel for the plaintiffs should submit an appropriate form of order in accordance with this opinion.