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Big Brother in the Workplace: Privacy Rights Versus Employer Needs*

Jan Duffy†
Stephen P. Pepe††
Beverly Gross†††

I
Presentation of Jan Duffy

I will be able to move a little more quickly today than I usually do because when I first started talking about employment privacy five or six years ago, I found I had to spend the first half of my talk explaining to the audience why it was important. By now I think most of you have had some exposure to employment privacy in one aspect or another. Whether it's been drug testing or employee access to personnel files, defamation lawsuits related to reference requests, or something of that nature, you all now have at least become aware of the fact that workplace privacy is a significant issue for both employers, employees, and I might also add, for employee representatives. So today my only preliminary remark is describing how I'm going to put fifteen hours worth of material into about twenty-five minutes of talk.

I'm going to give an overview of existing legal restrictions or protections, depending upon how you look at it, on employee privacy. I will be skipping those areas that deal with drug and alcohol testing because Steve Pepe will deal with those, and I'll be skipping those areas that deal with public employment because Beverly Gross will be dealing with those.

What I will do is focus on those items that I think are of particular interest, either because they are most important, because there are new
To begin, I think that workplace privacy needs to be defined. It is not simply tortious invasion of privacy, nor is it simply constitutional protection of privacy. Rather, workplace privacy is all those issues relating to employer acquisition and possession of employee information. This can include methods of acquisition such as lie detectors; employer maintenance and internal use of employee information, which includes such things as to whom supervisors can disclose employee information; employee access to information collected about them; and, perhaps most important, disclosure of personal information collected by and about employees to third persons, such as governments, unions, and prospective employer and reference requests.

To begin, then, covering all those issues with existing legal protection, I’ll first point out to you that there is indeed a Federal Privacy Act.\textsuperscript{1} Most significantly, however, that Privacy Act only applies to federal agencies. Although federal agencies are employers and there are, therefore, provisions of the Privacy Act which apply to the employment relationship, those provisions are of course restricted to federal employers and employees.

The one reason why I would commend this Act to your attention, whomever you represent, is because I think this Act represents the most current legislative thinking about what kinds of privacy restrictions are necessary. So it is relevant to your practice regardless whether you represent private or other nonfederal employees.

The Privacy Protection Study Commission was established by the Privacy Act to determine whether the provisions of the Privacy Act should be applied to the private sector.\textsuperscript{2} The conclusion was, on a mandatory basis no, but on a voluntary basis certainly yes.\textsuperscript{3} The Commission concluded that even private sector employers ought to be con-

\begin{enumerate}
\item \textit{Id}.
\item Privacy Protection Study Commission, Personal Privacy in an Information Society (1977). The Commission made 34 recommendations concerning private employment relationships. The Commission urged, \textit{inter alia}, that employers take voluntary steps to: review personal information practices to determine how, what, and why information is collected; limit information collected to that relevant to specific decisions; inform employees about types and uses of information to assure accuracy, timeliness, and completeness of information collected, retained or is disclosed about employees; permit employees to see, copy, correct or amend records maintained about them, although certain records may be designated as nonaccessible; retain conviction, medical and insurance information apart from regular personnel files; limit internal use of personal information; and limit external disclosures of personal information without employee’s authorization.
\end{enumerate}

The Commission also recommended federal legislative action to ban the use of polygraphs in the employment context; ban “pretext interviews” in employment background investigations; require employers to exercise reasonable care in selecting investigative agencies; and strengthen disclosure provisions of the Federal Fair Credit Reporting Act. \textit{Id.} at 223-75.
cerned with such things as restricting the types of information that employers collect, the sources of that information, including for example lie detectors, and the access within the agency to the information. Most importantly, the Commission concluded that employers should be concerned with issues of unnecessary disclosure of personal information about employees to outsiders such as other agencies or prospective employers.

The Federal Fair Credit Reporting Act also has some ramifications for workplace privacy. Namely, although it basically regulates the activities of credit reporting agencies, it describes employees and applicants for employment as consumers who are protected by the Act. Employers are described as users of the agencies' services. Accordingly, employer information gathering practices sometimes fall within the ambit of the Act, in particular, when an employer procures a consumer investigative report. That's a report based on personal interviews about an employee or prospective employee. The employer must notify the employee that such a report is going to be made and, if the employee requests it, give a fuller disclosure of the extent of that report. If an adverse employment action is taken as a result of the report, such as the denial of employment, the employer must notify the employee of the agency which provided the information. This is particularly important, I've found, in using the DMV to provide consumer investigative reports on a prospective employee's driving record. Many of the DMV's reports are based on personal interviews, such as accident investigations. As a result, this Act has certain ramifications for all employers.

Believe it or not, the Omnibus Crime Control and Safe Streets Act has ramifications for workplace privacy. That Act proscribes the deliberate interception of others' wire and oral communications, in other words listening to somebody on the telephone or, I suppose, eavesdropping outside their office. The Act provides penalties for violations. A violation occurs in the workplace when an employer intercepts an employee's communication, most often a telephone communication, in

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which the employee has a subjective expectation of privacy under conditions which objectively justify that expectation. In other words, if an employee is speaking on the telephone in a locked office where there is no extension phone, obviously he has an expectation of privacy. An employer listening outside the door (particularly with a glass) would obviously violate the Act. If an employee were speaking on the telephone in a large room, a bullpen sort of arrangement, I don't suppose there would be an objectively supportable expectation of privacy.

In *Watkins v. Berry*\(^6\) a violation of the Act was found where the employee's supervisor listened in on an extension phone to a call she was making which turned out to be a personal call. The employees' work was Yellow Pages ad sales, and they had been told supervisors would not listen. When this supervisor listened to the call and learned that the employee was considering other employment, she begged the employee not to consider other employment. The employee in fact went to another employer and then sued her former employer. The Act carries civil penalties as well as criminal ones. The supervisor is not in prison, but the company was assessed a civil penalty for violation of the Act. So certainly, it's something to consider.

Usually, I talk about this to employer groups and from an employer perspective, so you may hear me saying employers should consider doing such and such. Obviously it is employers who usually have the ball in their court on these issues, and therefore ought to be most concerned about what they do and do not do. However, both employee representatives and employees themselves can take the other side and recognize that this legislation exists for their protection.

To move on, the National Labor Relations Act has of course some ramifications for workplace privacy.\(^7\) Most importantly perhaps, it is clear that it is an interference with the right to organize to put employees under surveillance during an organizing campaign. Also, although there are cases going several different directions on this issue, I think the prevailing trend is that it is a refusal to bargain for an employer to unilaterally impose new testing or surveillance devices without prior bargaining with the union.

Equal employment opportunity laws are obviously applicable. There are restrictions imposed on what kinds of information employers can gather, because of potential violation of the equal opportunity employment laws. Most of you, I think, are familiar with those laws so I'll move on.

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One last point which should be made about federal legislation is with respect to pending legislation. Congress has considered privacy related legislation ever since I first started looking at this issue in about 1978. None has as yet passed, but this year the legislation has moved further than ever before. The House has passed a bill, H.B. 1524, and the Senate is considering a bill to prohibit the use of lie detectors in pre-employment and subsequent dishonesty screening. I would predict at this point that that legislation is not going to pass. Nevertheless, it's always a threat to employers who abuse the use of lie detectors in the workplace. Incidentally, one of the major recommendations made by the Privacy Commission was that employers refrain from using lie detectors either for pre-employment screening or for subsequent honesty testing, although certainly the latter use of lie detectors was preferable to the former.

Although this legislation is unlikely to pass, it certainly will be proposed again and, if this year's advance over past years is any clue, I think we can look forward to some regulation of workplace privacy, probably centering around lie detector use in the future.

State legislation is probably the most important legislative area of workplace privacy regulation. Rather than going through the various kinds of legislation that exist in all the states, I suggest that we look at California legislation, especially because basically any legislation that there is in the privacy area is found in California.

The California Privacy Act\(^8\) applies to state employees and mirrors the Federal Act. Of more general application is Labor Code section 1198.5, granting employees access to their personnel files.\(^9\) Note that the statute provides access but doesn't say anything about copying. Nevertheless, the Division of Labor Standards Enforcement, which enforces the statute, ordinarily takes the position that copying is included in the requirement. But I know employers handle that differently depending upon their proclivities.

Basically the only development since this statute was passed is the slight expansion in the case law of the statutory exemption of disclosing criminal investigation and reference materials. Such materials are specif-


ically exempted from disclosure to employees in the statute. Case law has expanded that to say, at least in one case,\textsuperscript{10} that evaluations—in this case it was peer evaluations of a professor provided in confidence—may not be disclosed to an employee on the grounds of protecting the evaluator’s privacy rights under the California Constitution.

The California statute is different in one respect from those found in a number of other states, and certainly from statutes in states which have only recently legislated in the area. Those other states have provided not only that employees have access, but that employees have the right to question material that they find in their file, and that employers must provide a dispute resolution mechanism.\textsuperscript{11}

I advise all California employers to provide such a mechanism now, even though it’s not mandated by statute. It’s obviously to the benefit of the employee to be able to question such material, but I think it’s in the employer’s interests as well. Because of potential liability on the employer’s part for disclosing inaccurate information, it is always wise to get an accuracy check by letting the employee see the file and criticize information found there. It can also bring an end to the issue if the employer has some kind of dispute resolution process, particularly one that provides for an appeal to, for example, the personnel director or some other executive within the company and, if that appeal is denied, the placing of a written disagreement by the employee in the employee’s file. The written disagreement then should be included with any information provided out of that file. I suggest this protective mechanism for employees and employers, although it is certainly not now mandated by the statute. It may perhaps be one day if California follows the rule of other jurisdictions.

The California Labor Code prohibits the use of lie detectors in certain circumstances.\textsuperscript{12} It is important to note that lie detector use is not absolutely prohibited by the statute but is simply prohibited as a condition of employment, meaning that it can only be administered if the employee or prospective employee agrees to take it and signs a statement indicating that it was voluntary.\textsuperscript{13} Employers usually get around this statute by saying to the employee or applicant, “You know, of course, lie detector use is voluntary. You’re not required to take a lie detector test, but gosh, it’s going to take us so long to get this background check done


\textsuperscript{12} Cal. Lab. Code § 432.2 (West 1971).

on you, and the position might be filled by the time we've finished, so what do you think about a lie detector test?” It happens; there's no question about it. But certainly that is not what the statute anticipated. The statute is intended to preclude all but the situation where the employee volunteers—that is, wants to clear his name—although I cannot understand why any employee would do that, and I cannot understand why an employee representative would suggest that an employee do so, especially since the results of a lie detector test seldom do anything to clear up matters. In any event, the current status is certainly that polygraphs can be used and are used with some regularity in certain industries.

One relatively recent legislative restriction in California I would like to comment on is the alcohol rehabilitation section of the Labor Code. Under that section an employer who has more than twenty-five employees must reasonably accommodate an employee who wishes to participate in an alcohol rehabilitation program. In most cases “accommodation” means time off. There actually is a privacy aspect to that provision because the second part of the section says that employers must make reasonable efforts to safeguard the privacy of the employee as to the fact that the employee is enrolled in the program. There is no explanation as to what constitutes reasonable efforts. Perhaps we will see one day when some employer fails to take them. In any event, I think the problems from tortious invasion of privacy, wrongful discharge or defamation that will confront an employer who improperly handles this information are more frightening than the statutory section.

Also, I should point out to those of you who perhaps are not familiar with it, that San Francisco has recently passed an ordinance applying both to the private and public sector, prohibiting the use of blood or urinalysis tests, unless there is evidence of impairment. However, since Steve Pepe will be talking more about that, I'll go on to the issues that are perhaps the most startling, those that involve judicial protection of workplace privacy. Judicial protection is based on either tort or constitutional principles.

Looking first at the relevant tort principles, I think there are two that are most important: defamation and invasion of privacy torts. Defamation occurs when someone communicates harmful information about somebody else, information that injures the person's reputation. What you may not have thought about is that it can happen with some frequency in the workplace. And in fact, after a reasonably lengthy study of defamation cases, I've concluded that a good percentage, perhaps about forty percent of the published cases, actually relate to workplace defamations. They occur in situations most often, for example, when an employer communicates information about a prior employee to a

prospective employer, in other words, reference requests. Other contexts include an employer giving required contractual notice to the union of the reason for the employee’s termination, or posting a termination notice on the employee’s locker or broadcasting it over the public address system. That does happen, and it raises the spectre of defamation if the information that the employer is communicating is not true.

Under the doctrine of privilege, a person who has communicated defamatory information in a situation recognized as privileged is not liable for defamation. Most workplace communications fall within one or another of the privileges widely recognized. About the only situation that has created real problems as falling outside of a privilege is when a supervisor decides to communicate to all the other employees the reason for an employee’s termination, or something like that, on the grounds of employee morale or to teach them a lesson. That’s always a dangerous situation. It falls outside of all the known privileges to defame. One other point, of course, is that most privileges are qualified. That means they can be withdrawn if they are abused, and courts have held that when an employer communicates excessively, such as by posting the termination notice on the locker or broadcasting it over the loudspeaker—neither of which I made up, these are things that actually happened—it has abused the privilege. The privilege is withdrawn and the employer is held responsible for defamation.

The only other point that I want to make about defamation falls in my category of startling developments. Defamation occurs when someone communicates false injurious information about somebody else. The communication is relatively simple. It can occur either when you speak or when you leave a memo out on your desk. It can even occur if your security guards grab somebody and interrogate him in a glass booth. That too has actually been tried. It is defamatory when it suggests that the employee is a thief when in fact the employee is not a thief.

Most employers have been relatively safe in their communications because they are careful as to whom they inform of an employee’s record. And in recent years, frankly, most employers have refused to communicate anything to other employers. Well, the startling development occurred in recent cases in Minnesota and California. In these two cases the courts held that communication of defamatory information by the employer can occur even when the employer has said nothing, and it is the employee who communicates the defamatory information. The courts reasoned that an employer who terminates an employee and gives him a false reason for his termination, knows that the employee is going to have to communicate that false information to a prospective employer.  

In both of these cases employees were fired, given what was subsequently alleged to be a false reason for termination, and found they could not get a job until they told their prospective employer the reason for their discharges. The court in the Minnesota case indicated that the employer made the situation worse by informing the prospective employer of a company policy against communicating information about employees, thereby making it absolutely necessary for the employee to communicate the defamation. It is an interesting twist on the old law of defamation, one that I think bears watching by both employers and employees.

I'd like to move on in the tort area. The action that always springs to mind when discussing workplace privacy issues is invasion of privacy. As I think most of you know, invasion of privacy is actually four different torts. All of them have some applicability to the workplace. For example, appropriation of another's name and likeness can occur when an employer takes a photograph of an employee and uses it in an advertisement. Employees have actually sued successfully in this circumstance. What can an employer do about it? Obviously, ask the employee's consent or get a signed consent from the employee, since consent waives the tort.

More important, though, are two other invasion of privacy torts. The first of these is public disclosure of true private facts. This tort occurs when an employer discloses things about employees which are true but private and embarrassing, and discloses them to a large number of people. On the other hand, because the tort requires a rather public disclosure, it is difficult to base an action on statements made in the workplace. Absent the posting on the locker, broadcasting over the address system or, as in a number of the cases, an employer, such as a sheriff, telling the media why the deputy has been terminated, a court will usually not find an invasion of privacy.

Most important is the intrusion into seclusion brand of tortious invasion of privacy. This tort used to occur only in cases where someone intruded into a private place, such as the employee's home. Courts now are increasingly finding that it may occur when the employer intrudes into an area in which the employee has an expectation of privacy.

16. Public disclosure usually occurs in the workplace when an employer publicly (i.e., widely) disseminates private information such as reasons for an employee's discharge, medical condition, or performance evaluation.


18. For intrusion into another's seclusion, courts traditionally required an unreasonable intrusion into a private geographical space such as a home or hotel room. Some recent cases have, however, dispensed with this requirement. See, e.g., Levias v. United Airlines, No. 49503 (Ohio Ct. App. Oct. 3, 1985) (court found tortious invasion of privacy where the airline's medical examiner disclosed plaintiff's confidential medical records to her husband and to her flight supervisor, neither of whom had a "need to know"). But see Kobeck v. Nabisco, 166 Ga. App. 562, 305 S.E.2d 183 (1983).
Courts have taken two different tacks on this one. In one recent case an employer intruded into a locker supplied by the employer but locked by the employee's lock. The employee's lock created an expectation of privacy. Therefore an intrusion into seclusion form of tortious invasion was committed when the employer searched the locker without notice. The other tack has focused on intrusion into seclusion in the psychological sense. In an Alabama case an employer questioned an employee about her sex life. This was found to constitute an intrusion into her psychological seclusion.

I want to quickly point out that a new tort seems to be developing for the violation of lie detector statutes. There are two cases in which employers violated the statute and, on some kind of vague tort notion, were held liable in damages to the employee.

The last thing I'd like to mention concerns constitutional rights to privacy. Beverly Gross is going to talk about that in the public employee context, but there's one thing that I would like to mention that is relevant to all employers. That is the line of cases that springs from Detroit Edison, where an employer has been asked to provide information about employees not necessarily the subject of the particular lawsuit or grievance and the employer asserts the uninvolved employee's privacy rights. Detroit Edison had a footnote suggesting that employees had some privacy interests. There have been a number of subsequent developments such as when NIOSH (National Institute of Occupational Safety and Health) or other governmental agencies have asked for employee information. But I think the clearest development has occurred where employers have refused to turn over employee files to unions, for example, on the grounds of those employees' privacy.

Three cases seem to have defined this area. In New Jersey Bell, the

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21. See, e.g., Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (employee who was constructively discharged in violation of statute for refusing to take lie detector test recovered $300,000 compensatory and $1,000,000 punitive damages for abusive discharge and infliction of emotional distress); Kamrath v. Suburban Nat'l Bank, 363 N.W.2d 108 (Minn. Ct. App. 1985) (bank teller whose employer asked her to take a lie detector test sued for violation of statutory prohibition on "directly or indirectly soliciting" an employee to take a polygraph test and recovered $160,000 damages and $30,000 attorney's fees). But see Gibson v. Hummel, 688 S.W.2d 4 (Mo. Ct. App. 1985) (in absence of statute, employee failed to establish that lie detector testing constituted "outrageous behavior").
court concluded that indeed, the records that the union requested were private. Now, I've never seen attendance records like this in my life, but the attendance records in question had such basic detail as the reasons for employees' absence from work, and it included venereal disease and things like that. The great one involved an employee who apparently had given information to someone, who noted it down in the employee's record, that the employee was absent because, in treatment for hemorrhoids, he "had used too hot of water on too tender of skin." The judge remarked, "If that's not private, I don't know what is." In any event, the judge concluded that the information was private. Moreover, because the employer had a privacy protection program and had guaranteed privacy to employees, it was not required to turn over the information. In two subsequent cases in which employers tried to protect less private information, such as evaluations, their requests were denied, the courts holding that the information was not that private, and the employers' lack of any kind of privacy protection programs weakened their claim of legitimate privacy interests.24 The information had to be turned over. I think that tells us quite a bit about the answer to the question of what an employer may refuse to turn over.

California has a constitutional Privacy Amendment.25 We all know it extends to private action. What we don't know at this point is how far it extends. Does it apply to keeping employers from getting involved in employee off-the-job conduct? The rule in the Miller case suggests that it does.26 Does it apply to giving out information to third parties? Does it apply to drug and alcohol testing? We don't know at this point, but we'll find out.

In conclusion, I think that privacy is one area where there is a substantial unanimity of interests involved. Employees have an interest in having their privacy protected, while employers have an equal interest in not falling afoul of some of the restrictions such as defamation or tortious invasion of privacy. The area presents some interesting issues, issues that employers and employees can work out together.

Thank you.

II
PRESENTATION OF STEPHEN P. PEPE

I'm going to talk about employee privacy as it has to do with testing in three primary areas: AIDS, drugs, and lie detector testing. I'll touch

24. Salt River Valley Water Users Ass'n v. NLRB, 769 F.2d 639 (9th Cir. 1985); NLRB v. Pfizer, 763 F.2d 887 (7th Cir. 1985).
only briefly on the lie detector because Professor Duffy has already covered it and that's a fairly stable area of the law. In terms of looking at these issues, I think there are eight legal theories or categories that an employer has to look at.

The first is whether or not there is any direct legislative regulation, either at the state, federal or local level. If there is a labor organization, the question is whether there is a duty to bargain, and whether there is a chance of arbitration. An employer also needs to know whether or not federal and state handicap statutes apply. And then there are the three torts that have already been talked about quite a bit, torts for wrongful discharge, invasion of privacy and defamation. Obviously the law in these areas differs from state to state.

It's fairly well settled that most states, some twenty-six now, either restrict or prohibit the use of lie detectors or psychological stress evaluations, which are called voice tests.27 There is a new test that is being used primarily in the retail industry that, for want of a better term, is being called a pencil and paper veracity test. This is a test given to clerks asking them a series of questions, such as whether it is ever proper to steal. Based upon the results of that test, so the proponents of the test say, an employer can predict whether or not that employee is going to be honest or dishonest. Many employers in the retail industry are shifting to that type of test as a replacement for the lie detector.

With regard to AIDS, I think that situation has calmed down a great deal, primarily because of the scientific information that's come out. I don't think it's seriously disputed among most people that terminating somebody for having or being suspected of having AIDS is either going to run afoul of direct legislation where it exists, or your state or

27. One state and the District of Columbia prohibit employers from using lie detector tests. See D.C. CODE ANN., Act 2-320 (1982); MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1986). Six states require operators to be licensed or to avoid questions concerning religion, labor affiliation and sexual activities or the like: ARIZ. REV. STAT. ANN. § 32.2701 (1976); ILL. ANN. STAT. ch. 111, § 2415.1 (Smith-Hurd 1986); MICH. COMP. LAWS ANN. § 37.203 (West 1986) (if employee requests test, operator must be licensed and certain questions must be avoided); NEV. REV. STAT. § 648.187 (1985); N.M. STAT. ANN. § 61-26-9 (1978); and VA. CODE § 40.1-51.4:3 (1977). Twenty-one states prohibit employers from requesting or compelling lie detector tests but permit lie detector tests if voluntary: ALASKA STAT. § 23.10.037 (1984); CAL. LAB. CODE § 432.2 (1985); CONN. GEN. STAT. ANN. § 31-51g (1972); DEL. CODE ANN. tit. 19, § 704 (1985); HAWAII REV. STAT. §§ 378-21, 378-22 (1976); IDAHO CODE § 44-403 (1977); IOWA CODE § 730.4 (1986); ME. REV. STAT. ANN. ch. 32, §§ 7151, 7166, 7167 (1985); MD. ANN. CODE art. 100, § 95 (1984); MICH. COMP. LAWS ANN. § 37.203 (West 1986); MINN. STAT. ANN. § 181.75 (West 1986); MONT. CODE ANN. § 39-2-304 (1980); NEB. REV. STAT. § 81-1932 (1981) (after consent, questions limited); N.J. STAT. ANN. 2C-40A-1 (1982); OR. REV. STAT. § 659.225-227 (1983); 18 PA. CONS. STAT. ANN. § 7321 (Purdson 1986); R.I. GEN. LAWS § 28-6.1-1 (1979); VT. STAT. ANN. tit. 21 § 494(a) (1986); WASH. REV. CODE ANN. §§ 49.44.120, 49.44.130 (1985); W. VA. CODE § 21-5-5(a & b) (1985); WIS. STAT. ANN. § 111.37 (West 1986). Utah prohibits: (a) surreptitious detection test; (b) use of telephonic means to determine truth; and (c) termination or denial of employment based on refusal to submit to such examination. UTAH CODE ANN. § 34-37-16.
federal handicap statutes. You also have the same problem with AIDS as with drugs if you are going to engage in mandatory testing.

In terms of drug testing, so far there is no direct legislation, excluding perhaps San Francisco, dealing with the pre-employment drug testing process. In the context of existing employees, it has been recognized that if an employer has cause to believe that somebody is under the influence of alcohol or drugs, the employer has the right to request a test. The controversial area and the one that's getting all the publicity has to do with random drug or alcohol testing. Now in addition to that, if an employer discloses information learned from lie detectors, AIDS or drug tests, it faces the risk of a suit for invasion of privacy.

Now turning specifically to AIDS in the workplace, there is at present direct legislative attention in California, Florida and Wisconsin. Under the NLRA, I don't think there is any question that if there is a union and you want to engage in testing or take disciplinary action because of AIDS, you probably have a duty to bargain. So far the discrimination statutes, such as Title VII, have not come into play. In the federal and state handicapped area, tribunals in both New York and Florida have suggested that AIDS may fall within their state handicap statutes, and other states are going in the same direction. The tort of wrongful

28. San Francisco enacted an ordinance effective Jan. 2, 1985 which limits the ability of employers in San Francisco to require an employee to submit to a drug test as a condition of employment. SAN FRANCISCO, CAL., ORDINANCE NO. 527-85, art. 3300A, amending Part II, Chapter VIII of the SAN FRANCISCO MUNICIPAL CODE.

29. In McDonnell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) the court held that the fourth amendment of the United States Constitution prohibited a public employer—the Iowa Department of Corrections—from requiring an employee to submit to a urine, blood or breath test unless the employer has a reasonable suspicion that the employee is then under the influence.

30. In the few cases that have considered the matter, the courts have generally concluded that "[o]ne clearly has a reasonable and legitimate expectation of privacy in . . . personal information contained in his body fluids." Id.

31. CAL. HEALTH & SAFETY CODE § 199.21(f) (West Supp. 1986); FLA. STAT. ANN. § 381.606(s) (West 1986); WIS. STAT. ANN. § 103.15 (1986).

32. The Federal Rehabilitation Act of 1973 prohibits handicap discrimination in employment by the federal government, government contractors, and programs receiving federal financial assistance. 29 U.S.C. §§ 701-796i (1985). The Rehabilitation Act includes within its definition of a "handicapped individual" one "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." Id. § 706.

New York prohibits discrimination in employment against individuals based on a "disability." N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982). The term "disability" includes "a physical . . . or medical impairment resulting from . . . physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." N.Y. EXEC. LAW § 292(21) (McKinney Supp. 1986). In a nonemployment context, a New York court has concluded that AIDS may be a disability under the New York Human Rights Law. People v. 49 W. 12th Street Tenants Corp., No. 43604/83 (N.Y. Sup. Ct.), N.Y.L.J., Oct. 17, 1983, at 1 (motion for preliminary injunction to stop eviction from co-op on behalf of tenant doctor who treated AIDS patients).

In Shuttleworth v. Broward County Office of Budget and Management Policy, FCHR No. 85-
discharge I don't think would exist in the AIDS context since the AIDS victim is protected either by direct legislation or by handicap statutes, so that the employee's lawsuit would be restricted to those and not a common law tort theory. Invasion of privacy was covered in Professor Duffy's report. The analysis would be the same: if the employer discloses publicly that somebody does have AIDS, or is suspected of having AIDS, it has probably invaded that person's privacy. A similar analysis probably obtains for defamation.

Now I would like to talk about drug testing in the workplace and I'll start off by talking about the nature of the problem. The problem varies from state to state and geographic area to geographic area. In Southern California it is either an epidemic or an avalanche, depending on one's point of view. I know a number of employers who do pre-employment drug screens in the City of Industry, Vernon, Santa Fe Springs, and Pico Rivera areas. They regularly register sixty to seventy percent positives or failures, however you want to state it. Most of the country seems to run around twenty to thirty percent. That's kind of an astonishing statistic when you think about it, since these are people who know the test is coming, because they are told as part of the pre-employment process that they will have to take a drug screen if they want to be hired.

In terms of the impact on employers, there's really no question that employee drug use causes lost productivity, medical costs and theft. You can argue about how much. One of the interesting sidelights of drug usage that most employers don't recognize is that drug problems are often accompanied by a rash of petty thefts. People in the workplace are using drugs, they're running out of money to buy them and so they start opening lockers, opening purses and taking wallets. When you start getting a rash of petty thefts I think the employer ought to start wondering whether there is a drug problem, because these problems go hand-in-hand.

Looking at why drugs are dealt at the workplace, the answer is

0624, the Florida Commission of Human Relations is currently considering whether AIDS is a protected handicap under the Florida handicap statute.

33. When a statute creates rights not previously recognized at law, some courts have held that the new remedies for such rights are exclusive unless they are shown to be inadequate. In California, this approach has been applied to an age discrimination claim brought under the Fair Employment and Housing Act. In Strauss v. A.L. Randall Co., 144 Cal. App. 3d 514, 194 Cal. Rptr. 520 (1983), the court held that the statutory remedy was adequate and therefore the exclusive remedy for the new rights created therein. The court refused to permit the wrongful discharge claim. Because the California handicap statute created a new right not existing at common law, and a statutory remedy for the infringement of that right, the statutory remedy should be exclusive, barring an employee's wrongful discharge claim. See Hentzel v. Singer Co., 138 Cal. App. 3d 290, 291, 188 Cal. Rptr. 159 (1982).

Other jurisdictions, however, have held such statutory remedies not to be exclusive. See, e.g., Holien v. Sears, Roebuck and Co., 66 Or. App. 911, 677 P.2d 704, aff’d en banc, 689 P.2d 1292 (1984).
fairly simple. From the buyer's point of view—the consumer—she is going to get better quality. If you go buy your drugs up on Sunset Boulevard, you're not sure what you're getting. But if you're buying drugs from your co-worker, you know that he is going to be providing good quality, because if he doesn't you are going to come back at him and he is shortly going to be out of business. From the seller's point of view, he gets a steady clientele. He deals with people he knows and he has less chance of getting ripped off. Additionally, one of the reasons the buyers and sellers enjoy dealing at the workplace is because they use credit. If you are short, the seller will always carry it to the end of the week.

When asking why employees engage in the sale of drugs, you've also got to look at the economics. A pound of cocaine goes for $20,000, an ounce goes for $1,600 and a gram goes for $100. At each stage that cocaine is sold, it's cut. It starts off ninety percent pure down in South America, or the Far East, and ends up ten percent pure when the user gets it. So your employee buys an ounce of cocaine. That's $1,600, a significant amount of money, but not outrageous. If she sells it in one gram lots, she will sell it for $2,800 and make $1,200 for doing next to nothing. But she's not going to do that. She is going to cut it with baby laxative and end up with fifty-six grams, which she then sells for $5,600. So she has made herself a $4,000 profit. And that is a lot more fun and money than she gets working for $10 per hour, or even $20 per hour. So those are the economic reasons why employees sell cocaine and the reasons why employees are using it.

There really is no legislation at the federal level directly addressing mandatory employee drug testing for private employers. The preponderance of the states have no provisions restricting drug tests, though Oregon is a notable exception.34

However, it seems clear that the employer has a duty to bargain about testing if the workplace is unionized.35 Then you are going to run into arbitrations, and while arbitrators will differ, I think most arbitrators will sustain a discharge for the sale or purchase or use of drugs on company premises or time, provided that the employer has a rule about it, the rule has been communicated to the employees, and the employer can prove its case. The problem in arbitration is proving the case, be-

34. OR. REV. STAT. § 659.225 (Supp. 1983) (prohibits an employer from implementing a mandatory breathalizer test as a condition of initial or continued employment unless the employer has “reasonable grounds to believe that the individual is under the influence of intoxicating liquor.” The statute defines “breathalizer” as “a test to detect the presence of alcohol in the body through the use of instrumentation or mechanical devices.”
Because oftentimes the employer is dealing with undercover agents and has to face the successful and skillful union lawyers who will argue entrapment. Or oftentimes the employer is dealing with employees who are implicated by co-workers who were fired for using drugs, and those co-workers are gone and are not going to show up at the arbitration and testify for the employer. So the employer has to rely on either tape recorded statements or handwritten confessions, and those pose some interesting and difficult problems in arbitrations.

For arbitration purposes, I would caution most employers to treat people who use marijuana the same way they treat alcohol users. If you fire someone for having a drink on the job or during lunchtime, and then somebody smokes a joint, you ought to fire her for smoking a joint. But if you don’t fire the guy who has a drink during lunch, you ought not to fire the people who smoke marijuana cigarettes. Now when you get into cocaine, I think there is a different set of rules that apply, but most employers too often don’t consider the alcohol relationship to marijuana or cocaine and they get hurt at the arbitration when the union shows that there are inconsistent past practices. Most arbitrators normally will not sustain discharges for off-premises use on noncompany time of drugs unless you can show somehow that such usage affects the company’s image or garners adverse publicity. The real issue in arbitration is what is the standard. The worst case from my point of view is “beyond a reasonable doubt,” the criminal standard. I argue for a “preponderance of the evidence” standard and most arbitrators fall somewhere within those parameters.

From the employer’s point of view, the main reason and the main justification for drug testing is that you have an obligation under the state and federal statutes to provide a workplace which is free and safe for the employees to work at, and free from employees who are dangerous to themselves and to others. The employer has to be cognizant of safety and is subject to absolute liability. If the employer is aware that employees are using drugs or is told that they’re using drugs and they are having accidents and the employer fails to take any action about that, it faces significant legal risk both on safety and other issues. But on the other hand the employer has to watch out for the invasion of privacy tort, especially when dealing with blood, breath or urine tests. Employers


37. State and federal occupational safety and health statutes and regulations provide strong public policy for maintaining workplace safety and may support an employer’s drug testing policy. The federal Occupational Safety and Health Act provides that employers must “furnish . . . a place of employment which [is] free from recognized hazards.” 29 U.S.C. §§ 651-678 (1986). See also CAL. LAB. CODE § 6400 (West Supp. 1986).
ought not to be going out there under any circumstance and coercing or physically compelling those kinds of tests.

I think there's some hope for employers. In *Ingersoll v. Palmer*\(^3^8\) a California Court of Appeal upheld the use of random roadblocks to test for drunk drivers, saying that it was a valid administrative search doctrine and that the government had an interest in safe roads which outweighed the individual's interest in not being subjected to a random test of that nature. I think employers can use cases like *Ingersoll* when unions argue invasion of privacy or constitutional protections. The employer should argue for a balancing test, citing the workplace safety statutes and arguing that an employer has not only a right, but an obligation to engage in drug testing to provide a safe workplace.

Thank you very much.

III

**PRESENTATION OF BEVERLY GROSS**

The private sector and the public sector are very different, particularly in the area of privacy, which, when we talk about the Constitution, defies definition. The cases have found privacy rights in general to flow from various places in the Constitution. The derivation of the right has never been really pinpointed to one constitutional source, and so in the public sector several problems arise.

First of all, it is easy to say that the public employer is engaging in state action or government action and therefore that the Constitution comes into play. While this is probably so in most circumstances—and certainly the public employer should in any event act as though it's so in all circumstances—I wonder if, as the cases develop now particularly in the drug testing area, the courts will not at some point start drawing distinctions. Thus the public employer could be immune from constitutional attack when wearing its employer hat and dealing with its own employees as a proprietary function, as compared with taking actions toward third parties in a governmental capacity, where the constitutional application cannot be questioned.

I find more discussion about balancing of interests when the government is dealing with its own employees than when it is dealing with third parties. That is why I prognosticate that at some point a court will give us a true analysis in a drug testing case and will ultimately say that in its capacity as an employer the government is freer to act in self-protection without regard to the full scope of constitutional rights that the criminal cases have made clear are applicable to public employees.

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\(^3^8\) 175 Cal. App. 3d 1028, 221 Cal. Rptr. 659 (1985). [EDITOR’S NOTE: Since this presentation the California Supreme Court has granted review in this case, effectively eliminating any precedential value in the lower court's decision. 715 P.2d 680, 224 Cal. Rptr. 719 (1986).]
Garrity v. New Jersey\(^39\) still stands for the proposition that while there is no constitutional right to be a police officer, the public employer cannot violate constitutional rights in order to deprive that person of or discharge that person from public employment. That is a late 1960's case, but that principle is still very strong and the analysis of the courts, even in the developing area of privacy rights, has not yet departed totally and so we're still dealing in these fictions of balancing.

In this day and age of government contracting out some of its functions, the consequent privatization of traditional government functions and prisons in particular has paved the way for the development of case law regarding the constitutional standards for the private employers who serve as contractors.

So in the public sector, what are seen in the private sector as torts are viewed as constitutional violations because of the nature of the employer. In the privacy analysis we come down to really three aspects of privacy.

To illustrate the first aspect, let me tell you my own privacy invasion experience. When I got out of law school in 1968, in my early middle years and with two small children, one of the private employers that interviewed me asked me my birth control plans for the future. That was not at all an unusual experience for my female colleagues getting out of school at that time. That was 1968. About 1971 women started to refuse to answer those kinds of questions. Mine was a most unpleasant experience; I chose not to answer and did not take that job. But they were not a bit embarrassed to ask it, nor were lots of employers. This aspect of privacy that speaks about autonomy and independence of decisions, the Griswold v. Connecticut\(^40\) type of privacy in the public sector, deals essentially with family and sexual issues, those kinds of private decision-making that should be free from government interference. In that area we see in the public sector an expansion of the right of privacy. The old morality about sexual conduct is fast becoming passé, although occasionally we get a glitch, particularly from the Ninth Circuit.

As recently as 1983 the Ninth Circuit took an opposite position from that which it had taken only a year earlier, in a case dealing with police officers who were unmarried and living with or having adulterous affairs with other people. In 1982,\(^41\) the court upheld a police department rule that said that officers should not commit crimes, without reaching the constitutional question, where it found unclear whether the

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\(^{39}\) 385 U.S. 493 (1967) (police officers who chose to incriminate themselves for conspiracy or to forfeit their jobs under a New Jersey statute dealing with forfeiture of office or employment did not waive their right to fourteenth amendment protections against coerced confessions).


\(^{41}\) Andrade v. City of Phoenix, 692 F.2d 557 (9th Cir. 1982).
police department board would find that a particular officer's act of adultery satisfied the criminal statute under state law. So it avoided the constitutional question but it certainly did not say that since the conduct at issue took place while the officer was off-duty it was impermissible for the department to look at it.

A year later in a case called *Thorne*, a female police applicant was questioned about her sex life and her sexual conduct, and the same court found that that was a constitutionally impermissible set of questions. So in that particular area we see that those kinds of private decisions are being left to the person and the government is being told to stay out. In the *Olmstead* decision, I think it was Justice Brandeis' dissent that said there are some things that are just not government's business, and that, in this day and age, is probably the predominant point of view.

The second aspect of privacy is the right to be free from disclosure by government of very private matters, and in that area we see maybe even a little narrowing of protections, but it depends upon what you are asking about.

In the public sector, particularly in today's climate in New York, financial disclosure is a very important matter. Courts are likely to find that public official corruption is an appropriate area of inquiry, and in fact, a financial disclosure law in New York has been upheld already in the Second Circuit. The Mayor has just issued an executive order requiring additional kinds of disclosure. A new local law has been passed allowing the Inspector General to demand certain financial disclosure forms without notice to the employee, which is an exception to the law otherwise. We may see an absolute elimination of any claim of privacy in the area of financial disclosure, and probably legitimately so. It is hard for us union-side lawyers to agree that management may be right but certainly you cannot argue with government's right to protect itself against corruption. The question is, how reasonable is the route chosen?

In the area of union access we just had a case that said that the union was entitled to the addresses of public sector employees, as against

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44. When addressing the right to be free from government disclosure of personal matters the Court will apply a balancing test, measuring the government's interest in disclosure against the private interest in confidentiality. See, e.g., Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (the public's interest in preserving matters of historical value outweighed the former president's interest in privacy of personal communications).
45. Barry v. City of New York, 712 F.2d 1554 (2d Cir. 1983) (financial disclosure by public employees and public inspection of the material furthers a substantial, possibly even compelling, state interest in deterring corruption and conflicts of interest, which overcomes personal privacy claims).
the government's claim that these addresses were private. The union's right overrode since the national labor policy of unions' access to information was read into this claim.

In the area of medical information about employees, I think it is going to go both ways. I think that as the unions establish more and more our right to have information under OSHA and OSHA-related laws for legitimate purposes, including bargaining, the employer similarly is going to claim a legitimate right to have information from our welfare systems about employee medical problems. There may be some compromise in terms of sanitization of records or some other thing, but I think that is a legitimate area of dispute.

Now let me talk about the third area of privacy, which stems from the right to be free from unreasonable searches and which raises the fourth amendment question. Fourth amendment protections, mostly interpreted in the criminal context, have two aspects. The first is the individual's subjective expectation of privacy under the circumstances, and the second concerns whether the search was reasonable. If the individual did not have a subjective expectation which is objectively reasonable, then a search did not occur. The courts sometimes confuse the analysis of whether a search occurred with whether the search was reasonable. But basically, those are the two aspects: Did I have a legitimate expectation, did they violate my privacy, and was it a reasonable or unreasonable violation?

Now again, when it is your own employee, the courts have dealt with this inquiry backhandedly. In criminal cases the employer's consent for the law enforcement folks to take materials from a wastebasket that was in an employee's exclusive control and custody and in which he had a reasonable expectation of privacy, was not sufficient to overcome the fact that this was a search and unreasonable. However, because the

47. See, e.g., Whalen v. Roe, 429 U.S. 589 (1977) (The Court extended a limited right of privacy to medical information. The majority and concurring opinions indicate disagreement among the justices with respect to what matters raise constitutional privacy claims and what standard is appropriate in assessing the state's interest in intruding on privacy.).
48. Although public servants are not subject to "watered down" versions of their constitutional rights, see Garrity v. New Jersey, 385 U.S. 493, 500 (1967), numerous factors inherent in public employment have been held to either diminish the employee's expectation of privacy or enhance the government's interest in conducting, and therefore the reasonableness of, the search. It should also be noted that while employment-related searches conducted for the purposes of instituting criminal proceedings or uncovering evidence of criminal activity are subject to fourth amendment protection, most courts agree that inspections by government supervisors of employee work areas, conducted in order to evaluate and monitor employee work performance are subject to only the nonconstitutional restrictions imposed on private employers. See United States v. Kahan, 350 F. Supp. 784, 791 (S.D.N.Y. 1972).
49. United States v. Kahan, 350 F. Supp. 784 (S.D.N.Y. 1972) (The inspection of contents of wastebasket in course of criminal investigation relating to malfeasance of Immigration and Natural-
court says in that instance the employer has become an arm of the criminal investigation, the public employer has therefore become an outside law enforcement agency of government and must observe the fourth amendment standards applicable to criminal matters.

When I put on my employer hat, however, and I want to look at my employee's work performance, then the fourth amendment question becomes a little more attenuated and that is where we see balancing of the interests. The courts have said that the government has an interest in protecting the public. Well that is so in every situation of a public employee. The courts do not stop to say why exactly that is so in this situation. Or a court will say this is a police or correction officer and this organization is a para-military organization, which I think in this day of collective bargaining, at least in large uniform forces, may also be not the whole answer that it used to be. What does para-military mean when you have a bargaining agent and collectively bargained disciplinary procedures?

So I think it is an oversimplification. Tell me why this analysis is different from the Garrity analysis I spoke of earlier, which says that I do not give up my rights when I become a public employee. Tell me why those rights suddenly become attenuated?

When the employer is doing the search for the employer's purposes, the court is much more likely to say that it is okay. Now, the major difference between the public sector and the private sector, is that in the public sector the concept of probable cause is so much present. In the absence of a warrant and in the absence of an emergency circumstance, the court will say it is presumptively an unreasonable search, you did not have probable cause to do that.

The probable cause question is relevant to the employer's ability to check on the performance of the employee. In a corrections department case that arose in the Second Circuit, the corrections department engaged in three kinds of searches for contraband being brought by correction officers into the prisons.

There was a strip search, a visual body
cavity search and random searches. A refusal to submit to any of those searches was grounds for discipline. The court said that the strip search needed reasonable suspicion and therefore a public employer could not conduct a strip search without a warrant. The body cavity search was per se unreasonable and therefore required a warrant because it was unlikely to produce contraband from the employee. A correction officer is not going to carry the kind of things that need to be hidden in body cavities since they have other ways to get contraband into the prisons. The random searches are also unreasonable. So you need at least notice.

Addressing drug testing, I think that we neglect to determine the purpose of the test. To what use is the drug test put? If we agree that the purpose is just to find out if somebody is using drugs, then I have no quarrel with Steve Pepe. If, however, we agree that the only legitimate purpose of drug testing is where the employee is job impaired, then we have another circumstance and that is where the comparison with alcohol comes in, because the alcoholic tests have to do with current, present, immediate circumstances and usually involve rehabilitation programs. Why bother to find out if the employee's nonperformance is because of drugs when you can fire him simply for that nonperformance? The only valid purpose for this invasion of privacy must be rehabilitation.

The drug test taken last week measures drug use over the previous $X$ number of days and does not say a thing about job performance today. If the purpose is just to determine who is a drug user, fine, then use the test. But if the purpose is to say the employer has a legitimate interest in increased medical costs, a superficially appealing argument, then why are you not also inquiring into my diet, which causes hypertension or heart disease, or why are you not also inquiring into my tobacco use, et cetera. That is not really the answer. You are talking about accidents on the job, productivity, or current performance standards, and if you are talking about current performance standards, then don't tell me about tests that measure how much drug was ingested some time ago.

I think also when we're talking about the argument of safe workplace as being the be-all, end-all, how come I still have to bring my OSHA complaints and all the other things about asbestos in the air ducts and no lights and no hot water and no air conditioning and so forth? Those things are argued as not being safe workplace responsibility, but drug testing is? And the most important part of it is, the failure rate on proficiency tests described by the Center for Disease Control indicates as high as a sixty-nine percent failure rate in spotting drugs that they know are in there. You can ask any malpractice lawyer about testing in the ordinary lab, including the hospital labs. The point is that if you are trying to screen out the people who perform poorly by doing this kind of test which is not reliable, at least do a confirming test. There are ways to
verify those cheaper tests if you get a positive reading, and you are getting as high as a sixty-five percent false positive or false negative, which from the employer's point of view should be as much of a concern as my point of view about a false positive. Yes, confirming tests are expensive, but they are not as expensive as the undercover people that you are putting on the job and the arbitrations that you are going to have to go through in order to prove your case against me. If you had used the right tests in the first place I might not be arguing quite so hard.

And the fact of the matter is that with all these screening devices, you are going to end up with the fittest, physically fittest and mentally fittest employees. The physically and mentally fittest, but that does not begin to measure creativity and devotion and loyalty and all those other things, and you may be screening out the person who is going to discover the cure for cancer next year, or going to come up with the best marketing approach for your company, because they smoked pot a week ago, or sniffed some coke maybe. The test doesn't even tell me that for sure, so how can you stake so much? Look at the terrible price we're paying just for the employer to be able to say, "I screen for drugs." What are you screening and whom are you screening and what is the purpose of your screening? Challenging this, in the public sector we will be raising fourth amendment questions about drug testing in the workplace.

Thank you.

IV

QUESTIONS AND ANSWERS

Given the demonstrated unreliability of drug urinalysis testing, can you as an employer counsel advise your clients to discharge current employees solely because they failed a drug urinalysis test?

MR. PEPE: There are unreliable tests, there are unreliable laboratories, and I agree with Beverly Gross' comments that what the employers ought to do is to pay a couple of bucks extra to get a first rate laboratory, and when you've got a doubt, get a backup or a second or third test. So my answer is don't use unreliable laboratories, but if you've got a first rate reliable laboratory with a good test and a backup if you think one is warranted, yes, I don't have any problem with recommending that the employee be discharged.

Ms. GROSS: I think we have to remember, though, that we're going to start seeing arbitrations that start to look like court cases, because the very first thing I'm going to do is subpoena the lab technician. I'm going to make sure the technicians knew what they were doing, for example, that they watched the employee urinate, because the chain of custody is crucial. You have to make sure the jars are labeled, and that the lab saves the positive specimens, because I'm going to challenge the reading.
I'm going to challenge the lab technician's credibility and credentials and the whole system at the lab. We can have a whole new area of law, urine law.

I have negotiated with the city of New York—the police department, the hospital corporation, and the board of education—and agreed that only for cause may an employee be required to undergo drug testing, and the cause has to be corroborated by two separate supervisors not of that person's unit so that it is job related to begin with. If they agree that there is cause, the test is taken, and if it is positive there is a confirmatory test, which is the more expensive one. If both of those come out the same, then they can bring charges and I'm going to have my day in court. If they come out different, then we'll talk about it.

MR. PEPE: Let me make a quick reply to Beverly.

I happen to represent the race tracks in the state of California and for years race tracks have regularly taken urine samples. The chain of custody is maintained and when there are drugs there is a thorough investigation. The labs are tested, the people testify, and it is really not as onerous as it sounds.

*What is the state-of-the-art drug test right now? Is it a blood test?*

MR. PEPE: The answer to your question is that the best way to do the current drug testing is to use both the urine and blood tests, and then there are different degrees of sophistication of those tests that you can employ. That is a matter that you really have to ask a medical doctor about, not a lawyer.

One of the registrants asks that Professor Duffy comment on the potential liability of an employer for supplying personnel files and other information to the EEOC or the NLRB, when that information concerns employees other than the discriminatee or the charging party?

PROF. DUFFY: The law is not settled, but I think we can extrapolate based on cases relating to the union's requests of the employer for information. The whole issue is complicated by the fact that there are two issues involved here. One is what can the employer give without liability, and what must the employer give, because quite frankly, privacy rights are often used as a reason to not give things the employer would rather not give.

In any event, if we extrapolate from the cases that exist now, but again recognizing that the law just is not clear at this point, I think it can be said that indeed there may be private information in other employees' personnel files, and giving that information—at least giving it voluntarily, without even stopping to demand a subpoena or some other administrative process—might be violative of the privacy rights of the employees concerned.

Certainly the nature of the information requested is going to be one
of the issues and some information is really private. Other information is not so private and at least one court has said mere performance evaluations, which simply tell someone's fitness for a job but not his general fitness as a person, as psychological testing did in Detroit Edison, is not really so private.

Another thing is the reason for which the information is going to be used, and then another is whether employees have been promised confidentiality. Many employers these days have privacy protection plans and I certainly would never advise an employer to just offhandedly violate that privacy protection plan by turning over employee personnel files to any agency.

In short then, I think there are privacy considerations. Employers have to weigh them and certainly one of the easiest things to do is to say to the agency demanding the information, "We'd love to give it to you, but of course we're very concerned about our employee privacy rights. Either we get a signed authorization from the employee in question, or you subpoena it." And while any protection of the employer is not thereby guaranteed, it is certainly enhanced, and I think everybody is more satisfied with that route than just automatically turning over the information.

Ms. Duffy, we also received no fewer than three questions on the Alcohol Rehabilitation Act. The questions basically are two kinds. First of all, does it apply to job applicants as well as to current employees? And second, does it apply in the drug addiction context?

Prof. Duffy: The statute is very brief. To my knowledge it does not apply to applicants. It says only employees, and employees are defined differently than applicants when the legislature chooses to do so. So I would say no, it doesn't apply to applicants. Also, it does not apply to drugs.

The Act requires accommodation and that accommodation will usually be time off to existing employees who choose to engage in alcohol rehabilitation programs. Again though, it's limited to participation in organized rehabilitation programs. It also requires that the employer safeguard the privacy of the fact of the employee's participation in that program. It doesn't seem to extend to other things; medical records are handled by another statute and by these other restrictions that I've already mentioned. So the statute is very limited.

Mr. Pepe, in your opinion, would the off-premises arrest of an employee for drug dealing be sufficient reason for discharge in a nonunion setting? And whatever your answer is as to that point, would it provide a sufficient reason for a locker room search by the employer?

Mr. Pepe: Unless you can show that the off-premises arrest somehow involves the employer in terms of either adverse publicity, or the employee involved—to make an easy example, let us suppose it is a nurse
who works in or about the operating room where there are drugs regularly available. Unless you have some kind of compelling argument like that, I do not think that you would be able to discharge the employee.

As to the locker search, I think the analysis would follow the same way. I would assume you do have a policy that would advise employees not to bring any personal items onto the premises, and, secondly, advise them that they and their personal effects, including their lockers, are subject to search, and, third, that you would provide the locks as well as the lockers to avoid getting in the argument of expectation of privacy.52

Having done all of that, it seems to me if you have that kind of policy and you want to search the locker, you can. If you do not find anything, you are obviously not going to discharge them. If you find drugs, drug paraphernalia, contraband, company property, et cetera, then you have cause to terminate them, if you so choose, based upon what you found in the locker.

What are the chances of the California legislature intervening in the problem of drug and alcohol testing and passing some legislation controlling employer use of such tests?

PROF. DUFFY: My answer is it is anybody's guess. The fact that the San Francisco City Council was willing to intervene in a legislative manner certainly does not suggest that the California legislature will, since San Francisco is but a part, and a unique one at that, of California. It certainly shows that at least some people, however, have considered the issue of legislative intervention, interestingly enough, in the direction of prohibiting use of drug and alcohol testing.

There has also been some question in the past of legislative mandating of such drug and alcohol testing. If we were to see either, I think it would be in the mode of prohibition. I do not know of any legislation pending. That certainly does not mean there is none nor does that mean there will not be any.

MR. PEPE: There were one or two bills introduced about a month ago that were then taken out of the committee, which would have been a pro-employer bill to permit drug testing.

In terms of predictions, I think it is more likely that we are going to get regulation of the laboratories first. Then second, some regulation similar to lie detectors, as to whether or not it can be permitted and under what circumstances.

52. See, e.g., United States v. Speights, 557 F.2d 362 (3d Cir. 1977) (A warrantless search of locker in effort to secure weapon linking police officer to string of neighborhood burglaries was held unreasonable. The following factors justified the officer's expectation of privacy in locker notwithstanding the employer's ownership interest in locker and retention of master key: (1) department's acquiescence in officer's attempt to secure privacy by changing lock; (2) understanding among employees that not only equipment but personal effects could be kept in lockers; and (3) lack of notice, regulation or past practice indicating lockers subject to search).
PROF. DUFFY: I actually think more than legislative regulation in the immediate future, we are going to see judicial comment in the context of cases. Is it a violation of the privacy guarantee in the California Constitution to impose mandatory drug screening? Is random testing unconstitutional, whereas impairment testing is not? I think those kinds of issues will most likely be fought in the judicial arena.