

DEVELOPMENTS IN VERMONT LAW

JAR WARS IN THE GREEN MOUNTAIN STATE: VERMONT'S DRUG USE TESTING ACT HAS THE POTENTIAL TO BE THE BEST IN THE NATION

I suspect that the real appeal of the urine test lies in its control over a workforce that had become dangerously suspicious and potentially powerful. Pulling workers' pants down lets 'em know who's boss. It threatens their jobs and dignity.¹

INTRODUCTION

On May 22, 1987, Vermont enacted an innovative statute (the Act) regulating drug use testing in the workplace.² The Act was the product of lengthy hearings,³ vigorous debate,⁴ and substantial legislative compromise.⁵ Governor Madeleine Kunin heralded the re-

1. A. HOFFMAN & J. SILVERS, STEAL THIS URINE TEST: FIGHTING DRUG HYSTERIA IN AMERICA 159 (1987) (emphasis omitted).

2. VT. STAT. ANN. tit. 21, §§ 511-520 (1987).

3. Both the House Judiciary and General and Military Affairs committees heard testimony from employees who had been subjected to drug use testing, employers who utilized drug use testing, as well as the American Civil Liberties Union of Vermont. Burlington Free Press, Jan. 30, 1987, at B3, col. 1. The well attended hearings before the Senate Committee on General Affairs included similar representative testimony. Burlington Free Press, Apr. 2, 1987, at B5, col. 3.

4. The House debate was "three hours of the most heated debate of the session." Burlington Free Press, Mar. 13, 1987, at A1, col. 4.

5. State Senator Chester Ketcham described the final law as "a compromise of many different viewpoints." Rutland Herald, Nov. 3, 1987, at 12, col. 3. Pre-employment drug use testing would have been forbidden under the original Senate bill. S. 146, 59th Leg., Biennial Sess., § 552, 1987 Vermont. That bill was referred to the Committee on General Affairs. Sen. Jour. 139, 59th Leg., Biennial Sess., 1987 Vermont. An even stronger bill was later introduced in the House which would have absolutely prohibited all drug use testing. H. 253, 59th Leg., Biennial Sess., §§ 521-523, 1987 Vermont. Like the original Senate bill, this bill was terminally referred to the Committee on General and Military Affairs. House Jour. 100, 59th Leg., Biennial Sess., 1987 Vermont.

The original House bill would have banned all pre-employment drug use testing in the manner of the original Senate bill, but permitted discharge of an employee who tested positive. H. 39, 59th Leg., Biennial Sess., § 522(a), (c), 1987 Vermont. The Senate passed the House bill with substantial amendment to permit some pre-employment drug use testing, and to prohibit discharge of an employee for a single positive drug use test result. Sen. Jour. 610, 59th Leg., Biennial Sess., 1987 Vermont. The House rejected the Senate version. House Jour. 802-08, 59th Leg., Biennial Sess., 1987 Vermont. A Committee of Conference was ap-

vised Senate version of the bill as a "model" piece of legislation likely to be copied by other states.⁶ A year and a half after the Governor signed the final version of the drug use testing bill into law, only six other states have legislation in place directed at regulating workplace drug use testing.⁷ Now that Vermont has the benefit of seeing what these other states have done, useful re-evaluation of Vermont's law is feasible.

The first section of this note discusses the competing interests of employers and employees which have arisen primarily because of the current technological limitations of drug use testing.⁸ The second section analyzes the complex way in which the Vermont drug use testing statute seeks to balance these countervailing needs, concluding that several sections within the statute need to be clarified because they are susceptible to conflicting interpretations.⁹ The third section of this note urges that, because of the technological limitations and extremely obtrusive nature of drug use testing procedures, Vermont's legislative balance between the needs of employers and the privacy rights of employees in this area should be tilted even further in favor of the latter group.¹⁰ The note proposes that in order to make this adjustment, the Vermont legislature should amend the Act to include several additional protections for Vermont's workforce which have been developed by the other states that currently have drug use testing laws. These protections include the following: a requirement that employers themselves submit to drug use testing, a limitation of drug use testing to those employees in dangerous or security-sensitive occupations who are actually impaired, an explicit prohibition of employer retaliation against employees who exercise their rights under the drug testing law, and punitive damages in civil actions

pointed to reconcile the two versions. *Sen. Jour.* 656-57, 59th Leg., Biennial Sess., 1987 Vermont; *House Jour.* 808, 59th Leg., Biennial Sess., 1987 Vermont. The House and Senate both affirmed the Committee's recommendations. *Sen. Jour.* 750, 59th Leg., Biennial Sess., 1987 Vermont; *House Jour.* 892-94, 59th Leg., Biennial Sess., 1987 Vermont.

6. Burlington Free Press, May 12, 1987, at B1, col. 4.

7. See 1987 Conn. Acts 551 (Reg. Sess.); IOWA CODE ANN. § 730.5 (West Supp. 1988); MINN. STAT. ANN. §§ 181.950-.957 (West Supp. 1989); MONT. CODE ANN. § 39-2-304 (1987); R.I. GEN. LAWS § 28-6.5 (Supp. 1988); UTAH CODE ANN. §§ 34-38-1 to -15 (1988). For a comprehensive comparison of the relative protections afforded by the seven state statutes, see Note, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 653-57 (1988).

8. See *infra* notes 12-26 and accompanying text.

9. See *infra* notes 27-70 and accompanying text.

10. See *infra* notes 71-85 and accompanying text.

against intentional violators of the drug testing law.¹¹

I. THE COMPETING INTERESTS

The costs which employers seek to decrease with employee drug use testing are not illusory. The estimated cost of workplace drug use to American industry ranges from twenty-five to thirty-three billion dollars annually.¹² One estimate places the cost of an individual drug abusing employee to an employer at between five hundred and one thousand dollars annually.¹³ These costs take many forms. Increased absenteeism, more expensive insurance and workers' compensation payments, more frequent injuries, decreased productivity, employee replacement and training, poor quality manufacturing, expanded liability exposure, greater theft and property damage, and lost goodwill are all costs legitimately attributable to workplace drug abuse.¹⁴ In reaction to these costs and perils nearly thirty percent of the nation's Fortune 500 companies have instituted some type of drug use testing program.¹⁵ The workforce subjected to the urinalysis drug use testing, however, has not enthusiastically embraced the testing programs.¹⁶

Urinalysis drug use testing is objectionable for two reasons. First, it is a humiliating process requiring the surrender of urine. Second, the results obtained are not sufficiently reliable, do not discriminate previous use from present intoxication, and disclose personal information unrelated to the employer's asserted purpose for administering the test.¹⁷

Of necessity, the urinalysis drug use testing procedure requires that employees provide their urine samples in the presence of others to insure the authenticity of the specimen. The employee is required to expose his or her genitals in a closely supervised situation in a way that will guarantee the integrity of the sample.¹⁸ This

11. See *infra* text accompanying notes 71-85.

12. Lewis, *Drug Testing in the Workplace: Legal and Policy Implications for Employers and Employees*, 3 DET. C.L. REV. 699, 700 (1987).

13. See Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment*, 25 DUQ. L. REV. 597, 610 (1987).

14. *Id.*

15. Lewis, *supra* note 12, at 702; Rutland Herald, Nov. 3, 1987, at 12, col. 2.

16. See Burlington Free Press, Jan. 30, 1987, at B3, col. 1.

17. See *infra* text accompanying notes 19-25.

18. Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L.J. 307, 366 (1987).

is a very different experience than giving a urine sample to one's physician. The patient-physician relationship is one of trust and confidence, not one of intimidation and suspicion. Urine given to a physician is surrendered for analysis aimed at the detection of disease or pregnancy. Moreover, a physician presumes the authenticity of the proffered sample and does not therefore typically monitor its production. In sum, a urinalysis test administered to detect drug use is, at best, an uncomfortable and unpleasant experience. At worst, it is a debasing, humiliating affront to bodily integrity.

In addition to the aforementioned privacy concerns, urinalysis drug use testing is a technologically immature procedure. The problems are many. The accuracy of urinalysis drug use testing varies greatly depending on the procedure employed, the way in which the sample is collected and handled, and the types of drugs for which the employee is tested.¹⁹ Urinalysis drug use tests can not discern whether the person tested was actually intoxicated at the time the sample was collected.²⁰ A positive urinalysis test result for certain substances may merely indicate use within the previous thirty days.²¹ Employees who have not themselves smoked marijuana, but have been present while others have smoked, may test positive due to passive inhalation of smoke.²² Many foods, over-the-counter medicines, and prescription drugs "cross-react," giving false positive results of illicit substance use.²³

Information about the private non-working activities of the tested employee is unnecessarily accessible to the employer. A urine sample can disclose pregnancy as well as whether a person is afflicted by, or taking medication for, conditions such as epilepsy, diabetes, asthma, schizophrenia, manic depression, and AIDS.²⁴ Finally, and perhaps most ominous, preliminary research indicates that minorities with dark skin pigmentation, because they have greater concentrations of the skin pigment melanin, may be more likely to test falsely positive for marijuana use because melanin is

19. *Id.* at 357.

20. *Id.* at 358.

21. McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1457 (1987).

22. *Id.* at 1459; Halbert, "Coming Up Dirty": *Drug Testing at the Work Place*, 32 VILL. L. REV. 691, 710 (1987).

23. Bookspan, *supra* note 18, at 358; Halbert, *supra* note 22, at 710.

24. Bookspan, *supra* note 18, at 367; Halbert, *supra* note 22, at 715; McGovern, *supra* note 21, at 1458 n.27.

chemically similar to the active ingredient in marijuana.²⁵

Recognizing the tremendous costs to industry from workplace drug use, as well as the technological limitations and employee privacy concerns about urinalysis drug use test procedures, the Vermont Legislature attempted to strike a balance between the needs of employers and the privacy rights of employees.²⁶ The result was a complex and comprehensive attempt to protect employee privacy rights, although several parts of the legislation are ambiguous.

II. AN ANALYSIS OF HOW VERMONT'S DRUG TESTING LAW OPERATES TO PROTECT EMPLOYEES

A. Applicant Protections

Employers²⁷ often perceive detection of drug use in the pre-employment stage as the most efficient utilization of drug use testing because it ensures that the employer, by hiring "drug free" job applicants,²⁸ avoids all costs related to the treatment or discharge of an employee²⁹ who tests positive for drug use.³⁰ However, under the Vermont law, this advantage is unavailable to an employer unless the employer has extended a "conditional offer of employment" to the prospective employee.³¹ Additionally, the Act re-

25. Halbert, *supra* note 22, at 711.

26. See Burlington Free Press, Jan. 30, 1987, at B3, col. 1; Burlington Free Press, Apr. 9, 1987, at B4, col. 2.

27. The Act broadly defines "employer" to include any individual, organization, or governmental body including partnership, association, trustee, estate, corporation, joint stock company, insurance company or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, and any common carrier by mail, motor, water, air or express company doing business in or operating within this state, or which has offered or may offer employment to one or more individuals.

VT. STAT. ANN. tit. 21, § 511(6) (1987).

28. An "applicant for employment" is defined as "an individual seeking or being sought for employment with an employer." *Id.* § 511(1).

29. The Act defines an "employee" as "any person who may be permitted, required or directed by any employer, in consideration of direct or indirect gain or profit, to perform services." *Id.* § 511(5).

30. Lewis, *supra* note 12, at 714. The author, however, concludes that the assumption of a "drug free" workplace becomes a misnomer because job applicants will investigate whether an employer uses pre-employment drug use testing and respond evasively. *Id.*

31. VT. STAT. ANN. tit. 21, § 512(b)(1) (1987). The statute defines a conditional offer of employment as one "conditioned on the applicant receiving a negative test result." *Id.* Minnesota is the only other state with this requirement. MINN. STAT. ANN. § 181.951(2) (West Supp. 1988); See generally D'Aquila, *Drug and Alcohol Testing in the Workplace: The Legislative Response*, 14 WM. MITCHELL L. REV. 255 (1988) (analyzing the operation of the

quires that the employer give the job applicant no less than ten days notice of the test,³² that the test be conducted as part of a comprehensive physical examination,³³ and that the test be administered in accordance with the Act's procedural requirements.³⁴

B. Employee Protections Under the Act

For the applicant who satisfies the condition precedent of receiving a negative test result, and is therefore able to accept the employer's offer of employment, the level of protection increases substantially under the Act. Notably, the Act flatly prohibits all random or company-wide drug use tests.³⁵ However, the Act establishes that an employer may require an individual employee to submit to a drug use test if four conditions are met.³⁶

First, the employer must have "probable cause" to believe that the employee is using or is under the influence of a drug while on

Minnesota statute).

Curiously, the Vermont law states that "[a] conditional offer of employment shall not be necessary if the applicant resides more than 200 air miles from the place the applicant is to be tested." VT. STAT. ANN. tit. 21, § 512(b)(1) (1987). It is impossible to fly two hundred straight air miles within the state of Vermont. See RAND McNALLY COMMERCIAL ATLAS & MARKETING GUIDE 234-35 (118th ed. 1987). Thus, the effect of the statute is to permit discriminatory drug use testing of applicants for employment who reside outside of Vermont. These applicants can be required to submit to drug use testing without the protection of an offer of employment conditioned on a negative test result.

32. VT. STAT. ANN. tit. 21, § 512(b)(2) (1987). The Act provides that this notice shall inform the applicant of the drugs for which he or she will be tested, and of the fact that therapeutic levels of prescription drugs tested will not be reported. *Id.* The notice requirement may not be waived by the applicant. *Id.* One ambiguity noted by Attorney Dennis Wells, who represented the Association of Vermont Industries during legislative hearings on the bill, is whether the ten day notice provision runs from the time when the applicant first obtains the job application or from the time when the conditional offer of employment is made. Burlington Free Press, Nov. 9, 1987, (Business Monday), at 17, col. 2.

33. VT. STAT. ANN. tit. 21, § 512(b)(3) (1987). The test and examination need not, however, be taken or administered at the same time. *Id.*

34. *Id.* § 512(b)(4); see *infra* notes 43-60 and accompanying text.

35. VT. STAT. ANN. tit. 21, § 513(b) (1987). The Act does, however, make exception for such testing where required by federal law or regulation. *Id.* For a thorough discussion of random or company-wide testing by federal agencies, as well as challenges thereto, see Stern, *Government Drug Testing and Individual Privacy Rights: Crying Wolf in the Workplace*, 5 YALE L. & POL'Y REV. 235 (1986). The United States Supreme Court has agreed to decide the constitutionality of random drug use testing by a federal agency and in a federally regulated industry. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, 108 S. Ct. 2033 (1988); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

36. VT. STAT. ANN. tit. 21, § 513(c) (1987).

the job.³⁷ Second, the employer must have established an "employee assistance program."³⁸ Third, the test must be administered in accordance with the Act's procedural requirements.³⁹ Finally, the employer may not terminate the employee who tests positive. Instead, the employer may only suspend the employee pending successful completion of an employee assistance program.⁴⁰

The prohibition of employee termination extends only to the first positive test result. If, after successful completion of an employee assistance program and subsequent reinstatement, an employee tests positive a second time, the employer may then terminate the employee with impunity.⁴¹ However, the Act leaves unanswered a very important question: May an employer terminate an employee who refuses to submit to drug use testing?⁴² The

37. *Id.* § 513(c)(1) (1987). The Act provides no definition or explicative language to aid the employer in determining what constitutes "probable cause." The decision as to whether or not particularized "probable cause" to test for drug use exists has been characterized as requiring "quasi-prosecutorial discretion" for which employers are probably "ill-equipped." T. Denenberg & R. Denenberg, *Drug Testing from the Arbitrator's Perspective*, 11 *NOVA L.J.* 371, 392 (1987). The absence of any guiding criteria for the administration of the probable cause standard should be especially significant to employers in light of the remedies available to an aggrieved employee under section 519 of the Act. See *infra* notes 61-66 and accompanying text.

38. The Act defines an Employee Assistance Program as "a bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the employer or is available to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation." VT. STAT. ANN. tit. 21, § 513(c)(2) (1987).

Such an employee assistance program is distinct from the type of program which, although identically named, utilizes an innovative approach of progressive confrontation of employee drug abuse in the workplace as an alternative to drug use testing. See Sonnenstuhl, Trice, Staudenmeir & Steele, *Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace*, 11 *NOVA L.J.* 709 (1987).

39. VT. STAT. ANN. tit. 21, § 513(c)(4) (1987); see *infra* notes 43-60 and accompanying text.

40. VT. STAT. ANN. tit. 21, § 513(c)(3) (1987). Impliedly, unsuccessful completion of the employee assistance program would be sufficient grounds for termination under the Act. Likewise, an employee who has tested positive and refuses to enroll in the employee assistance program can probably be dismissed with impunity. The employer may suspend the employee who tests positive for up to three months during the employee's enrollment in the employee assistance program. *Id.* While participation in an employee assistance program is certainly a less harsh result than discharge, it may be over-inclusive of employees who, although testing positive on a single occasion, were not actually intoxicated and have no real need for remedial drug abuse counseling.

41. *Id.* The Act makes clear that this second test may only be administered for "probable cause." This would seemingly require an employer to use objective criteria and preclude using the employee's past enrollment in an employee assistance program as a factor in determining "probable cause." However, the Act is not clear on this point.

42. Resolution of this pivotal question was provided by a clause in the original Senate bill: "Refusal by an employee to submit to a drug test shall not by itself constitute insubor-

employer who discharges an employee for refusing to submit to a drug use test does not know whether he or she may be subject to suit under the Act. Similarly, an employee who refuses an employer's demand that he or she submit to a drug use test does not know whether this refusal will result in discharge or suspension pending successful completion of an employee assistance program. Until the Legislature modifies the Act to answer this question, the positions of both employers and employees in such a confrontation will remain uncertain.

C. *Procedural Protections in the Administration of Drug Use Tests*

Under the Act, there are many procedural protections for both employees and applicants who are subject to drug use testing. The Act strictly dictates the manner in which tests must be conducted, notice of results given, and confidentiality of results maintained. The Act also specifies the responsibilities of an employer faced with an employee's positive drug use test result.

An employer may only test for the presence of alcohol or illegal drugs, as defined under the Act, as well as therapeutic drugs present at nontherapeutic levels.⁴³ The employer must provide each job applicant or employee tested with a copy of the employer's written drug use testing policy.⁴⁴ The written policy must identify the circumstances under which persons may be tested, the manner in which the test will be conducted, a list of the drugs for which the employer will test, as well as a statement that some over-the-counter drugs and other substances may cause a false positive test result and describing the consequences of testing positive.⁴⁵ All employers are required to establish a chain of custody

dination or cause for dismissal." S. 146, 59th Leg., Biennial Sess., § 522(f), 1987 Vermont. The legislature should resurrect this language in order to clarify the Act. In the alternative, language could be added to the above provision which would make it clear that refusal to take a drug use test administered for probable cause was intended to be grounds for suspension pending completion of an employee assistance program.

43. VT. STAT. ANN. tit. 21, § 514(1) (1987). Nontherapeutic levels of therapeutic drugs are determined by the Commissioner of the Department of Health by establishing a range of values considering average medical use for each particular drug for which an employer may test under the Act. *Id.* § 518(c).

44. *Id.* § 514(2).

45. *Id.* The purpose of the accuracy disclaimer is unclear, unless it is meant to encourage employee retesting of a portion of a positive sample. See *infra* note 49 and accompanying text.

procedure which will insure the integrity of each collected sample.⁴⁶

The Vermont law carefully outlines the acceptable procedure for analyzing a urine test sample obtained from an employee. The employer must use a state designated laboratory.⁴⁷ In addition, it is the employer's responsibility to ensure that the chosen laboratory will subject any positive test result to retesting by a more accurate procedure.⁴⁸ Finally, the employer is required to see that some portion of any sample which tests positive is stored for retesting within ninety days.⁴⁹

In addition to urinalysis drug use testing, there are other techniques that can be utilized to determine drug use. While it is clear that an employer may not request or require an employee or applicant to provide a blood sample for a drug use test,⁵⁰ nowhere does the law mention the permissibility of saliva testing.⁵¹ Although the statute clearly contemplates testing for employee alcohol use,⁵² it

46. VT. STAT. ANN. tit. 21, § 514(5) (1987). One state, apparently believing that the chain of custody procedures are of too extreme importance in assuring the accuracy of results to be left to the individual employers, has charged the Commissioner of its Department of Health with the development of regulations. See MINN. STAT. ANN. § 181.953(b)(6) (West Supp. 1987).

47. VT. STAT. ANN. tit. 21, § 514(4) (1987). The Department of Health is charged with designating official laboratories. *Id.* § 518(a). As of this writing, the Department has given provisional approval to six facilities. Burlington Free Press, Nov. 17, 1987, at B1, col. 1. Because expensive equipment is necessary to test at the level of accuracy required under the Vermont law, all of the laboratories are located outside of Vermont. *Id.*

48. VT. STAT. ANN. tit. 21, § 514(6)(A) (1987). Although the Act does not specify which test methods are acceptable for the initial evaluation of the employee's sample, the confirmatory test must be either gas chromatography with mass spectrometry or some equivalent scientific method. *Id.* For a thorough technical discussion of the relative strengths of the various urinalysis testing methods, see Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 *NOVA L.J.* 415 (1987).

49. VT. STAT. ANN. tit. 21, § 514(10) (1987).

50. *Id.* § 514(3). However, as part of a urinalysis drug use testing procedure, the employer must provide the employee with an opportunity to have a blood sample drawn and preserved, at the employee's expense, for later comparison with the urinalysis results. *Id.* § 514(6)(B).

51. Saliva drug use testing is better than urinalysis drug use testing for two reasons. First, and most obvious, collection of a saliva sample is a less humiliating experience for the employee or applicant than is the collection of urine. Second, saliva testing, although not capable of disclosing intoxication levels, only retains trace elements for two to eight hours after consumption. Note, *Jar Wars: Drug Testing in the Workplace*, 23 *WILLAMETTE L. REV.* 529, 539 (1987). Therefore, the probability is considerably greater that an employee who tests positive in a saliva test was actually intoxicated in the workplace than it is for an employee who tests positive in a urine test (where trace elements are typically detectable several days after use). *Id.* at 538.

52. Alcohol is listed as a "drug" in the definitional section. VT. STAT. ANN. tit. 21, §

does not address the propriety of utilizing breathalyzer tests.

The last sections dealing with the administration and evaluation of the urinalysis drug use test are directed at the disclosure, effect, and confidentiality of results. The results of a drug use test, whether positive or negative, must be disclosed by the laboratory simultaneously to the employer and to the employee or applicant.⁵³

If the test results are positive, then the employer has two additional responsibilities. First, he or she must provide the employee or applicant with an "informal meeting" to allow the latter an opportunity either to explain the results or to suggest their probable inaccuracy.⁵⁴ Second, the employer must provide an opportunity for the employee to have the preserved portion retested by an independent laboratory, and must "consider" those test results.⁵⁵

The value of these protections to an employee is unclear. The law neither prescribes the effect of the "informal meeting" nor does it do more than ambiguously require that the employer "consider" the results of the subsequent retesting. Thus, it is conceivable that in the informal meeting an employee could present a reasonable explanation for the positive test result (such as ingestion of a food which cross-reacts),⁵⁶ rebut the positive test results with the preserved urine sample tested at an independent laboratory, and receive a negative result from a blood sample which was taken at the employee's request at the time of the urine drug use test, and perhaps still be forced to choose between discharge and enrollment in an employee assistance program. Such a result is seemingly at odds with the tenor of the Act. It can be prevented by a simple amendment of the Act which would require that, when confronted with conflicting drug use test conclusions, an employer give the employee's results the benefit of the doubt.

Finally, the Act stipulates that all drug use test results shall be confidential as between the employer and the applicant or employee.⁵⁷ No employer or laboratory may release the information under any other circumstances unless the person tested requests

511(3) (1987).

53. *Id.* § 514(9).

54. *Id.* § 515(a).

55. *Id.* § 515(b).

56. *See supra* note 23 and accompanying text.

57. VT. STAT. ANN. tit. 21, § 516(a) (1987).

such release in writing.⁵⁸ Although a court of competent jurisdiction may compel release in connection with an action brought under the Act,⁵⁹ the information obtained can not be used in any other judicial or quasi-judicial proceeding.⁶⁰

D. *Enforcement Mechanisms for Violations of the Act*

All of the aforementioned requirements and protections of the Act depend upon strict enforcement to ensure that Vermont employers comply with the Act. The first enforcement provision is the private right of action available to an applicant or employee aggrieved by a violation of the Act.⁶¹ Such an action may be brought in pursuit of either money damages, injunctive relief, or both.⁶² In this type of action the Act places the burden of proving full compliance on the employer.⁶³ Additionally, the Act provides that in any action brought against a drug use testing laboratory for breach of the reporting or confidentiality requirements, the laboratory shall bear the burden of proving compliance with the relevant sections of the law.⁶⁴ Finally, the Act vests the courts with the power to award attorney's fees to the successful plaintiff,⁶⁵ thus removing a substantial economic barrier to aggrieved employees and applicants.⁶⁶

The State of Vermont is also a potential plaintiff under the Act. The Act provides for civil actions by the state Attorney General against violators of the Act, as well as criminal actions against any person who knowingly violates the Act.⁶⁷ As of this writing, the Attorney General has not brought any actions for failure to comply with the Act.⁶⁸ In one case, the Attorney General threatened to bring an action for civil penalties against an employer for administering a drug use test without probable cause (and subsequently

58. *Id.* § 516(b).

59. *Id.*

60. *Id.* § 516(c).

61. *Id.* § 519(a).

62. *Id.*

63. *Id.* § 519(b).

64. *Id.*

65. *Id.* § 519(a).

66. See generally Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 *LAW & CONTEMP. PROBS.* 187 (1984); Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 *LAW & CONTEMP. PROBS.* 233 (1984).

67. *VT. STAT. ANN.* tit. 21, § 519(c), (d) (1987).

68. Interview with Andrew W. MacLean, Assistant Attorney General, Civil Division, in Montpelier, Vermont (Oct. 17, 1988).

suspending without pay an employee who tested positive until he completed a rehabilitation program).⁶⁹ The employer filed for injunctive and declaratory relief in federal district court where the matter remains unresolved.⁷⁰

III. PROPOSED ADDITIONAL WORKER PROTECTIONS

The multi-faceted Vermont drug use testing Act was a comprehensive legislative response to the advent of workplace urinalysis drug use testing. It is the most detailed and thorough legislation of the three New England states which currently have laws regulating the use of drug tests in the workplace.⁷¹ The Act is comprehensive, but urinalysis drug use testing remains a technologically imperfect procedure,⁷² as well as a humiliating practice which is invasive of personal privacy rights. Therefore, Vermont's law would profit substantially from incorporating a few of the various novel worker protection provisions now utilized by the other six states which have similar laws.⁷³

The most innovative and distinctive worker protection provision is found in an extremely unlikely source: Utah's drug use testing law.⁷⁴ The Utah law, although on balance tending to favor the needs of employers,⁷⁵ and alone in its purposeful declaration of

69. *Id.*

70. *Yellow Freight System, Inc. v. Amestoy*, No. 88-160 (D. Vt. filed June 24, 1988). *Yellow Freight System* alleges that the Vermont law is preempted by federal law on two bases. Plaintiff's Complaint at 1, 14, 16, *Yellow Freight System, Inc.*, No. 88-160. First, *Yellow Freight* alleges that its biennial urinalysis testing of its truck drivers is necessary to comply with the Federal Motor Carrier Act and related regulations. *Id.* at 2-9. Second, *Yellow Freight* claims that, because the biennial urinalysis test is provided for in a union contract obtained through collective bargaining under the National Labor Relations Act (NLRA), the federal law preempts the Vermont statute. *Id.* at 10-16. *Cf. Schmedemann, Unions and Urinalysis*, 14 WM. MITCHELL L. REV. 277, 315-25 (1988) (suggesting that a civil cause of action under the Minnesota drug use testing statute would likely be preempted if the alleged violation by the employer was permissible under the terms of a contract collectively bargained through the NLRA).

71. See 1987 Conn. Acts 551 (Reg. Sess.); R.I. GEN. LAWS § 28-6.5 (Supp. 1988).

72. See *supra* notes 19-25 and accompanying text.

73. One commentator has taken the position that the disparity in restrictions among the state drug use testing legislation will give rise to unpredictability for multi-state employers which should be rectified either by adoption of a federal statute or by committee promulgation of a uniform law. See Comment, *supra* note 13, at 944-57. However, these concerns should not prevent the Vermont legislature from continuing to lead the way with progressive legislation.

74. UTAH CODE ANN. §§ 34-38-1 to -15 (1988).

75. See Note, *supra* note 7, at 656.

workplace drug use testing as desirable,⁷⁶ contains a requirement which subtly serves to protect workers as does no other statute: “[E]mployers and management in general must submit to the testing themselves on a periodic basis.”⁷⁷ Vermont should follow Utah’s innovative lead. By requiring employers and management occasionally to undergo the same drug use testing as job applicants or employees, the Vermont law would guarantee that no employer or manager initiated a drug use testing policy in ignorance of its intrusive nature.

In borrowing this unique protection from the Utah law, the Vermont legislature should go one step further. The Utah law does not specify to whom the results of such employer and management testing are to be reported, nor does it indicate the effect of a positive test result for an employer or member of management. This type of testing requirement should be supplemented with a stipulation that supervisors and management, through establishment of some type of intra-supervisory committee, maintain detection and suspension provisions paralleling those applicable to their employees. Such a requirement forces employers and management to demonstrate the seriousness of their commitment to combating the high costs of workplace drug abuse at all levels. More importantly, such a revision of the Vermont Act would sweep away the subservient connotations which inherently accompany an employer or management-initiated policy of drug use testing that focuses solely on a subordinate labor force.

A second beneficial worker protection is one that changes the level of suspicion necessary for compelling an employee to submit to drug use testing. Presently, a Vermont employer must have probable cause to believe that an employee is “using” or “under the influence” of drugs or alcohol in the work place.⁷⁸ The employer need not believe that the employee’s abilities are impaired.⁷⁹ In Rhode Island, “the employer [must have] reasonable grounds to believe based on specific objective facts, that the employee’s use of controlled substances is *impairing his ability to perform his job*.”⁸⁰ Similarly, in Iowa, “[t]he employer [must have]

76. UTAH CODE ANN. § 34-38-1 (1987).

77. *Id.* § 34-38-3.

78. VT. STAT. ANN., tit. 21, § 513(c)(1) (1987).

79. The House bill, as originally introduced, did have a level of suspicion related to impairment. H. 39, 59th Leg., Biennial Sess., § 522(c)(1), (2), 1987 Vermont.

80. R.I. GEN. LAWS § 28-6.5-1 (A) (Supp. 1988) (emphasis added).

probable cause to believe that an employee's faculties are *impaired on the job*.⁸¹ A probable cause standard limited to suspicion of impairment would enhance the Vermont law by setting the required level of suspicion at the point where an employee's drug use, by interfering with job performance, gives rise to the employer's need to test for drugs in order to decrease the related production costs.

Just as the employer's interest in a "drug-free" employee is greatest at the point where drug use impairs job performance, so too is the public's interest in drug use testing most substantial when the employee is working in a hazardous or security-sensitive occupation.⁸² In apparent recognition of this, four other states have, at least partially, restricted drug use testing to occupations where drug use endangers either employees or the general public.⁸³

The Vermont Act should be revised to combine a level of suspicion tied to impairment with a restriction of drug use testing to those employees in dangerous or security-sensitive occupations. This would mean that employees in these occupations could not be tested until the employer had probable cause to suspect impairment. The result would be a proscription of workplace drug use testing except where the converging interests of the employer and the public are great enough to outweigh the employee's personal privacy rights. Likewise, employers should only be able to test those applicants seeking dangerous or security-sensitive positions

81. IOWA CODE ANN. § 730.5(3)(a) (West Supp. 1988) (emphasis added).

82. See McGovern, *supra* note 21, at 1498-1504 (concluding that a "safety-only" legislative standard is the best accommodation of employers' concerns and employees' privacy rights). The first Senate bill and the original version of the House bill both recognized this and provided (in identical language) that an employer could test an employee only if "the employer has reasonable grounds based on specific objective facts to believe that the employee's faculties are impaired on the job [and] the employee is in a position where such impairment presents a clear and present danger to the physical safety of self or others." S. 146, 59th Leg., Biennial Sess., § 522(d)(1), (2), 1987 Vermont; H. 39, 59th Leg., Biennial Sess., § 522(c)(1), (2), 1987 Vermont.

83. In Montana, pre-employment testing is restricted to persons applying for positions in "hazardous work environments or in jobs the primary responsibility of which is security, public safety, or fiduciary responsibility." MONT. CODE ANN. § 39-2-304(b) (1987). In Iowa, in addition to requiring probable cause to believe employee impairment, a pre-condition to employee testing is that such "impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or when impairment due to the effects of a controlled substance is a violation of a known rule of the employer." IOWA CODE ANN. § 730.5(3)(b) (West Supp. 1988). In Connecticut and Minnesota, drug and alcohol testing on a random selection basis is restricted to those persons in "safety-sensitive" positions. See 1987 Conn. Acts 551(7)(2) (Reg. Sess.); MINN. STAT. ANN. § 181.951(4) (West Supp. 1989).

(after extending the required conditional offer of employment).

Finally, there are two aspects of the enforcement sections of the Vermont law which should be revised in order to protect more fully worker privacy interests. First, following Minnesota's lead, language should be added which explicitly prohibits an employer from retaliating against an employee for asserting rights and remedies provided in the Act.⁸⁴ Perhaps even more likely to foster increased enforcement of the Vermont Act by employees and applicants would be a revision which provided for punitive damages in civil actions brought against willful violators of the Act.⁸⁵

Although making employer retaliation actionable and adding punitive damages for willful violations can only be accomplished through legislative action, Vermont employers currently utilizing drug use testing should now take the initiative and modify their drug use testing policies in accordance with three of the above recommended statutory changes. First, they could make any drug use testing program applicable to management as well as employees. Second, employers could voluntarily restrict drug use testing to those employees engaged in, or applying for, dangerous or security-sensitive occupations. Finally, employers could refrain from drug use testing unless there is probable cause to believe that an employee's drug use is actually impairing job performance. Although it is extremely unlikely that Vermont employers who currently have drug use testing programs will take the initiative in the absence of legislative change, the incentive for employers to limit their drug use testing in this fashion is that it might decrease the amount of employee resistance to workplace drug use testing.

84. The Minnesota law affirmatively states that "[a]n employer may not retaliate against an employee for asserting rights and remedies [conferred under this statute]." MINN. STAT. ANN. § 181.596(5) (West Supp. 1989). Amending the Vermont Act to include similar language would insulate employees who bring actions against employers engaged in illegal drug use testing practices. Additionally, it would caution employers to refrain from vindictive actions or risk facing additional liability.

85. Presently, Rhode Island is the only state which has incorporated this strong deterrent to employer abuses of drug testing. R.I. GEN. LAWS § 28-6.5-1(1) (Supp. 1988). *But cf.* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1416 (1987) (cautioning that the lure of high punitive damage awards may be insufficient to draw more plaintiffs' lawyers to a particular type of action because of the decreased probability of success in the face of an increased burden of proof and standard of conduct).

CONCLUSION

Viewed in its entirety, Vermont's drug use testing Act is one of the most protective of employee privacy rights in the country. There are, however, several ambiguous sections which presently make it difficult to understand and to enforce. The legislature should revise these sections of the Act if only to clarify its original understanding of the statute.

Beyond such explanatory revision, there are a few areas which the legislature should strengthen in order to provide employees additional security from, and redress for, unwarranted or inaccurate workplace drug use testing. These changes can be effected without seriously undermining the availability of employee drug use testing in those situations where it is most appropriate. Vermont's drug use testing Act has the potential to be the best in the nation. Only when these changes have been made will Vermont have a drug use testing law which truly reflects the dignity of the Vermonter as one who "in taking a job, . . . insists upon being the captain of his soul and will enter upon no bargain for his services which in any wise makes him truly subservient."⁸⁶

Andrew J. Field

86. C. CRANE, LET ME SHOW YOU VERMONT 20 (1937).