



DRUG AND ALCOHOL TESTING

The Plaintiff's Perspective

by Michael J. Petitti, Jr.

It all began with an appeals court decision awarding unemployment insurance benefits to a worker fired not for being impaired on the job or for any other form of workplace misconduct, but merely because he failed a drug test. For those who believed that the law should deny the fired worker and his family all jobless benefits as he searched for a new job, the appropriate response would have been to simply amend the law. Instead, the Arizona legislature went one step further. It enacted an unnecessary, overbroad new drug and alcohol testing statute. The new law strips employees of many common law rights against workplace wrongs, and puts a powerful club in the hands of Arizona employers to commit these very wrongs in the name of doing what is right.

THE APPEALS COURT DECISION THAT STARTED IT ALL AND THE LEGISLATURE'S OVERREACTION

In *Weller v. Arizona Department of Economic Security*,¹ Fred E. Weller, a heavy equipment operator with more than 12 years seniority, was subjected to a random drug test. His urine sample tested positive for marijuana.² Mr. Weller was then fired even though there was no evidence he had ever used drugs or alcohol at work or that he was intoxicated or impaired on the job. Nor had he ever been arrested or convicted for any alcohol or drug related offense. The DES Appeals Board denied unemployment benefits on the basis of misconduct: violation of a

known, uniformly enforced and reasonable rule (i.e., drug testing policy) imposed by his employer.³

The *Weller* court reversed, holding that the employer's rule, i.e., "a positive test for any level of [marijuana] in urine alone warrants termination", cannot disqualify an employee from unemployment compensation where the employer failed to show that (1) the positive test result was connected with impairment at work and (2) the employer's testing rule was "work-related and reasonable".⁴

In response, the legislature passed H.B. 2220 ("the Act") which made the mere failure to pass or refusal to take a drug test or alcohol impairment test a bar to unemployment benefits. However, the legislature did not stop there. The Act is a comprehensive statute which encourages drug and alcohol testing, including random testing, by providing employers who comply with the Act's standards broad immunity from suit.

Arizona employers who test employees for drugs or alcohol have generally been free to fire employees based on the test results. The Act not only confirms this right but provides virtually all Arizona employers⁵ with protection from legal claims relating to their mistakes in testing and decisions based on testing. The Act may also contravene serious public policy concerns and leave employees who have been significantly harmed without a remedy.

THE ISSUE IS OFF-DUTY PRIVACY, NOT DRUGS IN THE WORKPLACE

No one will dispute that drugs and alcohol in the workplace can pose a threat to productivity as well as health and safety. At risk is the health and safety of all employees, including those who do not use drugs or alcohol on the job.⁶

However, an employer's testing for drugs and alcohol must be weighed against the employee's right to privacy. The Arizona Act does not recognize this right to privacy. For instance, the Act permits drug testing on a "random or chance basis", in addition to job-related purposes.⁷ The Act permits the employer to randomly drug test employees by securing samples of "urine, blood, breath, saliva, hair or other substances".⁸ It is far-reaching and intrusive.

The Act also appears to draw a distinction between alcohol and drug testing. For example, the Act recognizes drug testing for both employees and prospective employees, but alcohol testing only for employees. The Act consistently seeks to identify "alcohol impairment" as opposed to the mere "presence of drugs". The legislature made a distinction between the off-duty use of alcohol and the off-duty use of drugs.⁹ Of course, drugs are illegal, alcohol is not. Nonetheless, public policy may be violated when employers are permitted by law to punish employees for truly off-duty conduct.

The *Weller* court indicated that a positive drug test result does not necessarily mean that the employee is using drugs at

work or that he is impaired on the job.¹⁰ The court was rightly concerned that unless an employer's rule is work-connected, an employer may regulate any aspect of an employee's private conduct that the employer might consider immoral or improper.¹¹ For instance, should an employer be able to terminate employees for off-duty use of tobacco or cohabitation which might promote health and family values, if this conduct is outside and unrelated to the workplace?¹²

In fact, regulating the off-duty conduct of employees appears to be contrary to the stated intent and purpose of the Act which is, in part, "to encourage the development of uniform standards and requirements regarding the testing of employees and prospective employees for use of [illegal drugs and alcohol] in the work setting". (Emphasis supplied.) A recent employee survey indicates that employees are likewise comfortable with employers' job-related inquiries. However, employees draw the line at inquiries regarding their private lives.¹³

DOES THE ACT VIOLATE PUBLIC POLICY?

This concern with invasion into an employee's private life raises the question whether the right to privacy granted in the Arizona Constitution conflicts with the Act. The Arizona Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."¹⁴ Although constitutional provisions generally only limit a public entity's conduct, similar provisions in the California and Alaska State Constitutions have been extended to limit the nature and extent of drug and alcohol testing by private employers.¹⁵ The *Weller* court, in dicta, also recognized that this constitutional provision was "evidence of Arizona's public policy to protect individual privacy."¹⁶ No Arizona case appears to have directly addressed this issue in the employment setting. However, the Arizona Appeals Court, in a nonemployment case, held that the Constitution's privacy provision did not provide a private party with a cause of

action against another.¹⁷

Arizona's constitutional provisions prohibiting the abrogation of a party's right of action for damages may also be implicated.¹⁸ As discussed below, the Act dramatically limits an employee's common law claims and may very well abrogate, as opposed to regulate, most of an employee's common law claims for damages relating to an employer's negligent or wrongful conduct. The Act may therefore be subject to constitutional challenge.¹⁹

MORE GOVERNMENT ON THE BACKS OF WORKERS

The Employer's New Statutory Shield Against Suit

Besides constitutional concerns, the Act provides employers with almost complete immunity from potential claims for their actions based on and relating to employee drug and alcohol test results. For instance, if an employer initiates a testing program in accordance with the Act's standards, no cause of action is available for: (1) actions taken in good faith based on the results of a positive drug or alcohol test; (2) the failure to test for drugs or alcohol impairment or the failure to test for specific drugs or any other controlled substance; (3) the failure to test for or, if tested, failure to detect any specific drug or other substance, or medical, mental, emotional or psychological disorder or condition; or (4) the termination or suspension of any substance abuse prevention or testing program or policy. The Act also limits causes of action for defamation, libel, slander, or damage to reputation to situations where false positive test results are negligently disclosed to an unauthorized person and all the elements of the defamation claim are satisfied.²⁰

The Act also immunizes employers from suit for decision-making mistakes based on false positive test results. In fact, the only cause of action expressly allowed against an employer who is in compliance with the Act is where an employer takes action based on a false positive test result and the employer:

knew or clearly should have known

that the result was in error and ignored the true test result because of the reckless or malicious disregard for the truth or the wilful intent to deceive or be deceived. (Emphasis supplied.)²¹

Even in this situation, the test is presumed to be valid if the employer complied with the provisions of the Act, and the employer is not liable for monetary damages if its reliance on a false positive test was reasonable and in good faith.²²

This result is particularly harsh because an employee who is fired because of a false positive may be stigmatized for life. Although the Act does require separate confirmation of positive drug test results, it does not require that the employee be provided with a duplicate sample for independent testing. False positives do occur. Some studies indicate they can exceed 25 percent, especially with urinalysis tests. Failure to clean instruments, as well as human error, can also produce unreliable results. Even absent human error, false positives can occur based on a person's use of other substances or medicines such as poppyseed muffins, Advil and Nyquil.²³

Under the Act, an employee who is fired because of a mistake in identifying or confusing his negative sample with a positive sample from another employee, or who is fired based on a positive test result that resulted from cross reactivity to a legal substance, have no claim. Innocent employees will likely be prevented from bringing otherwise meritorious claims because of the Act's difficult standard and the presumption in the employer's favor.

These results may also be contrary to existing Arizona employment law. For example, in *Jeshi v. American Express Company*,²⁴ an employee was terminated for allegedly sending a package containing obscene materials through the mail to an American Express management employee. The employee denied any knowledge of the matter but was still fired. The employee who actually sent the offending package came forward to admit responsibility and exoner-

ate the fired employee. The Arizona Court of Appeals found that the employer's oral and written promises of fair treatment raised an issue regarding whether (1) the personnel manual modified the employment at-will relationship and (2) the employee was entitled to damages. Assume a similar scenario, except that the wrong drug test is applied and the employee is terminated. The employer finds out the true facts after termination. Under the Act, the employer has no responsibility to reinstate the employee or compensate her for damages which she has incurred.

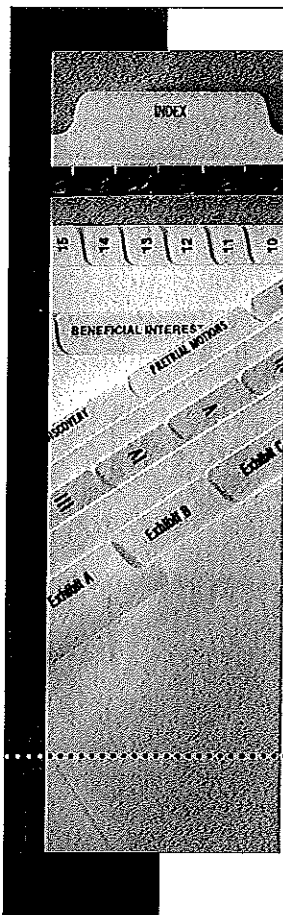
CONCLUSION

The legislature's reaction to *Weller* was excessive. If it was concerned with *Weller's* result, it could, as it did, amend the appropriate unemployment compensation statute. As *Weller* noted, "[m]isconduct justifying an employer in terminating an employee and misconduct disqualifying an employee from [unemployment] benefits are two distinct concepts." In employment-at-will situations the employment can be terminated at the pleasure of either party with or without cause. "Thus, an employer who terminates an at-will employee for failing a drug test *ordinarily* incurs no civil liability." (Emphasis supplied.)

This was the state of Arizona law prior to the new Arizona Drug and Alcohol Testing Act. To the extent that the Act confirms this principle, it does not significantly harm employees. The Act, however, goes well beyond this principle. It also goes well beyond amending the Arizona unemployment statute to include failing or refusing a drug test as a disqualifying event. It is instead a broad endorsement of an employer's invasion into an employee's private life and a severe limitation on the employee's right to remedy the drastic effects an employer's testing mistakes may have not only on her current employment, but the rest of her life.

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will they adopt? *Upjohn* appears tacitly to approve the modified subject matter test, but that test includes several elements that cannot be found in the text of H.B. 2161, although some are mentioned in the legislative history. Criminal cases presumably are not governed by the statute, potentially leaving some life in *Samaritan* and creating an uncomfortable dichotomy for cases with both civil and criminal possibilities. Questions also arise over when conversations must have occurred to be covered by the statute and whether the act will be applied to communications with former employees. Above all this, constitutional concerns cast some doubt on the validity of the entire legislative enterprise.

In addition to observing that things are better regulated by law than decided by judges, Aristotle observed that "[a]s in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."⁵³ The Arizona legislature has attempted a "universal" enactment for the corporate attorney-client privilege in civil litigation, but it does not address the "particulars" of corporate action. Despite Aristotle's best advice, judges ultimately will decide the full scope of the new privilege and whether it is constitutional. Until these questions are resolved by the courts, lawyers should proceed cautiously when advising their clients on the scope of the corporate privilege in Arizona.

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ENDNOTES

1. Rhetoric, book 1, 1.
2. 176 Ariz. 497, 862 P.2d 870 (1993). The new statute presumably has no effect on the work product portions of *Samaritan*.
3. 176 Ariz. at 499, 862 P.2d at 872.
4. 1994 Ariz. Sess. Laws Ch. 334. The new legislation will be codified as part of A.R.S. § 12-2234.
5. *Samaritan Foundation v. Superior Court*, 173 Ariz. 426, 434, 844 P.2d 593, 601 (App. 1992).
6. Some commentators continue to argue that the corporate attorney-client privilege should be abolished altogether. See, e.g., Thornburg, Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege, 69 Notre Dame L. Rev. 157 (1993).
7. 176 Ariz. at 503-504, 862 P.2d 876-877.
8. 176 Ariz. at 503, 862 P.2d at 876.
9. 176 Ariz. at 508, 862 P.2d at 881 (emphasis added).
10. 176 Ariz. at 507, 862 P.2d at 880.
11. *Upjohn v. United States*, 449 U.S. 383, 389 (1981).
12. *Upjohn*, 449 U.S. at 395.
13. See *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp.

- 483 (E.D. Pa. 1962) (control group test); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (subject matter test); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (modified subject matter test); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950) (unlimited privilege). To these approaches can be added the unique tests adopted by the Arizona Supreme Court and Court of Appeals in *Samaritan*. The Court of Appeals adopted the control group test, under which the attorney-client privilege extends only to communications between corporate counsel and members of the corporation's control group. Finding this test to be too narrow, the court also held that a qualified privilege extends to communications between corporate counsel and corporate personnel outside the control group. This qualified privilege could be overcome by the same showing required to defeat work product protection under Rule 26(b)(3) of the Arizona Rules of Civil Procedure. See *Samaritan Foundation v. Superior Court*, 173 Ariz. 426, 844 P.2d 593 (App. 1992).
14. See *Arizona State Senate*, March 22, 1994 Minutes of Committee on Judiciary, at 2.
15. See *Arizona State Senate*, Fact Sheet For H.B. 2161, dated April 19, 1994, at 2.
16. 449 U.S. at 386, 396.
17. *Admiral Insurance Co. v. U.S. Dist. Court of Arizona*, 881 F.2d 1486, 1492 (9th Cir. 1989).
18. *Upjohn Co. v. United States*, 600 F.2d 1223 (6th Cir. 1979).
19. 572 F.2d 596 (8th Cir. 1978).
20. *Id.* at 609.
21. 449 U.S. at 391-392, 396.
22. 449 U.S. at 394-395.
23. At least some commentators agree that *Upjohn* seemed to endorse the modified subject matter test of *Diversified Industries, Inc. v. Meredith*. See Weinstein & Berger, *Weinstein's Evidence Vol. 2*, § 503(b)(4), p. 503-74 (1994); Graham, *Handbook of Federal Evidence*, § 503.3 (3rd ed. 1991).
24. 449 U.S. at 394.
25. *Diversified Industries*, 572 F.2d at 609.
26. 449 U.S. at 394.
27. *Diversified Industries*, 572 F.2d at 609.
28. See *Arizona State Senate*, March 22, 1994 Minutes of Committee on Judiciary, at 2.
29. See *Blanchard Statement to H.B. 2161*, attached to Report of Conference Committee dated April 11, 1994.
30. 449 U.S. at 395.
31. *Diversified Industries*, 572 F.2d at 609.
32. See *Arizona State Senate*, March 22, 1994 minutes of Committee on Judiciary, at 2.
33. *State v. Ybarra*, 161 Ariz. 188, 777 P.2d 686 (Ariz. 1989).
34. Some courts have held that the attorney-client privilege "can attach to reports of third parties made at the request of the attorney or the client where the purpose of the reports was to put into usable form information obtained from that client." *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980). Arizona courts have acknowledged this authority without deciding the question. See *State v. Superior Court*, 161 Ariz. 181, 187, 777 P.2d 679, 676 (App. 1989), vacated in part 161 Ariz. 188, 777 P.2d 686 (1989); *Granger v. Wisner*, 134 Ariz. 377, 380, 656 P.2d 1238, 1241 (1982).
35. The version of the corporate privilege adopted in section 123 of the Restatements of the Law Governing Lawyers (Tentative Draft No. 2, 1989), also applies to those who have an "agency relationship" with the entity.
36. Additional issues include who within the corporation can waive the privilege (see A.R.S. § 12-2236) and whether a parent corporation can assert a privilege for communications with employees of a subsidiary.
37. Arizona Constitution, Art. 4, pt. 1, § 3.
38. See A.R.S. § 13-4062.2.
39. Because federal privilege law applies in federal criminal cases, *U.S. v. Glick*, 445 U.S. 360 (1980), federal criminal actions would be governed by *Upjohn*. Thus, the dichotomy would seem to arise only in state criminal proceedings.
40. 449 U.S. at 394 n. 3.
41. See *Admiral Insurance Co. v. U.S. Dist. Court of Arizona*, 881 F.2d 1486, 1493 (9th Cir. 1989); *In re Coordinated Pretrial Proceedings in Petroleum Antitrust Litigation*, 658 F.2d 1355, 1360-1361 & n. 7 (9th Cir. 1981).
42. See *Arizona News Service Amendment Record*, dated March 31, 1994, at 426.
43. *Id.* at 464.
44. See *Report of Conference Committee*, dated April 11, 1994.
45. My thanks to John Rogers of Brown & Bain for identifying this issue and relevant case law.
46. Art. 3.
47. Art. 6, § 5.
48. *Dacu v. Harris*, 139 Ariz. 353, 358, 678 P.2d 934, 939 (1984) (emphasis added).
49. *Id.*
50. *Barson v. Susong*, 156 Ariz. 309, 314, 751 P.2d 969, 974 (1988) (quoting *Redenour v. Marion Power Shovel*, 149 Ariz. 442, 446, 719 P.2d 1058, 1062 (1986)).
51. *Id.*
52. Rule of Evidence 501 (emphasis added).
53. Politics, book 2, 8.

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acknowledges his debt to David Gomez for his contributions and editorial assistance.

ENDNOTES

1. *Weller v. Arizona Department of Economic Security*, 176 Ariz. 220, 221, 860 P.2d 487, 488 (App. 1993).
2. *Id.* at 222, 860 P.2d at 489.
3. *Id.*
4. *Id.* at 223, 860 P.2d at 490.
5. The law covers any Arizona employer who employs "one or more full-time employees". A.R.S. § 23-493(4). It does not apply to public sector employees. Because of constitutional prohibitions, a public employer's right to test is much more limited. A public employer generally cannot randomly or systematically require employees to submit to drug tests, absent a compelling government interest. See, e.g., *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) (testing of positions involving public safety).
6. Recent surveys show that 85% of all major companies are presently using some form of employee or applicant drug or alcohol testing. The number of individuals testing positive for drug use continues to decline. In 1992, 2.5% of employees and 4.3% of applicants tested positive, down from 8.1% and 11.2% in 1989. See S. Biddle, *Arizona Employment Law Handbook* § 8.3, (1994).
7. A.R.S. § 23-493.04(B), (C).
8. A.R.S. § 23-493(7).
9. See, e.g., A.R.S. § 23-493.01, 04, 05.
10. *Weller* at 224-225, 860 P.2d at 491-492.
11. *Id.* at 227, 860 P.2d 594.
12. *Weller* at 224-225, 860 P.2d at 491, 492.
13. ACLU, *Live and Let Live: American Public Opinion about Privacy at Home and at Work* (1994). (Admittedly, of all privacy issues measured by the survey, it appears that the invasiveness of drug testing is least troubling to employees).
14. Ariz. Const. Art. 2, § 8.
15. See, e.g., *Luedtke v. Neighbors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989); *Senore v. Pool 266 Cal. Rptr. 280* (Cal. Ct. App. 1990).
16. *Weller* at 227 (n.8), 860 P.2d 494 (n.8).
17. *Cluff v. Farmers Insurance Exchange*, 10 Ariz. App. 560, 563, 460 P.2d 666, 669, (1969).
18. See Ariz. Const. Arts. 2, § 31, 18, 86.
19. See, e.g., *Boswell v. Phoenix Newspapers, Inc.* 152 Ariz. 9, 730 P.2d 186 (1986); *Estate of Hernandez v. Board of Regents*, 172 Ariz. 522, 838 P.2d 1283 (App. 1991).
20. A.R.S. § 23-493.06, 08. (The Act limits the causes of action "for any person." Thus, third party claims such as negligent retention or supervision also appear to be barred.)
21. A.R.S. § 23-493.07(A).
22. A.R.S. § 23-493.07(B). There is also no employer liability for any action taken related to a false negative test. A.R.S. § 23-493.07(C).
23. *Report of Society of Forensic Toxicologists Vol. 16 No. 3* (August 11, 1992), Chapman, *The Ruckus Over Medical Testing* *Fortune*, Aug. 1985, p. 57; Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 J. Psychoactive Drugs 305 (1984); ACLU, *supra*.
24. 147 Ariz. 19, 708 P.2d 110 (App. 1985).

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