Workplace Privacy: Balancing Employer-Employee Rights and Obligations in the New Millennium

by Mark A. Fahleson

The U.S. Bureau of Prisons maintains the following sign next to all telephones used by inmates:

"The Bureau of Prisons reserves the authority to monitor conversations on the telephone. Your use of institutional telephones constitutes consent to this monitoring . . . "

I'm planning to put signs like these next to the telephones, computers, fax machines and other equipment used in my chambers because, according to a policy that is up for a vote by the U.S. Judicial Conference, we may soon start treating the 30,000 employees of the judiciary pretty much the way we treat prison inmates.

The Honorable Alex Kozinski, *Privacy on Trial*, *The Wall Street Journal*, Sept. 4, 2001. * See note below

Overview

Most Americans believe that among the fundamental rights we have as citizens is the right to privacy. This right, of dubious origin and incapable of precise definition, becomes particularly problematic in today's modern workplace and with the advent of new technologies. In the workplace, this right to privacy that permits employees to be secure in their persons and their personal and confidential information must be balanced with the right of employers to protect their assets and, increasingly, the employer's duty to maintain a safe and secure workplace.

This article attempts to provide an introduction to the primary issues that arise with respect to workplace privacy issues. As the discussion below clearly demonstrates, technological changes have created unique workplace privacy issues and will continue to do so as we enter the new millennium.

In analyzing any issue involving a matter of workplace privacy, the first issue that must be addressed is whether a private-sector or public employer is involved. Generally, constitutional protections limit the ability of the state to infringe upon the fundamental rights of individuals. Thus, absent some degree of state action, courts are generally reluctant to extend constitutional protections to purely private actions.[1]

Employment Screening

Background Checks

Fair Credit Reporting Act

The federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §1681 *et. seq*., imposes certain obligations on employers that obtain or use "consumer reports" or "investigative consumer reports" from "consumer reporting agencies" for an employment purpose.

"Consumer Report"

The definition of "consumer report" covers a great deal of information other than credit information and can include virtually any information obtained through reference checking. Under the FCRA, a "consumer report" is defined as "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes . . ."[2] Thus, criminal histories, education, and licenses held by consumers can qualify as "consumer reports."[3] However, drug tests

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**Kozinski is a judge on the U.S. Court of Appeals for the Ninth Circuit. After the Judicial Conference was forced to postpone its September 11, 2001, consideration of the proposals due to the terrorist attacks on Washington, D.C. and New York City, the Judicial Conference met on September 20th and with little controversy adopted a new, but modified, policy permitting limited monitoring of employee Internet use from a central location. However, monitoring of individual computers or e-mail is not permitted under the revised policy. The Conference postponed deciding what form of notice that judicial employees would be given regarding monitoring.*

are generally not considered to be "consumer reports."[4]

"Investigative Consumer Report"

An "investigative consumer report" is a "consumer report" or portion thereof in which the information is obtained through personal interviews with neighbors, friends, or associates of the consumer. The information gathered must involve an individual's character, general reputation, personal characteristics, or mode of living. However, excluded from "investigative consumer report" is specific factual information obtained directly from the consumer.[5]

"Consumer Reporting Agency"

A "consumer reporting agency" is any person "which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information . . . for the purpose of furnishing consumer reports to third parties."[6] An entity that meets the technical definition of "consumer reporting agency" is covered by the FCRA even if the only information it collects, maintains, and disseminates is obtained from public record sources. Thus, a law firm that regularly researches the criminal records of job applicants for its clients is a "consumer reporting agency" subject to the requirements of the FCRA.[7] However, an employer conducting in-house background checks is not a "consumer reporting agency."[8]

Requirements

The FCRA imposes obligations on employers at different stages of the hiring process. Specifically, the FCRA requires the following:

- Prior to obtaining a consumer report, an employer must provide an applicant with a clear and conspicuous written notice that a consumer report will be obtained and obtain written authorization from the applicant to obtain the report. 15 U.S.C. §1681b(b). The authorization for a "consumer report" may be obtained at any time prior to the employer's request for the report. 15 U.S.C. §1681b(b)(2)(A)(ii).[9] However, as discussed below, the authorization for an "investigative consumer report" must be obtained not later than three (3) days after the date the report was requested. 15 U.S.C. §1681d(a)(1)(A). The notice and authorization can be in the same document, but cannot be accompanied by any other information, such as an employment application. 15 U.S.C. §1681b(b)(2).[10]

- When obtaining an "investigative consumer report," the employer must deliver written notice to the individual not later than (3) days after the date the report was requested, informing the individual of her right to request information from the employer as to the nature and scope of the investigation. If the individual requests such information, the employer must respond completely and accurately (within five (5) days of receiving the request or within five (5) days after the report is requested, whichever is later), describing in writing the questions asked, the number and types of people interviewed, and the name and address of the investigating agency.

- **Pre-adverse Action Disclosure:** Before an employer takes an adverse employment action based in whole or in part on information contained in a consumer report, the employer must give the individual a copy of the report and a written description of the individual's rights under the FCRA, including the right to request disclosure of the nature, source and recipients of any consumer report. 15 U.S.C. §1681b(b)(3).

- **Adverse Action Notice:** Once an adverse employment action is actually taken based in whole or in part on information contained in a consumer report, the employer must provide the application with oral, written or electronic notice of the adverse action; provide the application with the name, address and tele phone number of the consumer reporting agency that furnished the report together with a statement that ▶

[A]n employer conducting in-house background checks is not a "consumer reporting agency."

the consumer reporting agency did not make a decision to take adverse employment action and is unable to explain the specific reasons behind the decision; and provide the applicant with notice of his or her rights to dispute the accuracy of the report.[11] While the FCRA does not set forth the amount of time that must elapse between the "Pre-Adverse Action Notice" and the "Adverse Action Notice," it is important to keep in mind "the clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken."[12]

Applicability to Workplace Investigations

Recently, a debate has raged in workplace law circles regarding a Federal Trade Commission ("FTC") advisory opinion concerning the applicability of the FCRA to harassment investigations. Recall that the FCRA defines a "consumer reporting agency" as any person "which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information . . . for the purpose of furnishing consumer reports to third parties." 15 U.S.C. §1681a(f). Moreover, Title VII of the Civil Rights Act of 1964 prohibits discrimination (including harassment) in employment on the basis of race, color, religion, sex or national origin. Finally, recent decisions from the Supreme Court have made clear that employers must take prompt, remedial action to address unlawful harassment, including taking an "adverse action" against the offending employee. Thus, according to the FTC,
an employer that uses a third-party *(e.g.*, law firm) to conduct workplace investigations may subject the entire investigation to the FCRA, including its notice requirements and the requirement that the employer provide the employee with a copy of the report.[13]

Enforcement

The FTC, other federal agencies, states and individuals have a right to file suit for violations of the FCRA. Failure to comply with the provisions of the FCRA can result in fines and civil penalties. Moreover, individuals can seek actual damages, punitive damages for deliberate violations, attorney fees and costs.

Negligent Hiring and Retention Generally

Many employers use reference checks to obtain valuable information about prospective and current employees. With the increased focus on workplace violence, reference checks can serve as an important risk management tool as well. Generally, when an employee harms a third party while acting in the scope of his employment, the employer of the employee can be held liable to the third

party under the doctrine of *respondeat superior*. Liability is based on the theory that the employee was acting for the employer when the harm occurred. Conversely, if an employee harms a third party while acting outside the scope of his employment *(e.g.*, assaults a customer) the employer cannot be held liable under the doctrine of *respondeat superior*. In that situation, the employee clearly was not acting for the employer. However, most jurisdictions recognize a cause of action for negligent retention, and a growing number now recognize a cause of action for negligent hiring.

Generally, the tort of negligent hiring is based on the hiring of a person that the employer knew or, through the exercise of reasonable care, should have known posed an undue risk of harm to others. As defined by the Restatement (Second) of Agency:

> [a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> * * *
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others.

Restatement (Second) Of Agency §213.

The tort of negligent retention, on the other hand, is based on an employer continuing to employ an individual after the employer has learned of the employee's dangerous propensities. Because negligent retention generally requires actual or constructive knowledge,[14] this tort was in existence long before the tort of negligent hiring was first recognized.

Cases

- Certain occupations are more susceptible to negligent hire/retention claims. Generally, the greater the personal contact with customers and general public, the greater risk to the employer. For example, various jurisdictions have held employers responsible for tortious acts committed by their employees holding the position of bar bouncer, delivery person, schoolbus driver, truck driver, cable television installer, telephone installer, hotel steward, residence maintenance worker and mover.[15]

- Generally, the plaintiff must establish the employer had actual or constructive knowledge of the employee's dangerous propensities. For example, one court rejected a customer's claim of employer liability for damages resulting from the customer becoming HIV positive. The court found that the employer was unaware that its employee was having unprotected sex with the customer.[16]

- While most negligent hiring cases deal with an employer's failure to investigate an applicant's references or criminal background, some revolve around the use or nonuse of personality tests. However, courts have uniformly declined to impose a duty on employers to conduct psychological testing of employees.[17]

- In recent years some courts have expressed a reluctance to expand any

employer duty to investigate applicant/employee backgrounds due to individual privacy rights. For example, in *P.F. v. Delta Air Lines, Inc.*[18] a 2000 decision arising out of New York, a flight attendant who was drugged and raped by coworker alleged that the employer had a duty to investigate the sexual backgrounds and activities of its employees. In rejecting the plaintiff's claim, the court found that "[t]o hold an employer liable in these circumstances would be to encourage unacceptable inquisitorial snooping and intrusiveness by employers into the private lives of their employees, contrary to fundamental American notions of privacy." Whether this reluctance will dissipate in light of the events of September 11th remains to be seen.

- Generally, plaintiffs must show some connection between the employee's alleged unfitness and the employee's *tortious* activity. Thus, a truck driver's criminal record for drug possession is not sufficiently connected to a subsequent claim of physical assault to give rise to a claim of negligent hire.[19]

- While not couched in terms of a negligent hiring/retention claim, employers may be liable for failing to use reasonable care in recommending former employees for employment without disclosing material information bearing on the former employee's fitness for employment. In one celebrated California case, the court held that tort liability for fraud or negligent misrepresentation may lie where a school district wrote "unreserved and unconditional" favorable recommendations for a former employee without disclosing prior charges and complaints of sexual misconduct leveled against the former employee. Partially as a result of the favorable recommendations, the former employee was subsequently hired by another school district, where he allegedly sexually assaulted the plaintiff, a student.[20]

Nebraska Common Law

Nebraska courts have recognized a cause of action for negligent retention and negligent hiring, although these causes of action have not been "fleshed out" to the extent they have in other jurisdictions.

- *Jane Doe v. TK Pizza, Inc.*, Doc. 988, No. 104 (Douglas Cty. Dist. Ct., August 31, 2001). Plaintiff was sexually assaulted and raped by a pizza deliveryman who was delivering a pizza to the plaintiff in the course of his employment with the defendant. The defendant hired the deliveryman "despite a record that included driving violations . . . a conviction for attempted first-degree sexual assault on a child . . . [and being] jailed . . . For allegedly stalking a woman he met while delivering pizza [for another pizza company]."[21] Plaintiff brought suit against Domino's Pizza, Inc., and its franchisee, TK Pizza, Inc., alleging negligent hire. After the franchisor settled out of court, the case proceeded against the franchisee. In the instructions given to the jury, the jury was informed that the plaintiff could recover if she was able to establish: (1) the defendant was negligent in failing to ascertain its deliveryman's criminal record or failing to verify the accuracy of his job application before hiring him and sending him to customers' homes; (2) causation; and (3) damage. The jury awarded plaintiff $175,000.

- *Larson by Larson v. Miller*, 76 F.3d 1446 (8th Cir. 1996). Action brought by handicapped child and her parents against school district for failing to properly hire and train van driver who sexually abused the child. The court applied the "discretionary–function" exemption under the Nebraska Political Subdivision Tort Claims Act to find that public employer decisions to "investigate, hire, fire, and retain" employees are generally discretionary and could not be the basis for liability.

- *Strong v. K&K Investments, Inc.*, 216 Neb. 370, 343 N.W.2d 912 (1984). Plaintiffs owned a hotel in Omaha, and defendant K&K was a liquor distributor. K&K held a company Christmas party at the plaintiff's hotel, upon the conclusion of which ▶

some remaining K&K employees went into the hotel's public lounge. Around closing time, a fight broke out between certain K&K employees and the plaintiffs' bartenders. When one of the plaintiffs attempted to break up the fight, he was injured and subsequently brought a cause of action against K&K for, among other things, negligence in hiring and retaining employees known to have violent propensities. In affirming the defendant's motion for summary judgment, the court concluded that the K&K employees involved in the fight were hired to distribute K&K's products and, based on the evidence, it could not be said that the employees were unsuitable for the purpose for which they were hired. According to the court, "[n]o rule of law requires the employer to search all records that exist to satisfy himself that an employee will not engage in conduct not allied with purposes for which he was retained."

Medical Information

Individuals generally regard information relating to their physical and mental health to be among the most private. With increasing frequency, employers are accessing and using employee medical information in making workplace decisions.

Drug and Alcohol Testing

Public Sector

Federal Constitutional Protections

Drug-testing by government employers is restricted by the United States Constitution, most particularly the Fourth Amendment. The Fourth Amendment limits the rights of government to engage in unreasonable searches and seizures. The Supreme Court has held that drug testing constitutes a "search" as it relates to the Fourth Amendment.[22]

The Fourth Amendment does not prohibit all searches; it only prohibits those that are unreasonable.[23] Generally, "to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."[24] However, exceptions to this general rule exist based on "special needs, beyond the normal need for law enforcement."[25] When such "special needs" are alleged, courts undertake a context-specific inquiry that examines the competing public and private interests. *Id.* Stated another way, "[w]hat is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' . . ." "Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[26] All of the U.S. Supreme Court's "special needs" cases have turned on the drug policy's ultimate goal.[27]

"[n]o rule of law requires the employer to search all records that exist to satisfy himself that an employee will not engage in conduct not allied with purposes for which he was retained."

An illustrative, but not exhaustive, list of cases analyzing public employer drug testing policies is set forth below:

Impermissible:

- *Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998) (city policy of mandatory testing of solid waste department truck mechanics served no "special need" and was unreasonable).
- *Ford v. Dowd*, 931 F.2d 1286 (8th Cir. 1991)(unsubstantiated rumor of being "involved with drugs" insufficient basis on which to subject police officer to drug test).
- *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 865 (1990)(court rejected Justice Department's random testing of prosecutors and employees with access to grand jury proceedings).
- *Baron v. City of Hollywood*, 93 F.Supp.2d 1337 (S.D. Fla. 2000) (no "special need" for city policy mandating drug test to all job applicants after conditional offer of employment).

Permissible:

- *Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997)(mandatory drug testing of medical resident due to misconduct permissible).
- *Stigile v. Clinton*, 110 F.3d 801 (D.C. Cir. 1996), cert. denied, 118 S. Ct. 1163 (1998)(federal policy of subjecting employees with access to Old Executive Office Building directly adjacent to White House to random testing permissible).
- *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987)(mandatory random testing of prison employees with regular prisoner contact reasonable).
- *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 479 U.S. 986 (random drug testing of jockeys reasonable in highly regulated industry).
- *Geffre v. Metropolitan Council*, 174 F. Supp. 2d 962 (D. Minn. 2001 (court rejected challenge to city's policy of random testing of waste water department employees where testing was reasonable and the employees' bargaining representative consented to the inclusion of the policy in collective bargaining agreement).
- *Allen v. City of Marietta*, 601 F.Supp. 482 (N.D. Ga. 1985) and 693 F.Supp. 1122 (N.D. Ga. 1987)(mandatory testing of city employees working with high tension wires permissible).
- *Miller v. Vanderburgh County*, 610 N.E.2d 858 (Ind. Ct. App. 1993) (where employer had no drug testing policy, employees may be tested only upon reasonable suspicion, which the court found existed based upon employee's poor attendance and failed attempt at rehabilitation).

Nebraska Constitutional Protetions

Like its federal counterpart, the Nebraska Constitution protects individuals "against unreasonable searches and seizures." NEB.CONST. art. I, § 7. Like the federal FourthAmendment, this "search and seizure" protection proscribes only governmental action and is inapplicable to searches and seizures effected by private parties.[28] However, the Nebraska provision offers no greater protection that its federal counterpart.[29]

Legislative and Executive Provisions

- ***Drug-Free Workplace Act of 1988.*** In 1988, Congress enacted a package of legislation entitled the Anti-Drug Abuse Act of 1988, which contained the Drug-Free Workplace Act of 1988. 41 U.S.C. §701 *et seq*. This statute, which applies to certain federal contractors and grant recipients, does not require or even mention drug testing. Rather, it requires covered contractors and grantees to establish drug-free awareness programs and require employees convicted of drug offense occurring in the workplace to report such to their employer within five (5) days of conviction.

- ***Drug-Free Federal Workplace Executive Order***. In 1986, President Ronald Reagan signed Executive Order No. 12564 requiring federal agencies to develop plans to combat drug abuse, authorizing employee drug testing in the event of a work-related accident or upon reasonable suspicion, and requiring employees holding designated sensitive positions to submit to suspicionless drug testing .[30]

- ***Nebraska Act.*** In 1988, the Nebraska Legislature adopted a statute governing drug and alcohol testing. NEB. REV. STAT.§§ 48-1901 to -1910. The statute applies to all public employers and private-sector employers who employ six (6) or more full-time or part-time employees at any one time.[31] On its face, the statute specifically address the testing of employees, but not job applicants. While the statute does not require or prohibit drug testing, it does regulate the manner in which it is to be conducted. The specific requirements of the Nebraska drug and alcohol testing statute are discussed below.

Private Sector

As noted in the introduction to this article, constitutional protections generally restrict the ability of the government to infringe upon the fundamental rights of individuals. Thus, constitutional protections are generally inapplicable without some degree of state action. It is for this reason that courts are generally reluctant to extend constitutional protections to private employment.[32] Nevertheless, various statutory and common law restrictions exist that limit the ability of private employers to access, use and disseminate employee medical information.

Nebraska Drug and Alcohol Statue

The Nebraska Legislature enacted NEB. REV. STAT. §§ 48-1901 to -1910 "to help in the treatment and elimination of drug and alcohol use and abuse in the workplace while protecting the employee's rights." In Nebraska, private employers may deny continued employment or take disciplinary action against any employee who fails a drug test or refuses to be subject to a drug test as long as drug-testing is performed in accordance with requirements established in NEB. REV. STAT. § 48-1903.

> Section 48-1903 provides:
> Any results of any test performed on the body fluid or breath specimen of an employee, as directed by the employer, to determine the presence of drugs or alcohol shall not be used to deny any continued employment or in any disciplinary or administrative action unless the following requirements are met:
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> (1) A positive finding of drugs by preliminary screening procedures has been subsequently confirmed by gas chromatography mass spectrometry or other scientific testing technique which has been or may be approved by the department; and
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> (2) A positive finding of alcohol by preliminary screening procedures is subsequently confirmed by either:
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> (a) Gas chromatography with a flame ionization detector or other scientific testing technique which has been or ▶

may be approved by the department; or

(b) A breath-testing device operated by a breath-testing-device operator. Nothing in this subdivision shall be construed to preclude an employee from immediately requesting further confirmation of any breath-testing results by a blood sample if the employee voluntarily submits to give a blood sample taken by qualified medical personnel in accordance with the rules and regulations adopted and promulgated by the department. If the confirmatory blood test results do not confirm a violation of the employer's work rules, any disciplinary or administrative action shall be rescinded.

Except for a confirmatory breath test as provided in subdivision (2)(b) of this section, all confirmatory tests shall be performed by a clinic, hospital, or laboratory which is certified pursuant to the federal Clinical Laboratories Improvement Act of 1967, 42 U.S.C. 263a.

NEB.REV.STAT. §48-1903.

Cases construing the Nebraska Act include the following:

- *Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992). Plaintiff employees brought a Goolsby cause of action under NEB. REV. STAT. § 20-148, claiming among other things that their employer Walker Manufacturing deprived them of their rights recognized under the First, Fourth, Fifth and Fourteenth amendments to the United States Constitution and their Nebraska constitutional counterparts when they were terminated for failing a employer mandated drug test. The Eighth Circuit held that Section 20-148 is inapplicable to circumstances of drug-testing by private employers. The court explained that the section merely provides a civil remedy for violations of constitutional or statutory right; the section does not create causes of actions or rights.

- *Poole v. Burlington N. Railroad Co.*, 987 F. Supp. 753 (D.Neb. 1997). Plaintiff Poole was an employee of Burlington Northern. During an off-duty meeting with BN officials on BN property, the officials smelled alcohol on Poole and offered to refer Poole to a rehabilitation program, which he declined. The officials also gave Poole the opportunity to submit to a voluntary blood test at a local hospital to confirm Poole's claim that he had not consumed alcohol, which he rejected. Poole was subsequently terminated from employment with BN for violating a work rule prohibiting the use or possession of alcohol on BN property or while on-duty. The district court granted BN's motion for summary judgment on Poole's Nebraska drug testing statutory claim and intentional infliction of emotional distress claim, but overruled the motion as to Poole's false light invasion of privacy claim. Although Poole's drug testing claim as an off-duty employee was not preempted by U.S. DOT regulations, his claim failed because merely smelling alcohol on Poole's breath was not a "test" under Section 48-1903. Because genuine issues of material fact existed as to Poole's claim of invasion of privacy, this cause of action was permitted to go forward.

- *Polinski v. Sky Harbor Air Service, Inc*, 2001 Neb. App. LEXIS 37 (Case No. A-99-1358, Feb. 13, 2001) (unpublished decision). Plaintiff Polinski worked as a lineman for Sky Harbor and as a ramp serviceman for United Airlines at Omaha's Eppley Airfield. Sky Harbor conducted drug tests on its employees, and Polinski was fired after testing positive for marijuana. As a result of his termination, Polinski was denied a security badge by the Omaha Airport Authority, and consequently lost his job with United Airlines. Polinski sued, claiming he was wrongfully terminated in violation of his statutory right to privacy and in violation of Nebraska drug and alcohol testing laws. He also claimed Sky Harbor illegally released the drug test results to the Omaha Airport Authority.

After the trial court dismissed all of his claims, Polinski appealed to the Nebraska Court of Appeals. The Court of Appeals began its analysis by noting that Nebraska law provides that any person trespassing upon any person's privacy is liable for invasion of privacy if the intrusion would be highly offensive to a reasonable person. NEB.REV.STAT. § 20-203. An invasion of privacy is "justified," however, if the subject of the alleged invasion consents to the intrusion. Sky Harbor argued that Polinski consented to the drug test, pointing to a "Sky Harbor Line Department Drug/Alcohol Free Workplace Policy Letter" that Polinski admitted he read, understood, and signed. The policy letter specifically stated that Sky Harbor was permitted, under Nebraska law, to conduct drug tests and that refusal to submit to a drug or alcohol test could become grounds for discipline, including discharge. Polinski also signed another policy statement prohibiting the manufacture, distribution, dispensation, possession, or use of controlled substances in the workplace. Sky Harbor also pointed to evidence that, upon arriving at the testing facility, Polinski signed a form giving his consent to submit to a drug test. Moreover, Polinski also signed a consent form for laboratory testing of the drug test specimen. On this issue, the Court of Appeals sided with Sky Harbor. Pointing out that Polinski did not dispute that he voluntarily signed all the other forms, the court decided Sky Harbor had succeeded in proving that Polinski voluntarily consented to the drug test and affirmed dismissal of this claim.

The Nebraska Court of Appeals also agreed with the trial court's dismissal of Polinski's claim that Sky Harbor impermissibly disclosed the results of the drug test to the Omaha Airport Authority. The court found that Sky Harbor did release the information to the Omaha Airport Authority, but did so with Polinski's permission. Polinski admitted he authorized Sky Harbor to release information about the events leading to his termination to the airport authority in an attempt to obtain a new security badge, so he

could keep his job with United. However, the Court of Appeals sent the case back to the trial court on Polinski's final claim, in which he alleged that Sky Harbor violated Nebraska law by failing to confirm the results of the drug test before firing him. Nebraska's drug testing law specifically provides that a drug test "shall not be used to deny continued employment" unless certain conditions are met, including confirmation of any positive drug test. Sky Harbor relied on the affidavit of a medical technologist from the drug testing facility. The technologist, Jane McKernan, stated in the affidavit that Polinski's drug test was positive for marijuana and that the positive finding was later confirmed by "gas chromatography /mass spectrometry." However, the Nebraska appellate court found that this affidavit did not meet legal requirements, that there was no evidence McKernan had personal knowledge that the test had been confirmed, and remanded on this issue. See also *Polinski v. Omaha Airport Authority*, 2000 Neb.App. LEXIS 236 (Case No. A-99-359, July 25, 2000)(unpublished decision) (genuine issues of material fact regarding on alleged invasion of privacy and Fourth Amendment claim).

Nebraska Employment Security Law

Nebraska Employment Security Law, NEB.REV.STAT. §48-601 *et seq*., provides unemployment benefits to employees separated from employment. However, an employee may be partially or totally disqualified from receiving unemployment benefits if the employee was discharged for "misconduct" connected to the employee's work. Nebraska's courts have consistently held that violation of an employer's established drug-free policy constitutes "misconduct."

- *Douglas County School District 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998). Dutcher was employed as a full-time van driver for Omaha Public Schools. The school district had adopted and published a drug-free workplace policy that provided for random testing and the termination of employees in violation of the policy. Dutcher consented to a random drug test, which tested positive. OPS terminated Dutcher's employment and she filed for unemployment benefits, which she received after a 7-week disqualification period. The Nebraska Supreme Court of Nebraska determined that testing positive in a random employee drug test constitutes *gross* misconduct when the employee "was a governmental employee whose job was to transport school children. . . . Because Dutcher was entrusted with the lives and safety of the children riding in her van, her violation of OPS' drug-free workplace policy warrants more than a 7-week benefit disqualification." As a result, Dutcher was totally disqualified from receiving unemployment benefits.

However, a test to determine an individual's blood alcohol level is considered a "medical examination" for purposes of the ADA.

- *Dolan v. Svitak*, 247 Neb. 410, 527 N.W.2d 621 (1995). The employer adopted and published a drug-free workplace policy as "an attempt to improve job safety, to ensure quality production for its customers, and to demonstrate to the community its stand against chemical abuse." Pursuant to that policy, Svitak submitted a urine sample, which tested positive for drugs. Svitak was terminated as a result and sought unemployment benefits. The court held that Svitak's positive drug test disqualified him from receiving unemployment benefits, explaining that "[i]t would seem beyond dispute that a worker who knowingly and deliberately violates a work rule that unquestionably seeks to enhance the employer's reputation in the community for taking a stand against illegal drug use on the job, has been guilty of: (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, [as well as] (3) disregard of standards of behavior which the employer can rightfully expect from the employee."

Americans with Disabilities Act of 1990

Generally, the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12111 et seq., does not restrict a covered employer's ability to conduct tests to detect whether an applicant or employee is using illegal drugs. This is because tests to determine illegal drug use are excluded from the ADA's definition of "medical examination."[33] However, a test to determine an individual's blood alcohol level is considered a "medical examination" for purposes of the ADA.

The ADA prohibits all medical examinations, including job-related examinations, prior to an offer or conditional offer of employment.[34] However, one can make an offer of employment conditioned on the results of a medical examination if:

- all similarly-situated applicants are subjected to such an examination regardless of disability; and
- information obtained regarding the medical condition/history is kept in a separate confidential medical file.

With respect to incumbent employees, the ADA requires that all medical examinations be job related and necessary for the business. The need for the examination may be triggered by some evidence of problems related to job performance or safety, *e.g.*, credible evidence suggesting that an employee is working under the influence of alcohol. Likewise, medical examinations on employees are permitted where required by federal, state or local law.

Common Law

In addition to the various constitutional and statutory provisions that affect workplace drug and alcohol testing, employers must be understand that such testing and the ▶

dissemination of the results may give rise to a number of common law claims. The common law claims most often alleged in this setting are invasion of privacy and defamation.

Invasion of Privacy

Most jurisdictions recognize a cause of action for invasion of privacy. Authority for such a cause of action is found in Section 652 of the Restatement (Second) Torts, which provides in relevant part:

Section 652A. General Principle

> (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
>
> (2) The right of privacy is invaded by:
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> (a) unreasonable intrusion upon the seclusion of another . . . ;
> (b) appropriation of the other's name or likeness . . . ;
> (c) unreasonable publicity given to the other's private life . . . ; or
> (d) publicity that unreasonably places the other in a false light before the public, . . .

Section 652B. Intrusion upon Seclusion

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

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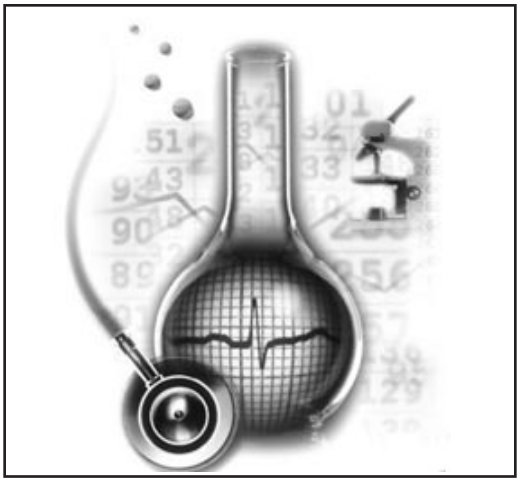
Section 652D. Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that

> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

Restatement (Second) Of Torts § 652 (1997).

Nebraska has codified the right to privacy in Sections 20-201 to -211 of the Nebraska Revised Statutes. Of particular importance in the employment setting is Section 20-203, which provides:



> Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy.[35]

In interpreting Section 20-203, the Nebraska courts have looked to Section 652B of the RESTATEMENT (2D) OF TORTS for guidance.[36]
Under Nebraska's privacy law, a plaintiff may recover four types of damages for an action for invasion of privacy.

> (1) *general damages* for harm to the plaintiff's interest in privacy which resulted from the invasion; (2) *damages for mental suffering*; (3) *special damages*; and (4) if none of these are proven, *nominal damages*.[37]

Cases applying Nebraska's invasion of privacy statute in situations involving drug testing include the following:

- *Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992). Discussed in greater detail above. The Eighth Circuit held that Nebraska's invasion of privacy statute, NEB. REV. STAT. § 20-203, was applicable to employee drug-testing in the private sector. Nevertheless, the court concluded that when an employer conforms with Nebraska's statutorily-imposed drug-testing procedures, the intrusion of privacy is not "highly offensive to a reasonable person." *Id.* at 1123. As the court explained, "Nebraska's statutory right to privacy . . . extends to [plaintiff employee's] place of employment, and requiring an employee to submit to drug-testing certainly infringes upon a worker's sense of privacy. To recover under section 20-203, however, the intrusion upon [plaintiff employee's] privacy must 'be highly offensive to a reasonable person.' NEB. REV. STAT. § 20-203. This is not the case here."

- *Poole v. Burlington N. Railroad Co.*, 987 F.Supp. 753 (D.Neb. 1997). Discussed in greater detail above. The trial court overruled Burlington Northern's motion for summary judgment on Poole's false light invasion of privacy claim. Because genuine issues of material fact existed as to Poole's claim of invasion of privacy, this cause of action was permitted to go forward.

- *Polinski v. Sky Harbor Air Service, Inc*, 2001 Neb. App. LEXIS 37 (Case No. A-99-1358, Feb. 13, 2001) (unpublished decision). Discussed in greater detail above. In construing NEB.REV.STAT. § 20-203, the court held that an invasion of privacy is "justified" if the subject of the alleged invasion consents to the intrusion. Polinski consented to the drug test through at least three (3) different avenues, including signing a consent form for laboratory testing of the drug test specimen. Consequently, Polinksi's invasion of privacy claim was dismissed.

Defamation

Generally, defamation involves the unprivileged publication of false statements. Employment-related medical testing and the dissemination of false or inaccurate results may give rise to a claim for defamation.

The following cases illustrate that the common law action for defamation

arises in this context:

- *Baggs v. Eagle-Picher Indus., Inc.*, 957 F.2d 268 (6th Cir. 1992). Defendant employer became concerned about drug use among employees. As a result, the employer, among other things, adopted a strong anti-drug policy and carried out a surprise drug screen that resulted in the termination of the plaintiffs. The plaintiffs brought suit, alleging breach of contract, invasion of privacy and defamation. The defamation claim was based upon a statement made by the defendant's president that was published in the local newspaper. That statement was that he told the employees that, "If you know you are an illegal drug user and feel you are going to be caught you have the option to leave the plant in a few moments and we will accept that as a voluntary quit." The president did not identify any of the plaintiffs by name. Finding the comment was not defamatory, the court affirmed the trial court's grant of summary judgment.

- *Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 536 (9th Cir. 1987). Plaintiff Tellez was a long-time employee of Defendant PG&E and covered by a collective bargaining agreement that, among other things, prohibited discipline without just cause and established grievance procedures. After PG&E began investigating drug use among its employees, a coworker informed the security department that Tellez showed and offered to sell him cocaine and was observed attempting to purchase cocaine. After an investigation, PG&E sent Tellez a letter accusing him of attempting to purchase cocaine and suspending him without pay for ten days. This letter was also distributed to other PG&E managers. Tellez filed a grievance and the review panel ultimately found that PG&E lacked just cause to suspend Tellez. Tellez then sued PG & E, alleging breach of the duty of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation. On appeal, the Ninth Circuit overruled the district court's entry of summary judgment for PG&E, finding that the defamation claim was not preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (a), and that genuine issues of material fact existed.

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- *Norman v. General Motors Corp.*, 628 F.Supp. 702 (D.Nev. 1986). Plaintiff was a long-time warehouse supervisor for Defendant GM. Plaintiff was terminated and filed suit challenging his termination on, among other grounds, defamation. Plaintiff claimed that GM management accused plaintiff of having "involvement with narcotics" and created a situation whereby plaintiff was accused of drug trafficking. GM sought summary judgment on the defamation claim because plaintiff could not prove publication in that only GM employees were present when the accusation was made and that officers, agents and employees of a corporation cannot "publish" to each other. The court overruled the motion, finding a genuine issue of material fact as to whether the accusation was distributed to third-parties outside of the corporation.

Public Policy Exception To Employment At Will

Most jurisdictions recognize an exception to employment at will where a termination violates a well-established public policy of that particular jurisdiction. Some employees have attempted to challenge their drug test-related terminations as being contrary to public policy.

- *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) (at-will employee who was terminated for refusing to submit to mandatory drug testing and workplace searches challenged termination on public policy exception; federal appeals court applying Pennsylvania law rejected use of federal and state constitutional provisions as source of public policy, but held that source could be found in common law invasion of privacy claim).

- *Semore v. Pool*, 266 Cal. Rptr. 280 (Cal. Ct. App. 1990)(held that state c onstitutional right to privacy extended to private sector at will employee).

- *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W.Va. 1990) (court answered "Yes" to the certified question: "Can the discharge of an employee for refusing to submit to urinalysis as part of a random drug test violate a substantial public policy of West Virginia and subject the employer to damages . . . when the employer has no individualized suspicion of drug usage and the drug test is not prohibited by state statute"; however, the court permitted two exceptions to this general rule where the drug testing is based on "reasonable good faith objective suspicion" or where the employee's job duties involves public safety or the safety of others).

- *Jennings v. Minco Technology Labs*, 765 S.W. 2d 497 (Tex. Ct. App. 1989) (court rejected employee's challenge to employer's random drug test based in part on public policy exception).
- *Luedtke v. Nabors Alaska Drilling, Inc.* 768 P.2d 1123 (Alaska 1989)(at-will employees who refused private employer's mandatory drug test were terminated challenged policy as, among other things, violative of state public policy as evidenced by state constitutional and common law right to privacy).

AIDS/HIV Testing

Generally

Even more than drug and alcohol testing, employer testing of applicants and employees for the presence of the human immunodeficiency virus ("HIV") or acquired immunodeficiency syndrome ("AIDS") raises significant privacy issues. As a result, employer attempts to conduct HIV/AIDS testing have been challenged on the same grounds as drug/alcohol testing.

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Constitutional/Statutory Provisions

- *Glover v. Eastern Neb. Community Office of Retardation*, 867 F.2d 461 (8th Cir. 1989). Nebraska state agency adopted policy mandating blood testing for AIDS and hepatitis B viruses. Because the risk that clients would contract the viruses from the employees was "minuscule, trivial, extremely low, extraordinarily low, theoretical, and approaches zero," the court held that the policy was not reasonable at its inception and therefore unconstitutional.

- NEB.REV.STAT. § 20-168(1). This section provides that an "employer" shall not: (a) refuse to hire; (b) dis charge; or (c) otherwise discriminate against an individual on the basis that the individual is suffering from HIV or AIDS. The term "employer" is not defined.

Genetic Testing

Generally

Advances in medical technology have made it possible to evaluate a person's genetic makeup to determine, among other things, whether a predisposition to certain diseases and disorders exists. Requiring applicants to disclose information regarding their genetic makeup as a condition of employment or permitting surreptitious collection of such information by employers involves the same types of privacy interests at issue in drug/alcohol and AIDS/HIV testing. In addition, such activities create an environment ripe for disability and other forms of unlawful discrimination.

Legislative and Executive Provisions

Americans With Disabilities Act of 1990

The federal Equal Employment Opportunity Commission has taken the position that the ADA's "regarded as" definition of "disability" covers individuals who are discriminated against "on the basis of genetic information relating to illness, disease, or other disorders." This is illustrated by the following example found in the EEOC's Compliance Manual:

Example - CP's genetic profile reveals an increased susceptibility to colon cancer. CP is currently asymptomatic and may never in fact develop colon cancer. After making CP a conditional offer of employment, R learns about CP's increased susceptibility to colon cancer. R then withdraws the job offer because of concerns about matters such as CP's productivity, insurance costs, and attendance. R is treating CP as having an impairment that substantially limits a major life activity. Accordingly, CP is covered by the third part of the definition of "disability."[39]

L.B. 432

On May 25, 2001, Governor Mike Johanns signed L.B. 432 into law. This newly enacted law applies to all employers of one or more employees and provides that such employers shall not:

- fail or refuse to hire, recruit, or pro mote an employee or applicant because of genetic information that is unrelated to the ability to perform the duties of a particular job or position;

- discharge or otherwise discriminate against an employee or applicant with respect to the terms or conditions of employment because of genetic information that is unrelated to the ability to perform the duties of a particular job or position;

- limit, segregate or classify an employee or applicant in a way that deprives or tends to deprive the employee/applicant of employment opportunities or otherwise adversely affects the status of the employee/applicant because of genetic information that is unrelated to the ability to perform the duties of a particular job or position; or

- require an employee or applicant to submit to a genetic test or to provide genetic information as a condition of employment or promotion.[40]

However, the act does not bar an employee from voluntarily providing an employer with genetic information related to the employee's health or safety in the workplace.[41]

Executive Order No. 13,145

President Bill Clinton signed Executive Order No. 13, 145 on February 8, 2000. This executive order generally bars federal

agencies from discriminating on the basis of genetic information and limits their access to and use of such information.

Cases

- *EEOC v. Burlington N. Santa Fe Ry.Co., N.D. Iowa*, No. C01-4013 (Feb. 9, 2001). The EEOC and two unions representing railroad workers filed suit against Burlington Northern/Santa Fe Railroad alleging thatBN/SF's practice of requiring employees submitting claims of work-related carpal tunnel syndrom to provide blood samples to determine if they had a genetic propensity to the condition violated the ADA. BN/SF responded by immediately halting the testing and promising to advocate against the practice of genetic testing. BN/SF's settlement with the EEOC allows the approximately 20 to 30 employees who were subjected to the testing to pursue a claim for damages. *Burlington Northern-EEOC Pact Preserves Right to Damages for Genetic Job Testing*, 76 DAILY LAB. REP. at A-1 (Apr. 19, 2001); *In Accord with Unions, Railroad Agrees to Advocate Against Genetic Testing for Jobs*, DAILY LAB. REP. at A-6 (Apr. 11, 2001).

Psychological Testing

Pre- and post-employment psychological and personality testing may give rise to potential claims of constitutional, statutory and common law invasion of privacy. For example, in Soroka v. Dayton Hudson Corp., 235 Cal.App.3d 654, 1 Cal.Rptr.2d 77 (1991), a class action was filed against the defendant challenging its practice of requiring Target security guard applicants to pass a psychological test called "Psychscreen" which was a combination of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory. The test was composed of 704 true-false questions, which included such questions as

"My soul sometimes leaves my body."

"I believe in the second coming of Christ."

"I have often wish I was a girl. (Or if you are a girl) I have never been sorry that I am a girl."

"I am very strongly attracted by members of my own sex."

The appellate court overruled trial court's order denying a preliminary injunction against Target's testing. The court found that the test violated the applicant's state constitutional right to privacy and state law prohibiting employment discrimination on the basis of an individual's religious and political (expression of homosexual orientation) beliefs. 

Read the rest of this article in Part 2 of *Workplace Privacy,* in the April issue of *The Nebraska Lawyer.*

The term "employer" is broadly defined to include "any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee."

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