**Nebraska Law Review**

Volume 67 | Issue 1 Article 10

1988

# Defense Perspective on Individual Employment Rights

Thomas H. Barnard
*Duvin, Cahn & Barnard*, tom.barnard@ogletreedeakins.com

Martin S. List
*Duvin, Cahn & Barnard*

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Thomas H. Barnard and Martin S. List, *Defense Perspective on Individual Employment Rights*, 67 Neb. L. Rev. (1988)
Available at: https://digitalcommons.unl.edu/nlr/vol67/iss1/10

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Thomas H. Barnard* and Martin S. List**

# Defense Perspective on Individual Employment Rights

TABLE OF CONTENTS


I. Introduction ..... 193
II. Defamation ..... 194
III. Sexual Harassment ..... 198
IV. Bad Faith Denial of Contract: A New Tort ..... 199
V. Liability of Employees for Informing on Their Co-Workers ..... 200
VI. Drug Testing ..... 202
VII. AIDS ..... 205
VIII. Polygraphs ..... 207
IX. Conclusion ..... 209


## I. INTRODUCTION

There has been a rapid evolution in the laws governing the rights of individual employees, and it is perhaps an overstatement to label those changes as a revolution. The changes in this area have generally been gradual, with rights being established incrementally. However, just as the aunt who has not seen her niece in some time is apt to exclaim, "My, how you've grown!" upon again meeting the child, employers can now be heard to exclaim their surprise at seeing the growth in the restrictions placed upon them in their dealings with employees. Aunts, of course, know that during the course of an absence from their young niece, the niece was growing. They are nevertheless surprised to see the new, enlarged version of their niece. So, too, with employers. While they understand and are aware of the fact that the law has been rapidly changing in the area of individual employees' rights, they are astounded when they survey the area and digest the magnitude of the changes. What employers view as more astonishing

* Partner, Duvin, Cahn & Barnard (specializing in labor relations and employment law). B.A., 1961, University of Puget Sound; LL.D., 1964, Columbia University; LL.M., 1970, Case Western University.

** Partner, Duvin Cahn & Barnard (specializing in labor relations and employment law). B.S., 1972, Cornell University; J.D., 1975, Rutgers University.

is the fact that the changes are continuing, and some of the more sweeping changes may still lie ahead.

It is from this vantage point that management has observed the evolution and expansion of the rights of individual employees. It is not so much a negative response, but rather one of concern and frustration. In particular, management perceives these developments as exposing the employer to conflicting obligations and potential liabilities. As an analysis of some of the recent developments in the areas of drug testing, AIDS in the workplace, privacy, and defamation discloses, the reaction of management is more than understandable.

This article will explore certain developments in the area of individual employees' rights. Some of these developments have not yet fully matured to "doctrines" or discrete principles of law. Rather, some of these developments are still mere judicial hints of things which are, perhaps, still to come. In a number of instances these hints are gleaned from the language of courts which, while rejecting a claim, set forth standards under which such a claim could be established. Moreover, these developments are discussed not so much to present an encyclopedic detailing of the current status of the law in the areas of employment-at-will, drug testing, AIDS, polygraphs, and defamation, but rather to present a management perspective on these areas, including an analysis of the impacts these developments might have on the traditional, non-unionized employer-employee relationship.

## II. DEFAMATION

It has long been recognized that employers may be liable to employees for defamation. Employers who publish defamatory statements regarding their employees or former employees are responsible for the injuries caused by such publication. When determining the employer's liability, courts have traditionally applied the standards which govern defamation generally. While the standards vary somewhat between jurisdictions, a statement is defamatory, and therefore actionable, if it is negligently published, untrue, and injures the reputation or good name of the plaintiff or subjects the plaintiff to public ridicule.

Most jurisdictions have tempered this standard by establishing a qualified privilege for statements uttered by employers regarding their employees. The privilege is triggered when the publication was made in a context in which the employer had a legitimate business reason to issue the communication to a person who shared the legitimate business need for the information.[1] This privilege is permitted

1. *See, e.g.*, Zuschek v. Whitmoyer Laboratories, Inc., 430 F. Supp. 1163 (E.D. Pa. 1977), *aff'd*, 571 F.2d 573 (3d Cir. 1978); Benson v. Hall, 339 So. 2d 570 (Miss. 1976); Calero v. Delaware Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

in order to foster the policy of enhancing the free flow of business information. When the privilege applies, the plaintiff, to establish a cause of action, must plead and prove that the employer made the utterance with malice and in bad faith.[2]

In any event, a fundamental element of defamation is that the defamatory material be published to a third party. Generally, the defendant's utterances directly to the plaintiff are not actionable. Aware of this general principle, employers have traditionally felt comfortably immune from employee libel suits when they did not communicate information about employees to third parties. For example, employers often refrain from providing "references" — and, in particular, the reason or reasons for the employee's termination — to inquiring prospective employers or others.

This sense of security, however, may be ill-founded. Recent developments in the law indicate that employers may be liable even when no actual publication to a third party has been made.

Relying on the doctrine of compelled self-publication, at least one court has recently held an employer liable even in the absence of a publication to a third party. In *Lewis v. Equitable Life Assurance Society*,[3] the employees/plaintiffs were terminated for gross insubordination and were informed of such by their employer. The employer did not communicate this reason to any third parties, including any prospective employers of the plaintiffs. However, the plaintiffs informed their prospective employers that they were terminated—at least according to their previous employer, Equitable—for gross insubordination. The Minnesota Supreme Court found that Equitable was liable for defamation because the plaintiffs were compelled to republish the statement of the defendant when asked by their prospective employers why they left Equitable. In addition, the court found that Equitable had reason to believe the plaintiffs would be under a strong compulsion to disclose the contents of the defamatory statement.

Although shocking to some, this decision is not wholly lacking in prior judicial support. Indeed, the Restatement (Second) of Torts[4] articulates the doctrine of compelled self-publication. Moreover, as the *Lewis* court noted, the doctrine had been applied to the employment context in at least three prior cases.[5] The courts in these cases really did no more than adapt a recognized rule of common law to the em-

2. Each state is free to fashion its own definition of malice. The most common formulation is that to prove malice a plaintiff must demonstrate that the employer made the publication with knowledge of its falsehood or in reckless disregard of the truth.
3. 389 N.W.2d 876 (Minn. 1986), *aff'g in part and rev'g in part*, 361 N.W.2d 875 (Minn. Ct. App. 1985).
4. § 577k (1976).
5. McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.W.2d 306 (1946); Grist v.

ployment context. Accordingly, while management certainly can criticize the wisdom of the application of the doctrine of compelled self-publication, any argument that its application is without foundation would be misguided.

Thus, in this area, the evolution was simply unnoticed by or, at the very least, of no concern to management. If this development in *Lewis*, the case of most recent note, was unexpected, perhaps it should not have been.

The application of the doctrine of compelled self-publication to the workplace, however predictable it should have been, places an employer in a practical and legal box from which it may be unable to extricate itself. If an employer reveals the reason for discharging an employee to a prospective employer, it exposes itself to claims of defamation. On the other hand, if the employer refuses to communicate such information to the prospective employer, it still remains subject to such claims pursuant to the compelled self-publication doctrine. This is an unenviable position.

The employer's natural reaction to this Hobson's choice is to refrain from openly communicating with its employees. With the current emphasis by personnel and human resources professionals on opening communication lines between employers and employees, this natural reaction to limit communications in an effort to avoid liability for defamation is seriously counter-productive. Those urging application of the doctrine of compelled self-publication to the workplace should seriously consider the costs to employers and employees of a return to the hopefully bygone days when communication channels between them were narrow — if existent at all.

The costs resulting from employers refusing to divulge information to prospective employers will be felt elsewhere, as well. The optimal allocation of manpower yields maximum productivity and growth. If information to prospective employers is limited, the likelihood of achieving this optimal allocation is correspondingly diminished. This cost must be considered before the compelled self-publication doctrine is freely applied in the workplace.

Additional, albeit unintended, obligations may be placed on employers by virtue of the extension of the compelled self-publication doctrine to the workplace. Under that doctrine, an employer may be liable when he terminates an employee, communicates the reason for that termination to the employee, and the employee, in turn, communicates that reason to a prospective employer. If the employer acted in bad faith when terminating the employee, it may therefore be liable for communicating that bad faith reason to the employee. In

---

Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969). *See also* First State Bank v. Ake, 606 S.W.2d 696 (Tex. Civ. App. 1980).

essence, the doctrine establishes a requirement of good faith and fair dealing — a requirement many states have not yet seen fit to interpose on the employment relationship. The extension of the doctrine could, therefore, significantly alter the law by establishing a covenant of good faith and fair dealing where it does not presently exist.[6] Those advocating the extension of the doctrine should be prepared to accept as a corollary thereto the addition of the covenant of good faith and fair dealing.

As might be expected, for these and other reasons, the doctrine has not been uniformly accepted. In applying Indiana law under its diversity jurisdiction, the District Court of Indiana held that the doctrine was inapplicable to the employment context in *Sarratore v. Longview Van Corp.*[7] The court referred to the doctrine as "appealing," but found the "historical and judicial context" insufficient to predict that the Supreme Court of Indiana would adopt the rationale of *Lewis*.[8]

The Colorado Court of Appeals similarly refused to extend the doctrine to the employment context in *Churchey v. Adolph Coors Co.*[9] However, the court provided little reasoning for the decision.

The future of the doctrine's application to the employment context is, at best, uncertain. Its extension will, no doubt, meet with significant employer resistance. In part, the resistance will find its genesis in the employers' general attempts to limit liability. However, some of the opposition will be based on concern over the more subtle costs attendant to the inevitable narrowing of employer-employee communication channels and the restricting of the free flow of information in the labor market generally. Critics should not be hasty to assume that employer opposition is predominantly motivated by selfishness.

The court in *Lewis* viewed the relationship between the employer and the employees as one deserving the same treatment as other business or public relationships. The employer was to enjoy no protection beyond that enjoyed by any other person or entity dealing with others. Stated otherwise, the employer was to be held accountable to its employees for its acts, just as would any other culpable party.

It is perhaps this lesson which is most notably learned from *Lewis* and the lesser-noted early cases. The courts, in mirroring — or, possibly, foreshadowing — society are willing to strip from the employment relationship its special status under which the employer was previ-

6. The court in Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 887-88 (Minn. 1986), rejected an argument that the recognition of the doctrine of compelled self-publication created tort liability for wrongful discharge, noting that such a right arguably already then existed in Minnesota. Where such a tort does not now exist, therefore, it may be created as a natural consequence of the recognition of the doctrine of compelled self-publication.
7. 666 F. Supp. 1257 (N.D. Ind. 1987).
8. *Id.* at 1264.
9. 725 P.2d 38 (Colo. Ct. App. 1986).

ously protected. If this is, in fact, a lesson of *Lewis*, employers should anticipate additional applications of common law duties to the workplace. The failure to anticipate these developments could prove to be a serious mistake.

## III. SEXUAL HARASSMENT

It is now unquestioned that sexual harassment in the workplace is actionable under Title VII of the Civil Rights Act of 1964.[10] It is further recognized that the employer may be liable when the work environment is made hostile by sexual harassment. Under Title VII, the remedies available to the plaintiff are limited to equitable relief, lost pay, and attorney's fees. The plaintiff cannot recover punitive or compensatory damages.[11] Plaintiffs, therefore, have sought other theories under which courts might hold an employer liable for sexual harassment in the workplace and consequently be able to award punitive or compensatory damages. The most productive area has been the tort of intentional infliction of emotional distress. If the plaintiff proves the commission of the tort, compensatory and punitive damages are recoverable.

To establish the tort of intentional infliction of emotional distress, most jurisdictions require the plaintiff to prove that the defendant's conduct was extreme and outrageous, beyond the bounds of decency, and caused severe emotional distress. Mere indignities, insults, and embarrassments are not actionable.[12]

Because this is an intentional tort, the liability of the employer for the acts of its agents must turn on the application of common law principles of respondeat superior. When appropriate, therefore, the employer is liable for the acts of its agent and all the damages proximately resulting therefrom.

In addition to liability for the acts of its agent, the employer will be liable for any independent torts it may commit. Presumably, however, the mere ratification of the acts of the agent does not constitute an independent tort by the principal.

Given these rather fundamental tenets of law, the decision in *Ford v. Revlon, Inc.*[13] is an example of the expansion of general principles when applied to the workplace. In *Ford*, a supervisor of the plaintiff repeatedly harassed her by asking her out for dinner and persisting despite her refusals, threatening to impose himself on her physically and sexually, and actually restraining and touching her and placing

10. 42 U.S.C. § 2000(e) (1982). *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
11. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979); 42 U.S.C. § 2000e-5(g) (1982).
12. RESTATEMENT (SECOND) OF TORTS § 46 (1965). *See, e.g.*, Yeager v. Local Union 20, Teamsters, 6 Ohio St. 3d 369, 453 N.E.2d 686 (1983).
13. 153 Ariz. 38, 734 P.2d 580 (1987).

his hands on her legs. The plaintiff informed the company officials about this conduct, but they were unresponsive to her complaints and permitted the matter to drag on for months.

The jury returned a verdict against the offending individual for assault and battery, but not for intentional infliction of emotional distress. The jury did, however, find the employer liable for intentional infliction of emotional distress. The employer's argument that these jury awards were inconsistent, and thus tainted, was handily rejected by the trial and appellate courts.

What is of most interest to employers in this case is that the mere failure to stop sexual harassment by its agents may itself constitute intentional infliction of emotional distress, even when the harassment itself does not. With the employer already a favorite "deep pocket" target, such an additional theory of liability is hardly a welcome addition to the expanding arsenal of the plaintiffs' legal weaponry.

## IV. BAD FAITH DENIAL OF CONTRACT: A NEW TORT

A similar example of the expansion of common law doctrines when applied to the workplace is found in *Rulon-Miller v. IBM*.[14] While this opinion is highly controversial for having applied the "implied covenant of good faith and fair dealing" doctrine[15] to the workplace, another portion of the decision may be equally, if not more, disturbing to employers.

In *Rulon-Miller*, the employer sought to deny the existence of a contract which was alleged to have been formed based upon the employer's written and verbal policies. The denial of the contract by the employer occurred as part of its relations with the plaintiff before the action was filed as well as part of its defense in the litigation itself.

The court held that the employer's bad faith denial of the existence of the contract gave rise to an independently actionable claim of the plaintiff for tort liability. This holding exemplifies one of the severest forms of judicial activism in the area of employer-employee relations and the most dramatic example of the stretching of common law doctrines to the workplace. In few, if any, instances has a claim of breach of contract been supplemented by an independent tort for the bad faith denial of the existence or terms of that contract.[16] Yet, the *Ru-*

14. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).
15. *Id.* at 248, 208 Cal. Rptr. at 529. This doctrine, borrowed from commercial law, states that implied in every contractual relationship is the mutual obligation of the parties to deal with each other in good faith and fairly.
16. While the rules of civil practice in many jurisdictions, as well as the Federal Rules of Civil Procedure, contain provisions permitting sanctions for the bad faith filing of claims or defenses, those sanctions run against filing counsel, not the litigant. FED. R. CIV. P. 11. The "bad faith denial of contract" doctrine in *Rulon-Miller*, therefore, goes well beyond these sanctions against counsel.

*lon-Miller* court created such a concept for application to the workplace. Such a cause of action might create potential liability for punitive and compensatory damages where the breach of the alleged contract itself would not generally entitle the plaintiff to such damages.

The chilling effect which would flow from a broad application of this doctrine is frighteningly significant. Employers would, for fear of exposing themselves to additional liability, hesitate to urge, as a defense, that there was no contract with an employee. Such a hesitation would be especially disturbing in light of the quite unsettled law in the areas of express and implied employment contracts. The vigorous presentation of employers' defenses to contract claims is necessary to permit the system to carve out clearer and more precise rules to govern this area. With employers inclined to hold back from fully presenting their defenses to employee contract claims and the courts, thus, lacking a balanced presentation, the law will develop without a full airing and will likely militate more toward employee interests than it might otherwise.

The expansive doctrines of *Rulon-Miller* are additional evidence that the employer-employee relationship is no longer a privileged child of the law. There are broader implications of these cases, as well. The court's sanctioning of jury verdicts such as these — and the legal reasoning behind the affirmation of such awards — signals to management observers that existing common law doctrines will not only be reactivated and applied to the employer-employee relationship, but may actually be expanded. Therefore, not only is the employer-employee relationship no longer privileged, it is ever more rapidly being singled out as a legal relationship requiring adjustments through judicial intervention.

Other developments — or developments apparently about to happen — have also served or will serve to alter the traditional legal and practical parameters of the employment relationship. One such developing area involves the potential liability of co-workers for interference with the relationship between employer and employee.

## V. LIABILITY OF EMPLOYEES FOR INFORMING ON THEIR CO-WORKERS

In this highly competitive era, in which competition is global as well as domestic,[17] productivity and efficiency are quite important. Employers must, therefore, seek the assistance of dedicated employees to keep the other employees in line. Employees are naturally reluctant to help and would be even more reluctant to if their efforts

17. For a comprehensive discussion of the impacts of global economy on United States business, see *Your Global Market*, FORTUNE, Mar. 14, 1988, at 40-72.

might expose them to liability for interfering with the employment relationship of a co-worker.

Such a claim was brought against a co-worker by a terminated employee in *Davenport v. Epperly.*[18] The co-worker informed management that the plaintiff was hunting elk while collecting benefits under the employer's disability salary continuation program. The plaintiff was then terminated and subsequently brought an action against the co-worker. While the Supreme Court of Wyoming upheld the granting of the co-worker's motion for summary judgment, it did so only after reasoning that the plaintiff would have established his claim had he demonstrated that the co-worker had acted out of improper motive or ill will.

Employees who are aware of the potential for such liability might refrain from voluntarily reporting violations of rules by their co-workers. Furthermore, the same liability potentially attaches when the reporting is done pursuant to a company rule requiring such reporting. The resulting loss of employee cooperation could lead to lower productivity and accidents or even liability of the employer to other employees and third parties.

If viewed creatively, such a cause of action can result in liability to the employer as well. In the majority of jurisdictions which have not adopted the "covenant of good faith and fair dealing" or "discharge only for cause" doctrines, an employer may terminate an employee for any reason whatsoever,[19] with impunity. However, the co-worker who reported the employee in the first instance could face liability. Given this reasoning, if the employer was aware of the bad faith motives of the reporting co-worker and terminated the allegedly offending employee, the discharged employee could argue that the employer also be liable in conspiracy, or through ratification of the co-worker's actions. The anomalous result is that the employer would be liable indirectly for that which he would not be liable directly.

Such causes of action, therefore, have the potential for substantially greater impact on the employer-employee relationship than might appear at first blush. This is another example of the multi-faceted attack on the traditional employer-employee relationship under which employer responsibility was limited, and the employer's corresponding ability to efficiently compete was greater. Increased costs and lost efficiencies are present, although they might, as a practical matter, be incalculable. Nevertheless, these costs are real and must be weighed against the benefits of greater "fairness" and responsibility in the workplace.

---

18. 744 P.2d 1110 (Wyo. 1987).
19. This would exclude, of course, civil rights laws, direct anti-retaliatory statutes, or clear public policy restrictions.

## VI. DRUG TESTING

While the developments in areas of traditional concern such as employee termination are dramatic, the law's treatment of issues only recently of significance in the workplace is even more dramatic. The use and abuse of drugs is such an area. Just as the nation has become highly sensitized to the issue of drug abuse, employers have become more acutely concerned with the direct[20] and indirect costs of drug use in, or affecting, the workplace. Additional costs can occur through liability to third parties for injuries caused by employees under the influence of drugs, whether directly[21] or on the theory of negligent hiring. Subsequently, employer reactions to the problem, such as testing and discipline, have been counteracted by increasing limitations on employer reactions.

It is certainly reasonable for management to want to minimize the number of employees who use drugs and to deal appropriately with those who do. However, dealing with drug use as it affects the workplace must, by necessity, start with detection and identification of the employees who use drugs. That, in turn, often leads to a desire to test for drug use. It is this testing which has emerged most visibly as an issue.[22]

While federal statutory guidelines have not yet been established for employee drug testing and the use of the test results, a number of

20. These costs, estimated at $100 billion, have been caused by lost productivity due to absences, workers' compensation claims, on-the-job accidents, health insurance cost increases, and theft. NATIONAL INSTITUTE ON DRUG ABUSE, DRUG ABUSE IN THE WORKPLACE: CONSENSUS SUMMARY, 1 (1986). The indirect costs due to morale problems and time spent by management in dealing with the problem cannot readily be measured.

21. An interesting example of the employer's exposure is found in Henry v. Vann, 71 N.Y.2d 76, 518 N.E.2d 896, 524 N.Y.S.2d 1 (1987), *aff'g*, 124 App. Div. 2d 783, 508 N.Y.S.2d 502 (1986). In Henry, an employee reported to work inebriated, was terminated, and ordered off the employer's property. On the way home, the employee collided head-on with another car, causing the death of the occupants. The employer was held not liable for these deaths, but only because the employee had been terminated and thus the employer bore no responsibility for the former employee's acts. Employers no doubt shudder to think of the result had the employee merely been suspended and sent home. Implicit, perhaps, in this decision is the theory that an employer, knowing that an employee is drunk or drugged and thus dangerous, must restrain that employee lest the employer be responsible for injuries caused by the employee. This case, therefore, also expands common law duties owed by requiring an employer to serve as a "dry-out" center for its employees. Such an obligation thoroughly warps the traditional employer-employee relationship and compels the employer to patronizingly act in the place of others who traditionally provide such care and services. *See also* Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (1973).

22. Federal labor law principles, such as the duty of the employer to bargain with the union before instituting a drug testing program, are not dealt with here. Similarly, constitutional and statutory issues arising from drug testing of public sector employees are not discussed herein.

states and localities have enacted such legislation.[23] These laws deal not only with the right to test, but also with the procedures and methods of testing. They focus on the invasion of privacy concern and restrict the use of the results.

Even without such legislation, just as with the communication of any other information, employers must be careful not to disseminate false or inaccurate reports. The failure to maintain the confidentiality of the test results can lead to a claim for defamation. Similarly, disclosure of the results to third parties, even if accurate, may expose the employer to liability for invasion of privacy. Moreover, the questioning of employees during drug testing, on aspects of their private lives unrelated to their employment or drug use, may constitute an invasion of the employee's privacy.

Not unexpectedly, some employees actually welcome drug testing. They are fearful of being injured by co-workers who are under the influence of drugs and are unhappy with having to pick up the slack caused by unproductive co-workers who use drugs. It is this legitimate goal of workplace safety which often initially motivates employers to test employees for drugs.

Moreover, drug and alcohol users themselves often wish to be detected so as to be encouraged and enabled to participate in rehabilitation and therapy programs.[24] Employer sponsorship of such programs, in conjunction with testing, can, therefore, achieve what church and family have been unable to achieve.

The employer's efforts to use drug testing to achieve workplace safety may, indeed, constitute more than a voluntary business decision. The Occupational Safety and Health Act (OSHA) requires the employer to provide a safe workplace.[25] The argument certainly can be made that drug testing is necessarily a part of the employer's responsibility to ensure a safe workplace. Indeed, employers may seek to take this position when defending against state and local legislative or judicially created restrictions on drug testing, and argue that OSHA pre-empts these state and local restrictions.

---

23. *See, e.g.*, 1987 Conn. Act 551 (Reg. Sess.) (requiring three independent positive tests before employment action can be taken; results must be kept confidential); 1987 Iowa Acts 469, (cannot require drug test as condition of employment unless there is probable cause to believe the employee is impaired and such impairment endangers the employee, his co-workers, or the general public); MINN. STAT. ANN. § 181.950 (West Supp. 1988) (no arbitrary testing; must have written policy; licensed laboratories only may be used; confidentiality of results); R.I. GEN. LAWS § 28-6.5-1(A) to (G) (1987 Supp.) (no testing as condition of employment except upon reasonable suspicion of impairment of ability of employee to perform his/her job).

24. For a discussion of the phenomenon of drug users desiring, but not able to get, treatment, see *Concern Mounts Over Lengthy Wait for Drug Treatment in D.C.*, Washington Post, Feb. 21, 1988 at C1, col. 2.

25. 29 U.S.C. § 651-678 (1982).

While the limits on employer drug testing and the use of the test results[26] provide employees with significant protection, those restrictions may result in a lack of detection which, in turn, exposes employers to liability to co-workers and third parties. Indeed, absent restrictive legislation or clear judicial authority limiting drug testing in a particular jurisdiction, an argument can be made that an employer's failure to test can create liability under a negligent hiring theory when an employee's drug use injures a co-worker or third party.[27] Moreover, in states which have judicially or statutorily relaxed the traditional workers' compensation bar to tort suits against employers for on-the-job injuries, such a failure to test could also result in additional employer liability for injuries to co-workers.[28]

Besides merely restricting drug testing and the use of the test results, some state laws have classified drug addiction as a handicap.[29] As a result, employers must accommodate and not discriminate against employees identified as addicts. Therefore, addicted employees may not be terminated simply because of their addiction.

While there may be reasonable debate as to the rationality of classifying drug addition as a handicap, there is little that can lessen the strained morality and logic of requiring employers to employ persons who have recently violated the laws against drug use — laws which reflect the nation's currently heightened and more visible efforts to stop drug abuse. Indeed, one cannot help but notice the irony of the withdrawal of Judge Ginsburg as a nominee for the position of Supreme Court Justice due, in large part, to his admitted casual use of marijuana years ago,[30] while the law requires employers to retain and accommodate addicted employees.

Whether the war against drugs is founded on practical, social, or moral considerations, the inconsistency in its application must be reconciled before the country, including employers, can reach a consensus as to drug use and the workplace. Employers cannot be expected to face the adverse financial and other burdens of drug abuse alone. Employers will participate *along with* government and the people as a whole in eliminating drug abuse, but they will not — and, in this

26. *See, e.g., supra* note 23.
27. *See, e.g.*, Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (1978).
28. Blankenship v. Cincinnati Milacron Chem. Inc., 69 Ohio St. 2d 60, 433 N.E.2d 512 (1982), *cert. denied*, 459 U.S. 857 (1982) (no bar where employer commits intentional tort), *modified by* OHIO REV. CODE ANN. § 4121.80 (Anderson 1987).
29. *See, e.g.*, Hazlett v. Martin Chevrolet, Inc., 25 Ohio St. 3d 279, 496 N.E.2d 478 (1986). *But see* 29 U.S.C.A. § 706(8)(B) (West Supp. 1988) (expressly excluding drug or alcohol abuse as a handicap where the current use of drugs or alcohol prevents the individual from performing his or her job or where his or her employment would constitute a direct threat to property or the safety of others).
30. In this regard, in contrast to Judge Ginsburg's dated use of marijuana, virtually all drug testing can only detect relatively *current* usage.

writer's view, should not — be the sole segment of society financially supporting the war against drug use and abuse.

Those advocating the wholesale banning of drug testing in the workplace, or at least severely restricting drug testing, do not properly balance the needs of society as a whole with the rights of the individual employees. The cost is simply too great to permit the economic and human losses resulting from drug use in the workplace in the name of the rights of privacy and fair dealing. Employers must be able to remain flexible in responding to the very real dangers posed by drug use in, or affecting, the workplace. The goals must be balanced.

The statutory and judicial restrictions on drug testing and discrimination against detected drug users, and the requirement that employers accommodate—as handicapped—drug users reflect, again, a radical departure from the traditional employer-employee relationship. Here, too, employees are provided rights in the workplace which they may not have in their private lives. Thus, this represents another dramatic example of the reconstruction of the employer-employee relationship from a privileged one, to one in which there are more limitations than might exist in other relationships.

## VII. AIDS

Perhaps no issue has had greater public visibility in recent years than AIDS. The media, health care professionals, and the government have all attempted to publicize their concerns regarding the spread of the AIDS virus.[31] As much emphasis has been placed on dispelling the many misconceptions about the disease as has been placed on sensitizing the public to the existence and implications of the disease.

The concern over AIDS, and the concern over its error-laden mythology, have reached the workplace. Employers are concerned with liability to co-workers and third parties while, at the same time, employees often object to working with AIDS infected co-workers.

On the other hand, infected employees — or those who simply are suspected of being infected and refuse to medically confirm or deny that suspicion — seek to maintain what they urge to be their rights to privacy, dignity, to be free of discrimination, and to be free from the adverse affects of misinformed hysteria. The challenge facing the law is to balance the interests of the employer, the infected employee, co-workers, and third parties.

A handful of states and localities have enacted statutes designed to

31. In 1986, the Public Health Service estimated that in 1991 alone, 54,000 people will die from the disease; and 74,000 people will contract it. Cumulatively through 1991, there will be 270,000 cases of AIDS with 179,000 deaths, the Public Health Service further indicated. Morgan & Curran, *Acquired Immunodeficiency Syndrome: Current and Future Trends*, 101 PUB. HEALTH REP. 459, 461 (1986).

protect AIDS victims from discrimination in the workplace. In California, it is unlawful to disclose the test results, reflecting the "right to privacy" aspect of the concern.[32] Massachusetts[33] and the City of Austin, Texas,[34] prohibit or limit the requiring of testing for AIDS.

A number of state courts and civil rights agencies have categorized the AIDS infection as a handicap under state laws prohibiting discrimination against the handicapped.[35]The United States Department of Justice Office of Legal Counsel has reached a similar conclusion[36] in interpreting section 504 of the Rehabilitation Act of 1973.[37] These laws require reasonable accommodation and prohibit discrimination. AIDS victims are, therefore, assured that they may not be terminated solely because they are infected with the AIDS virus.

Employer obligations, however, do not end with the protection of the rights of the infected employee. The Occupational Health and Safety Administration and the Department of Health and Human Services have issued a Joint Advisory Notice to health care employees stating that "[i]t is the legal responsibility of employers to provide appropriate safeguards for health care workers who may be exposed to [AIDS]" and requiring gloves as a minimum protective device for such workers.[38] There is every reason to believe that similar rulings will be issued regarding the protection of employees from the spread of AIDS by infected co-workers.

The OSHA-Health and Human Services Joint Advisory Notice reflects a wider issue. Employees are often quite concerned about being around co-workers who are AIDS infected. Employees voice concern over the shared use of the toilet, lunch room, water fountain, and on-site first aid facilities with actual or suspected AIDS-infected employees.[39] Some have even indicated a reluctance to handle tools or work

32. CAL. HEALTH & SAFETY CODE §§ 199.20-.22 (West 1988).
33. MASS. GEN. LAWS ANN. ch. 111, § 70F (1987).
34. Austin, Tex., Ordinance 861, 211-V (Dec. 11, 1986), Individual Empl. Rts. Man. (BNA) 585:7 (to be codified at §§ 7-4-120 to 7-4-133).
35. Cronan v. New England Tel. Co., 41 Fair Empl. Prac. Cas. (BNA) 1273, 1277, 1 Individual Empl. Rts. Cas. (BNA) 651, 655 (Mass. Super. Ct. 1986); Department of Fair Employment & Hous. v. Raytheon, Daily Lab. Rep. (BNA) No. 29 at E-1 (Feb. 13, 1987) (Cal. Fair Empl. & Hous. Comm'n 1987), *aff'd*, Daily Lab. Rep. (BNA) No. 86 at F-1 (May 4, 1988) (Cal. Super. Ct. 1988); Policy Statement Ohio Civ. Rts. Comm'n, Treatment of Charges Alleging Discrimination Based Upon Acquired Immune Deficiency Syndrome (AIDS) Comm'n (Mar. 25, 1987); Shuttleworth v. Broward County Office of Budget & Management Policy, Daily L. Rep. (BNA) No. 242 at E-1 (Dec. 17, 1985) (Fla. Comm'n Human Relations 1985).
36. Application of Section 504 of the 1973 Rehabilitation Act to Persons with AIDS, memorandum Off. Legal Counsel (June 23, 1986), Individual Empl. Rts. Man. (BNA) 595:3001.
37. 29 U.S.C.A. § 794 (West Supp. 1988).
38. Joint Advisory Notice (Dept. of Labor and Dept. of Health & Human Services) 52 Fed. Reg. 41,818 (1987).
39. A description of such hysterical and apparently medically unfounded reactions

with machinery handled by such co-workers. While the current state of medical knowledge indicates that such fears are totally unwarranted, they nevertheless present a very serious problem for the employer.

Employer reactions to such employee fears can range from nothing to attempts to make employees better informed — and, thus, more rational — to discipline. If an employer must discipline employees who refuse to work with AIDS-infected co-workers, it may be forced to lose valuable, productive employees and incur the costs associated with such loss. In addition, if employees act in concert to protest working with an AIDS-infected co-worker, their actions might be found to constitute protected concerted activity pursuant to federal labor law,[40] thereby immunizing the employee from discipline.

The employer is, therefore, faced with bearing the financial and other costs of balancing the competing interests. Perhaps no issue better exemplifies the overall trend of making the employer a guarantor of special treatment and the provider of rights than AIDS in the workplace. The employer may not discriminate against, and must even accommodate, the AIDS-infected employee, while at the same time exposing itself to liability to third parties and co-workers, as well as having to maintain the order and harmony of its fearful work force.

The costs of these responsibilities will no doubt be passed on to the consumer. Once again, the judiciary and law makers must balance these costs against the benefits to the individual AIDS-infected employees. A nearsighted, unthoughtful failure to consider these costs could prove to be serious error.

## VIII. POLYGRAPHS

Those involved in litigation and the practice of criminal law have long been aware of the continuing debate over the validity and courtroom admissibility of polygraph and other bio-mechanical truth-testing devices. However, this debate has now been brought into a new arena — the workplace. Many people urge the prohibition or limitation on the use of polygraph results, the requirement of a polygraph

---

appears in an article detailing swimmers leaving a pool which was used by an AIDS victim and Immigration and Naturalization Service employees who demanded to wear gloves when they were dealing with Haitian applicants. *U.S. Confronting AIDS With Sense of Realism*, N.Y. Times, Feb. 17, 1988, at A1, col. 1.

40. 29 U.S.C. §§ 157, 158(a)(1) (1982). Sections 7 and 8(a)(1), respectively, of the Labor-Management Relations Act, provide in relevant part:

> Sec. 7. Employees shall have the right to . . . engage in other concerted activities for the purpose of . . . mutual aid or protection . . . .
>
> Sec. 8(a). It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

test as a condition of employment, or the procedures and use of polygraphs.

A number of jurisdictions and localities currently prohibit or limit the use of polygraphs in the workplace. Some prohibit polygraph testing, while others seek to regulate or limit the procedures and use of test results.[41] Moreover, comprehensive federal legislation, just recently passed, prohibits employers from requesting or requiring employees to submit to polygraph testing.[42] While the law contains a number of exceptions to these prohibitions,[43] the lawful use of polygraphs in the employment relationship in the private sector has been virtually eliminated.[44]

Legislation limiting the use of polygraphs in the workplace is premised on two distinctly different concerns. First, there is widespread, although controverted belief, that polygraphs are unreliable and, thus, inherently unfair as a basis for employment decisions. Second, many feel that the polygraph test invades the privacy of the employee being tested. This belief focuses both on the mechanics of the test itself — wires being connected to the employee — and the questions asked of the employee.

If, indeed, these are valid bases for the restriction on the use of polygraphs in the workplace, it necessarily follows that other employer security techniques might likewise be unlawful. For example,

---

41. *See, e.g.*, CAL. LAB. CODE § 432.2 (West Supp. 1988); CONN. GEN. STAT. ANN. §§ 31-51g (West 1987); DEL. CODE ANN. tit. 19, § 704 (1985); D.C. CODE ANN. § 36-801 to 803 (1981); HAW. REV. STAT. §§ 378-26 to 29 (1985); IDAHO CODE § 44-903 (1977); IOWA CODE ANN. § 730.4 (Supp. 1987); ME. REV. STAT. ANN. tit 32, § 7166 (1988); MASS. GEN. LAWS ANN. ch. 149, § 19B (West 1982); MICH. COMP. LAWS ANN. §§ 37.201-.209 (West 1985); MINN. STAT. ANN. § 181.75 (West Supp. 1988); NEB. REV. STAT. § 81-1932 (1987); N.J. REV. STAT. § 2C:40A-1 (West Supp. 1987); N.Y. LAB. LAW §§ 735-739 (McKinney Supp. 1988); OR. REV. STAT. § 659.227 (1987); 18 PA. CONS. STAT. ANN. § 7321 (Purdon 1983); R.I. GEN. LAWS §§ 28-1.1 to 6.3 (1986); VT. STAT. ANN. tit. 21, §§ 494-494e (Supp. 1986); VA. CODE ANN. § 40.1-51.4:3 (1986); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1988); WIS. STAT. ANN. § 111.37 (West 1988).
42. Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (1988).
43. Most notably, section 7(d) of the Act permits employers to request employees to take a polygraph where there is an on-going investigation of economic loss to the employer as a result of theft, embezzlement, misappropriation or unlawful industrial expionage or sabatoge. However, even when such a request is made, employees may not be discharged or otherwise adversely affected in their employment if they refuse to take the polygraph or terminate the polygraph examination at any point. *Id.* § 7(d), 102 Stat. at 649.
44. Section 10 of Public Law 100-347 expressly provides that state and local laws, as well as collective bargaining agreements, which are more restrictive of the use of polygraphs are to remain enforceable and are not preempted or otherwise affected by the Act. The Joint Explanatory Statement of the Conference Committee noted that such state or local laws or collective bargaining agreements could preempt the limited exceptions provided in the Act. *Id.* § 10, 102 Stat. at 653.

tough interrogation by professionals might be deemed unlawful. The results of such interrogation can be unreliable and constitute an invasion of the employee's privacy. Electronic surveillance of employees in the workplace may be similarly unlawful. Therefore, if the logic of the antipolygraph arguments is extended, the results might severely emasculate employer security efforts; with the inevitable pass through to consumers of the resulting increased costs.

## IX. CONCLUSION

One need not resolve the myriad of issues which arise in each of the areas discussed herein in order to focus on the overall implications of the trend. Regardless of whether polygraph tests are reliable, for example, and regardless of whether the administration of drug tests invades the privacy of the employee, every employee has the choice to refuse these tests, although risking adverse employment action in the course of that refusal. As such, it is clear that underlying the trends discussed is the much more general premise that the employer now is to serve as a guarantor of rights generally thought to be afforded solely by governments. The workplace is, therefore, being viewed as a place where society's general values of fairness are to be adhered to despite the voluntary nature of employer-employee relationships which are formed, in theory, on the basis of the freely self-adjusting supply and demand of labor.

If concerns for fundamental fairness lie behind the dramatic trends, such trends are likely to continue. If, however, these developments reflect the view that employers traditionally have greater power than their workers, and that such power needs readjustment, one may safely assume that these trends will periodically show change as the balance of economic power between employers and employees shifts.

Regardless of the motivations behind these trends, we need to retrench and evaluate, as a nation, what shape we want the employer-employee relationship to ultimately take. Whenever the law intervenes to skew the free flow of the marketplace, there is a cost attached to that intervention. As a society, we may indeed be willing to pay that cost. However, unlike the prohibition of baseless, individious discrimination, which prohibition may result in no costs to employers — and, indeed, may even result in direct economic benefits due to the more optimal allocation of manpower that flows from a merit-based employment system — the trends discussed herein result in direct economic costs to employers and, therefore, to the public. Those who will make the decisions cannot do so solely out of instinctive reactions. Moreover, those who oppose or seek to limit the judicial and legislative efforts to change the role of the employer in the workplace should not be branded as uncaring and selfish.

The fact that many of these workplace concerns are being handled on a local level only serves to heighten the confusion and the costs. Through piecemeal, state-by-state developments, substantive inconsistencies have been commonplace. Many of the judicial and legislative efforts have been far too short-sighted. Employers are asked to shoulder the burden of competing interests and are often placed in unenviable, no-win situations. At the same time employer liability to coworkers and third parties is increasingly broadened, the employer's ability to control its work force so as to limit its exposure to those liabilities is being restricted.

If reforms are necessary in the law of the workplace, those reforms should be legislative, not judicial, and national in scope. Employers operating on a multistate basis, with interstate impact, cannot reasonably be expected to be accountable under fifty or more diverse sets of rules, each changing so quickly as to be nearly unmonitorable. The result can be chaos, with neither employee rights nor the rights of coworkers or third parties being well served.

The management perspective, if rationally composed, is simply this: Newly established rights have costs, and these costs should not be ignored. Progress in the area of employee rights is inevitable and desirable. If pushed too far, however, the American workplace will be rich with employee rights and poor economically. This is the challenge.