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Jennifer S. Goldstein
Jennifer.Goldstein@chicagounbound.edu

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Drug Testing and the Unemployment Compensation System

Jennifer S. Goldstein†

The concerns underlying workplace drug testing programs and the requirements of the unemployment insurance system create an interesting predicament for an employer wishing to discharge an employee who tests positive for drug use.¹ By firing the employee, the employer may rid itself of a potentially large problem, but it may simultaneously increase its financial obligation to the unemployment insurance system. Every worker discharged for failing or refusing to take a drug test who receives unemployment benefits increases the annual tax that an employer must pay into its state unemployment insurance fund.² Employers therefore have an incentive to show that a positive test for drug use, or a refusal to be tested, should disqualify an employee from receiving benefits.³ When an employee is fired for testing positive or refusing to take a drug test, or when an employee quits rather than take a test, an employer will thus argue that the discharge was for “misconduct” or that the quit was without “good cause,” both of which are grounds for denial of unemployment benefits.⁴

¹ A.B. 1985, Bryn Mawr College; J.D. Candidate 1989, The University of Chicago.

² Drug abuse affecting the workplace has gained considerable attention in recent years. See, for example, Reagan Calls for Private Sector Efforts to Help Curb Drug Use in the Workplace, 26 Daily Lab. Rep. (BNA) A-8 (February 9, 1988). See also John Hoerr, Privacy, Business Week 61 (March 28, 1988). Estimates of productivity losses to businesses resulting from drug use are as high as $46.9 billion for 1984, an increase of $21.2 billion from 1980. See Sandra N. Hurd, ed., Employment Testing: A National Reporter on Polygraph, Drug, AIDS, & Genetic Testing D:3 (1987). Losses take the form of increased tardiness, absenteeism, injuries, poor workmanship, and property damage. Businesses have responded to this situation by instituting employee drug testing programs. For example, the percentage of Fortune 500 companies with drug testing programs jumped from three to forty between 1983 and 1986. Administration of Drug Testing Key Factor in Getting Reliable Results, Employers Told, 200 Daily Lab. Rep. (BNA) A-11 (Oct. 16, 1986). This Comment discusses only urinalysis testing for drug use; it does not address testing for alcohol abuse.

³ An employer may accept an increase in the unemployment tax, of course, if it feels that the benefits of apparently decreased employee drug use outweigh the tax costs. An employer will nevertheless attempt to minimize its tax burden.

⁴ This Comment primarily discusses unemployment compensation issues in the context of employment-at-will relationships. Judicially-created public policy exceptions may create
This Comment argues that mere failure of, or refusal to submit to, a drug test alone should not disqualify an otherwise deserving employee from receiving unemployment benefits. In order to prove misconduct, an employer should have to satisfy a reasonable suspicion standard by demonstrating that it decided to test on the basis of concrete evidence that the employee either was impaired or used drugs on the job. Alternatively, the employer should have to show that the test was as free from error as possible and that the employee's job was such that it was within an extremely narrow category of jobs for which an employer reasonably could expect an employee to abstain completely from any drug use.\textsuperscript{*} In cases where an employee has quit to avoid a drug test, courts and

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  \item Federal and state labor laws, and the collective bargaining agreements they encourage, may afford employees other protections against discharge in the drug-testing context. See the Labor Management Relations Act, 29 U.S.C. sec. 158 (1982), which requires employers and unions to bargain in good faith on issues of hours, wages and other conditions of employment such as a drug testing program; Comment, Injunctions Against Drug Testing Programs Pending Arbitration: The Role of the Courts and the Right to Privacy, 1988 U. Chi. Legal F. 261. And see, for example, N.J. Stat. Annot. sec. 34:13A-5.4 (West 1988).

  \item Employees of state actors may also enjoy significant protections under the federal and state constitutions. The Fourth Amendment to the U.S. Constitution restricts some drug tests through its prohibition against unreasonable searches and seizures. See, for example, \textit{Jones v. McKenzie}, 833 F.2d 335 (D.C. Cir. 1987), petition for cert. filed; \textit{McDonell v. Hunter}, 809 F.2d 1302 (8th Cir. 1987); \textit{National Treasury Employees Union v. Von Raab}, 816 F.2d 170 (5th Cir. 1987), cert. granted 108 S. Ct. 1072 (1988); \textit{Railway Labor Executives' Ass'n v. Burnley}, 839 F.2d 575 (9th Cir. 1988), cert. granted 108 S. Ct. 2033 (1988); and \textit{Shoemaker v. Handel}, 795 F.2d 1136 (3d Cir. 1986). For an analysis of these drug testing cases and the Supreme Court's approach to search and seizure issues, see Comment, Some Traditional Thinking About Non-Traditional Searches: Mandatory Drug Testing, the Fourth Amendment and the Supreme Court's Balancing Methodology, 1988 U. Chi. Legal F. 285.

  \item In some states, even private sector employees may be protected by a right to privacy granted by the state constitution. See Ariz. Const. art. II, sec. 8; Cal. Const. art. I, sec. 1; Hawaii Const. art. I, sec. 5; Ill. Const. art. I, sec. 6; La. Const. art. I, sec. 5; Mo. Const. art. I, sec. 1-4; and Wash. Const. art. I, sec. 7. Finally, public policy exceptions to the employment-at-will doctrine, which evolved at common law, may provide some protection against mandatory, humiliating urine tests. Courts have been reluctant, however, to uphold a wrongful discharge claim in the few drug testing cases where such claims have been brought. See \textit{Satterfield v. Lockheed Missiles & Space Co.}, 617 F. Supp. 1359 (D.S.C. 1985) (employee, dismissed after an unconfirmed test showed traces of marijuana, deemed not to have been wrongfully discharged).

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unemployment compensation boards should assure themselves that the employee’s departure was not the result of coercion or ignorance of her legal rights and responsibilities.

Part I of this Comment examines the history and purpose of unemployment compensation statutes and explains how benefits programs function. Part II analyzes when an employee should be disqualified from receiving benefits for “misconduct” after either failing or refusing to submit to a drug test. Part III examines the circumstances under which an employee may have “good cause” to quit rather than take a drug test.

I. UNEMPLOYMENT COMPENSATION: AN OVERVIEW

Before the 1930s, the dominant political and workplace cultures in the United States attributed joblessness to the fault of the worker. Accordingly, the individual worker had to bear the costs of his or her unemployment. Small relief programs existed as early as the 1870s, and by the 1900s many communities, trade unions and employers had devised voluntary plans. Even where these plans existed, however, payments were generally too low to meet an unemployed worker’s needs.

The prevailing view changed radically during the Depression. When jobless rates soared as high as twenty-five percent in 1933, a political consensus began to evolve that a worker’s unemployment might not be the worker’s fault. The question then became not whether to institute a compensation system, but what kind of system would be appropriate. A federal program appeared necessary because any state enacting a mandatory benefits scheme would put its own businesses at a competitive disadvantage. Ultimately, Congress enacted the Social Security Act of 1935, which included provisions establishing a federal-state unemployment insurance

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* The so-called frontier philosophy in America attributed individual job losses to laziness and encouraged the perception of an unemployed worker as “a victim of his own vices.” Most Western European governments, by contrast, were already beginning to consider unemployment schemes by the early part of the twentieth century. Europe’s impoverishment after World War I resulted in demands for social welfare programs, especially for a compulsory unemployment insurance system. During the same period in the United States, both the prosperity and extreme political conservatism that existed effectively stifled calls for social reform. Daniel Nelson, Unemployment Insurance 4 (1969). For an incisive historical analysis of the period, see William E. Leuchtenburg, The Perils of Prosperity, 1914-32 (1958).


* Mackin, Benefit Financing at 8 (cited in note 7). See also note 11.
Pursuant to the statute, each state passed its own unemployment insurance legislation, creating a system through which workers were partially reimbursed for lost income.

Under the state component of the unemployment insurance system, each state establishes an unemployment insurance fund into which most employers are required to make annual payments. The payments are then transferred to a federal unemployment fund where the money is held in trust for the state agency which administers the benefits.

The federal component of the unemployment system, in turn, is tied to a tax-credit program. Each employer subject to the tax must pay the federal government a certain percentage of its total payroll, with most of the tax owed offset by the amount contributed to the state unemployment insurance fund. In general, the mandatory contribution rate for the state fund is determined by the employer's "experience with unemployment." As former employees collect more compensation under the unemployment insur-

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11 It took two years for all of the states to pass unemployment legislation. Several states predicted that the federal statute would be held unconstitutional, but in Steward Machine Co. v. Davis, 301 U.S. 548, 586 (1937), the Supreme Court upheld the statute, rejecting the argument that "the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states." Justice Cardozo, writing for the Court, stated that before Congress' action, the states did not address the unemployment problem for fear of placing their own industries at an economic disadvantage, and maintained that the federal statute gave the states a welcome motive for enacting legislation. Id. at 588-89. The statute was therefore not coercive but was "the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil." Id. at 587. After the Court upheld the statute's constitutionality, the states that had not enacted insurance legislation proceeded to do so. William Haber and Merrill G. Murray, Unemployment Insurance in the American Economy 106 (1966).


15 Saucier and Roberts, 9 Employee Rel. L.J. at 595 (cited in note 2).
ANCE PROGRAM, THE EMPLOYER'S ANNUAL TAX INCREASES. THE EMPLOYER, THEREFORE, HAS AN INCENTIVE TO REDUCE THE NUMBER OF FORMER EMPLOYEES ELIGIBLE FOR BENEFITS, EITHER BY DISCHARGING FEWER WORKERS OR BY ATTEMPTING TO DEMONSTRATE THAT A FORMER EMPLOYEE IS NOT ENTITLED TO RECEIVE BENEFITS.\footnote{The American experience-based plan, which emphasizes compensation but includes the prevention of unemployment as a secondary goal, differs from Western European plans which emphasize compensation alone. One author explains the "prevention" rationale by stating that because "it is solely up to the employer to decide whether to hire, retain, or lay off workers, making him bear the social cost of unemployment directly as a cost of doing business would create an incentive to stabilize employment and reduce or prevent unemployment." Mackin, Benefits Financing at 5 (cited in note 7). See also Nelson, Unemployment Insurance at 104-13 (cited in note 6).}

The primary purpose of unemployment insurance statutes is to lighten the burden of those who are unemployed through no fault of their own and to ensure some measure of economic stability for jobless individuals.\footnote{See Barclay White Co. v. Unempl. Comp. Bd. of Rev., 356 Pa. 43, 50 A.2d 336, 340 (1947) (emphasis deleted). See also a statement by the United States Department of Labor: "Unemployment insurance is a program . . . which provides partial compensation for wage loss as a matter of right, with dignity and dispatch, to eligible individuals." Haber and Murray, Unemployment Insurance at 26 (cited in note 11), quoting U.S. Dept. of Labor, Bureau of Employment Security, Major Objectives of Federal Policy with Respect to the Federal-State} As one court has noted, "[i]nvoluntary unemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker . . . . Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages . . . ."\footnote{Courts are virtually uniform in recognizing this compensatory purpose. See, for example, Dean v. South Dakota Dept. of Labor, 367 N.W.2d 779, 782 (S.D. 1985) (clerk-typist, discharged after two off-duty shoplifting incidents, denied benefits because of misconduct connected with her employment); Feagin v. Everett, 9 Ark. App. 59, 652 S.W.2d 839, 843 (1983) (teacher fired after being charged with criminal possession of marijuana and hashish oil denied benefits due to misconduct); O'Neal v. Employment Security Agency, 89 Idaho 313, 404 P.2d 600 (1965) (postal worker fired for misconduct after violating statute forbidding lewd acts with minors); and Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 639 (1941) (cabdriver's repeated accidents did not constitute misconduct). Many states have explicitly incorporated this purpose into their unemployment statutes. See, for example, 48 Ill. Rev. Stat. para. 300 (West 1988); Annot. Cal. Unemp. Ins. Code sec. 100 (West 1986); and 34 Ga. Code Annot. sec. 8-2 (1982).} Given the humanitarian
objectives of the unemployment insurance statutes, they are given
a liberal construction in favor of the employee in order to achieve
the legislation's compensatory goals. Thus, courts closely scruti-
nize an employer's arguments that a claimant is ineligible for
benefits.

In order to receive benefits, an employee must satisfy certain
requirements, which vary among the state schemes. For example,
the employee generally must have received a minimum amount of
wages over a certain period of time and must be actively seeking a
new job. Even if she meets these requirements, however, the
claimant may still be disqualified from receiving benefits if the em-
ployer can demonstrate that she was fired because of "wilful" or
"gross" misconduct or that she quit her job without good cause.

II. DISQUALIFICATION FOR MISCONDUCT

If a discharged employee tests positive for drug use or refuses
to be tested, her eligibility for unemployment benefits turns on
whether failing or refusing to submit to the test constitutes "mis-
conduct." Each state's unemployment insurance statute contains
its own definition of "misconduct," but most standards conform to
the following description:

'Misconduct' . . . is limited to conduct evincing such
wilful or wanton disregard of an employer's interest as is
found in deliberate violations or disregard of standards of
behavior which the employer has the right to expect of
his employee, or in carelessness or negligence of such de-

19 See, for example, Annot. Mo. Stat. sec. 288.020 (Vernon 1965). Although the benefits
system was designed primarily to compensate the unemployed worker, actual compensation
is only a portion of former earnings. For a critique of the adequacy of benefits under the
present system, see a study based on data from 1976 which found that unemployment insur-
ance benefits maintained a family's standard of living in only ten percent of the households
surveyed, and that in forty-six percent of all cases the benefits did not reach half of the net
wages lost. Elchanan Cohn and Margaret M. Capen, A Note on the Adequacy of UI Bene-
20 See LeGare v. Com., Unemploy. Comp. Bd. of Rev., 498 Pa. 72, 444 A.2d 1151, 1153
(1982) ("[i]n reviewing the Board's conclusions, we are guided by the remedial, humanita-
rian objectives of the Unemployment Compensation Law . . ."). See also Parker v. St. Ma-
ries Plywood, 101 Idaho 415, 614 P.2d 955, 959 (1980); and Weaver v. Wallace, 565 S.W.2d
867, 869-870 (Tenn. 1978).
21 Haber and Murray, Unemployment Insurance at 113-14 (cited in note 11); and Sau-
cier and Roberts, 9 Employee Rel. L.J. at 598 (cited in note 2). Most state statutes are
virtually identical on the issue of searching for a new job, though there are some minor
differences.
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...[as] to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.\footnote{Boynton Cab Co., 296 N.W. at 640 (cited in note 17). See also Weaver, 565 S.W.2d at 870 (misconduct must be a "breach of duty owed to the employer, as distinguished from society in general"). But see Haas v. Texas Employment Com'n., 683 S.W.2d 462, 465 (Tex. App. 1984) ([t]he court interpreted Texas' statute to mean that "to be guilty of misconduct . . . it need not be shown that the behavior was wanton, wilful, or deliberate . . .").}

Mere inefficiency, isolated instances of ordinary negligence, or poor performance due to inability to perform work do not generally constitute misconduct.\footnote{Boynton Cab Co., 296 N.W. at 640; Maywood Glass Co. v. Stewart, 170 Cal. App.2d 719, 339 P.2d 947 (1959); glassware packer with five years of tenure, who had unintentionally packed defective merchandise, found not guilty of misconduct); and Yellow Cab Co. of Shreveport v. Stewart, 111 So.2d 142 (La. App. 1959) (aged taxi cab driver's involvement in a number of accidents demonstrated only heedlessness or carelessness and therefore did not constitute misconduct).} Rather, an employer must demonstrate either that a claimant has \textit{deliberately} violated reasonable standards of behavior that the employer "has the right to expect" the employee would follow, or that a claimant has been grossly negligent in a manner tantamount to intentional disregard of those standards.\footnote{See Saucier and Roberts, 9 Employee Rel. L.J. at 599 (cited in note 2). See also Weaver, 565 S.W.2d at 870; Armstrong v. Neel, 725 S.W.2d 953, 955 (Tenn. App. 1988); and LeGare, 444 A.2d at 1153. Although some states once required a claimant to prove that her discharge was not due to misconduct, every state now puts the affirmative burden on the employer to prove misconduct. David R. Packard, Unemployment Without Fault, 17 Vill. L. Rev. 635, 639 (1972).}

Two basic reasons exist why an employer should not be permitted to satisfy its burden of demonstrating misconduct merely by producing a positive drug test result. First, drug tests have many inherent inaccuracies and limitations that make random use of them unreasonable. They produce false results in a substantial percentage of cases and are incapable of distinguishing active drug use from passive exposure.\footnote{See generally Section II.A. infra.} They do not prove that an employee...
deliberately ingested the drugs for which she tested positive or that she even took the drugs at all.

Second, even when test results accurately indicate metabolite levels that could result only from deliberate ingestion, they cannot show whether the employee is presently impaired.26 This limitation of drug tests is important because in many cases an employee’s off-the-job drug use may not violate reasonable workplace rules. While it is reasonable to demand that employees not use drugs in the workplace or work under the influence of drugs, employers rarely have the right to regulate the private lives of their workers and demand abstinence outside the workplace.27 Therefore, to prove misconduct caused by on-duty use or impairment, an employer should advance more than a positive test result. An employer additionally should be required to provide concrete evidence, such as observations of aberrant employee behavior on the job, which ultimately led to testing the employee for drug use.

A. The Limitations and Inaccuracies of Drug Tests

An employer seeking to prove a claimant’s misconduct must demonstrate that a positive test result reflects actual drug use. The crucial question of test accuracy, however, is frequently overlooked or downplayed by courts and unemployment compensation boards, and they often fail to realize that three distinct and mutually exclusive conclusions can be derived from a positive test result:

(1) Actual use of the drug indicated by the test; (2) inadvertent, unintended, or even unknown consumption of or exposure to the identified drug . . . ; and (3) presence in the tested specimen of a substance, other than the identified drug or metabolite, to which the tests responded.28

Additionally, even if the test accurately reveals that the employee has used illegal drugs, it will not reveal whether the drug is impairing the employee while she is at work.

1. Inadvertent or passive ingestion. The first major problem in interpreting drug test results is the possibility that a positive result is due to unintentional consumption. Inadvertent drug ingestion may result from the consumption of food laced with drugs, for example, or from passive inhalation. Although employers, courts and unemployment compensation boards often disbelieve

26 Alcohol & Drugs in the Workplace (BNA) 29 (1986).
27 See notes 83-93 and accompanying text.
claims that inadvertent consumption or passive inhalation causes a positive test result, a number of studies have shown that when a person has been in a confined environment, such as a small car or room, “with sufficient time and high marijuana smoke exposure conditions, it becomes difficult to distinguish between active smoking and passive inhalation.”

A claim of inadvertent ingestion, therefore, cannot be rejected offhand. If drug consumption is unintended, it does not constitute the “wilful or wanton disregard of an employer’s interests” that is required for a finding of misconduct.

In a recent Virginia case, Blake v. Hercules, Inc., the court recognized the possibility of unintended consumption. In Blake, the employer administered a drug test to the claimant after receiving an anonymous tip that he used marijuana. The test result was positive, but the court refused to deny benefits, noting that there was no evidence refuting the claimant’s assertion that he tested positive because he had been in the presence of others smoking marijuana. In addition, there was no evidence that the cannabinoid quantity in the claimant’s system affected his abilities at work, nor was there evidence indicating when he had ingested the marijuana. Accordingly, the court properly refused to find that the claimant intentionally ingested drugs or had been impaired on the job.

2. False Results. The second major problem with drug tests is their high rate of false positive results. The EMIT test, an inexpensive and, among employers, popular method of testing, when used by itself, produces false positives in ten to forty percent of all cases. Because of this high error rate, the manufacturer of the EMIT test recommends confirmation of a positive result with a gas chromatography-mass spectroscopy (“GC/MS”) test. The GC/MS

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29 Id. at 512, quoting Waterhouse, A Passive Inhalation Study of Cannabis, reported at the American Academy of Forensic Sciences Meeting, Cincinnati, Ohio (Feb. 18, 1985).
30 Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 640 (1941).
32 Karen Hudner, Urine Testing for Drugs, 11 Nova L. Rev. 553, 555 (1987). See also Elaine Shoben, Test Defamation in the Workplace, 1988 U. Chi. Legal F. 181; and Allan Adler, Probative Value and the Unreasonable Search, 1988 U. Chi. Legal F. 113. The EMIT test is based upon the human body’s natural defense system, which produces an antibody when a germ, virus or drug is injected into it. The test works by mixing a purified antibody with a urine sample. If a drug similar to the one which would stimulate the production of that particular antibody exists in the sample, the drug will bind to the antibody. The test will identify this combined antibody-drug. The test has accuracy problems because the antibody will react not only with the drug being tested but with chemicals similar to the drug.
33 In the GC/MS test, the urine sample is converted into gas and then pushed through a long glass column with helium gas. Each drug can be identified by the time it takes to go through the column. As the gas exits the column, it is bombarded by electrons which break up the drug. The resulting pieces are then analyzed by a mass spectrometer, which becomes
test costs approximately $60 to $100 per test, however, and involves a difficult, time consuming procedure that employers are reluctant to use.\(^4\)

False positives generally occur whenever a test does not distinguish the metabolites of the drug it is designed to detect from those of other substances. Tests which detect amphetamines, for example, also respond to phenylpropanolamine, a common over-the-counter decongestant that is found in Contac and Sudafed; a positive test for heroin and morphine may be triggered by codeine; a test for cocaine may respond to amoxicillin, an antibiotic; and a positive test for morphine may be produced by poppy seeds and their oil, which are common in breads, rolls, and pastries.\(^5\) Finally, false positives arguably may occur because of particular physiological factors.\(^6\)

If an employee is discharged because of a false positive, she should not be considered to have violated the Boynton Cab Co. standard because that standard requires an actual violation of a reasonable employer rule.\(^7\) A recent decision, denying benefits to an employee who tested positively for drugs, implicitly recognized this position in emphasizing that the test which led to the finding of misconduct had been performed three times.\(^8\) The chance of

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\(^4\) Hudner, 11 Nova L. Rev. at 559 (cited in note 32).

\(^5\) If an employer is fully informed of the over-the-counter or prescription medication an employee may be taking, many of these problems can be avoided.

\(^6\) The primary example of this is the so-called "melanin defense." Some have argued that melanin, the pigment responsible for the dark color of a person's skin, closely resembles marijuana metabolites found in urine, and that because Blacks excrete more melanin that whites, tests for marijuana use have a discriminatory disparate impact on Blacks. See Shield Club v. City of Cleveland, 838 F.2d 138 (6th Cir. 1987).

\(^7\) See note 22, citing Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 640 (1941).

\(^8\) Whittington v. Board of Review, W. Va. Unemployment Ins. Rep. (CCH) par. 8673 (Cir. Ct. 1987). The court did not specify whether the employer confirmed the initial result with the EMIT or GC/MS test. If the confirmations were performed with the EMIT test, the decision is problematic because even multiple EMIT tests do not eliminate the significant concerns about false positives that they raise.

The increasing importance which employers are placing on test results (see note 1) may also lead to false negatives. To avoid discharge, drug abusers may dilute their urine samples by drinking large amounts of water, substitute another person's urine for their own, add salt or sweat to the sample, or ingest prescription drugs in order to have a legitimate excuse for a positive result. David Bearman, The Medical Case Against Drug Testing, 88 Harv. Bus. Rev. 126 (Jan.- Feb. 1988).

As a means of discouraging employees from tampering with their urine samples, several commentators have suggested that an employer's response to a positive test should not be to discharge the employee but to enroll her in an Employee Assistance Program ("EAP").
getting three false positive results seemed sufficiently low so that the claimant could reasonably be considered to have actually used the drug.

3. **Drug tests do not prove on-the-job impairment.** Because an employer usually may not regulate the off-duty conduct of its employees, in order to prove misconduct, it must demonstrate that a discharged employee was impaired while working or used drugs in the workplace. But drug tests can neither measure impairment nor distinguish between drug use off or on-the-job.

If the drug test is accurate, a positive result will show that the person who was tested had ingested that drug, but will not measure the degree of the person's impairment. The test will not do so, regardless of the procedures used, for several reasons. First, tolerance levels vary greatly among individuals. Factors such as fatigue or anxiety will affect an individual's tolerance level and make it even more difficult for a tester to draw conclusions concerning impairment of the tested individual's cognitive and motor functions. Furthermore, tests generally cannot establish the quantity of the drug used or when it was used—both of which are critical in any attempt to determine actual impairment. The technical limitations of drug tests led the 1983 Consensus Development Panel on Drug Concentrations and Driving Impairment to conclude:

> Testing [for] drugs or drug metabolites in urine is only of qualitative value in indicating prior exposure to specific drugs. Inferences regarding the presence or systemic concentration of the drug at the time of driving or impairment from drug use are generally unwarranted.

EAPs emphasize rehabilitation, and those with experience in treating alcoholics regard them highly. An EAP encourages peer and self referral, and it addresses a broad range of personal problems beyond substance abuse. EAPs have been quite successful in treating alcoholics. James T. Wrich, Beyond Testing, 88 Harv. Bus. Rev. 120, 124 (Jan.-Feb. 1988). Finally, studies have shown that EAPs, because they reduce absenteeism, accidents, health costs, and productivity losses, are a good investment. Alcohol & Drugs in the Workplace (BNA) 45 (1986). See also Comment, Meeting the Challenge to Privacy Rights by Employer Drug Testing: The Right of Nondisclosure, 1988 U. Chi. Legal. F. 213.

\[\text{\textsuperscript{39}}\] See notes 83-93 and accompanying text.

\[\text{\textsuperscript{40}}\] For example, while one may detect LSD for only one day subsequent to use and cocaine for two to five days, one may detect cannabinoids anywhere from two to twenty-one days after use, assuming a threshold level of twenty to 100 nanograms (a billionth of a gram) per milliliter of urine. Among chronic marijuana smokers, it may even be possible to detect the metabolite 77 to 81 days after use. See Dubowski, 11 Nova L. Rev. at 530 (cited in note 28). Threshold levels used in testing generally range from 25 to 200 ng./ml. Id.

\[\text{\textsuperscript{41}}\] Id. at 521, quoting Robert Willette, Feasibility Assessment of Chemical Testing for Drug Impairment (1985). Such limitations suggest that employers might consider alternative means of detecting on-the-job impairment. Alternative means of gathering evidence con-
Courts sometimes fail to recognize these severe technological limitations. In *Whittington*, for example, while concluding that "[c]ertainly, the use of drugs and the operation of heavy over-the-road trucks 'don't mix,'" the court did not distinguish between drug use on and off-the-job. The court also failed to address whether off-duty drug use, like on-the-job impairment, constitutes a "disregard of . . . an employer's interests." Simply failing a drug test, even if it constitutes a legitimate basis for discharge, is hardly a ground for a finding of misconduct.

In *Silverton Forest Products v. Emp. Div.*, by contrast, a case in which the claimant had tested positive for amphetamine and cocaine metabolites, the court refused to conclude that the claimant was impaired on the job, despite the fact that these metabolites can only be detected within three days of use. The court held simply that a drug test alone does not prove impairment at work. Similarly, the court in *Glide Lumber Products Co. v. Emp. Div. (Smith)*, although somewhat uncomfortable with its ruling because of safety concerns, held that a drug test alone does not prove on-the-job impairment and therefore does not substantiate a misconduct claim.

B. Misconduct and Employers' Rules and Interests

Most unemployment compensation decisions in which a finding of misconduct is based on a drug test emphasize an employee's intentional violation of an employer rule banning drug use. In one recent case, *Whittington v. Board of Review*, the claimant was tested for drugs immediately after returning from a vacation. The court denied the claimant benefits because it found that the positive test result violated an express employer policy. But a violation

cerning drug abuse may save significant costs as well. As Arthur J. McBay, Chief Toxicologist at the University of North Carolina School of Medicine, notes, random testing—as opposed to testing based on reasonable suspicion—is highly inefficient and expensive because of the "large numbers of apparently healthy and normally functioning people who will be tested in order to discover the few symptom-free people in whom a drug might be found."


4 id. at 51,979-11.
4 "Boynnton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W.2d 636, 640 (1941).
4 See Section II.C.
4 The court recommended direct supervisor observation as a preferable means to prove on-the-job impairment. See also notes 39-41 and accompanying text.
of an employer’s rule is not necessarily equivalent to misconduct, and the court erred by failing to address whether such an employer policy, absent evidence of on-the-job impairment, was a reasonable one.\textsuperscript{50}

1. Employment Rules Must Be Reasonable. If an employee violates an employer rule, intentionally or otherwise, a court should not accept the rule on its face but should evaluate its reasonableness.\textsuperscript{51} Although some courts have failed to consider whether an employer policy prohibiting drug use was reasonable,\textsuperscript{52} other adjudicative bodies have done so. The unemployment insurance appeals board in \textit{In the Matter of Ables}, for example, based its misconduct finding on the violation of an employer rule which required an employee to take a drug test if a “‘supervisor ha[d] a reason to suspect an employee of being under the influence of alcohol or drugs.’”\textsuperscript{53} The board found that the employer’s request was reasonable given the inherently dangerous nature of the job and, therefore, that the claimant’s refusal constituted insubordination. Thus, the nature of the given job—whether it is inherently dangerous, for example—affects the reasonableness of policies against employee drug use. It is important to note, in addition, that the rule in \textit{Ables} was premised on the existence of concrete evidence supporting reasonable suspicion of drug use.

Another drug testing case, \textit{Texas Employment Com’n v. Hughes Drilling Fluids}, also focused on the reasonableness of an employer policy, a policy requiring submission of a urine sample on a random basis, as it applied to the claimant, a warehouse worker and truck driver.\textsuperscript{54} The court explicitly justified its denial of benefits on the basis of a rule determined reasonable since it was designed to ensure the safety of company employees. The reason-

\textsuperscript{50} The court in \textit{Whittington} failed to address this issue. The importance of analyzing the reasonableness of the rule is discussed in the next section of this Comment.

\textsuperscript{51} See, for example, \textit{Wroble v. Bonners Ferry Ranger Station}, 97 Idaho 900, 556 P.2d 859, 861 (1976), in which the court stated:

We do not perceive [that] the legislative intent in enacting [the compensation statute was] to require that any violation of any rule of an employer will, per se, constitute misconduct such as will result in the denial of unemployment compensation benefits upon discharge. While an employer may make almost any kind of rule for the conduct of his employees and under some circumstances may be able to discharge an employee for violation of any rule, such does not, per se, amount to ‘misconduct’ constituting a bar to unemployment compensation benefits.

(emphasis in the original).


\textsuperscript{54} 746 S.W.2d 796 (Tex. App. 1988).
ing used in Hughes Drilling is somewhat problematic, however. The court deemed the company policy reasonable because of its goal—safety—but it did not subject the means of enforcement the company used—random drug testing—to an equally rigorous reasonableness analysis. While the court acknowledged that “urine drug screening is not effective to demonstrate psychomotor impairment at the time of the specimen collection,” it did not consider whether this shortcoming undermined the reasonableness of the policy. Courts, therefore, must evaluate rules both in light of the rules’ goals and in light of the means by which the employer seeks to achieve those goals. Where a drug test is capable of measuring no more than off-duty conduct, there should be a heavy presumption that it is an unreasonable method of achieving workplace safety.

If an employer proves a deliberate violation of a reasonable workplace rule, it generally need not show repeated violations to demonstrate misconduct, especially if the regulation was such that a single breach would be injurious to the employer’s interests. Establishing misconduct is, however, essential.

Adjudicative bodies sometimes fail to recognize that grounds for discharge and grounds supporting a misconduct finding are not coextensive. Although an employer may discharge an employee-at-will for unsatisfactory work performance, violation of certain standards of behavior, or for failure to adhere to an employer rule, the discharge will not necessarily lead to a finding of mis-

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55 Id. at 802.
56 For an additional discussion of the reasonableness of regulating off-duty conduct, see notes 78-93 and accompanying text.
57 Kehl v. Bd. of Review of Indus. Com’n, 700 P.2d 1129, 1134 (Utah 1985) (“a single violation of an employer’s rule may be sufficient to warrant disqualification . . . where the employee reasonably should have known that violation would interrupt the employer’s operations”). Compare Weston v. Gritman Memorial Hosp., 99 Idaho 717, 587 P.2d 1252 (1978) (surgical nurse’s tardiness, even after warnings, breached an important employer rule and therefore constituted misconduct because the tardiness occurred continually).
58 Maywood Glass, 339 P.2d at 951 (cited in note 23) (employee was fired for packing defective glassware; the court stated that “while [the employee’s] conduct may have justified her employer’s decision to terminate the employment relationship it did not necessarily constitute ‘misconduct’”).
59 Gallagher v. Unemploy. Comp. Bd. of R., 36 Pa. Commw. 599, 388 A.2d 785 (1978) (employee fired for calling employer’s girlfriend a “bitch,” while on his day off and in the employer’s place of business, was not guilty of misconduct).
60 Beaty v. City of Idaho Falls, 110 Idaho 891, 719 P.2d 1151, 1152 (1986) (where city employee, who was convicted of possession of both stolen property and marijuana, violated a rule against the commission of a felony, the court stated that “we reject the city’s tacit invitation to hold that any discharge that is reasonably based on the employer’s own rules will always result in a denial of the discharged employee's unemployment benefits”).
conduct and a consequent denial of unemployment benefits. In order for an employee's actions to constitute grounds for misconduct, they must usually be shown to have been intentional violations of an employer's rule which injure the employer's interest. Where an employer's rule prohibits drug use or impairment on the job, courts should ensure that only proven intentional violations that could injure the employer's interest are denominated misconduct. While some courts have addressed this point, others have confused discharge with misconduct. Still, at least two courts have recognized the distinction between general discharge and discharge for misconduct when deciding whether the claimant is entitled to unemployment compensation. In Glide Lumber Products (Smith) and Silverton Forest Products, randomly imposed drug tests indicated drug use. The employees were subsequently dismissed from their jobs, but because no evidence of on-the-job impairment existed in either case, the courts awarded benefits to both claimants.

Drugs, because of their illegality, create another tension in the misconduct calculus which often confounds decision-makers. While the use of illicit drugs may be a violation of criminal law, and is certainly "misconduct" in the ordinary sense of the word, "misconduct" as disqualification for unemployment benefits requires wanton disregard of the employer's business interests. Whether an action constitutes misconduct does not depend on whether it is legal or illegal; although illegality may be a factor in a misconduct determination, it is by no means dispositive. Where the employee

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also Consolidated Const. Co., Inc. v. Casey, 71 Wis.2d 811, 238 N.W.2d 758, 763 (1976) ("violation of a valid work rule may justify discharge but at the same time may not amount to statutory 'misconduct'").

61 See, for example, Blake v. Hercules, Inc., 4 Va. App. 270, 356 S.E.2d 453, 455 (1987) (no misconduct where company rule prohibited drug possession but employer failed to demonstrate claimant knew marijuana was in his system).

62 Compare Blake with Whittington v. Bd. of Rev., W.Va. Unemployment Ins. Rep. (CCH) para. 8673 at 51,979-11 (cited in note 38) (employer's right to fire equated with ability to determine misconduct: "Clearly, an employer may choose to terminate an employee upon less than substantial evidence of actually being under the influence of drugs . . .").


64 Boynton Cab Co. v. Neubeck, 296 N.W. at 640 (cited in note 17).

65 See O'Neal v. Employment Security Agency, 89 Idaho 313, 404 P.2d 600, 603-04 (1965), citing Gregory v. Anderson, 14 Wis.2d 130, 109 N.W.2d 675, 679 (1961) (post office worker's conviction on "a morals charge of the gravity of a felony" justified discharge under employer's rule prohibiting employment of felons and constituted misconduct because it brought "dishonor on the business name" to the same extent that, as the court analogized, a clerk's disparaging the quality of a merchant's goods would bring).

O'Neal was subsequently limited to its facts in Beaty v. City of Idaho Falls, 110 Idaho
frequently deals with the public, for example, and hence can reason-
ably be expected to maintain certain standards of behavior, some illegal acts have correctly been held to constitute misconduct.
The fact that drugs are illegal, however, is only relevant insofar as it relates to the claimant's job. Illegality does not make an oth-
wise unreasonable rule reasonable.

2. Inherently Unreasonable Rules: The Polygraph Example.
In addition to rules that are unreasonable given the circumstances
of a job, courts have also found some rules to be inherently unre-
asonable. A principal example of these are rules regarding poly-
graph testing. Courts have considered these rules when an em-
ployee's refusal to take a polygraph test has violated either a
specific rule requiring testing or a rule against insubordination. In
these cases it has been difficult to demonstrate that the employee's
refusal to submit to the test was misconduct because the polygraph
is so unreliable. In Douthitt v. Kentucky Unemployment Ins.
Com'n, for example, a court stated that a requirement for an em-
ployee to take a polygraph test was inherently unreasonable be-
cause of the unreliability of these tests. Another court held that
discharge for refusing to take a polygraph test is not misconduct
since "a tenth of the population are unfit subjects for polygraph
tests, and . . . such tests tend to inaccuracies in from something
less than ten up to twenty-five per cent of cases."

891, 719 P.2d 1151, 1152-53 (1986) (city garbage collector's violation of no felony rule by
conviction for possession of marijuana and stolen guns did not constitute misconduct and
was distinguishable from O'Neal, where the nature of the postal worker's job, which re-
quired frequent dealings with the public, made his "lewd and lascivious conduct" closely
connected to his employer's interests).

66 A positive drug test will usually demonstrate at best ingestion of a relatively small
quantity of drugs. In most states, then, this will constitute only a misdemeanor, not a fel-
ony. See, for example, Annot. Cal. Health & Safety Code, sec. 11357(b) (West Supp.
1988).

67 See notes 90-93 and accompanying text for discussion of the employee's duty and the
extent to which the nature of the job affects that duty.

69 Swope v. Florida Indust. Com'n Unemp. Comp. Bd. of Rev., 159 So.2d 653, 654 (Fla.
Dist. Ct. App. 1963) (department store employees' refusal to take a polygraph
test). The court also noted that "[i]nasmuch as the results of the tests cannot be used to
show misconduct, refusal to submit to those tests cannot be used to show misconduct." Id.
at 475.
 Courts refuse to deny benefits for other reasons as well. In one case, the court utilized a balancing test and concluded that, because the potential injury from taking a polygraph test outweighed the potential benefits, the refusal to take a test was not misconduct. Potential injuries included the polygraph's "inherent unreliability . . . as shown by its inadmissability in court . . . , the potentiality for abuse of the test, and the implicit possibility of an invasion of the employee's privacy in matters of no concern to the employer."  

Another indication that an employer's rule requiring polygraph examinations would generally be considered inherently unreasonable is the existence of statutes in at least 26 states and the District of Columbia that prohibit polygraphs or require that they be submitted to voluntarily. Congress has also recently passed a statute severely restricting polygraphs. The statute essentially bans the use of polygraphs by private employers, with a limited exception for some security guards and pharmaceutical company employees and with a separate exception for investigations concerning theft or industrial espionage against employers.

The obvious question that polygraphs present is the extent to which they can be compared to drug tests. Like polygraphs, drug tests are intrusive. Similarly, drug tests are unreliable because they yield so many false positives. Unlike polygraph examinations, however, drug tests may be confirmed to a very high level of certainty. But where an employer does not conduct a confirmatory test, an employee's refusal to take a drug test should not constitute misconduct because, given the great inaccuracy of initial tests, the employer's requirement would be inherently unreasonable.

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was correctly invoking his Fifth Amendment rights against self-incrimination, his refusal to take the polygraph was not done with the bad faith or wanton disregard of employer interests necessary for a misconduct finding. Id. at 551-52.


71 Id. at 66. See also Suope, which criticized an employer's use of a polygraph test as a "fishing expedition." 159 So.2d at 654 (cited in note 69).

72 Additionally, some courts, in jurisdictions without such statutes, have deemed the tests invalid. See Alcohol & Drugs in the Workplace (BNA) 74 (1986).


74 A urine sample can, for example, reveal whether an employee is pregnant. An employer can also release the results of a positive drug test to any prospective employer who requests it.

75 See notes 28-36 and accompanying text.

76 See note 33.

77 Similarly, concerning polygraph tests, the court in Douthitt v. Kentucky Unempl.
C. A Finding of Misconduct Requires More Than a Positive Test Result

Unless an employer provides sufficient evidence demonstrating on-the-job impairment or drug use in the workplace, or proves the reasonableness of a rule prohibiting both on and off-duty drug use,78 a claimant should not be disqualified for misconduct by failing or refusing to submit to a drug test. A drug test is insufficient by itself because it neither measures impairment nor pinpoints when a drug was taken. Before an employee may be denied benefits for failing or refusing to take a drug test, an employer should be required to produce evidence of impairment or use on-the-job to justify the imposition of a test. This prerequisite to testing should resemble a Fourth Amendment "reasonable suspicion" standard,79 which incorporates a further requirement of individualized suspicion.80 Such a standard would ensure that the drug test measured what it was supposed to: The employee's on-the-job impairment.

One unemployment compensation board has already adopted this approach. In In the Matter of Ables,81 the claimant, a drop hammer operator, exhibited violent behavior one day at work. His pupils were dilated, the whites of his eyes were slightly red, his eyes had a glazed look, and his speech was slurred. He continually moved his head from side to side during a conversation with the Security Manager and refused to take a drug test on that day and on two subsequent days. The claimant was consequently discharged. The board concluded that this evidence generated a "reasonable suspicion" that the employer's rule requiring a drug test in

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78 See notes 51-56 and accompanying text.
80 In Railway Labor Executives Ass'n v. Burnley, a Fourth Amendment case involving post-accident testing of railway employees, the court held that individualized suspicion of on-the-job drug use was necessary in order for a test to be deemed reasonable. 839 F.2d 575, 587 (9th Cir. 1988), cert. granted 108 S. Ct. 2033 (1988). As the court stated: Blood and urine tests intended to establish drug use... are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment... For this reason we think it imperative that drug testing be undertaken only when there is individualized suspicion... Requiring individualized suspicion would help to alleviate some of the harsh consequences of exclusive reliance on test results.
81 "Id. at 588-89.
82 Slip op. (cited in note 79).
these circumstances was reasonable and that a refusal to take the
test therefore constituted insubordination and misconduct.\textsuperscript{82} The
\textit{Ables} approach takes into account the substantial technical limita-
tion inherent in drug testing. Because it also squarely meets em-
ployer interests while eliminating the trauma that arises when a
worker is denied unemployment benefits as a result of inaccurate
testing and the imposition of unreasonable employer rules, the
\textit{Ables} methodology fulfills the historical humanitarian purpose of
unemployment compensation statutes.

D. Exceptional Instances: Regulation of Off-Duty Conduct

If an employer wishes to rely completely on the results of a
random drug test (administered without reasonable suspicion), it
must show both that the result was confirmed by a second, prefera-
bly more accurate test and that the employee’s job falls within a
narrow category of cases in which the employer could reasonably
regulate employee behavior off-the-job.

The burden on an employer to prove misconduct is particu-
larly heavy when it attempts to regulate off-duty conduct because
it must overcome the presumption that “[a]n employee’s conduct
off the working premises . . . [is not] misconduct in connection
with the employment” by showing that “the conduct is so closely
connected with the business interests of the employer as to war-
rant disqualification . . . .”\textsuperscript{83} If an employer cannot demonstrate
the connection, the rule will not be considered reasonable, and its
violation will not be a ground for denial of benefits.\textsuperscript{84}

A rule prohibiting off-duty alcohol consumption, for example,
may be sustained only where important employer interests are
jeopardized by such consumption. Otherwise, violation of the rule
will not constitute misconduct. Where an employer could not effec-

\textsuperscript{82} Id. at 7.
(1978).
\textsuperscript{84} A regulation also may not be reasonable, despite its relation to an important em-
ployer interest such as safety, if there are less sweeping reasonable alternatives which ac-
complish the same goal. See, for example, \textit{Consolidated Const. Co., Inc. v. Casey}, 71 Wis.2d
811, 238 N.W.2d 758 (1976) (rule regulating hair length held unreasonable because a hairnet
would have satisfied safety concerns). If the employer in \textit{Whittington}, for example, was
seeking to ensure that no drivers were impaired on the job, then the court should have
considered whether efforts to detect actual impairment would have been a reasonable alter-
native to random drug tests. W. Va. Unemployment Ins. Rep. (CCH) par. 8673 (cited in
note 38). See also Comment, Right of Nondisclosure, 1988 U. Chi. Legal F. 213 (cited in
note 38).
tively conduct its business without a rule regulating off-duty behavior, the rule will be considered reasonable. However, where no clear connection exists between the off-duty rule and the employer's business interests, no rule regarding off-duty conduct should constitute grounds for a denial of benefits.

A work connection requirement also applies to rules prohibiting off-duty drug use. In Glide Lumber Products (Smith), the court dismissed the relevance of the employer's safety-inspired rules, finding them to be inadequate proof of a work connection. The court stated emphatically that "[a]n employer cannot reduce its statutory unemployment insurance responsibilities simply by promulgating an in-house rule." Because the claimant's drug use had "no [demonstrated] impact in the workplace," the court held that the employer's rule prohibiting off-duty drug use was not sufficiently work-connected to justify a finding of misconduct.

A final factor affecting the reasonableness of an employer's regulation of conduct off-the-job is the nature of the employee's duty. Public employees, for example, have been held to a heightened standard of conduct because of the public trust reposed in their employer. This public duty may even apply in the absence

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88 Gregory v. Anderson, 14 Wis.2d 130, 109 N.W.2d 675 (1961) (rule prohibiting both on and off-duty alcohol consumption by truck drivers reasonable when employer could not obtain vehicle insurance unless all drivers refrained from alcohol consumption).
89 Olson v. Job Service North Dakota, 379 N.W.2d 285, 288 (N.D. 1985) (no misconduct where employee violated an agreement prohibiting both on and off-duty alcohol consumption where off-duty consumption of alcohol did not threaten employer's business interests and rule appeared to reflect a mere personal preference for abstemious employees).
90 Id. at 910.
91 Id.
of an explicit rule, through an implied condition of employment forbidding certain conduct both on and off-the-job. While the concept of implied conditions of employment in misconduct cases often makes sense, courts should nevertheless use it with care. The advantage of an explicit rule is that an employee is more likely to be aware of it and therefore take steps to avoid violating it. Any implied condition of employment should be so obvious to the employee that it has the same effect as a written rule. Furthermore, like any explicit rule, the implied condition must bear a reasonable relation to the conduct of the employer’s business so that violation of it materially affects the business. An employee of a drug rehabilitation center, for example, could reasonably anticipate that drug use on her part would fundamentally contradict the employer’s purpose. Someone responsible for investigating narcotics traffickers could reasonably expect that drug use would call into question his ability to perform his job. But absent a clear situation in which even infrequent drug use would be understood to harm the employer’s business, the employee should receive unemployment compensation. A lower standard would allow denials of benefits to claimants who are unemployed through no fault of their own and would thus frustrate the compensatory aim of unemployment statutes.

III. DISQUALIFICATION FOR QUITTING WITHOUT GOOD CAUSE

Voluntary terminations of employment shift the burden of

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*See, for example, Claim of Bruggeman, 477 N.Y.S.2d at 451 (denial of benefits to town assessor, whose felonious sale of a controlled substance violated an implied condition of his employment because he was in a “position requiring trust and confidence. His conviction reflected adversely on his integrity. His continued employment . . . would have been detrimental to the interests of the town, exposing it to public scorn and loss of confidence”); Dubuclet v. Division of Employment Sec., 483 So.2d 1183 (La. App. 1986) (school teacher denied benefits after discharge for possession of marijuana); and Feagin v. Everett, 9 Ark. App. 59, 652 S.W.2d 839, 846 (1983) (“the teaching profession is one which requires a higher standard of its practitioners . . . Teachers serve as examples and role models for their students . . . [and the claimant, therefore,] violated the ‘ethical and moral standards which the employer had a right to expect . . . ’”).

But see Weaver v. Wallace, 565 S.W.2d 867 (Tenn. 1978) (fork lift operator employed by the federal government did not violate a duty to his employer by his conviction for possession of marijuana); and Giese v. Employment Division, 27 Or. App. 929, 557 P.2d 1354 (1976) (state university professor convicted of conspiracy to blow up federal buildings awarded benefits because the university had no regulation pertaining to off-duty conduct, thus there could not be a violation of a rule which bore a reasonable relation to the employer’s business).

*See notes 83-84 and accompanying text.

*See notes 16-20 and accompanying text.
proof in unemployment compensation cases to claimants.\textsuperscript{a} When a worker's employment ends because of a quit, benefits are generally denied unless the employee can show she had "good cause" to quit. This is a difficult task for an employee,\textsuperscript{b} for an employee who has quit rather than submit to a drug test will have to convince a state unemployment insurance board that the intrusive nature of drug urinalysis justified the resignation and that waiting to be fired was not a reasonable alternative to quitting.

An employee must demonstrate that her departure was "for necessitous and compelling reasons" to meet her burden of proof in an unemployment compensation case.\textsuperscript{c} The rationale behind this standard is the advancement of the unemployment statutes' primary goal of protecting workers who are unemployed through no fault of their own.\textsuperscript{d}

Courts and agencies presume in many "good cause" cases that a worker who willfully quits her job is voluntarily jobless. Such a

\textsuperscript{a} Some commentators have argued that the distinction between quitting and discharge in the unemployment compensation context makes little sense in any event. See Packard, 17 Vill. L. Rev. at 638 (cited in note 24):

Voluntary leaving and misconduct are complementary sides of the same coin in which the ultimate issue is the same: whether the employee reasonably could have acted to avoid unemployment. Logically, no distinction in analysis or result should flow from the rather difficult process of classification. However, procedural and substantive rules do differ depending on whether the separation is classified as a discharge or a quit, and it is often quite difficult to make such a distinction.


See also Avrutis at 63 (cited in note 12): "Your employer may tell you that you will soon be terminated . . . and that for the sake of your job record, you may resign instead. Don't resign! Let yourself be laid off or fired. If you quit, you may be denied unemployment benefits." (emphasis in the original).

\textsuperscript{c} Taylor v. Unemployment Comp. Bd. of Review, 474 Pa. 351, 378 A.2d 829, 831 (1977). Other courts require the presence of a workplace condition of such gravity that a reasonable and prudent person would have no reasonable alternative but to quit. See Ferguson v. Employment Division, 68 Or. App. 849, 833 P.2d 147, 148 (1984); and McPherson v. Employment Division, 285 Or. 541, 591 P.2d 1381 (1979). In McPherson, the court emphasized that good cause is that which "would reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment." 285 Or. at 552, quoting Fajardo v. Morgan, 15 Or. App. 454, 516 P.2d 495, 497 (1973).

\textsuperscript{d} See notes 17-20 and accompanying text. See also Case Note, Sanchez vs. Cal. Employment Appeals Board, 12 W. St. U. L. Rev. 945 (1985) (courts should construe "good cause" strictly so that benefits accrue only to those without work through no fault of their own).
presumption is inaccurate, however, because a wilful termination of employment may not constitute a voluntary quit for purposes of an unemployment compensation determination:

[T]he mere fact that a worker wills and intends to leave a job does not necessarily and always mean that the leaving is voluntary. Extraneous factors, the surrounding circumstances, must be taken into the account, and when they are examined it may be found that the seemingly voluntary, the apparently intentional, act was in fact involuntary . . . . The pressure of necessity, of legal duty, or family obligations, or other overpowering circumstances and his capitulation to them transform what is ostensibly voluntary unemployment into involuntary unemployment.98

An employee who has wilfully quit rather than be drug tested should then not be considered voluntarily jobless if the drug test constitutes a “necessitous and compelling reason” for the quit. Among the serious factors that courts deem to be necessitous and compelling reasons for quitting are unremedied health and safety risks,99 a substantial reduction in wages,100 and persistent racist,101 sexist,102 or otherwise demeaning remarks103 made by the employer or co-workers.104 No court has considered whether avoiding a drug test falls into the necessitous and compelling category, but an employee could argue that drug tests are so invasive, humiliating and harmful to one’s reputation that quitting in protest or avoiding such degradation is justifiable.105

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101 Taylor, 378 A.2d at 834.
102 McPherson, 591 P.2d at 1390 (cited in note 96).
104 As the court in McPherson noted:
[The law] does not impose upon the employee the one-dimensional motivation of Adam Smith's 'economic man.' The workplace is the setting of much of the worker's daily life. The statute does not demand as a matter of law that he or she sacrifice all other than economic objectives and, for instance, endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits.
591 P.2d at 1390 (cited in note 96).
105 Drug tests vary in their intrusiveness, but even procedures designed to be sensitive to an employee's concerns cannot avoid some measure of intrusiveness. Federal testing procedures, developed with an eye toward Fourth Amendment concerns, highlight the intrusiveness of such a test. Under these guidelines, a collection site must be set up in which
Whether such an argument would succeed is unclear, in part because there is an important distinction between employer protests concerning problems such as health risks and those concerning an employer's drug testing requirement. Employees who are unable to persuade their employers to correct a health or safety risk can escape it only by quitting, whereas employees in drug testing cases may simply refuse to take a test and then wait to be discharged. Discharge may thus be a reasonable alternative to quitting in a drug testing case, where it would not be when an employee faces an occupational health or safety risk.

A claimant in a drug testing case could argue that she had no reasonable alternatives on several grounds. First, urinalysis tests invade employee privacy. They may be embarrassing both in the manner in which they are given and in the information which they reveal. Urinalysis also carries the risk of inaccurate results, which could affect both employment status and personal reputation. Because drug tests are indeed often inaccurate, in cases where an employer does not guarantee confirmation of a positive result with a more accurate test, an employee may be erroneously accused of using illicit substances.

Although these reasons may demonstrate that being tested is not a reasonable alternative to quitting, they do not explain why being fired is an unreasonable alternative to quitting when the em-

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"toilet bluing agents [are] placed in toilet tanks" and all sources of water, such as sinks and showers, are turned off. See Alcohol, Drug Abuse, and Mental Health Administration, Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11970, 11980 (1988). Upon arrival at the site, the employee to be tested must "remove any unnecessary outer garments" and leave all personal belongings with the collection site person. This person, while standing outside the stall, must observe that the person being tested has no access to water. The employee must urinate under the "direct observation" of the collection site person if the urine specimen is not within a certain temperature range. Id. at 11981.

Because of the requirement in good cause cases that employees have no reasonable alternative to quitting, an employee usually must attempt to persuade her employer to remedy an alleged unsatisfactory situation before leaving the job. In McPherson, for example, the employee had complained repeatedly about sexist remarks to her supervisor and to the employer's affirmative action officer. 591 P.2d at 1383 (cited in note 96). Compare Taylor, where persistent racial slurs and instances of racial discrimination both by co-workers and by the employer made the claimant's work environment so intolerable that the court found good cause even though the employee did not attempt to persuade his employer to remedy the situation. 378 A.2d 829 (cited in note 96).

See notes 22-26 and accompanying text.

A urine sample may reveal urinary tract cancer, pregnancy, liver disorders, malnutrition, diabetes, renal diseases, mental disorders such as manic-depression and schizophrenia, epilepsy, heart conditions, and even genetic defects. See Comment, The Right of Non-disclosure, 1988 U. Chi. Legal F. 213 (cited in note 38). See also Note, Privacy Rights in Medical Records, 13 Fordham Urb. L.J. 165 (1985).

See notes 28-36 and accompanying text.
ployee wants to avoid a drug test. Unlike the traditional good cause case, in which the alternatives are either to quit or remain on the job and be exposed to an alleged risk, in a drug testing case there are three alternatives: Remain on the job and be tested, refuse to be tested and be fired, or quit before you can be fired for refusing the test.

One court has considered whether being fired for refusing to take a drug test is a reasonable alternative to quitting to avoid the test. In *Glide Lumber Prod. v. Emp. Div. (Coats)*, the court rejected the claimant's argument that an employer rule requiring a drug test necessarily constituted good cause for voluntary departure, even though the rule would have been unreasonable if the employee had been fired and accused of misconduct for refusing to be tested. Because a refusal to be tested would not constitute misconduct, the claimant did not risk losing unemployment benefits by waiting to be fired. In effect, the claimant's decision to quit made his case far more difficult as he had to shoulder the burden of proving he had good cause for quitting.

The *Glide Lumber (Coats)* court's holding, however, is problematic. It means that an employee who wishes to avoid an unreasonable employer requirement and who desires to receive unemployment insurance benefits must stay on the job until she is discharged. Thus, because an employee should not quit in order to look for a new job, she may be missing job opportunities in order to ensure that she gets unemployment compensation. In addition to the inefficiency of this requirement, it also conflicts with the unemployment system's goal of reducing joblessness because the delayed job search increases the time that the employee will remain unemployed.

Furthermore, an employee will refuse to take a test and wait to be discharged rather than quit only if she is actually aware of the disparate burdens which courts impose in good cause and misconduct cases. But an employee who refuses to submit to a drug test because of privacy concerns or other reasons may not know the details of unemployment insurance law. This ignorance of legal rights and responsibilities should be given substantial weight in unemployment compensation cases because of the humanitarian

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111 *Glide Lumber (Coats)*, 741 P.2d at 905, explicitly stated that the facts of the case were identical to those in *Glide Lumber Products Co. v. Emp. Div. (Smith)*, 86 Or. App. 669, 741 P.2d 907 (1987), except that the employee in *Smith* was discharged. The employee in *Smith* was awarded benefits.
objectives of the statutes, which include "fairness to the unsophisticated claimant."

Finally, public policy may dictate that waiting to be fired is not a reasonable alternative to quitting. This is particularly true in the six states which have restricted by statute the use of drug tests as a condition of continued employment. And in Luck v. Southern Pacific Trans. Co., a jury awarded $485,000 for wrongful discharge to an employee who refused to participate in a random drug testing program. The award was based on violation of a public policy against random drug testing, breach of an implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. Thus, a test given in violation of a state's public policy may constitute good cause for quitting because it would be prompted by "the pressure . . . of legal duty."

Even the Glide Lumber (Coats) court suggested that an employee could argue that drug tests themselves, irrespective of the facts of the case, create policy problems sufficient to make avoidance of them good cause for quitting. The court in Zinman v. Unemployment Compensation Board of Review, for example, found such policy problems where an employment agency decided to tape record its employees' telephone conversations with prospective employers. This practice violated a Pennsylvania law which prohibited the tape recording of telephone calls without the permission of all the parties who were part of the conversation. The Zinman court ruled that this practice provided the claimant with good cause for her refusal to work, even though the employer

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113 Packard, 17 Vill. L. Rev. at 654 (cited in note 24). Even if a claimant is aware of the consequences of quitting, she may feel compelled to do so in order to prevent the damage to reputation resulting from discharge. But while quitting to avoid reputation damage may be prudent, concern for one's reputation may not be held to be good cause for quitting.


116 Taylor v. Unemp. Comp. Bd. of Review, 474 Pa. 351, 378 A.2d 829, 833 (1977). A claimant will have an even stronger argument for good cause where a drug test is administered by a state actor and may violate an employee's constitutional rights, or where the test violates a well-recognized right to privacy. See note 4.

117 Glide Lumber (Coats), 741 P.2d at 907 n. 3 (cited in note 110).

agreed not to record her phone calls.

Given the highly controversial nature of drug testing, the employee in Glide Lumber (Coats) could have argued that his quitting was in protest against the employer’s drug testing policy and that it was therefore “necessitous and compelling.” This reasoning, however, was rejected in Gavin v. Unempl. Comp. Bd. of Review, where the employee quit his job as an act of civil disobedience after his employer agreed to deduct from the employee’s salary the amount of tax the employee had refused to pay. In refusing to find good cause for the employee’s quit, the court observed that “[i]t is inconceivable . . . that our Legislature intended to subsidize [civil disobedience] through unemployment compensation. There are various ways for the citizen to seek change in laws which he considers unjust: the vote, the legislative lobby, a challenge in the proper court, or civil disobedience . . . . He who practices civil disobedience must pay the large price of that mode of political expression . . . .” Similarly, unless a court or compensation board is extremely sensitive to the policy problems created by drug testing, it will not likely “subsidize” an employee’s protest action, particularly in light of the employee’s alternative of refusing to submit to the test and waiting for possible discharge.

IV. Conclusion

In misconduct cases, courts should consider primarily that drug tests do not necessarily measure on-the-job impairment. Where considerable evidence of on-the-job impairment exists before a test is given and the employee either fails, refuses to take, or quits before submitting to a test, a court should have little difficulty in finding misconduct or lack of good cause. In virtually all jobs, drug-related impairment affects the employee’s job performance, and in many it poses a substantial risk to the safety of the employee and the employee’s co-workers. Therefore, if an employer reasonably suspects on-the-job impairment and supports the suspicion by concrete evidence apart from the information generated by a drug test, then failure of or refusal to take a test provides a strong basis for finding misconduct, and quitting to avoid

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119 Id. at 497.
120 See, for example, In the Matter of Ables, slip op. (cited in note 79).
taking the test should be considered to be without good cause.

When an employer tests an employee at random, and no evidence of drug use apart from the test exists, a court may not reasonably deny benefits based on a test result. Because drug tests do not actually measure either the degree of an employee’s impairment or when a drug was taken, positive test results might indicate conduct that occurred while the employee was off-duty.

In view of the limited informational value of drug test results, a court in a misconduct case which involves a test administered without prior reasonable suspicion of impairment or use should deny benefits only if the nature of the employee’s job was such that the employer could reasonably require that its employees completely abstain from drug use.\textsuperscript{122} While an employee of a drug treatment center could reasonably expect such a requirement, a schoolteacher who smokes marijuana off-duty within a month of a test, conduct in which over twenty-seven percent of Americans between 24 and 31 have engaged,\textsuperscript{123} provides a more difficult case. Finally, when an employee quits rather than submit to a random drug test, a court should ensure that the quitting was actually voluntary and was not, because of employee ignorance or employer coercion, a case of de facto discharge. In all cases, however, given the humanitarian rationale behind unemployment legislation, a decision to deny compensation should be extremely well-justified.

\textsuperscript{122} Also, if the test is not highly accurate, a court should not deny benefits in any event unless other evidence of off-duty use exists.

\textsuperscript{123} Alcohol & Drugs in the Workplace at 12 (cited in note 26) (statistic based on a 1982 study of 18 through 25 year olds).