State-by-State Drug & Alcohol Testing Survey

Morgan, Lewis, & Bockius
INTRODUCTION

The use of alcohol and drugs is a significant economic and social problem affecting both public and private employers. The federal Drug Enforcement Administration (DEA) has estimated that drug abuse costs United States industry between $60 billion and $100 billion a year. According to the Administrator of the DEA, drug abusers lose three times as much time from work as nonabusers and have four times as many accidents. Additionally, the DEA has reported that seventy airline pilots are currently under drug treatment without the knowledge of their employers; one-third of bus drivers in a major city tested positive for drug use; thirty percent of applicants answering advertisements to replace striking workers in another city tested positive for drug use; and substance abuse has caused forty-eight train wrecks in the past ten years. DAILY LABOR REPORT, Feb. 19, 1990, at A-8.

In recognition of this substance abuse problem in the workplace, many employers have adopted drug-testing policies and programs, and in some instances have taken adverse employment action against employees who test positive for drug and alcohol use or who exhibit substance-abuse problems while in the workplace. Although such actions are obviously defensible from a business standpoint, both drug testing and the imposition of discipline against employees for substance abuse raise significant legal concerns about which employers should be aware.

In addition, employees in the private sector who have challenged drug testing have found increasing success under common law theories. The most commonly invoked protections are wrongful discharge and tort actions for invasion of privacy, defamation, and intentional and negligent infliction of emotional distress. These theories and their relative acceptance vary from state to state.
and have fostered an increasing number of court decisions at the state level.

Finally, many states have addressed the use of adverse employment action against substance abusers through their handicap discrimination laws. Administrative and court decisions under those laws have interpreted the definition of "handicap" or "disability" under various state statutes to include alcoholism or drug addiction. Employees suffering from alcoholism or drug addiction are entitled to statutory protections otherwise unavailable in the workplace.

The purpose of this Survey is to provide a state-by-state summary of the various statutory, regulatory, constitutional, and common law developments that affect drug testing and the treatment of substance abusers in the workplace. Of course, this Survey is only a starting point for analyzing problems involving drug abuse in the workplace. The research reflected in this Survey is current through March 15, 1991. Moreover, the changing nature of the legal landscape in this area should caution one against relying upon this Survey without further in-depth research in the particular state in which the issue arises.

This Survey does not address the impact of federal law on drug testing and the treatment of substance abusers in the workplace. Several federal statutes and regulations apply to this area, including the Anti-Drug Abuse Act of 1988, and the drug-testing regulations of the Federal Department of Transportation, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administrations, United States Coast Guard, the Urban Mass Transportation Administration, and the Research and Special Programs Administration. Additionally, public employees may enjoy certain protections under the United States Constitution. Because the various federal statutes and regulations may not completely preempt all state laws relating to substance abuse and testing in the employment context, there may be considerable overlap between the state laws discussed in this Survey and the various federal requirements and restrictions. The purpose of this Survey is to highlight the various obligations, restrictions, and

2. 14 C.F.R. § 121 app. 1 (1990)
5. Id.
6. Id.
litigation risks imposed on employers by those state statutes, regulations, and court decisions.

**Alabama**

**Handicap Discrimination**

An Alabama statute prohibits discrimination against “the visually handicapped and the otherwise physically disabled” in employment “in the state service, the service of the political subdivisions of the state, in the public schools and in all other employment supported in whole or in part by public funds.” Ala. Code § 21-7-8 (1990). No cases addressing whether alcoholism or drug addiction constitute physical disabilities within the meaning of the statute have been found.

**Alaska**

**Handicap Discrimination**

The Alaska state legislature enacted a statute that prohibits private employers from discriminating on the basis of an individual’s physical or mental disability. Alaska Stat. § 18.80.210 (1990). The statute does not expressly address the status of alcohol or drug abuse as a disability. Id. § 18.80.300(13), (16)-(17).

**Drug Testing**

In Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989), an employer discharged two employees for refusing to submit to drug testing. Id. at 1126. One of the discharged employees voluntarily provided a urine sample during a physical examination but was unaware that the lab would screen it for drugs. Id. at 1125. After the screening revealed drug use, the employer suspended the employee and required him to submit to further testing before returning to work. Id. at 1126. The other employee was aware of the testing program but refused to participate in it. Id. Both employees brought claims against their former employer for violation of their state constitutional rights to privacy, common law invasion of privacy, wrongful termination, and breach of the implied covenant of good faith and fair dealing. Id. at 1126-27.

The Supreme Court of Alaska held that the Alaska Constitution prohibited only certain state action and did not provide a cause of action against the private employer based on an alleged invasion
of privacy. Id. at 1130. Because the employees presented no evidence of "an unreasonable manner of intrusion[] or intrusion for an unwarranted purpose," the court rejected their common law invasion of privacy claims. Id. at 1137-38. Specifically, the court found that the fact that one employee voluntarily provided a urine sample indicated that the manner of the testing was not "unreasonable" and that the employees' later refusals to submit to testing prevented further alleged intrusions from occurring. Id.

Although the court recognized Alaska's public policy in favor of protecting the privacy of employees, this policy failed to overcome the employer's paramount concerns for safety. Id. at 1132-36. The court explained that an employer's power to test employees has the following two limitations: (1) the tests "must be conducted at a time reasonably contemporaneous with the employee's work time" and (2) the employer must provide the employee notice of the drug-testing policy. Id. at 1136-37. With these requirements in mind, the court remanded the case for reconsideration of the breach of the implied covenant of good faith and fair dealing claim brought by the employee who, without notice of the drug policy, received a suspension for testing positive. Id. at 1137.

ARIZONA

Handicap Discrimination


Drug Testing

Arizona requires that a school transportation employee submit to drug and alcohol testing if the employee's supervisor "has probable cause [to believe] that the employee's job performance has been impaired" through drug or alcohol abuse. Ariz. Rev. Stat. Ann. § 15-513(A) (1990).

In response to an inquiry from a private employer about the legality of requiring AIDS testing as a condition of employment, the Arizona Attorney General stated, "[T]t appears that medical testing by private employers will be allowed unless there is intentional infliction of emotional distress by means of extreme and outrageous conduct." 1987 Op. Att'y Gen. Ariz. 251 (1987).
ARKANSAS

Handicap Discrimination

The state law that prohibits handicap discrimination, Ark. Stat. Ann. § 20-14-301(a), (b) (1990), extends only to those employees in state or state-funded service; it does not address the rights of handicapped persons in private employment. No case law discussing whether drug or alcohol addiction constitutes a “handicap” under the statute has been found.

Unemployment Compensation

Arkansas law specifically provides that an employee discharged from work for being under the influence of “intoxicants, including a controlled substance,” is disqualified from receiving benefits. Ark. Stat. Ann. § 11-10-514(b) (Supp. 1990).

In addition, the Arkansas Court of Appeals has determined that an employee’s positive drug test constitutes “misconduct” under the statute, disqualifying the employee from receiving unemployment compensation. Grace Drilling Co. v. Director of Labor, 790 S.W.2d 907, 908 (Ark. Ct. App. 1990).

CALIFORNIA

Handicap Discrimination


The California Labor Code provides that every private employer regularly employing twenty-five or more employees shall reasonably accommodate any employee who wishes to enter and participate voluntarily in an alcohol or drug rehabilitation program, “unless the accommodation would impose undue hardship on the employer.” Cal. Lab. Code § 1025 (West 1989). Employers must make “reasonable efforts to safeguard the privacy” of employees enrolled in alcohol or drug rehabilitation programs. Id. § 1026. Employers do not have to provide time off with pay, but they must allow employees to use sick leave. Id. § 1027. The Labor Code does not “prohibit an employer from refusing to hire or discharging an employee who, because of the employee’s current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform
the duties in a manner which would not endanger his or her health or safety or the health or safety of others.” Id. § 1025.

Drug Testing

California imposes duties on employers who receive medical information about their employees: every employer must “establish appropriate procedures to ensure confidentiality and protect [against the] unauthorized use and disclosure of that information.” Cal. Civ. Code § 56.20(a) (West 1989). These procedures may include instructing employees and agents who handle files and providing security systems that restrict access to medical information. Id.

The California Civil Code prohibits a health care provider from releasing confidential medical information without first obtaining a patient’s authorization. Id. § 56.10. The Code also prohibits discrimination against employees who refuse to authorize the release. See id. § 56.20(b).

State regulations permit an employer to condition an offer of employment on the results of a medical examination conducted to determine fitness for duty. Cal. Code Regs. tit. 2, § 7294 (1989); see Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194, 206-07 (Ct. App. 1989). Employees entering similar positions, however, must be subject to the same examination, and if the results of an examination would result in disqualification, an applicant must have an opportunity to submit independent medical opinions for consideration before the employer makes a final determination on disqualification. Cal. Code Regs. tit. 2, § 7294.0(d); see Wilkinson, 264 Cal. Rptr. at 207 n.13.

Article I, section 1 of the California Constitution states: “All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” Cal. Const. art. I, § 1 (emphasis added).


In Wilkinson, the California Court of Appeals held that applicant testing did not violate the right to privacy if the employer provided a clear notice of testing to prospective employees, no supervised urination occurred, and procedural safeguards existed to restrict
access to test results. *Id.* at 205. The program's procedures assured that employers made employment decisions based solely on test results by masking the names of all individuals tested. *Id.* In *Semore*, the court held that the California Constitution restricted a private employer's drug testing of current employees by "balancing an employee's expectations of privacy against the employer's needs to regulate the conduct of its employees at work." *Semore*, 266 Cal. Rptr. at 286.

California recognizes numerous exceptions to the employment-at-will doctrine. One such exception is a discharge that violates a strong public policy. In *Semore*, the court held that if an employer in the private sector terminates an employee for refusing to take a random drug test, the employee can use the public policy exception to the employment-at-will doctrine to assert a violation of his constitutional privacy right. *Id.* at 282. The court reached a contrary result in *Luck*. The court in *Luck* held that the standard for identifying a public policy had not been met because the right to privacy was a private right and, as applied to drug testing of private sector employees, was not firmly established at the time of the testing. *Luck*, 267 Cal. Rptr. at 636.

Other potential common law causes of action include: (1) breach of implied contract to terminate only for good cause or breach of the covenant of good faith and fair dealing, see, e.g., *id.* at 623 (firing a computer programmer when she refused to submit a urine sample as part of an unannounced drug test); *Semore*, 266 Cal. Rptr. at 288-89 (terminating a chemical factory employee for refusing to consent to pupillary reaction eye test used to determine whether individual is under influence of drugs); (2) invasion of privacy, see, e.g., *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402, 404 (Ct. App.) (testing student athletes for drugs), review granted, 801 P.2d 1070 (Cal. 1990); and (3) defamation, see, e.g., *Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 536, 538 (9th Cir.) (accusing employee of buying cocaine on the job), cert. denied, 484 U.S. 908 (1987). In *Semore*, the court held that an employee terminated for refusing to submit to a pupillary reaction eye test had not stated causes of action for fraud, negligent misrepresentation, and intentional or negligent infliction of emotional distress. *Semore*, 266 Cal. Rptr. at 289-91.

**COLORADO**

**Handicap Discrimination**

Colorado enacted an anti-discrimination act forbidding discrimination in employment against an otherwise qualified individual because of that person's handicap, unless: (1) the employer cannot
reasonably accommodate the handicap; (2) "the handicap actually
disqualifies the person from the job"; and (3) the handicap signifi-

The Act defines a "handicap" as a physical impairment that 
"substantially limits one or more of a person's major life activities 
and includes a record of such an impairment and being regarded 
as having such an impairment." Id. § 24-34-301(4)(a). Beginning July 
1, 1992, the Act will also protect any person who has a mental 
impairment, with "mental impairment" defined as "any mental or 
psychological disorder such as developmental disability, organic 
brain syndrome, mental illness, or specific learning disabilities." Id. 
§ 24-34-301(4)(b)(I), (III).

The statute does not explicitly address alcohol or drug abuse or 
adoption, and no case law on the application of the statute to those 
issues has been found. The Civil Rights Commission has issued 
regulations that define "handicap" in similarly broad terms, without 
reference to drug or alcohol abuse or addiction. Colo. Code Regs. 
§ 60.1 (1980).

CONNECTICUT

Handicap Discrimination

prohibits all employers of more than three employees from discrim-
inating on the basis of a past or present physical disability or 
mental disorder, "except in the case of a bona fide occupational 
qualification or need." Id. § 46a-60.

The statute defines a "physically disabled" person as "any indi-
vidual who has any chronic physical handicap, infirmity or impair-
ment, whether congenital or resulting from bodily injury, organic 
processes or changes or from illness." Id. § 46a-51(15). The statute 
does not state whether alcoholism or drug addiction qualifies as a 
physical handicap, infirmity or impairment, and no cases on this 
issue have been found.

Drug Testing

In 1987, Connecticut amended its Employment Regulation Law, 
regulations for the drug testing of current employees and job 
applicants by private sector employers. Id. §§ 31-51t to -51aa (Supp. 
1991). The statute provides:
An employer may not determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive drug test result unless:
(1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result,
(2) such positive test result was confirmed by a second urinalysis drug test which was separate and independent from the initial test, utilizing a reliable methodology, and
(3) such positive test result was confirmed by a third urinalysis drug test which was separate and independent from the initial test, utilizing a gas chromatography and mass spectrometry methodology or a methodology which has been determined to be as reliable or more reliable than the gas chromatography and mass spectrometry methodology.

*Id.* § 31-51u.

To require an employee to submit to a urinalysis test, the employer must have a "reasonable suspicion" that the employee is under the influence of drugs or alcohol that may have an actual or potential adverse effect on job performance. *Id.* § 31-51x(a). In the absence of "reasonable suspicion," an employer may require a test only if:
(1) federal law authorizes the test, *id.* § 31-51x(b)(1);
(2) the employee serves in an occupation that Connecticut law has designated as a high-risk or safety-sensitive occupation, *id.* § 31-51x(b)(2); or
(3) the urinalysis is conducted as part of an employee assistance program sponsored or authorized by the employer and in which the employee voluntarily participates, *id.* § 31-51x(b)(3).

An employer may not use urinalysis as part of the application process unless:

(1) the prospective employee is informed in writing at the time of application of the employer's intent to conduct such a drug test;
(2) such test is conducted in accordance with the requirements of [*Conn. Gen. Stat.* § 31-51u, which requires three positive test results utilizing reliable methodology]; and
(3) the prospective employee is given a copy of any positive urinalysis drug test result.

*Id.* § 31-51v. The employer must keep the results of any applicant's test confidential and may not disclose them to any person other than the applicant. *Id.*

The statute contains detailed procedures for administering tests. No employer or representative, agent, or designee of the employer may observe an employee or applicant in the process of producing
a urine specimen. Id. § 31-51w. The employer must maintain test results along with other medical records, and Connecticut's Personnel Files Law protects the records from unauthorized disclosure. Id.

The statute specifically reserves the employer's rights to prohibit the use of drugs or alcohol in the workplace and to discipline an employee who has violated the prohibition. Id. § 31-51y. An aggrieved applicant or employee may seek relief in a private civil action against the employer. Id. § 31-51z(a). An employer may "be liable . . . for special and general damages, together with attorneys' fees and costs." Id. Injunctive relief is also available. Id. § 31-51z(b). The Attorney General may enforce the statute by way of a civil action. Id.

In Connecticut, a person hired as a permanent employee or otherwise for an indefinite period of time is an at-will employee. See Graham v. Texasgulf, Inc., 662 F. Supp. 1451, 1463 (D. Conn. 1987), aff'd without opinion, 842 F.2d 1287 (2d Cir. 1988); Somers v. Cooley Chevrolet Co., 153 A.2d 426, 428 (Conn. 1959). A limited exception to the employment-at-will doctrine exists in situations in which a terminated employee proves a demonstrably improper reason for dismissal, derived from some clearly expressed, important violation of public policy. See Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388-89 (Conn. 1980); Murray v. Bridgeport Hosp., 480 A.2d 610, 611 (Conn. Super. Ct. 1984). In Johnson v. Carpenter Technology Corp., 723 F. Supp. 180 (D. Conn. 1989), the court held that a hacksaw operator with twenty-three years of service who was terminated for refusing to submit to a random drug test could not state a wrongful discharge claim by alleging the testing contravened the common law, Connecticut public policy, or any rights to privacy emanating from the State or Federal Constitution. Id. at 184-86.

DELAWARE

Handicap Discrimination

Delaware's Handicapped Persons Employment Protections Act, Del. Code Ann. tit. 19, §§ 720-728 (Supp. 1990), protects handicapped persons from discrimination in employment. Id. § 724(a). A "handicapped" person is one who: "a) Has a physical or mental impairment which substantially limits one or more major life activities; b) Has a record of such an impairment; or c) Is regarded as having such an impairment." Id. § 732(d). The statute further provides that a "[h]andicapped person shall not include any individual who is an
alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others.” *Id.* § 722(4)(c)(5).

**Unemployment Compensation**

In *Dock v. M & G Convoy*, No. 88A-FE-5, 1988 Del. Super. LEXIS 453 (Dec. 27, 1988), the court held that an employee who refused a test to determine whether he was under the influence of alcohol would be ineligible for unemployment compensation benefits if the employer could prove that the employee was in violation of a company rule prohibiting employees from being under the influence during working hours and that the employee did not refuse to take the test because of confusion over the employer's right to test under the applicable collective-bargaining agreement. *Id.* at *3-6.

**DISTRICT OF COLUMBIA**

**Handicap Discrimination**

The District of Columbia Human Rights Law, Code Ann. § 1-2501 (1990), prohibits discrimination in employment on the basis of a “physical handicap,” defined as “a bodily or mental disablement which may be the result of injury, illness or congenital condition, for which reasonable accommodation can be made.” *Id.* § 1-2502(23). The law does not address the issue of its application to individuals with drug or alcohol abuse problems or disorders. The Employment Guidelines issued by the D.C. Office of Human Rights and the Commission on Human Rights elaborate on the definition of handicap, but without reference to drug or alcohol abuse or addiction. Employment Guidelines § 513. They adopt the provisions promulgated by the Equal Employment Opportunity Commission (EEOC), which are also silent on the issue. *See* 29 C.F.R. § 1613.701 (1990). The EEOC regulations, however, are issued pursuant to the Rehabilitation Act of 1973, which provides specifically that employees whose current use of alcohol or drugs prevents them from performing their job or constitutes a threat to the property or the safety of others are not considered handicapped. 29 U.S.C. § 706(7)(B) (1988).

The Employment Guidelines further state that “all tests offered applicants and employees shall be related to the job.” Employment Guidelines § 513.6. Absenteeism, even if caused by injury or illness,
may be grounds for termination if it interferes significantly with the performance of an employee’s duties. *Id.* § 513.8.

The District of Columbia law separately protects the blind and “otherwise physically disabled” from discrimination in employment. D.C. Code Ann. § 6-1705 (1989). In the District of Columbia, physical disability “means a medically determinable physical impairment (other than blindness) which interferes with [the] ability to move about, to assist [oneself], or to engage in an occupation.” *Id.* § 6-1709(4).

**FLORIDA**

*Handicap Discrimination*

The Florida Human Rights Act of 1977, Fla. Stat. Ann. §§ 760.01-10 (West Supp. 1991), prohibits handicap discrimination in private employment. *Id.* § 760.10. “Handicap” means a “person has a physical or mental impairment which substantially limits one or more major life activities, or he has a record of having, or is regarded as having such physical or mental impairment.” *Id.* § 760.22(7)(a). No case law on the issue of alcoholism or drug addiction as a handicap has been found.

*Drug Testing*

Previously, the Workers’ Compensation Act provided that no compensation would be payable if an “injury was occasioned primarily by the intoxication of the employee[, or] by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician, which affected the employee to such an extent that the employee’s normal faculties were impaired.” Fla. Stat. Ann. § 440.09(3) (West Supp. 1991). If the employee’s blood contained .10% or more alcohol at the time of the injury, the law presumes the injury was “occasioned primarily by the intoxication of the employee.” *Id.*

A recent amendment provides that if an “employer has reason to suspect that the injury was occasioned primarily by the intoxication of the employee or by the use of any drug which affected the employee to the extent that the employee’s normal faculties were impaired, the employer may require the employee to submit” to a drug or alcohol test. *Id.* § 440.09(7)(a).

A more comprehensive statute provides: “If an employer implements a drug-free workplace program which includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the division, the employer *may* require the employee to submit
to a test for the presence of drugs or alcohol . . . .” *Id.* § 440.101 (emphasis added). The employer must give the employee written notice of the drug policy and testing procedure and must also afford the employee an opportunity to challenge the results. *Id.* § 440.102(3). The statute allows and defines the following four types of testing: “Job applicant” testing, “Reasonable suspicion” testing, “Routine fitness for duty” testing, and “Follow-up” testing. *See id.* § 440.102(4). The statute sets out specific testing and confirmation procedures for drug testing that the employer must follow to protect the employee and provide reasonably accurate results. *See id.* § 440.102(5)-(9).


**Unemployment Compensation**

A Florida appeals court held that an employee's refusal to submit to a urinalysis test on demand constituted “misconduct” warranting the denial of unemployment benefits to the discharged employee. *Fowler v. Unemployment Appeals Comm'n*, 537 So. 2d 162, 163 (Fla. Dist. Ct. App. 1989).

**GEORGIA**

**Handicap Discrimination**

Georgia has a statute, the Equal Employment for the Handicapped Code, Ga. Code Ann. § 34-6A-1 to -6 (1981), prohibiting discrimination against “handicapped individuals” in private and public employment. *Id.* § 34-6A-4. The statute specifically provides that a “handicapped individual shall not include any person who is addicted to the use of any drug or illegal or federally controlled substance nor addiction to the use of alcohol.” *Id.* § 34-6A-2(3).

**Drug Testing**

Georgia established two classes of state employees for drug-testing purposes. State employees in “high-risk” jobs, “where inattention to duty or errors in judgment while on duty will have the potential for significant risk of harm to the employee, other employees, or the general public,” Ga. Code Ann. § 45-20-90(3) (1990), are subject to random drug testing, *id.* § 45-20-91(a). A positive test result for illegal drugs or refusal to submit to the
test constitutes grounds for discharge. *Id.* § 45-20-93(a), (b). For non-“high-risk” positions, individuals shall be subject to drug testing when applying for employment with the state. *Id.* § 45-20-110. Refusal to submit to the test, or a positive result indicating the use of illegal drugs, bars the candidate from state employment for at least two years. *Id.* § 45-20-111.

The Georgia Supreme Court upheld the discharge of a state prison employee who tested positive for illegal drugs. *Department of Corrections v. Colbert*, 391 S.E.2d 759 (Ga. 1990). The court rejected the employee’s argument that the testing program was overbroad and found that the state had a compelling interest in preventing illegal drug use among state employees that outweighed the employee’s right to privacy. *Id.* at 761.

**Hawaii**

*Handicap Discrimination*

Hawaii law prohibits discrimination in private employment based on an individual’s “handicapped status.” Haw. Rev. Stat. § 378-2 (Supp. 1990). “Handicapped status” means “the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.” *Id.* § 378-1. No statutory exclusion exists for impairments caused by drug or alcohol use.

Hawaii requires that all insurance policies, medical service plan contracts, and health plan contracts issued in the state include coverage for alcohol and drug abuse treatment services. *Id.* § 431M-2.

*Drug Testing*

Hawaii makes it unlawful for an employer to “[u]tilize any device that intrudes into any part or cavity of the body for the purpose of truth verification.” Haw. Rev. Stat. § 378-26.5(5) (Supp. 1990). Although this statute is directed specifically to lie detector tests, it arguably applies to a drug or alcohol test an employer administers after asking an employee about drug or alcohol use.

**Idaho**

*Handicap Discrimination*

The Idaho Fair Employment Practices Act prohibits discrimination by an employer on the basis of an individual’s handicap.
Idaho Code § 67-5909 (1990). The statute defines a "handicap" as a "physical or mental condition of a person, whether congenital or acquired, which constitutes a substantial disability to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques" and further provides that "[a] handicapped person is one who (a) has such a disability, or (b) has a record of such a disability, or (c) is regarded as having such a disability." Id. § 67-5902(15). This statute does not expressly exclude alcohol or drug abusers from the protected class of handicapped persons.

In *Holmes v. Union Oil Co.*, 760 P.2d 1189 (Idaho 1988), the court held that an employee's at-will status was transformed by a letter from his employer conditioning continued employment on his participation in a rehabilitation program following a conviction for driving under the influence of alcohol. The court held that at least for the period of rehabilitation, the employer could not fire the employee except for cause. Id. at 1193.

**ILLINOIS**

**Handicap Discrimination**

The Illinois Constitution prohibits discrimination by *any* employer in hiring and promotion against persons with a physical or mental handicap unrelated to ability to perform the job. Ill. Const. art. I, § 19. The United States District Court for the Northern District of Illinois held that this constitutional provision provided a cause of action to a public employee discharged due to alcoholism. *Athanas v. Board of Educ.*, 28 Fair Empl. Prac. Cas. (BNA) 569, 573-74 (N.D. Ill. 1980). No cases that construe the provision in the context of private employment have been found.

The Illinois Human Rights Act protects against discrimination in employment based on an individual's physical or mental handicap. Ill. Rev. Stat. ch. 68, para. 1-101 (1988). Although the statute does not expressly mention drug and alcohol addiction, the Illinois Human Rights Commission has promulgated interpretive guidelines stating that drug and alcohol abuse shall not be considered "handicaps" unless the employee can demonstrate that the condition arises from or constitutes the equivalent of a disease or functional disorder. Ill. Admin. Code tit. 56, § 2500 (1990). The guidelines further state that a drug or alcohol abuser is protected from discrimination only if the abuse is unrelated to the employee's ability to perform job duties. Id. § 2500.20(d)(2).
Substance abuse that manifests itself in excessive absence or tardiness, or intoxication at work, is presumptively related to an employee's ability to perform. *Id.*

In *Habinka v. Human Rights Commission*, 548 N.E.2d 702 (Ill. App. Ct. 1989), the court specifically distinguished drug and alcohol "abuse" from a dependency that "arises from or constitutes the equivalent of a disease or functional disorder." *Id.* at 719. Because the plaintiff, who claimed that his chronic opiate dependency was a handicap within the meaning of the Human Rights Act, did not offer sufficient medical evidence that the "dependency" constituted a disease, functional disorder, or its equivalent, the court held that the Act did not protect him. *Id.* at 729.

**Drug Testing**

Illinois law grants the Illinois Department of Public Health the authority to assist in the development of drug education and treatment programs for businesses and industries. Ill. Rev. Stat. ch. 111-112, para. 6356-3 (1990). To date, the Department has issued no regulations that affect private employers in this area.

**INDIANA**

**Handicap Discrimination**

The Indiana Civil Rights Law, Ind. Code Ann. § 22-9-1-1 to -13 (Burns 1986), prohibits handicap discrimination in employment against properly qualified persons. *Id.* § 22-9-1-2(b). A "handicap" is a "physical or mental condition of a person which constitutes a substantial disability unrelated to the person's ability to engage in a particular occupation." *Id.* § 22-9-1-3(q). The statute specifically provides that handicap discrimination does not include an employer's "failure . . . to employ or to retain as an employee any person who because of a handicap is physically or otherwise unable to efficiently and safely perform, at the standards set by the employer, the duties required in that job." *Id.* § 22-9-1-13. No regulations or cases have been found applying these provisions to an employee or applicant with drug or alcohol abuse or addiction problems.
Iowa

Handicap Discrimination

The Iowa Civil Rights Act of 1965, Iowa Code §§ 601A.1-.19 (Supp. 1989), prohibits discrimination in employment based on an individual's disability, "unless based upon the nature of the occupation." *Id.* § 601A.6(1)(a). The Act defines "disability" broadly as "the physical or mental condition of a person which constitutes a substantial handicap." *Id.* § 601A.2(4). The rules of the Iowa Civil Rights Commission, which has jurisdiction over complaints made pursuant to the Act, appear in Iowa Admin. Code r. 161-1.1 (1988). Those rules define a "substantially handicapped person" as any person who has a "physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment." *Id.* r. 161-8.26(1).

In *Consolidated Freightways v. Cedar Rapids Civil Rights Commission*, 366 N.W.2d 522 (Iowa 1985), the Supreme Court of Iowa held that alcoholism may be a handicap under a Cedar Rapids ordinance prohibiting discrimination against the handicapped in employment. *Id.* at 527-28. The court found the ordinance consistent with the provisions of the Iowa Civil Rights Act, insofar as alcoholism is a protected disability if it does not prevent proper job performance. *Id.* at 527. The court upheld the trial court's finding that the employee, a sales representative, "had a substantial handicap but that, because he had achieved sobriety with reasonable prospects of maintaining that status, his handicap did not prevent him from properly performing his job." *Id.* at 534-35.

Drug Testing

Iowa has a criminal statute, enforceable alternatively in a private civil action, regulating drug testing of employees or applicants. Iowa Code § 730.5 (Supp. 1989). The statute prohibits testing of current employees unless the employer has either a known rule against impairment on the job or probable cause to suspect drug use of an employee who holds a safety-sensitive position. *Id.* The employer must provide substance abuse evaluation and treatment for any employee who tests positive and may not discharge an employee who participates in treatment after the first positive test. *Id.*
An employer may require drug tests of current employees in connection with regularly scheduled physicals if the employer gives notice at least thirty days prior to the physicals. Id. § 730.5(7)(b). An employer may test applicants in connection with physical examinations only if the employer makes the testing requirement part of all advertisements and applications and personally notifies the prospective employees. Id. § 730.5(7)(a). The Act sets forth confidentiality and accuracy requirements for all testing. Id. § 730.5(8).

By its terms, the statute does not apply to preemployment drug tests for peace or correctional officers of the state, nor to drug tests required under federal statutes, either conducted pursuant to nuclear regulatory commission policy or used to determine an employee’s eligibility for workers’ compensation benefits. Id.

**Kansas**

**Handicap Discrimination**

The Kansas Acts Against Discrimination, Kan. Stat. Ann. §§ 44-1001 to -1044 (1986), prohibit discrimination in employment against an individual because of a “physical handicap.” Id. § 44-1009(a)(1). The Acts define “physical handicap” as “the physical condition of a person, whether congenital or acquired by accident, injury or disease which constitutes a substantial disability, but is unrelated to such person’s ability to engage in a particular job or occupation.” Id. § 44-1002(j). No regulations or cases have been found addressing the application of the definition of physical handicap to drug or alcohol abuse or addiction.

**Drug Testing**

Kansas has adopted regulations establishing a drug-screening program for applicants and current employees in safety-sensitive positions in state government. Kan. Admin. Regs. §§ 1-6-32, 1-9-19(a) (Supp. 1990). Applicant testing is appropriate if the employer has “given a conditional offer of employment for a safety-sensitive position,” id. § 1-6-32(a), and has also advised the applicant of the testing procedure, the confidentiality provisions, and the appeal process, id. § 1-6-32(e). An employer may require testing of an employee in a “safety-sensitive position” if the employer has “reasonable suspicion of illegal drug use,” id. § 1-9-19a(a), and has similarly advised the employee, id. § 1-9-19a(b). An employer
may dismiss an employee who tests positive unless the employee has no prior positive results and completes an appropriate treatment program. *Id.* § 1-9-19a(f).

**Unemployment Compensation**


**Kentucky**

**Handicap Discrimination**

The Kentucky Equal Opportunities Act, Ky. Rev. Stat. Ann. §§207.130-.260 (Michie/Bobbs-Merrill 1991) prohibits discrimination in employment due to a person's handicap, "unless, the handicap restricts [the] individual's ability to engage in the particular job or occupation for which he or she is eligible" and discrimination due to a physical handicap, unless the handicap "constitutes a bona fide and necessary reason" for such treatment. *Id.* § 207.150. The Act specifically states that "nothing contained [herein] shall be construed to prohibit the rejection of an applicant for employment . . . on the basis of . . . any handicap which is not demonstrable by medically accepted clinical or laboratory diagnostic techniques, including, but not limited to, alcoholism, drug addiction, and obesity." *Id.* § 207.140. Because the exception specifically applies only to applicants for employment, its effect on current employees with an alcohol or drug addiction is unclear.

**Louisiana**

**Handicap Discrimination**

§ 45:2254(A) (West 1982). A person is "qualified" if he or she can perform the essential functions of a job with reasonable accommodation. Id. § 46:2253(4)(a). A "handicapped" person is one "who has an impairment which substantially limits one or more life activities or (a) has a record of such impairment or (b) is regarded as having such an impairment." Id. § 46:2253(1). "Impairment" includes physical or physiological disorders or conditions and mental disorders or conditions. Id. Employers have discretion not to consider chronic alcoholism or active drug addiction to be an impairment. Id. § 46:2253(2). In Casse v. Louisiana General Services, Inc., 531 So. 2d 554 (La. Ct. App.), cert. denied, 533 So. 2d 375 (La. 1988), the court held that individuals who were drug users, but not perceived as addicts, were not handicapped within the meaning of the statute. Id. at 555.

The statute also prohibits employers from making decisions concerning hiring, promotion, or discharge of a qualified handicapped person on the basis of either physical or mental examinations or preemployment interviews that are not job related or not required of all employees. La. Rev. Stat. Ann. § 46:2254(C)(4)-(5). The "use of a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the handicap of a prospective employee for discriminatory purposes" or "that expresses a preference, limitation, or specification" for nonhandicapped individuals is also unlawful. Id. § 46:2254(C)(8), (10). Finally, an employer may not make records, keep records, or disclose information concerning the handicap of a prospective employee for discriminatory purposes. Id. § 46:2254(C)(9).

Drug Testing

Louisiana's unemployment compensation law provides that an individual is ineligible for unemployment compensation benefits if his employer discharged him for using illegal drugs either on or off the job. La. Rev. Stat. Ann. § 23:1601(10)(a) (West Supp. 1991). To support a disqualification, the employer must prove by a preponderance of the evidence that the employee used a non-prescribed controlled substance. Id. Proof arising from a drug test done by an employer is limited to the results of a test administered pursuant to a written and promulgated substance abuse policy. Id. "Discharge of an employee for refusal to submit to a drug test . . . shall be presumed to be for misconduct." Id.

Drug testing in the unemployment compensation context must be conducted "under reasonably sanitary conditions . . . with due regard to the privacy of the individual being tested, and in a
manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples." *Id.* § 23:1601(10)(c). An employee must have an opportunity "to provide notification of any information . . . relevant to the test, including identification of currently or recently used prescription or nonprescription drugs." *Id.* The law also requires that all "[t]ests include verification or confirmation . . . by gas chromatography, gas chromatography-mass spectroscopy, or another comparably reliable analytical method, before the result of any test may be used" to establish ineligibility for unemployment benefits. *Id.* § 23:1601(10)(c)(v). Employers may use only test results that exclude the possibility of passive inhalation of marijuana as a basis for disqualification. *Id.*

An employer's written and promulgated substance abuse policy may require the collection and testing of samples for: individual employee impairment investigations; accident or workplace theft investigations; safety or security measures; and productivity or quality maintenance. *Id.* § 23:1601(10)(d).

The statute further provides:

(e) All information, interviews, reports, statements, memoranda, or test results received by the employer through its drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding related to an action . . . for unemployment compensation proceeding, hearing, or civil litigation where drug use by the tested employee is relevant.

(f) No cause of action for defamation[,] . . . libel, slander, or damage to reputation [may be brought] . . . against an employer who has established a program of drug or alcohol testing in accordance with this Chapter unless:

(i) The results of that test were disclosed to any person other than the employer, an authorized employee or agent of the employer, the tested employee, or the tested prospective employee;

(ii) The information disclosed was based on a false test result; and

(iii) All elements of an action for defamation, libel, slander or damage to reputation as established by statute or common law, are satisfied.

*Id.* § 23:1601(10)(e), (f).

A provision in the Louisiana Constitution that protects persons from "invasions of privacy," La. Const. art. I, § 5, may apply to
private conduct. Kelley v. Schlumberger Technology Corp., 849 F.2d 41, 42 (1st Cir. 1988) (watching plaintiff urinate to collect sample for drug-testing program violates constitutional right to privacy). In Kelley, an employee brought claims for tortious invasion of privacy and negligent infliction of emotional distress against his former employer. The claims resulted from the observation by the employer's representative of the employee's urination for the drug test and the discharge of the employee after the test revealed drug use. Id. at 42. In the district court, the jury found for the plaintiff on both claims. Id. at 46. The United States Court of Appeals for the First Circuit, applying Louisiana law, affirmed the decision. Id. The court upheld the jury instruction that an employer "has a duty to use reasonable care in implementing and administering its drug program so as not to cause serious emotional distress to its employees." Id. at 43.

In Casse v. Louisiana General Services, Inc., 531 So. 2d 554 (La. Ct. App.), cert. denied, 533 So. 2d 375 (La. 1988), the court held that two employees who were discharged after voluntarily submitting to drug testing had no cause of action because Louisiana has an employment-at-will statute, La. Civ. Code Ann. art. 2747 (West 1952). Casse, 533 So. 2d at 555. The court also held that the employees waived the constitutional right to privacy by consenting to urinalysis testing. Id. The employer did not abuse any rights of the plaintiffs by imposing mandatory drug testing because, as a distributor of a highly volatile substance, the company had a "serious interest in maintaining a drug-free working environment." Id.; see also Varnado v. Roadway Express, 557 So. 2d 413, 415 (La. Ct. App. 1990) (terminating at-will employee because of allegedly inaccurate urinalysis revealing marijuana use was not state tort action for wrongful termination).

MAINE

Handicap Discrimination


Nothing in the Act, however, prohibits an employer from discharging or refusing to hire a physically or mentally handicapped employee (1) when the employee's handicap renders him
“unable to perform his duties” or (2) when the handicap is
dangerous to the health or safety of himself or others. Id. § 4573.
“Physical or mental handicap” includes disabilities caused by
“environmental conditions or illness,” conditions that certain med-
ical professionals diagnose as handicaps, and “any other health
or sensory impairment which requires special education, voca-
tional rehabilitation or related services.” Id. § 4553(7-A).

Drug Testing

Sections 681-690 of Title 26 of the Maine Revised Statutes
regulate comprehensively all drug- and alcohol-testing procedures
Supp. 1990). The statute specifically exempts from its coverage
other workplace rules relating to substance abuse. It “does not
prevent an employer from establishing rules related to the pos-
session or use of substances of abuse by employees, including
convictions for drug-related offenses, and taking action based
upon a violation of any of those rules” except when the employer
implements drug testing as the basis for disciplinary action. Id.
§ 681(7). The statute also does not prohibit “employer[s] from
requiring or performing medical examinations of employees or
applicants or from conducting medical screenings to monitor
exposure to toxic . . . substances[, as long as those] examinations
are not used to avoid the [statute].” Id. § 681(6). Finally, the
statute does not apply to nuclear electrical generating facilities
and their employees, to independent contractors working at those
facilities, or to certain interstate motor carriers. Id. § 681(8).

“Before establishing any substance abuse testing program . . . ,
an employer with over 20 full-time employees must have a func-
tioning employee assistance program.” Id. § 683(1). The Depart-
ment of Human Services must certify the program pursuant to
rules promulgated under section 687. Id. Before testing com-
ences, an employer must develop a written policy that includes:
(1) the positions subject to testing; (2) the procedures for sample
collection; (3) the procedures for storage of samples; (4) the cut-
of level for screening and confirmation tests; (5) the conse-
quences of a positive test result or of a refusal to submit to a
test; and (6) appeal procedures. Id. § 683(2). An employer must
seek employee input during the development of the written
policy. Id.

Employers are prohibited from requiring or requesting the use
of consent forms, id. § 683(4); are required to use qualified testing
laboratories, id. § 683(6); and are required to adhere to the rules
regarding the reporting of laboratory results and the limitations placed on use of the tests, id. § 683(8)-(10). An employer cannot require an employee or applicant to remove any clothing during the collection of a urine sample, but, if the standard practice of an off-site medical facility requires removal of clothing for collection of a urine sample, that practice can be followed. Id. § 683(2)(C).

An employer must submit the proposed testing criteria and procedures to the Department of Labor for approval. Id. § 686. All actions taken subsequent to approval must be consistent with administrative rules promulgated by the Departments of Labor and Human Resources. Id. Employers must furnish employees with copies of the approved written testing policy and the statute at least thirty days before implementing and at least sixty days before changing the policy. Id. § 683(3). An employer may "require, request or suggest" that a job applicant submit to testing after making an offer of employment or offering a position on an eligibility list. Id. § 684(1). The employer may condition the offer on a negative test result. Id.

Finally, an employer may require tests of current employees if “probable cause” exists. Id. § 684(2). Probable cause is “a reasonable ground for belief in the existence of facts that induce a person to believe that an employee may be under the influence of a substance of abuse.” Id. § 682(6). A substance of abuse is “any scheduled drug, alcohol or other drug, or any of their metabolites.” Id. § 682(8). An employer may not base a decision that probable cause exists exclusively on: (1) a tip from an anonymous informant; (2) information about off-duty use; or (3) a “single work-related accident.” Id. § 682(6). Only certain supervisory and security personnel may make a probable cause determination. Id. § 684(2). The employer must state the facts leading to his determination of probable cause in writing and provide a copy of this statement to the employee. Id. The statute also provides:

[A]n employer may require, request or suggest that an employee submit to a substance abuse test on a random or arbitrary basis [only where: 1)] the employer and the employee have bargained for provisions in a collective bargaining agreement . . . that provide for random or arbitrary testing; or 2)] the employee works in a position [that poses] an unreasonable threat to the health or safety of the public or the employee's co-workers if the employee [is] under the influence of a substance of abuse.

Id. § 684(3).

Facilities providing treatment to an employee need not comply with the statute. Id. § 684(4). An employer, however, may not
"require, request or suggest" that a treating facility perform substance abuse testing, and an employer may not receive the results of any tests performed in connection with the employee's rehabilitation. *Id.*

The statute places restrictions on the actions an employer can take based on results of substance abuse testing. The statute empowers an employer to suspend an employee with full pay and benefits or to transfer him to another position *before* results of confirmation testing are received. *Id.* § 685(1). Once positive results are confirmed, or if an employee or applicant refuses to submit to a test, an employer may revoke an offer of employment, discharge an employee, discipline an employee, or change an employee's status. *Id.* § 685(2). An employer must first offer an employee who initially tests positive at least six months of rehabilitation. *Id.* If the employee refuses treatment, the employer can discharge, discipline, or transfer him. *Id.* If an employee participates in rehabilitation, the employer may not discharge or discipline him but may transfer or suspend him from active duty to reduce any possible safety hazard. *Id.* § 685(2)(C)(2). The employer may not reduce pay or benefits while an employee is participating in a rehabilitation program, but the employer need not pay the employee for time-off for rehabilitation purposes. *Id.* "All information acquired by the employer in the testing process is confidential and may not be released," except to certain individuals involved in the testing and rehabilitation processes. *Id.* § 685(3).

An employer who discharges an employee in violation of the statute is liable in a civil action for: (1) *three times* lost wages; (2) reinstatement with full benefits; and (3) attorneys' fees. *Id.* § 689(1). An employee may also recover separate civil penalties for an employer's breach of confidentiality in the amount of $1000 for a first offense and $2000 for any subsequent offense. *Id.* § 689(2).

In *Staples v. Bangor Hydro-Electric Co.*, 561 A.2d 499 (Me. 1989), an employee sued an employer who discharged him for operating a company car while under the influence of alcohol. The court held that the employee had no constitutional due process claim in the absence of state action, even in such a heavily regulated industry. *Id.* at 501. Because the plaintiff presented no evidence that an express restriction applied to the employer's common law right to discharge him at will, the court determined the discharge was not wrongful. *Id.* at 501. Finally, the court held that the employer's conduct was not so extreme
and outrageous as to support a cause of action for intentional infliction of emotional distress. *Id.*

**MARYLAND**

*Handicap Discrimination*

Maryland’s Fair Employment Practices Act, Md. Ann. Code art. 49B, §§ 1-28 (1991), prohibits discrimination in private employment against any individual because of a physical or mental handicap. *Id.* § 16. “Physical handicap” includes any “physical disability [or] infirmity . . . which is caused by . . . illness,” and mental handicap includes any “mental impairment or deficiency.” *Id.* § 15(g). No cases regarding the application of the statutory definitions to alcohol and drug abuse or addiction have been found.

*Drug Testing*

Maryland’s drug-testing statute, Md. Health-Gen. Code Ann. § 17-214.1 (1990), specifically grants private employers the right to conduct testing for drug or alcohol use among current employees or applicants. The Act prescribes standards and procedures that employers must follow when testing and reporting test results to affected individuals. *Id.*

An employee whose sample tests positive is entitled to independent testing for verification. *Id.* § 17-214.1(d). All testing must take place at a laboratory with a permit issued under the statute or approved by the Maryland Department of Mental Health and Hygiene. *Id.* § 17-214.1(b). At the time of testing, an employer must provide the employee with the name and address of the testing laboratory. *Id.* The laboratory may not report positive test results directly to an employer if the substance in question either is a legal nonprescription drug or a prescription drug that the employee is able to show was prescribed to him. *Id.* § 17-214.1(h).

**MASSACHUSETTS**

*Handicap Discrimination*

ch. 151B, § 1 (West 1982 & Supp. 1990). A “handicapped” person is a person who has “(a) a physical or mental impairment which substantially limits one or more major life activities . . . ; [or (b) has] a record of having such impairment; or (c) [is] regarded as having such impairment.” Id. § 1(17).

The definition further requires that a person must be “capable of performing the essential functions of a particular job, or . . . would be capable of performing the essential functions . . . with reasonable accommodation to his handicap.” Id. § 1(16). Factors that courts consider in determining whether an accommodation is reasonable or whether it would impose an undue hardship on the employer include: “(1) the overall size of the employer’s business . . . and size of budget . . . ; (2) the type of the employer’s operation, including the composition and structure of the employer’s workforce; and (3) the nature and cost of the accommodation needed.” Id. § 4(16). The statute does not specifically address whether alcoholics or substance abusers are “handicapped.” However, guidelines published by the Massachusetts Commission Against Discrimination, effective September 30, 1986, provide that substance abusers can qualify as “handicapped” under the Fair Employment Practices Law. Massachusetts Commission Against Discrimination, Guidelines: Employment Discrimination on the Basis of Handicap, 8 Mass. Discrimination L. Rep. 2003, 2006 (Sept. 30, 1986).

Under the guidelines, recreational users, or those not physically or mentally dependent, are not considered handicapped. Id. The substance or alcohol abuse must result from a physical or mental addiction and one or more of the abuser’s major life activities must be affected for the abuser to benefit from the Act’s protection. Id.

An employer may condition an offer of employment “on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job.” Id. at 2014. A medical exam may be conducted only after the employer has offered the job to the applicant with the condition that the applicant pass the exam. The medical exam itself must also meet certain criteria. For example, the only information obtained from the medical exam that should be given to the employer is the “opinion of the examining physician or health care practitioner that the prospective employee is either able or unable to perform the essential functions of the job.” Id. at 2015 (emphasis added).
In *Sexton v. Gulf Oil Corp.*, 809 F.2d 167 (1st Cir. 1987), an alcoholic employee sued his employer under the statutory predecessor to the Fair Employment Practices Law, arguing that his employer discharged him because of his handicap. The court held that the employer was entitled to a favorable judgment because the plaintiff had not shown that the employer failed to accommodate reasonably the plaintiff's handicap. *Id.* at 169. The only evidence consisted of the employee's suggestions of what the employer could have done. *Id.* The employee did not prove that he pursued the suggestions with his employer or that the suggestions, if implemented, would have accommodated his alcoholism. *Id.* The court also held that the plaintiff had failed to establish that the discharge was due *solely* to his alcoholism, as required by the predecessor statute. *Id.* at 168-69.

**Drug Testing**

A statutory right of privacy in Massachusetts may enable employees to avoid substance abuse testing. Under the statute, "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." Mass. Gen. Laws Ann. ch. 214, § 1B (West 1989). The Massachusetts Superior Court has jurisdiction to enforce the right and to award damages for interference with the right. *Id.*

In *Bally v. Northeastern University*, 532 N.E.2d 49 (Mass. 1989), a student-athlete challenged the private university's drug-testing program under the right-to-privacy statute. The court held against him, reasoning that the student did not prove public disclosure of confidential information, an element essential to statutory right-to-privacy actions. *Id.* at 53-54. The court further explained that a claim under the Massachusetts Constitution would also have been unsuccessful because no *direct* action may be brought under the Massachusetts Constitution against a private employer; state action is required. *Id.* at 51 n.3 (dictum).

The plaintiff in *Bally* also challenged the university's drug-testing program under the Civil Rights Act. The court held against him on the ground that he presented no proof of threats, intimidation, or coercion, elements essential to all actions under the Act. *Id.* at 51-52. To meet this burden, a plaintiff must show action directed toward a particular individual or class of persons. *Id.* at 52. The court characterized the testing program as indiscriminate and impartial. *Id.* at 53.

In *Bratt v. International Business Machines Corp.*, 467 N.E.2d 126 (Mass. 1984), the Massachusetts Supreme Court held that an
employer's disclosure of private facts about an employee to other company employees may violate the statute. Id. at 134. The court also explained that disclosure by employers of defamatory medical information concerning employees that is relevant to the employees' fitness to perform work is subject to a conditional privilege that can be lost only if the employee proves that the disclosure: (1) resulted from an "expressly malicious motive"; (2) was "recklessly disseminated"; or (3) was made with "reckless disregard for the truth or falsity of the information." Id. at 133.

In a subsequent proceeding, Bratt v. International Business Machines Corp., 785 F.2d 352 (1st Cir. 1986), the United States Court of Appeals for the First Circuit held that an employer's distribution of memoranda stating that an employee had been diagnosed as paranoid and had a mental problem did not violate the statute because: (1) the information was not widely distributed; (2) the individuals receiving the information needed to know in order to properly supervise and manage the employee; (3) the employer did not violate any internal regulations; and (4) the information was relevant to the evaluation of the employee's conduct. Id. at 360.

In Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988), cert. denied, 490 U.S. 1107 (1989), the First Circuit also held that section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1988), preempted an action brought by a union employee discharged after testing positive for marijuana. Id. at 114-15. The right-to-privacy statute upon which the plaintiff relied did not unequivocally deny employers the right to test employees. Id. at 114. Analysis of the right-to-privacy claim would, therefore, require interpretation of the parties' collective-bargaining agreement. Id.

Under the Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch. 12, §§ 11H, I (West 1986), plaintiffs claimed a right to be free from involuntary drug-testing programs. Sections H and I of the Civil Rights Act provide in pertinent part:

**H.** Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief. . . .

**I.** Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights
secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages.

Id.

The Massachusetts Constitution provides that all citizens of Massachusetts have the right to be free from unreasonable searches and seizures. Mass. Const. pt. 1, art. XIV. In Jackson, after balancing the private employer’s interests and the employee’s privacy rights the First Circuit held that the Massachusetts Constitution did not create a right for employees to be free from all drug testing by their employers. Jackson, 863 F.2d at 115-17.

MICHIGAN

Handicap Discrimination

The Michigan Handicappers’ Civil Rights Act, Mich. Comp. Laws §§ 37.1101-.1606 (1991), prohibits discrimination in hiring, recruiting, promoting, or discharging with respect to the “terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual’s ability to perform the duties of a particular job or position.” Id. § 37.1202(1)(a), (b). The statute defines “handicap” as a determinable physical or mental characteristic of an individual or a history of the characteristic “which may result from disease, injury, congenital condition of birth, or functional disorder.” Id. § 37.1103(e). In DiTomaso v. Electronic Data Systems, No. 87-CV-60320AA, 1988 WL 156317 (E.D. Mich. Oct. 7, 1988), the United States District Court for the Eastern District of Michigan found that the plaintiff employees did not prove their employer violated the Handicap Act by terminating them on the basis of marijuana use. Id. at *6. The employees denied any impairment or handicap resulting from drug use in their depositions and had based their claims on the premise that drug use did not affect their job performance. Id. The court did not address whether drug or alcohol addiction might be a “handicap” under different circumstances.

Drug Testing

Michigan’s Constitution protects its citizens against unreasonable searches and seizures, Mich. Const. art. I, § 11, but its provisions
do not govern private employers. In *DiTomaso*, the plaintiffs, security guards who were discharged by their employer following positive urinalyses for marijuana, brought suit against their employer alleging: (1) breach of a covenant of good faith and fair dealing; (2) intentional infliction of emotional distress; (3) negligence; (4) invasion of privacy; (5) defamation; and (6) wrongful discharge. *Id.* at *3. The court granted summary judgment to the employer on all claims. *Id.* The court declared that Michigan does not imply a covenant to act in good faith in an at-will employment relationship. *Id.* The court found that drug testing followed by employment termination does not inflict distress so severe that no reasonable person could be expected to endure it. *Id.* at *4. The court deemed the claim of negligence inappropriate because no independent action in tort existed for the conduct in question. *Id.* The court also held that the employer had a significant interest in assuring the guards were free from off-duty illegal drug use, and therefore testing for such use does not constitute an invasion of privacy unless the method employed to secure the test is objectionable to a reasonable person. *Id.* at *5. Because the plaintiffs offered no evidence to support the claim that the employer publicly disclosed the test results, the defamation claim was deficient. *Id.* at *4. Finally, the court held that an employee cannot rely on the Michigan Constitution in asserting a wrongful discharge claim based on a violation of public policy. *Id.*

**MINNESOTA**

**Handicap Discrimination**

The Minnesota Human Rights Act, Minn. Stat. Ann. § 363.01-.15 (West 1991), prohibits discrimination in employment based on an individual’s disability. *Id.* § 363.03. The definition of “disability” is a physical or mental “impairment which materially limits one or more major life activities,” a “record of such an impairment,” or a perception of such an impairment. *Id.* § 363.01(13). The statute excludes “any condition resulting from alcohol or drug abuse which prevents a person from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of others.” *Id.* § 363.01(35)(2). In *Gruening v. Pinotti*, 392 N.W.2d 670 (Minn. Ct. App. 1986), the court held that alcoholism can meet the statutory definition of disability. *Id.* at 674.

The rule of the Minnesota Department of Human Rights relating to certificates of compliance of public contracts, Minn. R. 5000.3400 (1990), similarly limits the definition of a disabled individual, ex-
cluding an individual whose current use of alcohol or drugs renders that individual a hazard to himself or others. Minn. R. 5000.3400(13) (1989).

**Drug Testing**


Certain types of testing, however, are acceptable. An employer may require a job applicant to undergo a test if he has extended a conditional job offer and requires the same test of all applicants. *Id.* § 181.951(2). “An employer may request or require [a current] employee to undergo drug or alcohol testing, as part of a routine annual physical examination” with two weeks written notice. *Id.* § 181.951(3). “An employer may request or require . . . employees in safety-sensitive positions to undergo drug or alcohol testing on a *random selection basis*.” *Id.* § 181.951(4) (emphasis added). A “safety-sensitive position” is “a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person.” *Id.* § 181.950(13). The statute permits suspicion testing if the employer reasonably suspects that the employee: (1) is under the influence of drugs or alcohol; (2) has violated written work rules prohibiting use of drugs or alcohol while operating an employer's vehicle; (3) has sustained a personal injury or has caused personal injury to another employee; or (4) “has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.” *Id.* § 181.951(5).

The employer must conduct all testing pursuant to and consistent with the terms of a written policy conforming to statutory standards. *Id.* § 181.951(1). These standards require an employer's drug- and alcohol-testing policy to identify the following: (1) the employees subject to testing; (2) the circumstances under which the employer will require testing; (3) “the right of an employee or job applicant to refuse . . . testing and the consequences of refusal”; (4) “any disciplinary or adverse personnel action” that the employer may take based on test results; and (5) “the right of an employee or job applicant to explain a positive result . . . or request and pay for confirmatory testing.” *Id.* § 181.952(1). Before testing, the employer must provide the employee or job applicant with a form on
which the employee or job applicant acknowledges that he has seen the employer's written policy, identifies intake of any over-the-counter or prescription medications, and provides any other information relevant to the reliability of, or explanation for, a positive test result. *Id.* § 181.953(6). “Within three working days after notice of a positive test result on a confirmatory test, the employee or job applicant may submit [other] information to the employer . . . to explain [the] result, or may request a confirmatory retest of the original sample at the employee's or job applicant's [expense].” *Id.*

All testing must take place in a laboratory licensed by the Commissioner of Health. *Id.* § 181.953(1). However, a breath test used as an initial screening test for alcohol may be performed by a medical clinic, hospital, or other medical facility not owned or operated by the employer. *Id.* The Act provides for the adoption of rules governing: (1) standards for licensure; (2) collection procedures which ensure privacy and prevent tampering; (3) threshold detection levels; and (4) chain-of-custody procedures and retention/storage procedures for mandatory confirmatory tests and retests of original samples. *Id.*

The Act specifically provides that an employer may not discharge an employee after a first positive result, even after confirmatory testing, unless the following conditions have been met:

1. the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and
2. the employee has either refused to participate in a counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

*Id.* § 181.953(10)(b)(1), (2).

In *City of Minneapolis v. Johnson*, 450 N.W.2d 156 (Minn. Ct. App. 1990), the court held that, although the statute prohibits employers from discharging employees based on a single positive test result if the employee agrees to participate in a rehabilitation program, an employer did not violate the statute by discharging a police officer who tested positive for the first
time. *Id.* at 160. The employer sustained the burden of proving the police department based the discharge not on the test result, but on the fact that the officer admitted using cocaine and failed to intervene in, or report, the use of cocaine he witnessed at a party. *Id.* at 161. The Act provides:

[A]n employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, co-employees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative. *Id.* § 181.953(10)(c).

In addition, employers must allow employees to have access to: (1) information contained in the employee's personnel file regarding positive test results; (2) any information acquired in the drug- and alcohol-testing process; and (3) any conclusions the employer reached based on the reports and other information. *Id.* § 181.953(10)(e).

Test results constitute private and confidential information and an employer may not disclose them without the written consent of the employee or job applicant. *Id.* § 181.954(2). An employer, however, may use evidence of a positive confirmatory test in an arbitration proceeding pursuant to a collective-bargaining agreement and in state court proceedings if relevant. *Id.* § 181.954(3). An employer may disclose the data both to agencies of the federal government if federal law requires and to a substance abuse treatment facility for the purpose of evaluation or treatment. *Id.* Prosecutors may not use positive results as evidence in a criminal proceeding against the employee or job applicant. *Id.* § 181.954(4).

The Act preserves the rights of parties to a collective-bargaining agreement to agree on drug- and alcohol-testing policies that meet or exceed the Act's minimum requirements. *Id.* § 181.954(5).

A civil action is available for statutory violations. *Id.* § 181.956(1), (2). Aggrieved employees may recover damages and injunctive or other appropriate equitable relief. *Id.* § 181.956(3), (4). The Act does not apply to employees and job applicants subject to drug and alcohol testing pursuant to:

(1) federal regulations that specifically preempt state regulation of drug and alcohol testing . . . ;
(2) federal regulations or requirements necessary to operate federally regulated facilities;
(3) federal contracts where the drug and alcohol testing is conducted for security, safety, or protection of sensitive or proprietary data; or
(4) state agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry . . . for the purpose of conforming the nonfederally regulated intrastate component of the industry to identical regulation.

Id. § 181.957(1).

In *Kise v. Product Design & Engineering*, 453 N.W.2d 561 (Minn. Ct. App. 1990), the court held that an employer could require an employee to submit to drug testing after sustaining a job-related injury and that the employee's refusal to submit to the test constituted grounds for dismissal. *Id.* at 565. The court stated that because the testing procedure was not arbitrary and because the employee had notice of the testing policy, the discharge of the employee did not violate Minnesota law. *Id.* at 566-67.

MISSISSIPPI

*Handicap Discrimination*

Mississippi's statutory handicap discrimination prohibition applies only to state employers or state-supported employers. Miss. Code Ann. §§ 25-9-103, 25-9-149 (Supp. 1990); *id.* § 43-6-15 (1981). The statute does not address alcohol or drug abuse or addiction, see *id.*, and no cases have been found that discuss the issue.

MISSOURI

*Handicap Discrimination*

The Missouri Human Rights Law, Mo. Ann. Stat. §§ 213.010-.126 (Vernon Supp. 1991), forbids discrimination in employment on the basis of an individual's handicap. *Id.* § 213.055. The Act defines "handicap" as "a physical or mental impairment which substantially limits one or more of a person's major life activities, or a condition perceived as such, which with or without reasonable accommodation does not interfere with performing the job." *Id.* § 213.010(8).

The statute does not address the issue of alcohol or drug use or addiction. No Missouri cases have been found that address
whether alcohol or drug use or addiction is a "handicap" within the meaning of the Act.

**Drug Testing**

In *Monroe v. Consolidated Freightways*, 654 F. Supp. 661 (E.D. Mo. 1987), the court held that private sector employees who lost their jobs after refusing to take a drug test had no cause of action under the Missouri Constitution's provisions protecting against unreasonable searches and seizures. *Id.* at 662. For an employee to prevail on a constitutional cause of action, state action is required. *Id.* Additionally, the court found that the employees had not stated a cause of action because the State of Missouri does not recognize a wrongful discharge action based on a public policy violation. *Id.* at 664. Even if the state recognized such a cause of action under some circumstances, the court opined that the employer's efforts to assure a drug-free working environment would not contravene the public policy of Missouri. *Id.*

**Montana**

**Handicap Discrimination**

Montana prohibits discrimination against a person because of a physical handicap. Mont. Code Ann. §§ 49-2-303, -308 (1989). The statute's definition of physical handicap does not expressly exclude alcohol or drug abuse. *Id.* § 49-2-101(13), (16). The Montana Commission of Human Rights has opined that alcoholism constitutes a protected handicap. *In re the Application of Am. Indian Action Council*, Case No. 288, Findings, Conclusions and Order (Montana Commission of Human Rights, Oct. 1976). The statute, however, does not specifically require an employer to reasonably accommodate an individual with a physical handicap. See Mont. Code Ann. § 49-2-303(1)(a), (b). Furthermore, no discrimination occurs if the nature or extent of the handicap precludes performance of the particular employment or if the particular employment subjects the handicapped person or his coemployees to physical harm. *Id.*

The Montana Constitution provides a right of privacy to the citizens of the state, Mont. Const. art. II, § 10, but the right of privacy does not apply to purely private action. See *Montana v. Long*, 700 P.2d 153, 157 (Mont. 1985) (denying defendants' motion
to suppress evidence of marijuana plants discovered by their landlord).

**Drug Testing**

Montana has a comprehensive statute regulating the testing of blood and urine of employees and prospective employees. Mont. Code Ann. § 39-2-304 (1989). Under the statute, an employer may not require a prospective employee to submit to a blood or urine test as a condition of employment, except for employment in “hazardous work environments or in jobs [in which] the primary responsibility is security, public safety, or fiduciary responsibility.” *Id.* § 39-2-304(1)(b). An employer cannot require a current employee to submit to a blood or urine test as a condition of continuing employment “unless the employer has a reason to believe that the employee's faculties are impaired on the job.” *Id.* § 39-2-304(1)(c).

Prior to giving any drug or alcohol test, the employer must adopt written drug-testing procedures and make them available to all employees subject to testing. *Id.* § 39-2-304(2). These procedures must provide for:

(a) collection of a . . . specimen in a manner that minimizes invasion of personal privacy;
(b) collection of a quantity of specimen sufficient to ensure the administration of several tests;
(c) collection, storage and transportation in tamper-proof containers;
(d) adoption of chain-of-custody documentation . . . ;
(e) verification of test results by two or more different testing procedures . . . ; and
(f) prohibition of the release of test results, except as authorized by the person tested or as required by a court of law.

*Id.* § 39-2-304(2).

Employers must provide a copy of any test result to the employee and allow the employee to obtain a confirmatory test from an independent laboratory selected by the employee, all at the employer’s expense. *Id.* § 39-2-304(3). The employee must also have an opportunity to rebut or explain positive test results. *Id.* An employer may not take adverse action against an employee who presents a reasonable explanation or a medical opinion indicating that alcohol or drug consumption did not cause the results of the test. *Id.* § 39-2-304(4). An employer violating the statute is guilty of a misdemeanor. *Id.* § 39-2-304(5).
Handicap Discrimination

Nebraska’s Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to -1126 (1988), prohibits discrimination against any individual in employment because of such individual’s disability. *Id.* § 48-1104. The term “disability” does not include a current alcohol or drug user's addiction to alcohol or drugs. *Id.* § 48-1102(8). The Act thus protects recovering alcoholics and addicts but allows employers to discipline current users for their use. *Id.*

Drug Testing

Nebraska has passed a law “to help in the treatment and elimination of drug and alcohol use and abuse in the workplace while protecting the employee’s rights.” Neb. Rev. Stat. §§ 48-1901 to -1910 (1988). Although the Act gives the employer great freedom to administer drug tests to current employees, it provides that an employer may not use a positive result of a body fluid or breath test in any disciplinary or administrative action or as a basis for terminating employment, unless the result is “subsequently confirmed by gas chromatography-mass spectrometry or other scientific testing technique which has been or may be approved by the [Department of Health].” *Id.* § 48-1903(1).

A positive finding of alcohol by preliminary screening procedures is similarly subject to confirmatory testing. *Id.* § 48-1903(2). If the confirmatory test results are negative, the employer must rescind any disciplinary or administrative action. *Id.* “Except for the confirmatory breath tests provided [for alcohol abuse], all confirmatory tests shall be performed by a clinic, hospital, or laboratory . . . licensed pursuant to the Federal Clinical Laboratories Improvement Act of 1967, 42 U.S.C. § 263a, or which is accredited by the College of American Pathologists.” *Id.*

All specimens from positive tests shall be refrigerated and preserved in a sufficient quantity for retesting for a period of at least one hundred eighty days. *Id.* § 48-1904. The statute also requires chain-of-custody documentation. *Id.* § 48-1905. An employer may not disclose test results to the public but must disclose them to the employee upon request and may disclose them to employees for purposes connected with their employment. *Id.* § 48-1906.

An employer may discipline or discharge “any employee who refuses the lawful directive of an employer to provide a body fluid
or breath sample.” Id. § 48-1910. Any employee who provides a specimen or alters a specimen for purposes of altering the results of any test “may be subject to the same discipline as if the employee had refused the directive of the employer to provide a [specimen].” Id. § 48-1909. The employee would also be guilty of a Class I misdemeanor. Id.

NEVADA

Handicap Discrimination

The Nevada Statute on fair employment practices prohibits discrimination by employers based on a “physical, aural or visual handicap.” Nev. Rev. Stat. Ann. § 613.330 (Michie Supp. 1989). This statute does not provide a definition of these handicaps and does not expressly exclude alcohol or drug abusers from the protected class of handicapped persons. See id.

Unemployment Compensation

In Fremont Hotel & Casino v. Esposito, 760 P.2d 122 (Nev. 1988), the court held that an employee discharged after refusing to submit to a drug and alcohol test contemplated by the collective-bargaining agreement between his union and employer was not entitled to unemployment compensation benefits. Id. at 124.

NEW HAMPSHIRE

Handicap Discrimination


The statute defines “physical or mental disability” as a “disability other than illness, unrelated to a person’s ability to perform a particular job or position available to him for hire or for promotion.” Id. § 354-A:3(XIII). The statute protects a disabled individual from discrimination so long as he does not present a hazard to himself or any other employee. Id. The statute does not indicate whether drug addiction or other substance abuse would qualify as a handicap. No reported cases interpreting this statute in the
context of a substance-abuse-related discharge, refusal to hire, or employer-testing program have been found.

**Drug Testing**

In *O'Byen v. Papa Gino's*, 780 F.2d 1067 (1st Cir. 1986), an employee brought wrongful discharge and invasion of privacy claims after he failed a polygraph test administered when his employer learned that he was a substance abuser. In rejecting the wrongful discharge claim, the court held that no New Hampshire public policy protects an employee from taking an invasive polygraph test. *Id.* at 1071-73. The court found, however, that the investigative techniques used by the employer were coercive, would be highly offensive to a reasonable person, and were invasive of plaintiff's privacy. *Id.* at 1072. These factors supported an award for invasion of privacy. *Id.*

**NEW JERSEY**

**Handicap Discrimination**

New Jersey law prohibits discrimination against any person who is or has been handicapped, unless the nature and extent of the handicap reasonably preclude the performance of the particular employment. N.J. Rev. Stat. § 10:5-4.1 (Supp. 1990). The statute defines "handicapped" as "suffering from physical disability, infirmity, malformation or disfigurement ... or from any mental, psychological or developmental disability resulting from an anatomical, psychological, physiological or neurological condition which prevents the normal exercise of bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." *Id.* § 10:5-5(q).

The New Jersey Supreme Court has held that alcoholism is a handicap within the meaning of the statute because it may manifest itself in either physical or psychological abnormalities. *Clowes v. Terminix Int'l, Inc.*, 538 A.2d 794, 804 (N.J. 1988). The reasoning of the New Jersey Supreme Court in *Clowes* applies equally to drug addiction. *See In re Cahill*, 585 A.2d 977, 979 (N.J. 1991) (observing that, because alcohol is a drug, the reasoning in *Clowes* extends to drug addiction).

**Drug Testing**

The New Jersey Constitution's protection from unreasonable searches and seizures provides greater protection than the Fourth

In *Fraternal Order of Police v. City of Newark*, 524 A.2d 430 (N.J. 1987), the court held that a city directive subjecting narcotics officers to random drug testing "without probable cause or reasonable individualized suspicion" violated the New Jersey Constitution. *Id.* at 437-38 (citing N.J. Const. art. I, ¶ 7). In contrast, the court in *International Federation of Professional & Technical Engineers v. Burlington County Bridge Commission*, 572 A.2d 204 (N.J. Super.), cert. denied, 584 A.2d 244 (N.J. 1990), held that the state could require employees "physically involved in the opening and closing of bridges" to submit to a drug test as part of an annual physical exam. *Id.* at 205. The court distinguished the decision in *Fraternal Order* by emphasizing the direct effect on public safety and the lower expectation of privacy resulting from drug tests at annual physical exams. *Id.* at 212.

A New Jersey Superior Court recently reversed a trial court's opinion that public policy in New Jersey requires individualized, reasonable suspicion prior to drug testing in the private workplace. See *Hennessey v. Coastal Eagle Point Oil Co.*, 589 A.2d 170 (N.J. Super. 1991), rev'g No. W-003611-86, 1989 N.J. Super. LEXIS 474 (Apr. 28, 1989). In *Hennessey*, a former employee alleged that his discharge in the wake of a random drug screen violated public policy. *Id.* at 172. Although at-will employees in New Jersey have a cause of action for wrongful discharge that is "'[c]ontrary to a clear mandate of public policy,'" *id.* at 175 (quoting *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980)), a constitutional prohibition that does not affect private action will not suffice as evidence of a source of public policy in a private employment context, see *id.* at 175.

**NEW MEXICO**

**Handicap Discrimination**

New Mexico's Human Rights Act, N.M. Stat. Ann. §§ 28-1-1 to -15 (1987), forbids discrimination in employment against any person, otherwise qualified, because of a physical or mental handicap. *Id.* § 28-1-7. "Physical or mental handicap" means "a physical or
mental impairment that substantially limits one or more of an individual's major life activities." *Id.* § 28-1-2(M). The statute also defines an individual as handicapped "if he has a record of a physical or mental handicap or is regarded as having a physical or mental handicap." *Id.* An employer must accommodate an employee's handicap "unless such accommodation is unreasonable or an undue hardship." *Id.* § 28-1-7(J). No case law on the application of the statutory definitions to alcohol or drug abuse or addiction has been found.

**New York**

*Handicap Discrimination*

New York's Human Rights Law, N.Y. Exec. Law §§ 290-301 (Consol. 1983 & Supp. 1990), makes it an unlawful discriminatory practice for an employer to discharge, refuse to hire, or otherwise discriminate against an individual "in compensation or in terms, conditions or privileges of employment" because of a "disability." *Id.* § 296(1).

The Human Rights Law defines the term "disability" to mean:

(a) a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment . . . .

*Id.* § 292(21). A proviso to this definitional section limits the scope of protection of the Human Rights Law to disabilities that do not "prevent an individual from performing in a reasonable manner the activities involved in the job or occupation sought or held." *Id.*

An employer may properly rely upon an employee's attendance record in determining whether that employee has performed in a reasonable manner. *See Schmitt v. Kiley*, 507 N.Y.S.2d 907, 908 (App. Div.) (holding that a petitioner's illness preventing him from coming to work is not a "disability"), *appeal denied*, 511 N.E.2d 86 (N.Y. 1986); *Silk v. Huck Installation & Equip. Div.*, 486 N.Y.S.2d 406, 406-07 (App. Div. 1985) (determining that petitioner's physical disability "prevent[ed] her from doing her job in a reasonable manner since it caused her to miss an unacceptably high number of days of work in a job that required consis-
tently good attendance”). Accordingly, if an employee suffering from alcoholism or drug abuse misses an unacceptable number of workdays, an employer may discharge him without violating New York’s Human Rights Law.

**Drug Testing**

The Division of Human Rights takes the position that “an employer may not require a job applicant to submit to medical examinations, including laboratory and psychological tests, unless the examination is based upon a bona fide occupational qualification.” New York State Division of Human Rights, *Rulings on Inquiries* § 11(B) (1988). This prohibition specifically includes “testing for drug and alcohol abuse.” Inter-Office Memorandum from Douglas H. White, Commissioner of the New York State Division of Human Rights, to Albert J. Kostelny, Jr., Acting Chief Administrative Law Judge (Dec. 7, 1989) (copy on file with the William and Mary Law Review). However, “where an employer has reasonable cause to believe that an employee is taking drugs or abusing alcohol while on the job, drug testing may be utilized and the employer can consider and take further action based upon legitimate business necessity depending upon the results of the test.” *Id.* (emphasis added). All other drug testing, according to the Division, is prohibited unless it is tied to a bona fide occupational qualification. *Id.*

In *Burka v. New York City Transit Authority*, 680 F. Supp. 590 (S.D.N.Y. 1988), the court held that the New York Human Rights Law does not protect users of illegal narcotics unless they are rehabilitated or rehabilitating drug users currently enrolled in a treatment program. *Id.* at 600. Consequently, the employer’s drug testing to identify active narcotics users was not an impermissible screening for handicaps and the termination decisions resulting from test results were lawful. *Id.* at 610; see also *Porcello v. General Motors Corp.*, No. 3-E-D-85-103394, slip op. at 4-5 (Div. Human Rights Jan. 18, 1990) (determining that a social or casual user of drugs is not “disabled” within the meaning of the Human Rights Law).

In *Doe v. Roe, Inc.*, 539 N.Y.S.2d 876 (Sup. Ct. 1989), aff’d, 553 N.Y.S.2d 364 (App. Div. 1990), however, the New York County Supreme Court found that an employer violated the Human Rights Law by refusing to hire an applicant following a preemployment urinalysis test that revealed the presence of opiates. The court held that drug abuse alone cannot automatically disqualify a job applicant or serve as a ground for termination as long as the employee is able to reasonably perform his job. *Id.* at 878. An
“automatic” dismissal, based solely on the positive test results, violated the Human Rights Law. *Id.* The Division of Human Rights concurred. Inter-Office Memorandum from Margarita Rosa, General Counsel of the New York State Division of Human Rights, to Barbara A. Riley, Deputy Commissioner for Regional Affairs, at 5-6 (Oct. 28, 1987) (copy on file with the William and Mary Law Review) (stating than an employee may not be discharged on the basis of a drug test without regard for actual job performance).

The New York City Administrative Code prohibits employers from discriminating against otherwise qualified individuals based on their physical or mental handicaps. N.Y. Admin. Code tit. 8, § 8-108 (1985). An individual is deemed physically or mentally handicapped when he “has or had a physical or mental impairment that substantially limits one or more major life activities, and has a record of such an impairment.” *Id.* § 8-102(16)(a). The Code specifically provides that the term “physical or mental impairment” includes alcoholism, substance abuse, and drug addiction. *Id.* § 8-102(16)(b). The Code restricts the protection of section 8-108 to those handicapped persons who “with reasonable accommodation can satisfy the essential requisites of the job ... in question.” *Id.* § 8-102(16)(e).

The state constitution's equal protection and due process clauses, as well as its protection from unreasonable searches and seizures, apply only to state action and thus have no effect on activities of private employers. *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 510 N.E.2d 325, 329 (N.Y. 1987); see *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 550-51 (N.Y. 1949), cert. denied, 339 U.S. 981 (1950).

The Court of Appeals of New York indicated that the requirements of the New York Constitution might be more strict than those of the Fourth Amendment to the United States Constitution. See *Patchogue-Medford*, 510 N.E.2d at 328 (citing N.Y. Const. art. 1, § 1). The court in *Patchogue* held that the school board could not order teachers to submit to drug tests without “reasonable suspicion” and explained that “random searches conducted by the State without reasonable suspicion are closely scrutinized, and generally only permitted when the privacy interests implicated are minimal, the government’s interest is substantial, and safeguards are provided to insure that the individual’s reasonable expectation of privacy is not subjected to unregulated discretion.” *Id.* at 331 (citation omitted). In contrast, when police officers challenged their department’s plan to test narcotics officers randomly for drugs, the court upheld the plan, stressing the diminished expectation of

Absent an agreement for a definite period of employment, the courts presume employment relationships are at will. *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 920 (N.Y. 1987). In *Aikman v. Dean Witter Reynolds, Inc.*, 544 N.Y.S.2d 137 (App. Div. 1989), the court determined that an employee who signed an agreement making the at-will relationship explicit had no common law cause of action to contest his employer’s decision to discharge him for failing a polygraph test given to determine his recent drug use. *Id.* at 138. The court intimated that a drug- and substance-abuse policy was reasonable. *Id.* The holding concerning the lie-detector test has been preempted by statute. *See* N.Y. Lab. Law § 735 (Consol. 1983).

**NORTH CAROLINA**

**Handicap Discrimination**


An employer that “manufactures, distributes, dispenses, conducts research, stores, sells, or otherwise handles controlled substances regulated by the North Carolina Controlled Substances Act” may exercise its discretion as to employees or applicants currently using drugs or with a history of drug abuse, without reference to the prohibitions of the Handicapped Persons Protection Act. *Id.* § 168A-5(b)(2).

**NORTH DAKOTA**

**Handicap Discrimination**

The North Dakota Human Rights Act, N.D. Cent. Code §§ 14-02. 4-01 to -21 (1989), prohibits discrimination in employment because
of an individual's physical or mental handicap. *Id.* § 14-02.4-03. The Act requires employers to reasonably accommodate otherwise qualified individuals with a physical or mental handicap. *Id.* The Act defines "handicap" as an "impairment that substantially limits one or more major life activities" and "includes having a record of such an impairment or being regarded as having such an impairment." *Id.* § 14-02.4-02(7). The statute does not address the issue of whether alcohol or drug abuse or addiction is a protected handicap, and no applicable cases have been found.

**Ohio**

**Handicap Discrimination**

Ohio's fair employment practices statute, Ohio Rev. Code Ann. § 4112.01-.99 (Anderson 1991), prohibits discrimination in employment on the basis of an individual's handicap. *Id.* § 4112.02(A). The statute defines "handicap" as "a medically diagnosable abnormal condition." *Id.* § 4112.01(A)(13). The statute does not expressly define handicap to include alcohol or drug addiction. *Id.*

In *Hazlett v. Martin Chevrolet, Inc.*, 496 N.E.2d 478 (Ohio 1986), the Ohio Supreme Court held that drug addiction and alcoholism were "handicaps" within the meaning of the statute. *Id.* at 479. The court found that an employer who readily granted leaves for temporary disabilities violated the statute by discharging the plaintiff and denying him a leave of absence to obtain drug and alcohol rehabilitation. *Id.* at 480. Under *Hazlett*, an employee can establish a prima facie case of discrimination by showing: (1) that he has a drug or alcohol addiction; (2) that the employer's actions were based in part on his handicapped status; and (3) that he could safely and substantially perform the essential functions of his job. *Id.*

The employee must present "medically qualified evidence to support a finding" that he is an alcoholic. *Greater Cleveland Regional Transit Auth. v. Ohio Civil Rights Comm'n*, 567 N.E.2d 1325, 1327 (Ohio Ct. App. 1989). Even if an employee's handicap would increase occupational hazards, the employee can still establish a case of discrimination by showing that the employer could avoid these hazards with "reasonable accommodation." *Id.* at 1329 (citing Ohio Admin. Code § 4112-5-08(D)(3)(c) (1990)). The court held that requiring a second chance to complete an alcohol treatment program constituted reasonable accommodations. *Id.*
Drug Testing


Oklahoma

Handicap Discrimination

Oklahoma's anti-discrimination law, Okla. Stat. tit. 25, §§ 1101-1901 (Supp. 1991), prohibits employers from discriminating against any individual because of such individual's "handicap." *Id.* § 1302(A)(1). A "handicapped person" is one "who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such an impairment or is regarded as having such an impairment." *Id.* § 1301(4). The Oklahoma Human Rights Commission guidelines on employment discrimination explicitly adopt the definition of "handicapped person" used in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1988). Oklahoma Human Rights Commission, Interpretative Guidelines on Discrimination Against the Handicapped, ch. IX, § A (1986).

That statute contains an exception to coverage for current alcohol and drug abusers who are unable to perform their duties or who constitute a threat to property or safety. 29 U.S.C. § 706(8)(B). The Commission guidelines also outline an employer's duty to reasonably accommodate applicants or employees with handicaps. See Oklahoma Human Rights Commission, Interpretative Guidelines on Discrimination Against the Handicapped, ch. IX, § C (1986).

Unemployment Compensation

The Oklahoma Court of Appeals held that testing positive for drug use is not, in itself, willful misconduct and thus does not prevent a discharged employee from receiving unemployment

**OREGON**

**Handicap Discrimination**

Oregon's statutory law on civil rights for physically and mentally handicapped persons provides that "it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment" because an individual "has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved"; or because an individual has a record of, or is regarded as having, a physical or mental impairment. Or. Rev. Stat. § 659.425(1)(a)-(c) (1989). The statute does not expressly exclude alcoholics or other substance abusers from the protected class of disabled persons.

**Drug Testing**

Oregon law mandates that only licensed clinical laboratories conduct "tests, examinations or analyses on materials derived from the human body for the purpose of detecting substances of abuse in the body." Or. Rev. Stat. § 438.435(1) (1989). Licensed clinical laboratories may also accept samples from and report results to employers and other nonmedical practitioners. *Id.* § 438.435(2). If an employer submits a sample to an out-of-state laboratory, intending to use the results to deprive or deny an employee of employment or benefits, the employer has the burden of showing that the testing procedure meets or exceeds Oregon's testing standards. *Id.* § 438.435(6). Confirmatory tests must be conducted on samples yielding positive results. *Id.* § 438.435(3).

Oregon prohibits employers from requiring an employee or prospective employee to take a breathalyzer test as a condition of employment or continued employment unless the individual consents to the test or the employer has "reasonable grounds to believe that the individual is under the influence of intoxicating liquor." *Id.* §§ 659.225, 659.227. "If [an] employer has reasonable grounds to believe that [an] individual is under the influence of intoxicating liquor, the employer may require, as a condition for employment or continuation of employment, the
administration of a blood alcohol content test . . . .” Id. § 659.225(1).

In Association of Western Pulp & Paper Workers v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986), the employer had a drug- and alcohol-testing program that required testing of (1) any employee reasonably suspected of being under the influence of alcohol or illegal drugs and (2) any employee involved in an on-the-job accident requiring significant medical attention. Id. at 184. Employees who tested positive for illegal drugs or alcohol were subject to discipline up to and including discharge. Id. Employees who refused to submit to a drug test were also subject to discipline. Id. The court held that because employees were not subject to discipline for refusing alcohol testing unless a supervisor had reasonable cause to believe that the employee was under the influence, the program did not violate the breathalyzer statute. Id. at 186.

Unemployment Compensation

The Oregon Court of Appeals has determined that testing positive for drugs is not willful misconduct that would disqualify a discharged employee from receiving unemployment benefits when the use is off-duty and the employer does not show on-the-job impairment. Weyerhaeuser Co. v. Employment Div., 804 P.2d 1183, 1185, 1187 (Or. Ct. App. 1991); Veneer v. Employment Div., 804 P.2d 1174, 1180 (Or. Ct. App. 1991).

Pennsylvania

Handicap Discrimination

The Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-963 (1964 & Supp. 1990), prohibits discrimination in employment on the basis of a “non-job related handicap or disability.” Id. § 955(a). The Act defines a “non-job related handicap or disability” as “any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in.” Id. § 954(p). The regulations promulgated by the Pennsylvania Human Relations Commission define a “handicapped or disabled person” as one “who has a physical or mental impairment which substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such impairment.” 16 Pa. Code § 44.1(i) (1979). The statute does not expressly address drug or alcohol addiction.
In *Small v. Columbia Gas, Inc.*, 525 A.2d 424 (Pa. Super. Ct. 1987), a former meter reader sued her employer when she was discharged after an arrest for drunk driving and subsequent entrance into an alcohol detoxification program. The plaintiff alleged her employer fired her because of her alcoholism in violation of the handicap discrimination provisions of the Pennsylvania Human Relations Act. *Id.* at 425. The court stated that although an employer’s perception of an employee as alcoholic could constitute a handicap, here the employer had discharged the plaintiff because her arrest for drunk driving evidenced a lack of dependability and responsibility, both of which were essential to the proper performance of her job. *Id.* at 427. Moreover, the employer convinced the court that because the plaintiff did not demonstrate the classic signs of alcoholism, the employer had never regarded her as an alcoholic. *Id.* The employee’s discharge, therefore, did not constitute a violation of the Human Relations Act. *Id.*

**Drug Testing**


**Unemployment Compensation**

Denial of unemployment benefits on the basis of willful misconduct is appropriate when the employee violates an employer’s established policy. *See*, e.g., *Moore v. Unemployment Compensation Bd. of Review*, 578 A.2d 606, 608 (Pa. Commw. Ct. 1990) (involving refusal to submit to random drug test); *Brunson v.*

PUERTO RICO

No statutes, regulations, or constitutional provisions of Puerto Rico addressing drug or alcohol use, abuse, or addiction have been found. Puerto Rico's Wrongful Discharge Statute, P.R. Laws Ann. tit. 29, § 185a (1985), is silent on the issue.

RHODE ISLAND

Handicap Discrimination

The Rhode Island Fair Employment Practices Act, R.I. Gen. Laws §§ 28-5-1 to -40 (1986 & Supp. 1990), prohibits job discrimination on the basis of handicap by private employers of four or more individuals. Id. § 28-5-6(2)(A). An employer must reasonably accommodate the handicap of an employee or applicant "unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business." Id. § 28-5-7(1)(D).

The Act defines "handicap" as "any physical or mental impairment which substantially limits one or more major life activities, a record of such impairment or [being] regarded as having such an impairment." Id. § 28-5-6(7). A "physical or mental impairment" includes "any physiological disorder or condition . . . or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." Id. § 28-5-7(A). A "major life activity" includes "functions such as caring for one's self, performing manual tasks, walking, learning, and working." Id. § 28-5-6(7)(B). The statute does not address whether alcoholism or drug addiction are handicaps.

Another provision of the Rhode Island handicap statute, entitled Discrimination Against Handicapped, R.I. Gen. Laws § 42-87-1 (1988), provides that "no otherwise qualified handicapped person shall solely by reason of his or her handicap, be subject to discrimination by any person or entity doing business in the state." Id. § 42-87-2. The definitions of pertinent terms are almost identical to the definitions in the Rhode Island Fair Employment Practices Act, see id. § 42-87-1, so their applications to substance-dependent employees should be the same. No cases addressing the issue have been found.
Drug Testing

Rhode Island law prohibits an employer from subjecting any employee to urine, blood, or other bodily fluid or tissue sampling as a condition of continued employment without individualized reasonable suspicion. R.I. Gen. Laws, § 28-6.5-1 to -2 (Supp. 1990).

An employer may require an employee to submit to substance abuse testing as long as "the employer has reasonable grounds to believe based on specific objective facts, that the employee's use of controlled substances is impairing his or her ability to perform his or her job." Id. § 28-6.5-1(A).

An employer must adhere to certain procedures in conducting testing. The employer must permit the employee to provide the sample "in private, outside the presence of any person." Id. § 28-6.5-1(B). The employer must conduct the testing "in conjunction with a bona fide rehabilitation program." Id. § 28-6.5-1(C). Positive tests must be confirmed by scientifically recognized, accurate methods. Gas chromatography/mass spectrometry is the method of choice. Id. § 28-6.5-1(D). An employee must have an option of having the sample tested at an independent facility at the employer's expense and a "reasonable opportunity to rebut or explain" positive test results. Id. § 28-6.5-1(E), (F).

An employer who improperly administers a test is guilty of a misdemeanor punishable by as much as $1000 fine, one year of jail, or both. Id. § 28-6.5-1. A prevailing employee in a civil action may recover actual and punitive damages, attorneys' fees, and costs. Id. Injunctive relief is also available. Id.

SOUTH CAROLINA

Handicap Discrimination

In Prezzy v. Food Lion, Inc., 4 Individual Empl. Rts. Cas. (BNA) No. 996 (D.S.C. 1989), an employer discharged the plaintiff for smoking marijuana on the job. Id. at 996. The court held that because the employee handbook had a conspicuous disclaimer, the plaintiff could not rely on its provisions in a breach of contract action; moreover, the handbook specifically prohibited the use of illegal drugs on the premises. Id. at 997.

In Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985), an employee fired after testing positive for marijuana use unsuccessfully sued his former employer for: (1) wrongful termination; (2) breach of the covenant of good faith and fair dealing; (3) intentional infliction of emotional distress;
and (4) invasion of privacy. The court found that the terms of a policy manual were unenforceable because the manual did not constitute a contract. Id. at 1362-63. It refused to imply a covenant of good faith and fair dealing into an at-will employment relationship. Id. at 1363-64. The employer’s actions were not sufficient to give rise to an intentional infliction of emotional distress claim, id. at 1365-66, and the absence of public disclosure of private facts or otherwise outrageous conduct was fatal to the invasion of privacy claim, id. at 1370.

SOUTH DAKOTA

Handicap Discrimination


The statute defines “disability” as

any determinable physical or mental characteristic of an individual or a history of the characteristic which may result from disease, injury, congenital condition of birth or functional disorder which . . . is unrelated to an individual’s ability to perform the duties of a particular job or position, or is unrelated to an individual’s qualifications for employment or promotion.

Id. § 20-13-1(4). The statute does not indicate whether alcohol or drug use or addiction would meet the definition of disability, and no cases on this issue have been found.

TENNESSEE

Handicap Discrimination

The Tennessee statute governing employment of the handicapped prohibits discrimination in “hiring, firing, or other terms and conditions of employment” by any employer against any employee based solely upon any physical, mental, or visual handicap. Tenn. Code Ann. § 8-50-103(a) (1988). An exception is made when the handicap “to some degree prevents the applicant from performing the duties required by the employment sought or impairs the performance of the work involved.” Id. The definition does not specifically exclude drug or alcohol addiction, and no case
law that determines whether such addictions constitute “handicaps” under the statute has been found.

Drug Testing

Tennessee’s drug-testing statute applies only to the authority of the Commissioner of Corrections to require security personnel employed by the Department of Corrections to submit to drug tests. Tenn. Code Ann. § 41-1-122 (1990).


Unemployment Compensation


In Ivy v. Damon Clinical Laboratory, No. 41 (Tenn. Ct. App. Aug. 20, 1984) (LEXIS, States library, Tenn file), an employer temporarily suspended the plaintiff from his position as a bus driver because of a positive drug test. The employee regained his job after the results of a second test were negative. Id. He then sued the laboratory that had performed the first test, charging that it had caused “a slanderous, libelous and false report to be published.” Id. In finding for the defendants, the court held that a qualified privilege applied to the clinic’s publication of the test results to the employer, because the employer had an interest in the results. Id. The laboratory did not abuse the privilege because it did not know the results were inaccurate and therefore did not act recklessly. Id.

Texas

Handicap Discrimination

The Texas handicap discrimination law defines a "handicapped person" as "a person who has a mental or physical handicap, including mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, being crippled, or any other health impairment which requires special ambulatory devices or services." \textit{Id.} § 121.002(4). The Texas Commission on Human Rights Act defines "disability" as "a mental or physical impairment that substantially limits at least one major life activity or a record of such a mental or physical impairment." Tex. Rev. Civ. Stat. Ann. art. 5221k, § 2.01(4) (West Supp. 1991). The statute specifically excludes from the definition of "disabled" a person currently addicted to the use of alcohol or drugs. \textit{Id.} § 2.01(4)(A).

\textbf{Drug Testing}

In \textit{Jennings v. Minco Technology Labs, Inc.}, 765 S.W.2d 497 (Tex. Ct. App. 1989), the court held that an employer's policy requiring random urinalysis for evidence of illegal drug consumption was lawful and enforceable. \textit{Id.} at 502. The court refused to create a public policy exception to at-will employment based upon the employee's privacy rights because the plaintiff employee's privacy interest was not invaded without her consent. \textit{Id.} at 501. She chose to consent to the requirement that she give a urine sample, rather than reject further employment with the company. \textit{Id.} at 502.

\textbf{Unemployment Compensation}

In \textit{Texas Employment Commission v. Hughes Drilling Fluids}, 746 S.W.2d 796 (Tex. Ct. App. 1988), the court held that an employee's discharge for refusing to consent to random urinalysis disqualified him from receiving unemployment benefits because the refusal amounted to "misconduct." \textit{Id.} at 803. There was no violation of the employee's common law right of privacy, because by continuing to work with full notice of the provisions of the employer's drug-testing policy, the employee accepted the policy as a condition of continued employment. \textit{Id.} at 799-807. Likewise, the statutory disqualification did not violate the Fourth Amendment to the United States Constitution because of the employee's consent and the state's interest in eliminating drug abusers from the private sector workplace. \textit{Id.} at 800-01.
Handicap Discrimination

The Utah Anti-Discrimination Act, Utah Code Ann. §§ 34-35-1 to -7.1 (1989 & Supp. 1990), prohibits discrimination in employment against any individual because of that individual's handicap. Id. § 34-35-6. The Act defines "handicap" as "a physical or mental impairment which substantially limits one or more of a person's major life activities." Id. § 34-35-2(9). The Industrial Commission of Utah has issued regulations that expand the statutory definition, but without referring to alcohol or drug abuse or addiction. Industrial Commission of Utah, Utah's Anti-Discrimination Rules (1991). The regulations require reasonable accommodation of all handicapped individuals and set forth guidelines for determining whether an accommodation poses an undue hardship on an employer's operation. Id. R486-1-2(J).

No cases have been found applying the statutory definition of handicap to drug or alcohol abuse or addiction.

Drug Testing

Utah's drug- and alcohol-testing statute, Utah Code Ann. § 34-38-1 to -15 (1988), specifies procedures and guidelines for private employers wishing to conduct drug and alcohol testing of employees and limits employer liability arising from such testing. The statute permits an employer to test current or prospective employees for the presence of drugs or alcohol as a condition of hire or continued employment. Id. § 34-38-3. Management, however, also must submit to testing on a periodic basis. Id. An employer may conduct tests for the following purposes: individual employee impairment investigations; accident or theft investigations; safety procedures; or productivity, quality, or security maintenance. Id. § 34-38-7.

The Act contains standards for collection and testing. Id. §§ 34-38-5 to -7. The employer must pay all testing costs. Id. § 34-38-5. Employee time spent on testing "shall be deemed work time for purposes of compensation and benefits." Id.

Sample collections must occur "under reasonable and sanitary conditions," with regard to individual privacy, and "in a manner reasonably calculated to prevent substitutions" of samples or other interference. Id. § 34-38-6(1)-(2). The procedures also include: (1) labeling samples to preclude erroneous identification; (2) providing an opportunity for employees to notify the laboratory of
any relevant information that might affect the outcome of the test, “including identification of currently or recently used prescription or nonprescription drugs”; (3) collecting, storing, and transporting the samples “so as reasonably to preclude the probability of sample contamination or adulteration”; and (4) sample testing which conforms to scientifically accepted methods, including “verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method.” *Id.* § 34-38-6(3) to (5). The statute also obligates employers to distribute a written description of the testing policy to current and prospective employees. *Id.* § 34-38-7.

Upon receipt of a confirmed positive test result, or upon the refusal of a current or prospective employee to provide a sample, the employer may take action including the following:

(1) a requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;
(2) suspension of the employee with or without pay for a period of time;
(3) termination of employment;
(4) refusal to hire a prospective employee;
or
(5) other disciplinary measures in conformance with the employer’s usual procedures, including any collective bargaining agreement.

*Id.* § 34-38-8.

The statute also limits an employer’s liability arising out of the establishment of a drug- or alcohol-testing policy. *See id.* § 34-38-10. A cause of action against an employer arises only when an employer’s action is based on a false test result. *Id.* A rebuttable presumption that the test result is valid arises if the employer has complied with the statute’s collection and testing provisions. *Id.* Therefore, if an employer has complied with the statute, the employer must prove the violation. Moreover, the employer is not liable for monetary damages if the employer’s “reliance on a false test result was reasonable and in good faith.” *Id.*

**Unemployment Compensation**

In *Johnson v. Department of Employment Security*, 782 P.2d 965 (Utah Ct. App. 1989), the court held that an employee who
tested positive for marijuana on both the post-accident and random followup tests was discharged for just cause and ineligible for unemployment compensation benefits. Id. at 972. The court stated that “all employers and employees are entitled to a drug-free workplace.” Id. at 970.

VERMONT

Handicap Discrimination

The Vermont employment practices statute makes it an unlawful practice for an employer to discriminate against a “qualified handicapped individual,” except in the case of a bona fide occupational qualification. Vt. Stat. Ann. tit. 21, § 495 (1987). A “handicapped individual” is one who: (1) “has a physical or mental impairment which substantially limits one or more major life activities”; (2) “has a history or record of such an impairment”; or (3) “is regarded as having such an impairment.” Id. § 495d(5). A handicapped individual is qualified if he is “capable of performing the essential functions of the job or jobs for which he is being considered with reasonable accommodation to his handicap.” Id. § 495d(6). No cases have been found addressing the application of this definition to an alcohol- or drug-addicted employee or applicant.

Reasonable accommodation of an individual addicted to drugs or alcohol may include job restructuring or part-time or modified work schedules. See id. § 495d(12)(B). Factors to consider in determining whether the requirement of reasonable accommodation is unduly harsh include “the overall size of the employer’s operation with respect to the number of employees, the number and type of facilities, . . . the size of budget[,] and . . . the cost of the accommodation.” Id. § 495d(12)(C)(i), (ii).

Drug Testing

Vermont law specifically regulates drug testing in the workplace. Vt. Stat. Ann. tit. 21, §§ 511-520 (1987). An employer may require a job applicant to submit to a drug test if all of the following conditions are met: (1) the employer has extended an offer conditioned on the applicant receiving a negative test result; (2) the applicant has received written notice of the test at least ten days prior to its administration; (3) the drug test is admin-
istered during a comprehensive physical examination; and (4) the drug test is administered pursuant to the procedures described in the statute. Id. § 512.

The statute affords greater protection to current employees. An employer may require a current employee to submit to a drug test only if the employer or his agent “has probable cause to believe the employee is using or is under the influence of a drug on the job.” Id. § 513(c)(1). Vermont law prohibits random or company-wide drug tests unless federal law requires such testing. Id. § 513(b). The employer must make available a bona fide rehabilitation program for alcohol or drug abusers and may not terminate an employee on the basis of a positive test result if the employee successfully completes this employee assistance program. Id. § 513(c)(2)-(3). During the period of time necessary to complete the program, the employer may suspend the employee from work “but in no event for longer than three months.” Id. § 513(c)(3). The employer may terminate an employee who tests positive subsequent to completion of the program. Id.

The statute sets forth specific procedures for testing. Id. § 514. An employer may test only for the presence of alcohol and drugs that the United States Drug Enforcement Administration has listed or classified as Schedule I drugs or that are likely to cause impairment on the job. Id. §§ 511(3), 514(1). An employer must provide employees with a written policy statement identifying the circumstances under which the employer may require drug tests, the particular test procedures, the drugs involved in the screening, and the consequences of a positive test result. Id. § 514(2). An employer may only use a laboratory designated by the Department of Health and must establish a chain-of-custody procedure for sample collection and testing. Id. § 514(4)-(5). If urinalysis is used, confirmation tests must be performed, and, at the time of testing, each individual must have the opportunity, at his own request and expense, to have a blood sample drawn and preserved for later testing. Id. § 514(6). Finally, an employee or applicant must have an opportunity to explain the test results, id. § 515(a), and any information concerning drug test results must remain confidential, id. § 516(a), (b).

An aggrieved employee or applicant may seek injunctive relief, damages, costs, and attorneys’ fees in a civil action. Id. § 519(a). In any action, the employer or laboratory has the burden of proving that the procedure satisfied the statute’s requirements. Id. § 519(b). The statute also provides for criminal penalties. See id. § 519(d).
Handicap Discrimination


Unemployment Compensation


Handicap Discrimination

The Washington law against employment discrimination prohibits discrimination based on an individual's "sensory, mental or physical handicap." Wash. Rev. Code § 49.60.180 (Supp. 1990). "[F]or enforcement purposes a person will be considered to be handicapped by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal." Wash. Admin. Code § 162-22-040(1)(a) (1990). This section states further that "'[t]he presence of a sensory, mental, or physical handicap' includes, but is not limited to, circumstances where a sensory, mental, or physical condition: (i) is medically cognizable or diagnosable; (ii) exists as a record or history; or (iii) is perceived to exist, whether or not it exists in fact." Id. § (1)(b). Although the Washington Supreme Court held
that "freedom from intoxication" can constitute a bona fide "occupational qualification," the court declined to address the question whether alcohol abusers are within the protected class of handicapped persons. *Brady v. Daily World*, 718 P.2d 785, 789 (Wash. 1986).

**Drug Testing**

Wash. Rev. Code section 49.44.120 (Supp. 1990) states that

[i]t shall be unlawful for any person, firm, corporation or the state of Washington, its political subdivisions or municipal corporations to require, directly or indirectly, that any employee or prospective employee take or be subjected to any lie detector or similar tests as a condition of employment or continued employment.

The statute recognizes certain exceptions for jobs involving law enforcement, handling of controlled substances, and national security.

*Id.*

The phrase "similar tests" might suggest an interpretation that includes alcohol and drug testing. No state court cases or administrative agency rulings addressing this issue have been found. The Washington Supreme Court determined that Nuclear Regulatory Commission rules preempted a state constitutional law claim against drug testing at a nuclear power plant and provided no guidance about the state constitution's potential applications to drug testing in other circumstances. *Alverado v. Washington Pub. Power Supply Sys.*, 759 P.2d 427, 432, 436 (Wash. 1988).

**West Virginia**

**Handicap Discrimination**

The West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 to -19 (1990), forbids discrimination in employment on the basis of an individual's handicap "if the individual is able and competent to perform the services required." *Id.* § 5-11-9(a)(1). Although the Act defines the term "handicapped" broadly, it does not include "persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reasons of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." *Id.* § 5-11-3(t).
Handicap Discrimination

Wisconsin's Fair Employment Act, Wis. Stat. § 111.31-.395 (Supp. 1990), forbids discrimination in employment against any individual on the basis of a handicap that is not "reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment." Id. § 111.34(2)(a); see also id. §§ 111.321, 111.322(1). The statute defines "handicapped individual" as one who "[h]as a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work"; "[h]as a record of such an impairment"; or "[h]is perceived as having such an impairment." Id. § 111.32(8).


Handicap Discrimination

Wyoming's Fair Employment Practices Act, Wyo. Stat. §§ 27-9-101 to -108 (Supp. 1991), prohibits employers from discriminating against a "qualified handicapped person." Id. § 27-9-105. A "qualified handicapped person" is a "handicapped person who is capable of performing a particular job, or who would be capable of performing a particular job with reasonable accommodation to his handicap." Id. § 27-9-105(d). The Wyoming Fair Employment Commission's Rules of Practice define a "handicapped person" as "any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment." Wyoming Fair Employment Commission, Rules of Practice and Procedure ch. X, § 3(a). "Physical or mental impairment" is defined broadly, but no reference is made specifically to alcohol
or drug abuse or addiction. *Id.* § 3(b). No case law applying these standards to an alcohol or drug abuser or addict has been found.

**Drug Testing**

In *Employment Security Commission v. Western Gas Processors*, 786 P.2d 866 (Wyo. 1990), an employee who resigned rather than face immediate dismissal for refusing to submit to a surprise drug test sought unemployment compensation benefits. *Id.* at 869. The court rejected the employer’s claim that the claimant was discharged for misconduct and therefore ineligible for benefits. *Id.* at 873. The court found that no corporate policy established submission to testing as a condition of employment, and an employer cannot reasonably rely on uncorroborated allegations of drug use made by a hostile co-worker as the basis for demanding that an employee submit to testing. *Id.* at 872.

In *Horne v. J.W. Gibson Well Service Co.*, 894 F.2d 1194 (10th Cir. 1990), the plaintiff, after two positive tests, was discharged pursuant to a mandatory drug-testing policy. *Id.* at 1195. The court held that the plaintiff was an at-will employee despite the existence of the personnel policy that led to his termination. *Id.* at 1195-96. Therefore, he could not state a claim for breach of contract. *Id.* at 1196. The court affirmed a grant of summary judgment in the defendant’s favor on the plaintiff’s claim for a breach of the covenant of good faith and fair dealing because: (1) Wyoming does not recognize the claim in the employment context; (2) the plaintiff received fair treatment; and (3) the employer had a legitimate interest in a drug-free workplace. *Id.* The court also affirmed the district court’s conclusion that the employer’s conduct did not violate public policy. *Id.*

In *Greco v. Halliburton Co.*, 674 F. Supp. 1447 (D. Wyo. 1987), the plaintiff worked as a plant operation warehouseman in the defendant’s company. *Id.* at 1448. After refusing to submit to a urinalysis test for drugs, he was terminated. *Id.* When the plaintiff had begun work, he had signed an employment contract which stated that “[t]his contract may be terminated at any time at the option of either the employer or the employee.” *Id.* at 1449. Five months later, the company issued a policy stating that:

> The use, possession, transportation, or sale of narcotics, illegal drugs or drug paraphernalia by any employee while on duty, while on Company premises or in any Company vehicle, or while on any job site of a customer, is prohibited. During an
investigation, unless prohibited by state statute, employees may be requested to cooperate in urinalysis tests.... Employees may also be requested to cooperate in urinalysis and/or blood tests on a spot check basis.

*Id.* The policy also indicated that refusal to submit to a test would be cause for disciplinary action, including immediate discharge. *Id.*

The court found that the contraband policy distributed to employees did not change the at-will nature of the employment relationship. *Id.* The policy did not set out procedures to follow for discipline or discharge and did not create a right to a hearing or an opportunity for the employee to rebut the charges of a violation of company policy. *Id.* at 1449-50. Because the company retained its complete discretion to discharge the employee, the employment-at-will status of the employee remained unaltered. *Id.* at 1450.

The court rejected the plaintiff's claims for wrongful discharge and breach of an implied covenant of good faith and fair dealing. *Id.* at 1450-51. The court held that even if Wyoming recognized the tort of wrongful discharge for violation of public policy, the company's attempt to maintain a drug-free environment was not contrary to the public policy of Wyoming. *Id.* The court also found that the employer had not breached an implied covenant of good faith and fair dealing because it acted in good faith in implementing and carrying out the drug-testing policy. *Id.*

In *Alexander v. Phillips Oil Co.*, 741 P.2d 117 (Wyo. 1987), a supervisor with twenty-one years of service was observed drinking during duty hours. *Id.* at 118. The court declined to construe the covenant of good faith and fair dealing as requiring the company to give the plaintiff a second chance before terminating him. *Id.* at 119.