

## Ohio Supreme Court Reduces Employee Privacy Rights a Wee Bit in *Lunsford v. Sterilite of Ohio, LLC*.

We do not often discuss other states' legal developments but a recent decision in Ohio pertaining to drug testing has broad application. First, more employers than ever are confronting employee substance abuse problems as the pandemic drags on. Second, employers are looking for safe, practical and inexpensive drug testing providers.

The Ohio Supreme Court recently held that it is not an invasion of privacy for an employer to directly observe employees provide urine samples for drug tests. In [\*Lunsford v. Sterilite of Ohio, L.L.C.\*](#), employees of Sterilite, claimed Sterilite and U.S. Healthworks (the company administering the drug tests) were invading employee privacy. The company was conducting mandatory drug tests, where employees needed to produce witnessed urine samples. An agent of U.S. Healthworks directly observed them by keeping their "eyes fixed on the employee's groin area." Regardless of its legality, never promulgate a rule like this.

### **Lunsford v. Sterilite of Ohio, L.L.C.**

Sterilite had drug tested employees in the past but began using the direct observation method in October 2016. Employees were asked to sign consent forms agreeing to "any testing necessary" before testing, though the release did not disclose that Sterilite intended to move to direct

observation testing. Employees were only told they were subject to observation once they arrived at the restrooms. According to Sterilite's drug testing policy, employees who refused to or could not produce a sample were terminated.

The Ohio Supreme Court determined that the at-will employees failed to establish a right to privacy when they consented, without objection, to be drug tested. The Court began by noting that an employee's privacy rights must be construed within the context of the employee's "at-will" status and that employee consent to be drug tested was a condition of their employment with Sterilite.

Consent is an absolute defense to an invasion of privacy claim and according to the Court, Sterilite employees consented to observation twice. The employees first consented when they signed the release forms; they consented a second time when they produced samples without objecting to observation. By providing the samples without objection, the employees ratified their written consent, regardless of the vague language of the consent form.

### **Analysis**

The Ohio Court relied on [\*Skinner v. Ry. Labor Executives' Ass'n\*](#). In this case, the Supreme Court recognized that urine tests are "not invasive of the body, but "procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy" to defeat the third prong of the breach of privacy claim.

The Ohio Court stated that employee consent eliminated the employee's privacy interests, and that by being an at-will employee, consent was implied.

The Court's dissent pointed out that the employees "had no time to make considered decisions on whether to submit to drug testing under the direct-observation method." The dissent argued further that the power imbalance between Sterilite and its employees meant that failure to submit to testing would result in immediate termination. Forcing an employee to put employment over privacy is not a fair choice said the dissent and it bastardizes the purpose of consent.

### **Illinois Employer Considerations**

Illinois employers should not follow the precedent set forth in *Lunsford*. While Illinois offers no guidance on the specific issue of employee privacy during drug testing, the [Cannabis Regulation and Tax Act](#) and the [Illinois Human Rights Act](#) both permit *reasonable* drug testing of employees. What qualifies as reasonable has not yet been addressed by any statutes or courts, but employers should be wary as Illinois has historically strongly favored employee privacy ([820 ILCS 55](#), [740 ILCS 14](#), [815 ILCS 505/2RR](#)). Employers are encouraged to err on the side of caution and avoid the myriad legal complications that could arise from using direct observation testing.

However, this caution should not deter employers from drug testing. Employers worried about maintaining a drug-free work environment should still feel free to test employees. Any consent forms signed by employees

should state, with specificity, what the employee consents to and that drug testing can happen at any time.

Direct observation is not the only method to ensure honest testing of urine; alternative methods of oversight include being in the same room as employees giving samples without visually observing them, listening to employees as they produce samples, or asking employees to leave all non-essential belongings outside the testing area. Saliva tests and hair tests can also be used and they avoid the concerns presented by *Lunsford*.

Employee privacy rights are a necessary casualty in the age of COVID. Employers are now entitled to inquire about their employees' health in ways they might never have done in the past. But direct examination urine testing is a step too far regardless of what the Ohio Supreme Court holds.

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