



Ohio Supreme Court holds that "direct observation" of drug testing is not an invasion of privacy

September 15, 2020

In a 4-3 decision the Ohio Supreme Court recently held that the privacy of an at-will employee is not invaded when the employee is required to produce a urine sample while being monitored by a same-sex employer representative (the "direct observation method").

In *Lunsford v. Sterilite of Ohio*¹, the employer's substance abuse policy informed employees that, as a condition of employment, they could be subject to drug testing (i) as a result of an investigation of a workplace accident or incident; (ii) based on reasonable suspicion an employee was impaired by drugs or alcohol; or (iii) as part of random, periodic testing. The policy further provided that urinalysis would be used to test for illegal use of drugs or prescription medication, and notified employees that failure to produce a valid urine sample within two and a half hours is considered a refusal to take the test, subjecting the employee to termination, but the policy was silent on how the sample would be collected.

In the fall of 2016, four Sterilite employees were referred for drug testing. The lab administering the drug test, U.S. Healthworks (also a defendant in the case) provided a consent form to the employees when they reported to the testing site. This form authorized testing to determine the presence or level of drugs. The employees were notified that the direct observation method would be used when they reported to the restroom designated for collection. Two employees were able to produce a valid urine sample, while the other two – one of whom had been selected for testing due to reasonable suspicion – allegedly made good-faith efforts but were unable to do so within the stated timeframe. The company terminated the two employees unable to produce a sample.

All four employees sued, arguing that Ohio law recognizes an individual's right to privacy and to freedom from unreasonable invasion of privacy, and that the intrusion of the direct observation method outweighed the employer's interests in drug testing.

The Ohio Supreme Court disagreed, holding that “[w]hen an at-will employee consents, without objection, to the collection of the employee’s urine sample under the direct observation method, the at-will employee has no cause of action for common-law invasion of privacy”. The court reasoned that the employees consented to drug testing when they signed U.S. Healthworks’ consent forms, and they had a second opportunity to consent or refuse when they were informed by the same-sex monitor that the test would be conducted using the direct observation method. The court opined that Ohio recognizes the intentional tort of invasion of privacy, which includes “intrusion upon seclusion”, but went on to say that this tort is not absolute and, generally, consent will bar recovery for an invasion-of-privacy claim.

Of note, the plaintiffs did not object to the employer’s right to drug test its employees – they only objected to the manner in which it was administered.

The dissenting opinion stated that the at-will doctrine has no application to the employees’ invasion of privacy claims, but that if applied, the employees could not be terminated for failing to submit to the test because the court has held that invasion of privacy is against public policy and that terminating a worker for this reason would be contrary to public policy.

While this decision strengthens an employer’s ability to effectively maintain a drug-free and safe workplace, employers who intend to use the direct observation method may wish to update their substance abuse policies to notify employees of when they may use this method.

A motion for reconsideration is currently pending at the Supreme Court.

[1] No. 2020-Ohio-4193 (August 26, 2020).

Authors



Marie-Joëlle C. Khouzam

*Partner & Employment Practice Group
Chair*

Columbus
614.227.2311
jkhouzam@bricker.com

Copyright © 2023 Bricker & Eckler LLP. All rights reserved.