EMPLOYMENT LAW—EMPLOYMENT-AT-WILL—AN EMPLOYER MAY RANDOMLY DRUG TEST AN AT-WILL EMPLOYEE IN A SAFETY-SENSITIVE POSITION WITHOUT VIOLATING PUBLIC POLICY WHICH PROTECTS THE EMPLOYEE'S PRIVACY INTEREST—*Hennessey v. Coastal Eagle Point Oil Company*, 129 N.J. 81, 609 A.2d 11 (1992).

In the past thirty years many states have adopted the tort of wrongful discharge[1] to soften the often harsh realities of the employment-at-will doctrine.[2] The common law employment-at-will

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[1] The tort of wrongful discharge is defined as: "An at-will employee's cause of action against his former employer, alleging that his discharge was in violation of state or federal anti-discrimination statutes[,] . . . public policy[,] an implied employment contract[,] or an implied covenant of good faith and fair dealing . . . ." BLACK'S LAW DICTIONARY 1612-13 (6th ed. 1991).

[2] Some of the principle cases establishing the tort of wrongful discharge in eight of the more industrialized states are identified as follows:

California: Gantt v. Sentry Ins., 824 P.2d 680, 692 (Cal. 1992) (allowing a discharged employee to bring action for wrongful discharge when claim was based on furthering societal goals of eradicating sexual harassment); Tameny v. Atlantic Richfield Co., 610 P.2d. 1330, 1335, 1336-37 (Cal. 1980) (recognizing the tort of wrongful discharge when discharge, resulting from an employee's refusal to commit a criminal act, violated public policy embodied in state statutes); Semore v. Pool, 266 Cal. Rptr. 280, 286 (Cal. Ct. App. 1990) (holding discharge for refusal to submit urine for a random drug test violated public policy as found in the California Constitution's protection of personal privacy); Petermann v. International Brotherhood of Teamsters, 344 P.2d 25, 27, 28 (Cal. Ct. App. 1959) (holding that an employer may not discharge an employee for refusing to commit perjury to protect the employer).

Connecticut: Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 386, 389 (Conn. 1980) (holding that an action for wrongful discharge in retaliation for ensuring that an employer's products complied with licensing and labeling regulations could be brought as a violation of public policy); Battista v. United Illuminating Co., 523 A.2d 1356, 1362-63 (Conn. App. Ct. 1987), *certif. denied* 525 A.2d 1352 (Conn. 1987) (holding an employee must show more than incidental impact on public policy to establish wrongful discharge).

Illinois: Palmateer v. International Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981) (recognizing the tort of wrongful discharge for employer violations of public policy that included reporting employer violations of the Illinois criminal code); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978) (recognizing the tort of wrongful discharge where employee is fired in retaliation for filing a workmen's compensation claim).

Massachusetts: DeRose v. Putnam Management Co., Inc., 496 N.E.2d 428, 431 (Mass. 1986) (recognizing that an employee testifying against an employer in a criminal trial constituted a public policy exception to the at-will employment contract).

Michigan: Suchodolski v. Michigan Consol. Gas Co., 316 N.W.2d 710, 712 (Mich. 1982) (affirming that a cause of action for retaliatory discharge did not exist for termination of an employee who chooses to disobey employer directive that violates the ethical beliefs of a private association); Prysak v. R.L. Polk Co., 483 N.W.2d 629, 631, 634 (Mich. Ct. App. 1992) (concluding that discharge of an employee who threatened to protest against a customer of his employer was not a violation of public policy encouraging free speech).

New York: Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919, 920, 922, 923 (N.Y.

doctrine allowed either the employee or the employer to terminate the employment relationship at any time for any cause or no cause.[3] The purpose of the employment-at-will doctrine was to protect both the interest of the employee to move freely and to find satisfactory employment and the interest of the employer to manage his enterprise without outside interference.[4] The origins of the

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1987) (affirming common-law doctrine that an implied term of good faith incorporated into an employee relations manual applies only to an employment-at-will contract when the legislature enacts such protections); Pulsafeeder, Inc. v. Greene, 587 N.Y.S.2d 59, 60 (N.Y. App. Div.), *aff'd*, 587 N.Y.S.2d 245 (N.Y. App. Div. 1992) (refusing the tort of wrongful discharge for an employee-at-will).

Pennsylvania: Reese v. Tom Hesser Chevrolet-BMW, 604 A.2d 1072, 1074 (Pa. Super. Ct. 1992) (determining that an employee's wrongful discharge action based on that employee's refusal to restitute an employer's business losses did not violate "a clearly defined mandate of public policy" as articulated by statutes).

Texas: McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1989) (holding that discharge of an employee to avoid contributing to employee's pension plan was a violation of public policy); Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (recognizing a claim of wrongful discharge in retaliation for employee's refusal to commit an illegal act). *But cf.*, Hancock v. Express One Int'l, Inc., 800 S.W.2d 634, 635, 636 (Tex. Ct. App. 1990) (holding that discharge in retaliation for employee's refusal to violate federal statute that imposed only civil penalties did not violate public policy).

[3] Payne v. Western & Atlantic R. R. Co., 81 Tenn. 507, 517 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134, 137 (1915). *See also* Edward M. Chen et al., *Common Law Privacy: A Limit On An Employer's Power to Test For Drugs*, 12 GEO. MASON U. L. REV. 651, 651 (1990) (asserting that both traditional and modern employers have monitored an employee's cleanliness, attendance at church and types of cars driven to insure their employees would remain moral and fit for employment). Drug testing employees, some commentators argue, is nothing more than a modern form of "chemical surveillance," similar to the "paternalistic inspections" surveilling a worker's personal habits. *Id.* at 652.

[4] Lawrence E. Blades, *Employment At Will vs. Industrial Freedom: On Limiting The Abusive Exercise Of Employer Power*, 67 COLUM. L. REV. 1404, 1419 (1967). Professor Blades compared the power of large corporations over its employees to the government's power over its citizens. *Id.* at 1404. Professor Blades stressed that because technological advances made an employee's skills less marketable and only suitable for his particular employer or the relatively small group of employers in that field, employees were becoming immobilized in their particular field. *Id.* at 1405. The result of this unequal employment relationship, the professor posited, gave the employer power to control the employee in areas outside legitimate employer concern. *Id.* at 1406. Professor Blades opined that the employment-at-will doctrine was created in an era that defined the master/servant relationship as one in which the servant was subject to the will of the master and unable to have a will of his own. *Id.* at 1416. Justification for the doctrine, Professor Blades suggested was to give the employer economic freedom to manage the enterprise in accordance with the employer's goals. *Id.* Professor Blades recognized, however, that finding a boundary between the areas of legitimate employer control and activities that bore no relationship to the employer's business purposes was difficult. *Id.* at 1407. The professor concluded that the employment-at-will doctrine did not provide a remedy for such employer abuses. *Id.* at 1410. Recognizing that the courts would not expand the application of constitutional restrictions to include private employers, Professor Blades called on legislatures

employment-at-will doctrine stemmed from late nineteenth century American jurisprudence that emphasized freedom of contract and *laissez-faire* economics.[5]

To forge a compromise between the competing and, at times, inapposite interests of the employer and employee, the courts and some legislatures have created a public policy exception to the em-

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to modify the employment-at-will doctrine by enacting statutes that granted an employee broad protection against employer abuses. *Id.* at 1432, 1435. In doing so, Professor Blades speculated that the courts would be free to fashion a remedy for individual incidents of employer abuses. *Id.* at 1432-33.

One author has proposed that legislation be enacted that recognizes: 1) the employer's interest in managing the business free of second-guessing by courts; 2) the inability of employees to change jobs because of specialized employment skills and/or a benefit system based on seniority; and, 3) the public interest in encouraging employees to report employer wrongdoing. Claudia E. Decker, Comment, *The At-Will Doctrine: A Proposal To Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667, 684-85, 687-88 (1984). *See also* David P. Weiss, Note, *Public Policy Limitations To The Employment At-Will Doctrine Since* Geary v. United States Steel Corporation, 44 U. PITT. L. REV. 1115 (1983) (criticizing the Pennsylvania Legislature's attempt under the Unjust Dismissal Act "to protect employees from unjust dismissals and articulate[ ] remedies in the event of an unjust discharge"). Specifically, Weiss chastised the Unjust Dismissal Act's requirement that employers show "just cause" for discharging employees despite the employer's bad motive. *Id.* at 1140. The "just cause" standard, Weiss contended, gave the employer a loophole to enforcement because a just cause showing of a legitimate business purpose for the discharge would exempt the employer from liability. *Id.* at 1140-41. Conversely, under a "good faith" standard, the student author concluded, the employer would have to rebut the employees claim of bad motive, giving an employee greater protection. *Id.* at 1141.

[5] *See generally* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR (University of North Carolina Press 1991) (tracing the history of the status of an employee from that of the indentured servant to an individual with the freedom to barter his services for a wage). *See also* Marsha Weisburst, Note, *Guidelines For A Public Policy Exception To The Employment At Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617, 618 (1981) (arguing that the policy consideration of employment-at-will rule has uncertain origins). Weisburst noted that while American courts were developing the employment-at-will doctrine, the English courts imposed a term of one year on an employment contract for an unspecified term. *Id.* at 617. The rationales of the employment-at-will doctrine cited most frequently by scholars were the late nineteenth century notions of freedom of contract, *laissez faire* economics and class struggles between business owners and managers. *Id.* at 618-19. Another reason for the development of the doctrine, Weisburst recognized, may have been the contract theory of mutuality of obligation. *Id.* at 619. Because an employee was not required to work for the employer for any stated length of time, the courts, under mutuality of obligation, granted the employer the same privilege of terminating the employment contract at will. *Id.* at 619.

See also Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933-34 (1983) (citing Coppage v. Kansas, 236 U.S. 1, 13-14 (1915); Adair v. United States, 208 U.S. 161, 172-75 (1908)) (noting that the employer's right to terminate an employee-at-will was elevated to a constitutional right by the Supreme Court during the *Lochner* era).

ployment-at-will doctrine.[6] This exception protects the employee from discharge for failure to comply with an employer directive that violates public policy.[7] Originally, the public policy exception applied only to employer actions that affected the interests of society at large as defined under statutes, administrative decisions, some codes of professional ethics and the common law.[8]

Recent judicial decisions and statutory enactments, however, have recognized an employee's right to privacy as a more personal source to the public policy exception, particularly in the context of random drug testing by employers.[9] The introduction of privacy

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6 Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 69, 72, 417 A.2d 505, 510, 512 (1980); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1331 (1980).

7 *Pierce*, 84 N.J. at 72, 417 A.2d at 512. Additionally, New Jersey and a number of other states have enacted "Whistle Blower" statutes that prohibit an employer from discharging an employee for reporting illegal employer activities to the authorities. *See infra* note 77 (citing the Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-1 *et seq.* (West Supp. 1982), which prohibits an employer from taking retaliatory action against an employee who discloses an employer's illegal activities to a supervisor or public body).

8 *Pierce*, 84 N.J. at 72, 417 A.2d at 512.

9 *See, e.g.*, Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 99, 609 A.2d 11, 19 (1992) (holding that the public policy exception to the employment-at-will doctrine included protection of a privacy interest that prevented a private employer from randomly drug testing employees in non-safety sensitive positions); Semore v. Pool, 266 Cal.Rptr. 280, 285 (Cal. Ct. App. 1990) (same); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1130 (Alaska 1989) (same).

Recently, Connecticut, Florida, and Iowa have enacted legislation that regulates private employer drug testing. CONN. GEN. STAT. ANN. §§ 31-51t to -51bb (West Supp. 1992); FLA. STAT. ANN. § 440.102 (West 1992); IOWA CODE ANN. § 730.5 (West Supp. 1992). Generally, Florida's and Iowa's statutes follow the Connecticut statute, which provides in relevant part:

> § 31-51u. Drug testing: Requirements
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> (a) No employer may determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive urinalysis drug test result unless (1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result and (2) such positive test result was confirmed by a second 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 by the commissioner of health services to be as reliable or more reliable than the gas chromatography and mass spectrometry methodology.
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> (b) No person performing a urinalysis drug test pursuant to subsection (a) of this section shall report, transmit or disclose any positive test result of any test performed in accordance with subdivision (1) of subsection (a) of this section unless such test result has been confirmed in accordance with subdivision (2) of said subsection (a).
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> § 31-51x. Drug testing: Reasonable suspicion required. Random tests.
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> (a) No employer may require an employee to submit to a urinalysis drug test unless the employer has reasonable suspicion that the em-

into the public policy exception through employee drug testing is problematic because the private activity of the employee may conflict with the interests of society as a whole.[10] While drug and alcohol abuse is considered one of the more dangerous problems society faces,[11] the methods used to detect and presumptively deter this behavior engender grave privacy issues.[12] Unregulated drug testing in the private sector can lead to unwarranted intrusions

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ployee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance. . . .

(b) Notwithstanding the provisions of subsection (a) of this section, an employer may require an employee to submit to a urinalysis drug test on a random basis if (1) such test is authorized under federal law, (2) the employee serves in an occupation which has been designated as a high-risk or safety sensitive occupation pursuant to regulations adopted by the commissioner of labor pursuant to chapter 54, or (3) the urinalysis is conducted as part of an employee assistance program sponsored or authorized by the employer in which the employee voluntarily participates.

CONN. GEN. STAT. ANN §§ 31-51u, 31-51x (West Supp. 1992) (footnote omitted). Recently, the federal government enacted legislation that required operators of mass transportation equipment, drivers of commercial motor vehicles, and railroad operators to submit to "preemployment, reasonable suspicion, random, and post accident testing." *See* 49 U.S.C.A. § 1618a(b)(1) (West Supp. 1992) (mass transportation equipment operators); 49 U.S.C.A. § 2717(a) (West Supp. 1992) (commercial motor vehicle drivers); 45 U.S.C.A. § 431(r)(1)(A) (West Supp. 1992) (railroad operators). These statutes employ similar testing methods to Connecticut's statute. *See* 49 U.S.C.A. §§ 1618a(d)(1)-(8), 2717(d)(1)-(8) (West Supp. 1992) (outlining the procedures for drug testing); 45 U.S.C.A. § 431(r)(2)(A)-(H) (West Supp. 1992) (same).

10 *Hennessey*, 129 N.J. at 116, 609 A.2d at 28 (Pollock, J., concurring).

11 *See* Ronald Sullivan, *Motorman Gets 5 to 15 Years in Crash*, N.Y. TIMES, Nov. 7, 1992, at 25 (reporting on a serious New York City subway crash caused by an intoxicated motorman in which five passengers died). On August 28, 1991, Robert Ray, a motorman for the New York City subway system, lost control of his train carrying over 200 passengers and caused an accident killing five people and injuring 26. *Id.* On October 15, 1992, Ray was convicted of all five counts of manslaughter and 26 counts of assault. *Id.* The prosecution argued successfully that Ray's alcohol intoxication while operating the train showed reckless indifference to human life. *Id.* Rejecting Ray's request for leniency, Judge Daniel P. Fitzgerald responded, "Your actions were unconscionable. Lives were lost, ruined and shattered." *Id.* Judge Fitzgerald then sentenced Ray to the maximum of five to fifteen years for the manslaughter convictions, and one to seven years for each assault conviction involving the 26 injured passengers. *Id.* All sentences, the judge ordered, would run concurrently as required by law. *Id.*

Additionally, the Federal Register Administration surveyed train accidents occurring in the United States during the period between 1975 through 1984. Control of Alcohol and Drug Use in Railroad Operations, 50 Fed. Reg. 31,517 (1985) (codified at 49 C.F.R. §§ 212, 217-19, 225). This study revealed that 48 accidents were attributable to alcohol or drug use. *Id.* These accidents resulted in 37 fatalities, 80 injuries, and $34.2 million in direct damages to railroad property and environmental cleanup. *Id.*

12 National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1988) (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-18 (1989)) (requir-

into the private lives of employees.[13] Moreover, unreliable and inaccurate results often wrongly implicate employees of drug use or fail to identify individuals who may be a danger to society because of a substance-abuse problem.[14] As a result, many employers are

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ing employees to produce urine for chemical testing invaded a reasonable expectation of privacy protected by the Fourth Amendment).

[13] *Hennessey*, 129 N.J. at 99, 609 A.2d at 19 (arguing that giving a urine sample as part of a random drug test may result in revealing confidential, irrelevant information to an employer and an intrusion of privacy if the test is performed in the presence of an observer).

[14] *See generally* Kurt M. Dubowski, Ph.D., *Drug-Use Testing: Scientific Perspectives*, 11 NOVA L. REV. 415 (1987) (explaining the modern types of available drug screening devices and their problems). Dr. Dubowski noted that use of urine as a specimen in drug testing is rooted in three practical considerations: emphasis on non-invasive collection methods, suitability in testing large numbers of people and ability to perform a number of tests from one sample. *Id.* at 433. Despite these advantages, Dr. Dubowski criticized the use of urine as a reliable test to determine present drug impairment of the individual. *Id.* Because urine is the end product of the human body's metabolism, Dr. Dubowski determined only past impairment will be identified. *Id.* at 528. Moreover, because of the ability of the testee to dilute urine with water or other substances and thus reduce potential drug concentrations, Dr. Dubowski contended that urine testing presented many accuracy problems. *Id.* at 433. Additionally, the doctor pointed out that urine testing was only useful for identifying the presence of a given drug in the body; it did not provide, by itself, any conclusions as to the degree of impairment. *Id.* at 435. The author also warned that urine is susceptible to tampering if the chain of custody is not well documented and secure. *Id.* at 418. For this reason, Dr. Dubowski recommended that strict chain of custody rules, similar to those for other forensic evidence, should be enacted to protect the accuracy of the results. *Id.* at 417-18.

Furthermore, Dr. Dubowski cautioned that serious qualitative problems such as the number of false positives and/or false negatives have called into question the accuracy of these tests. *Id.* at 494-95. Dr. Dubowski advised that the state or federal government perform on-site inspection of these laboratories for regulation and accreditation purposes. *Id.* at 496.

An added criticism of drug testing concerns the excessive costs of properly testing urine for drugs that most employers are incapable of paying. Arthur J. McBay, Ph.D., *Efficient Drug Testing: Addressing the Basic Issues*, 11 NOVA L. REV. 647, 648 (1987). Dr. McBay emphasized that less expensive methods of testing were not adequate due to the possibility of false negatives and false positives. *Id.* The author continued that to ensure accuracy any inexpensive initial drug screening method would require a more expensive confirmatory test. *Id.* Dr. McBay explained that the initial test and appropriate follow-up procedures had the potential of costing $1,000 per individual. *Id.* Moreover, Dr. McBay concluded that a primary purpose of the test was defeated because a positive test did not show the present level of impairment. *Id.* at 649.

Most importantly, Dr. McBay questioned the large amount of resources being channelled to detect illegal drug-use when alcohol use was by far the most prevalent cause of death and injury associated with the workplace. *Id.* at 650-51. Additionally, Dr. McBay emphasized that alcohol testing was less expensive, more accurate and less invasive than any of the currently used drug tests. *Id.* at 651.

For a more detailed discussion on the accuracy of the drug tests commercially available, see George D. Lundberg, M.D., *Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism*, 256 JAMA 3003, 3004, 3005 (1986) (arguing that statistical

inhibited from implementing drug tests designed to protect society from drug and alcohol abuse in the workplace because of the threat of a wrongful discharge suit.[15] In a recent case, *Hennessey v. Coastal Eagle Point Oil Co.*,[16] the New Jersey Supreme Court addressed an employee's right to privacy in the employment-at-will context and held that an employer can discharge an employee engaged in a safety-sensitive job for failing a random drug test.[17] The *Hennessey* court concluded, however, that absent an overriding public interest in safety, an employer's discharge of an employee who refused to submit to a random drug test violated public policy that protects against the invasion of an employee's privacy.[18]

Shortly after Coastal Eagle acquired its refinery in Burlington County, New Jersey, the company conducted a pre-employment physical that included a drug test.[19] The test indicated that 19% of

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data indicates that drug-use among the general population is low and that wide spread drug testing would result in a high false-positive indication of drug use, thus transforming our system of justice from one based on a presumption of innocence to one based on a presumption of guilt); Richard H. Schwartz, M.D., & Richard L. Hawks, Ph.D., *Laboratory Detection of Marijuana Use*, 254 JAMA 788, 790 (1985) (describing the accuracy of various drug tests ranging from the enzyme immunoassay technique, a less accurate but more commonly used front line test, to gas chromatography/mass spectrometry, the most accurate and expensive); Richard H. Schwartz, M.D., et al., *Urinary Cannabinoids in Monitoring Abstinence in a Drug Abuse Treatment Program*, 111 ARCH PATHOL LAB MED 708, 710-11 (1987) (discussing the problem of false-negative results caused by the detection of chemically similar but legal substances, and the increasing knowledge among potential testees for marijuana that other legal substances "sanitize" the urine); *Scientific Issues in Drug Testing*, 257 JAMA 3110, 3113 (1987) [hereinafter *Scientific Issues*] (recommending confirmatory tests to verify front line drug test results and prevent tampering).

15 Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 116, 609 A.2d 11, 28 (1992) (Pollock, J. concurring) (quotation omitted); Fredric M. Knapp & Laura L. McLester, *The Dwindling Employment-at-Will Doctrine: Random Drug Testing in Private Employment Since* Hennessey v. Coastal Eagle Oil Company, N.J. LAYWER, Feb./Mar. 1993, at 11-12 (predicting private employers will not implement drug testing programs for fear of litigation by a discharged employee).

16 129 N.J. 81, 609 A.2d 11 (1992).

17 *Id.* at 88, 107, 609 A.2d at 14, 23.

18 *Id.* at 99, 100, 609 A.2d at 19, 20. The court relied partially on the New Jersey Constitution, Article I, Paragraph 1 for this proposition. *Id.* at 95, 99, 609 A.2d at 18, 19. This paragraph of the New Jersey Constitution states in relevant part: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1.

The United States Constitution has no express language that protects privacy. Griswold v. Connecticut, 381 U.S. 479, 482 (1965). In *Griswold*, however, the United States Supreme Court found a penumbra of privacy emanating from the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. *Id.* at 482-85.

19 *Hennessey*, 129 N.J. at 85, 609 A.2d. at 13. In 1985, Coastal Eagle purchased the

Coastal Eagle's employees tested positive for some form of drug use.[20] Coastal Eagle then issued a company directive that prohibited on-the-job drug use, required notification to management if an employee was taking prescription drugs that could impair performance and offered rehabilitation assistance to employees who voluntarily disclosed their drug use.[21] Additionally, drug-testing could be conducted at any time to insure compliance with the directive, and noncompliance would result in an employee's dismissal.[22]

After obtaining evidence that employees were using marijuana while on the job, Coastal Eagle conducted a random urine analysis drug testing program.[23] James Hennessey tested positive for marijuana and diazepam[24] and was fired immediately.[25] Hennessey then filed a wrongful discharge suit,[26] alleging *inter alia* that random employee drug testing was an unconstitutional search and seizure[27] and an invasion of privacy under both the common law

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refinery from Texaco Oil. *Id.* Texaco had no formal drug testing policy. *Id.* Coastal Eagle argued that the acquisition of the Texaco refinery established a new employment relationship with the refinery employees and therefore justified the pre-employment physicals and drug test. *Id.* at 85-86, 609 A.2d at 13.

20 *Id.* at 86, 609 A.2d at 13. James Hennessey, the plaintiff, tested negative for drugs in this first examination of Coastal Eagle employees. *Id.*

21 *Id.*

22 *Id.*

23 *Id.* Coastal Eagle found urine analysis to be the least intrusive of the drug screening methods. *Id.* The samples were collected while an observer watched the employee to protect the validity of the test. *Id.* Coastal Eagle tested only for drugs and positive results were confirmed by a different test. *Id.* Additionally, Coastal Eagle repealed the rehabilitation assistance program. *Id.*

24 *Id.* at 87, 609 A.2d at 13. Diazepam is the chemical ingredient of the schedule II narcotic commonly known by its brand name Valium. J.B. LIPPINCOTT CO., FACTS AND COMPARISONS LOOSE-LEAF DRUG INFORMATION SERVICE 288e (1988). Valium is a prescription tranquilizer commonly used to alleviate stress but is also prescribed for relieving muscle spasms. *Id.* Hennessey did not dispute the accuracy of the test nor the fact that diazepam was taken without a prescription. *Hennessey*, 129 N.J. at 87, 609 A.2d at 13.

25 *Hennessey*, 129 N.J. at 87, 609 A.2d at 13.

26 Specifically, Hennessey filed a six count complaint against Coastal Eagle. *Id.* at 87, 609 A.2d at 13. The six counts plead by Hennessey were: wrongful discharge; invasion of privacy; violations of New Jersey Constitution Article I, Paragraph 1 (generally protecting privacy) and Article I, Paragraph 7 (prohibiting unreasonable searches and seizures); violation of New Jersey's Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -42; breach of contract; and negligent or intentional infliction of emotional distress. *Id.* at 87, 609 A.2d at 13-14.

27 Hennessey claimed the request for him to submit to a drug test violated the New Jersey Constitution's protection against unreasonable searches and seizures because it was not founded on any reasonable suspicion of drug use. *Id.*, 609 A.2d at 14. The New Jersey Constitution Article I, Paragraph 7 states: "The right of the people to be

and the New Jersey Constitution.[28] Granting Hennessey's motion for summary judgment, the trial court concluded that Coastal Eagle violated public policy by requesting a drug test in the absence of any reasonable suspicion of employee drug use.[29] The New Jersey Superior Court, Appellate Division, reversed, concluding that private employers, unlike public employers, were not constrained to constitutional prohibitions against unreasonable searches and seizures.[30] Moreover, the appellate court reasoned that the other sources of privacy cited by Hennessey were too amorphous to support a wrongful discharge claim against a private employer.[31]

The New Jersey Supreme Court granted certification.[32] First, the court affirmed that private employers were not bound to the same constitutional constraints concerning searches and seizures as public employers.[33] The *Hennessey* Court then held that an at-will employee who occupied a safety-sensitive position and failed a random drug test had no cause of action for the tort of wrongful discharge.[34] Criticizing the appellate division, however, the court recognized that the public policy exception to the employment-at-will doctrine still protected an employee's privacy interests but only when that interest outweighed the public's interest in safety.[35]

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secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; . . ." N.J. CONST. art. I, para. 7 (1947).

[28] *Hennessey*, 129 N.J. at 87, 609 A.2d at 13. The New Jersey Constitution article I, paragraph 1 reads in pertinent part: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1 (1947). The parties stipulated to a dismissal of Hennessey's claim that Coastal Eagle violated New Jersey's Law Against Discrimination. *Hennessey*, 129 N.J. at 87, 609 A.2d at 14.

[29] *Hennessey*, 129 N.J. at 87, 609 A.2d at 14. Relying on *Fraternal Order of Police v. City of Newark*, 216 N.J. Super. 461, 524 A.2d 430 (App. Div. 1987), which held that public policy included the constitutional prohibition against unreasonable searches and seizures, the trial court concluded that policy applied to private employers such as Coastal Eagle. *Id.* For a discussion of *Fraternal Order of Police v. City of Newark*, see *infra* notes 87-96 and accompanying text. Accordingly, the trial court dismissed the remainder of the counts. *Hennessey*, 129 N.J. at 87, 609 A.2d at 14.

[30] *Id.* at 88, 609 A.2d at 14 (quoting Hennessey v. Coastal Eagle Point Oil Co., 247 N.J. Super. 297, 305, 589 A.2d 170, 175 (App. Div. 1991)).

[31] *Id.* (citing *Hennessey*, 247 N.J. Super. at 308, 589 A.2d 170).

[32] 126 N.J. 340, 598 A.2d 897 (1991).

[33] *Hennessey*, 129 N.J. at 95, 609 A.2d at 17-18.

[34] *Id.* at 88, 609 A.2d at 14.

[35] *Id.* at 99, 100, 609 A.2d at 19, 20. Specifically, the supreme court criticized the appellate court for giving "short shrift" to the protection of an employee's privacy interest under the public policy exception to the employment-at-will doctrine. *Id.* at 95, 609 A.2d at 17-18. For a full discussion of the balancing test used by the New Jersey Supreme Court, see *infra* notes 136-149 and accompanying text.

Although traditionally an employer could discharge an at-will employee with or without cause,[36] the New Jersey Supreme Court first recognized a limitation on that right in *Pierce v. Ortho Pharmaceutical Corp.*[37] In *Pierce*, Dr. Grace Pierce refused to continue research and development of the drug loperamide[38] because doing so violated her interpretation of the Hippocratic Oath.[39] After a number of discussions with Ortho Pharmaceutical about changing projects, Dr. Pierce resigned from the company.[40] The doctor then filed a wrongful discharge suit, claiming that her resignation was the result of Ortho Pharmaceutical's pressure to violate her ethical beliefs.[41]

Addressing Dr. Pierce's contentions, the supreme court recognized that employers sometimes use the at-will employment status to force employees to violate the law or face discharge.[42] To correct this situation, the majority followed the growing trend in the law that recognized a public policy exception to the employment-at-will doctrine.[43] Justice Pollock posited that an employee would have an action for wrongful discharge if terminated for disregarding an employer's direction to violate "a clear mandate of public policy."[44] For sources of public policy, the majority looked to legislation, ju-

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36 Payne v. The Western & Atlantic R.R. Co., 81 Tenn. 507, 517 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

37 84 N.J. 58, 71-72, 417 A.2d 505, 511-12 (1980).

38 Loperamide was developed as a potential treatment for diarrhea in infants, children and the elderly. *Id.* at 62, 417 A.2d at 506-07.

39 *Id.* at 63, 417 A.2d at 507. Dr. Pierce objected to the use of saccharin in the formula of loperamide because of medical controversy surrounding the safety of saccharin. *Id.* at 62-63, 417 A.2d at 507. Because of these risks, Dr. Pierce believed Ortho's decision to seek approval from the Food and Drug Administration to begin clinical studies on and formulation of a new drug would result in her violating the Hippocratic Oath. *Id.* at 63, 417 A.2d at 507. Dr Pierce acknowledged, however, that her medical conclusion concerning the use of saccharin was a matter of opinion and not a medical certainty. *Id.*

40 *Id.* at 63-64, 417 A.2d at 507-08. The New Jersey Supreme Court did not address Ortho Pharmaceutical's assertion that a claim of wrongful discharge cannot be brought when an employee resigns. *Id.* at 65, 417 A.2d at 508 (citation omitted). The supreme court upheld the trial court's decision that a fact question existed as to whether Ortho had induced Dr. Pierce to resign by forcing her to choose between continued employment or violating the Hippocratic Oath. *Id.* at 64-65, 417 A.2d at 507-08.

41 *Id.* at 64, 417 A.2d at 508.

42 *Id.* at 67, 417 A.2d at 509.

43 *Id.* at 67-70, 72, 417 A.2d at 509-11, 512.

44 *Id.* at 72, 417 A.2d at 512. The majority continued that a cause of action could lie in both contract and tort. *Id.* The contract claim would be based on breach of an implied term not to fire an employee who refused to perform an act violating public policy. *Id.* The tort action would lie in a breach of the employer's duty not to violate public policy. *Id.* Additionally, the *Pierce* court postulated that in a tort action, puni-

dicial decisions, administrative rules and regulations.[45] The supreme court determined, however, that the Hippocratic Oath was not a source of public policy.[46] Accordingly, Justice Pollock concluded that Dr. Pierce did not have a cause of action against Ortho Pharmaceutical because her refusal to work was not based on public policy but rather on her own ethical beliefs.[47]

Shortly after its landmark decision in *Pierce*, the New Jersey Supreme Court in *Lally v. Copygraphics*[48] addressed a claim of wrongful discharge based on an employer's retaliation against an employee who filed a claim under the Workmen's Compensation statute.[49] The supreme court found that the statute, which prohibited an employer from discharging an employee for filing a worker's compensation claim, was a source of public policy.[50] The majority held that such retaliatory discharges established a cause of action for wrongful discharge independent of other statutory remedies.[51] Moreover, the legislative intent of the Workmen's Compensation Act was to provide additional relief for the employee under the Act's own enumerated remedies of restoration of employment and compensation of lost wages.[52] The majority posited that society rendered this type of employer behavior abusive to the employee, thus making such conduct violative of a clear mandate of public policy set forth in *Pierce*.[53] Accordingly, the pursuit of a civil remedy, the *Lally* court concluded, would aid in enforcing employer compliance with this statute.[54]

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tive damages could be awarded as a deterrent to future employer misconduct. *Id.* (citations omitted).

45 *Id.*

46 *Id.* at 76, 417 A.2d at 514.

47 *Id.* at 75, 417 A.2d at 513-14.

48 85 N.J. 668, 428 A.2d 1317 (1981).

49 *Id.* at 670, 428 A.2d at 1318. The Workmen's Compensation Statute reads in pertinent part: "It shall be unlawful for any employer or his duly authorized agent to discharge . . . an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer, ..." N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1992).

50 *Lally*, 85 N.J. at 670, 428 A.2d at 1318.

51 *Id.* The majority noted an employee who was discharged in retaliation for filing a claim could also seek penal sanctions in municipal court in a disorderly persons action or administrative relief with the Commissioner of Labor and Industry. *Id.*

52 *Id.* at 671-72, 428 A.2d at 1319. The Workmen's Compensation Act provides in relevant part: "Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination; . . . ." N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1992).

53 *Lally*, 85 N.J. at 670, 428 A.2d at 1318.

54 *Id.* at 670-71, 417 A.2d at 1318.

In a factually similar case to *Pierce*,[55] *Kalman v. Grand Union Co.*[56] presented the issue of whether a licensed pharmacist's adherence to both legislation and professional ethics was a clear mandate of public policy that protected the pharmacist from a wrongful discharge.[57] In *Kalman*, a licensed pharmacist staffed a supermarket pharmacy counter in compliance with the Code of Professional Conduct of the American Pharmaceutical Association (Professional Code)[58] and a statute that required the presence of a pharmacist during store hours.[59] The pharmacist's action contradicted his supervisor's instructions and resulted in his immediate dismissal.[60] In a wrongful discharge suit, the pharmacist relied on both the statute and the Professional Code as sources of public policy.[61]

Reversing the trial court,[62] the *Kalman* court held that the sources of public policy proffered by the plaintiff permitted an em-

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55 *See supra* notes 36-47 and accompanying text (discussing *Pierce v. Ortho Pharmaceutical Co.*).

56 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982).

57 *Id.* at 157-58, 443 A.2d at 729-30.

58 The pharmacist relied on the following paragraph from the Code of Ethics of the American Pharmaceutical Association:

> A PHARMACIST has the duty to observe the law, to uphold the dignity and honor of the profession, and to accept its ethical principles. He should not engage in any activity that will bring discredit to the profession and should expose, *without fear or favor, illegal or unethical conduct in the profession.*

Id. at 158, 443 A.2d at 730 (citing Code of Ethics of the American Pharmaceutical Association) (emphasis in original).

59 *Id.* at 155-56, 157, 443 A.2d at 728-29, 730 (citing N.J. STAT. ANN. § 45:14-30). Sidney Kalman was the "pharmacist-in-charge" at the pharmacy located in the Grand Union supermarket. *Id.* at 155, 443 A.2d at 728. Because the pharmacy was not partitioned from the remainder of the store, the entire store was licensed as a pharmacy. *Id.*, 443 A.2d at 728-29. The pharmacist, therefore, was required by N.J. STAT. ANN. § 45:14-1 *et seq.* to be on-duty while the store was open. *Id.* at 157-58, 443 A.2d at 730. The Board of Pharmacy verified Kalman's belief that the store needed to staff the counter with a pharmacist while open to the public. *Id.* at 155-56, 443 A.2d at 729. The Board of Pharmacy's advice, however, directly contradicted the advice given to Kalman by his supervisor, who claimed the Board had given Kalman permission to close the pharmacy. *Id.* at 155, 443 A.2d at 729.

60 *Id.* at 156, 443 A.2d at 729.

61 *Id.* at 157-58, 443 A.2d at 729-30.

62 The trial court granted Grand Union's motion for summary judgment and held that the authorities cited by Kalman as sources of public policy were too personal and therefore did not constitute a clear mandate of public policy as required under *Pierce*. *Id.* at 156, 157, 443 A.2d at 729-30. The trial court reasoned that the administrative regulation and code governing the practice of pharmacy cited by Kalman were analogous to the Hippocratic Oath cited by the plaintiff in *Pierce v. Ortho Pharmaceutical*, 84 N.J. 58, 417 A.2d 505 (1980). *Id.*, at 156, 443 A.2d at 729. The trial court concluded Kalman's case was based on personal conviction not supported by a clear mandate of public policy and therefore had to be dismissed. *Id.*

ployee to state a cause of action for wrongful discharge.[63] Distinguishing *Pierce*, the appellate court asserted that the pharmacist was complying with his legal obligations rather than his conscience.[64] In doing so, the *Kalman* court concluded that a clear mandate of public policy existed in the administration regulations and Professional Code.[65] Furthermore, the court acknowledged that these regulations furthered public policy because they protected the public from unsupervised dispensing or theft of dangerous substances.[66] The court also asserted that the Professional Code not only served the interest of the pharmaceutical community but also protected society at large.[67]

Moving from the civil to criminal context, the New Jersey appellate division in *Potter v. Village Bank of New Jersey*[68] faced the issue of whether an employee who blew the whistle on his employer's criminal activities was protected from a retaliatory discharge.[69] In *Potter*, the appellate court held that public policy required protection of employees who notified the appropriate authorities of their employer's illegal activities.[70] Furthermore, the court posited that an employer's retaliatory discharge for terminating an employee who reports unlawful conduct constituted an intentional tort that allowed for punitive, economic and non-economic compensatory damages.[71]

Dale Potter was president and chief executive officer of Village Bank of New Jersey when he discovered a possible money-laundering operation at the bank.[72] Potter gave notice of his suspicion to the New Jersey Commissioner of Banking (Commissioner) who then conducted investigative audits of the bank.[73] Shortly after

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63 *Id.* at 159, 443 A.2d at 730-31.

64 *Id.*

65 *Id.* at 158, 443 A.2d at 730.

66 *Id.* (citing Board of Pharmacy v. Quackenbush & Co., 22 N.J. Misc. 334, 335-36, 39 A.2d 28, 29-30 (C.P. 1940)).

67 *Id.* at 159, 443 A.2d at 730.

68 225 N.J. Super. 547, 543 A.2d 80, *certif. denied*, 113 N.J. 352, 550 A.2d 462 (1988).

69 *Id.* at 550, 543 A.2d at 81.

70 *Id.* at 560, 543 A.2d at 87.

71 *Id.* at 561, 562, 543 A.2d at 87, 88. The appellate court listed examples of losses that an employee who sustained a retaliatory discharge claim could recover, including lost wages less unemployment insurance, costs of finding substitute employment, emotional distress associated with the discharge and loss of fringe benefits. *Id.* (citations omitted).

72 *Id.* at 552, 543 A.2d at 82.

73 *Id.* at 552-53, 543 A.2d at 82-83. Subsequently, the United States District Attorney's office subpoenaed the bank, requesting a list of accounts pursuant to its own Treasury Department investigation. *Id.* at 553, 543 A.2d at 83. The Department of Justice also interviewed Potter regarding the possible scam. *Id.*

learning of Potter's conversation with the Commissioner, the bank dismissed Potter without cause.[74] Potter filed a wrongful termination complaint and sought reinstatement to his former position.[75] On the issue of retaliatory discharge, a jury awarded Potter $50,000 in compensatory damages and $100,000 in punitive damages.[76]

Upholding Potter's wrongful discharge claim and affirming the jury award, the appellate court concluded that public policy encourages citizens to report criminal activity.[77] These objectives, the *Potter* court reasoned, would be frustrated if employees were not protected for reporting an employer's illegal conduct.[78] Af-

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[74] *Id.* at 553-55, 543 A.2d at 83-84. Upon learning of Potter's whistle blowing, one of the directors and controlling stockholders, Mory Kraselnick, became angry and asked Potter the basis for his discussion with the Commissioner. *Id.* Potter revealed his suspicions of money laundering, and Kraselnick agreed that such a scheme was possible. *Id.* at 553-54, 543 A.2d at 83.

[75] *Id.* at 550, 543 A.2d at 81.

[76] *Id.* at 551, 543 A.2d at 82. Potter also received $12,575.40 in prejudgment interest. *Id.*

[77] *Id.* at 559, 543 A.2d at 86 (citation omitted). For guidance the appellate court also looked to the recently enacted Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-1 *et seq.* *Id.* at 560, 543 A.2d at 86-87. The Conscientious Employee Protection Act reads in pertinent part:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law; . . . .

N.J. STAT. ANN. § 34:19-3 (West Supp. 1992). Although the Conscientious Employee Protection Act was enacted subsequent to Potter's termination, the court determined that the statute codified the common law tort established in judicial decisions. *Potter*, 225 N.J. Super. at 560, 543 A.2d at 86.

Additionally, 25 states have enacted statutes that prohibit either public or private employers from using retaliatory discharge against an employee who reports the illegal conduct of the employer. *See, e.g.*, ALASKA STAT. § 24.60.035 (1992); ARIZ. REV. STAT. ANN. § 38-532(A)-(M) (West Supp. 1992); CAL. LAB. CODE § 1102.5(a)-(c) (West 1989); COL. REV. STAT. ANN. §§ 24-50.5-103 *et seq.*, § 24-114-101, *et seq.* (West 1990); CONN. GEN. STAT. ANN. §§ 4-61dd, 31-51m (West Supp. 1992); FLA. STAT. ANN. § 112.3187 (West 1992); HAW. REV. STAT. § 378-62 *et seq.* (Supp. 1992); ILL. ANN. STAT. ch. 740, para. 175/1 *et seq.* (Smith-Hurd 1993); IOWA CODE ANN. § 79.29 *et seq.* (West 1991); KAN. STAT. ANN. § 75-2973 (1989); LA. REV. STAT. ANN. § 30:2027 (West Supp. 1993); ME. REV. STAT. ANN. tit. 26, § 831 *et seq.* (West 1988); MD. ANN. CODE art. 64A § 12G (1992); MICH. COMP. LAWS ANN. § 15.361 *et seq.* (West 1981); NEV. REV. STAT. ANN. § 281.611 *et seq.* (Michie Supp. 1991); N.C. GEN. STAT. §§ 95-240 *et seq.*, 126-84 *et seq.* (1992); OHIO REV. CODE ANN. § 4113.51 *et seq.* (Anderson Supp. 1991); PA. CONS. STAT. ANN. § 1421 *et seq.* (1992); R.I. GEN. LAWS § 36-15-1 *et seq.* (1992); S.C. CODE ANN. § 8-27-10 *et seq.* (Law Co-op Supp. 1992); S.D. CODIFIED LAWS ANN. § 60-11-17.1 (1992); TENN. CODE. ANN. § 50-1-304 (1992); UTAH CODE ANN. § 67-21-1 *et seq.* (1992); W. VA. CODE § 6C-1-1 *et seq.* (1993).

[78] *Potter*, 225 N.J. Super at 559-60, 543 A.2d at 86. The appellate court sympathized with the dilemma that many employees face in choosing to report criminal activity

firming both the compensatory and punitive awards, the court posited that the measure of damages was similar to those available for other torts.[79]

The New Jersey appellate division first addressed the issue of privacy as a source of public policy in *Slohoda v. United Parcel Service, Inc.*[80] In *Slohoda*, the court held that it was error to dismiss a complaint on the issue of whether a company policy, in which employees could be terminated for engaging in sexual relations with a co-worker based on marital status, violated an employee's right to privacy.[81] Jon Slohoda, an employee of United Parcel Service, claimed his discharge for adultery violated New Jersey's Law Against Discrimination which prohibited employment discrimination based on marital status.[82] Arguing that the right to privacy is protected by public policy, Slohoda claimed his discharge was in retaliation for exercising this right.[83]

The court agreed with Slohoda's claim that a policy restricting the personal relations between co-workers on the basis of marital status violated the anti-discrimination statute.[84] Moreover, the

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and losing their job or not reporting unlawful activity and keeping their job. *Id.* at 560, 543 A.2d at 86. The court recognized that absent protection from retaliatory discharges, employees would be reluctant to cooperate with the authorities, resulting in a "chilling effect on criminal investigations." *Id.*

79 *Id.* at 561, 543 A.2d at 87. The appellate court reasoned that a retaliatory discharge was an action in tort because an employer breached his or her duty not to discharge an employee who obeyed the law. *Id.* (quoting Pierce v. Ortho Pharmaceutical Co., 84 N.J. 58, 72-73, 417 A.2d 505, 512 (1980)). Accordingly, the *Potter* court held punitive damages were proper to deter this type of behavior. *Id.*

80 193 N.J. Super. 586, 594, 475 A.2d 618, 622 (1984).

81 *Id.* at 589-90, 475 A.2d at 619-20.

82 *Id.* at 588, 589, 475 A.2d at 619. Slohoda claimed his discharge was the result of his sexual relationship with a co-worker while he was legally married to another woman. *Id.* at 589, 475 A.2d at 619. Because United Parcel Service (UPS) did not have a similar policy concerning unmarried workers who engage in sexual relations with other co-workers, the court opined that the decision to discharge Slohoda was based on marital status and violated the Law Against Discrimination. *Id.* at 589-90, 475 A.2d at 619-20.

The New Jersey Law Against Discrimination states:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the race, creed, color, national origin, ancestry, age, *marital status*, affectional or sexual orientation, sex or atypical hereditary cellular or blood trait of any individual . . . to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

N.J. STAT. ANN. § 10:5-12(a) (West Supp. 1992) (emphasis added).

83 *Slohoda*, 193 N.J. Super. at 593, 475 A.2d at 621.

84 *Id.* at 590, 475 A.2d at 620. The majority also noted that UPS had an anti-nepo-

Slohoda court concluded that an invasion of an employee's privacy by an employer constituted a violation of a clear mandate of public policy as defined by *Pierce* and supported a claim of wrongful discharge.[85] Accordingly, the court concluded the trial court erred in dismissing Slohoda's complaint for failure to state a claim.[86]

Following the *Slohoda* decision, the New Jersey appellate division grappled with the issue of a public employer's implementation of a drug test as a violation of the state's constitutional prohibition against unreasonable searches and seizures.[87] In *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*,[88] the appellate division held that a public employer could not require a drug test from an employee unless there was an "individual reasonable suspicion" that the employee used drugs.[89] Shortly after the Police Director

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tism rule that lawfully prohibited a UPS employee who was married to another UPS employee from occupying a supervisory or management position. *Id.* at 592, 475 A.2d at 621. The court declined to determine whether Slohoda was discharged for violating this policy. *Id.* at 593, 475 A.2d at 621. The *Slohoda* court recognized, however, that UPS had a right to show that Slohoda was terminated under the anti-nepotism policy rather than the policy prohibiting sexual relations between married co-workers. *Id.*

85 *Id.* at 593, 475 A.2d at 621-22.

86 *Id.* at 589, 475 A.2d at 619. The appellate court remanded the case to develop the factual record on the issue of whether UPS' policy invaded an employee's privacy and, therefore, violated public policy. *Id.* at 594, 475 A.2d at 622.

87 Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461, 524 A.2d 430 (App. Div. 1987). The New Jersey Constitution, in Article I, Paragraph 7 states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." N.J. CONST. art. I, para. 7 (1947).

88 Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 216 N.J. Super. 461, 524 A.2d 430 (App. Div. 1987).

89 *Id.* at 474, 524 A.2d at 437. The appellate court recognized that the New Jersey Constitution granted greater privacy protection in the area of search and seizure than the Fourth Amendment of the United States Constitution. *Id.* at 477, 524 A.2d at 438-39 (citations omitted). The New Jersey Supreme Court has determined that the state's constitution afforded individuals greater protections than the United States Constitution in other circumstances. *See, e.g.*, State v. Hempele, 120 N.J. 182, 195, 198-200, 576 A.2d 793, 799, 801-02 (1990) (giving the definition of "reasonable expectation in privacy" under the search and seizure provision of the New Jersey Constitution broader protection than under the United States Constitution); State v. Ramseur, 106 N.J. 123, 167, 524 A.2d 188, 209 (1987) (noting that in death penalty cases, a broad reading of state constitution is required because "considerations of federalism . . . have constrained the United States Supreme Court" when determining the constitutionality of capital punishment under the federal constitution); Right to Choose v. Byrne, 91 N.J. 287, 292-93, 301, 450 A.2d 925, 928, 932 (1982) (cautioning that in the abortion context "[w]here provisions of the federal and state Constitutions differ . . . or where a previously established body of state law leads to a different result, then we [the Court] must determine whether a more expansive grant of right is mandated by our state Constitution."). Moreover, the *Fraternal Order of Police* court determined that reliance based solely on the federal constitution might require "needless review in the

of Newark issued a memorandum requiring all members of the Narcotics Bureau to submit a urine sample for drug-testing, the Fraternal Order of Police filed an action claiming such a requirement would be a search of the police officers without probable cause.[90]

First, the appellate court rejected the City's argument that because police officers were members of a highly regulated industry, drug tests were permissible without warrants.[91] The appellate court reasoned that although police officers were subjected to a number of administrative and statutory regulations, these types of law enforcement officials were not included within sensitive industries that required close inspection.[92] Second, the court contended that the City did not show the requisite probable cause for a drug test.[93] Judge Gaulkin, writing for the court, agreed that the public had a legitimate interest in keeping the police force drug

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United States Supreme Court." *Fraternal Order of Police*, 216 N.J. Super. at 477-78, 524 A.2d at 438-39.

90 *Fraternal Order of Police*, 216 N.J. Super. at 462-63, 524 A.2d at 431-32. The memorandum read in pertinent part:

> Effect 0001 hours, December 12th, 1985, all members of the Narcotic Bureau shall be required to take a urinalysis and blood test. Furthermore, any transfer into the Unit shall be predicated upon a successful urinalysis and blood test. Any request of transfer to the Narcotic Bureau shall be forwarded with the understanding that a urinalysis exam and blood test is required as part of the assignment, both upon transfer and at least twice a year afterwards. These exams are to be administered to determine: a. Health deficiencies[;] b. Substance abuse[.] . . . Furthermore, all such testing shall be conducted under the supervision of the Police Surgeon or his representative and the Internal Affairs Bureau. All results are to be confidential and forwarded to the Police Director for review.

Id. at 463, 524 A.2d at 431-32 (footnote omitted). The Police Director issued the memorandum in response to concerns of abuse among the members of the department and society in general as well as the results of recent drug tests performed on new recruits. *Id.* at 464, 524 A.2d at 432. The Director noted that two recent classes "yielded 5 positive tests for such substances as cocaine, heroin, morphine and barbituates." *Id.* Moreover, the Director claimed that citizen tips revealed that specific individuals, including two narcotics officers, were using controlled dangerous substances. *Id.*

91 *Id.* at 469-70, 524 A.2d at 434-35 (quotation omitted).

92 Police officers, the court proffered, did not engage in a "commercial enterprise" and were not required to submit to drug testing as part of a "comprehensive and defined" regulatory program. *Id.* Moreover, the court noted that the legislature had not determined "'that warrantless searches [were] necessary to further a regulatory scheme[.]'" *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)).

93 *Id.* at 474, 524 A.2d at 437. The appellate court defined probable cause "as 'well grounded suspicion' that a crime has been or is being committed." *Id.* at 466 n.5, 524 A.2d at 433 n.5 (citations omitted).

free.[94] The court posited, however, that with such an intrusive test, the public interest had to be balanced against the officer's privacy interests.[95] To test employees for drugs, the appellate court opined, a public employer had to show either wide-spread abuse in the ranks or an identifiable public risk.[96]

In a similar case, *Local 194A v. Burlington County Bridge Commission*,[97] the New Jersey appellate division addressed whether a public employer could drug test an employee involved in a safety-sensitive position as part of an annual physical.[98] In *Local 194A*, the union operators of draw bridges spanning the Delaware River challenged the county's policy of drug testing the operators during their annual physicals.[99] The union claimed the drug test violated the New Jersey Constitution's prohibition against unreasonable searches and seizures because the decision to test for drugs was not based on an individual reasonable suspicion of drug use.[100]

Although the court agreed that *Fraternal Order of Police, No. 12 v. City of Newark*[101] demanded a standard of individual reasonable suspicion,[102] the appellate court validated the drug testing of the bridge operators.[103] Distinguishing *Fraternal Order of Police*, the

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94 *Id.* at 472, 524 A.2d at 436. For example, the court noted that drug use "can impair job performance and put the public at risk." *Id.* (citations omitted).

95 *Id.* at 472-73, 524 A.2d at 436.

96 *Id.* The appellate court also dismissed that as a matter of public safety, narcotics officers could be subject to drug testing absent a warrant. *Id.* at 475, 524 A.2d at 437. The appellate court posited that while maintaining public safety was a legitimate goal, testing, absent an individualized reasonable suspicion, was an improper means to achieve this goal under the state constitution. *Id.* For support and guidance, the appellate court looked to the Attorney General's Law Enforcement Drug Screening Guidelines. *Id.* at 475, 524 A.2d at 438. These guidelines stated unannounced drug testing was appropriate for new recruits during training. *Id.* For permanent employees, however, an "individualized reasonable suspicion" was the standard to follow when testing. *Id.* at 475-76, 524 A.2d at 438.

97 240 N.J. Super. 9, 572 A.2d 204 (App. Div.), *certif. denied*, 122 N.J. 183, 584 A.2d 244 (1990).

98 *Id.* at 12, 13, 22, 572 A.2d at 205, 206, 211.

99 *Id.* at 13, 572 A.2d at 205.

100 *Id.* at 12, 14, 572 A.2d at 205, 207. Specifically, the union employees claimed the rule violated their rights under the First, Fourth, Fifth and Ninth Amendments of the United States Constitution and Article I, paragraphs two and seven of the New Jersey Constitution. *Id.* at 12, 572 A.2d at 205. Additionally, the union alleged the drug testing impaired its members' rights as public employees to negotiate employment contracts and violated the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-4.1. *Id.*

101 216 N.J. Super. 461, 524 A.2d 430 (App. Div. 1987). *See supra* notes 87-96 and accompanying text (discussing the individual reasonable suspicion test developed in *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*).

102 *Local 194A*, 240 N.J. Super. at 14-17, 572 A.2d at 207-08.

103 *Id.* at 11, 572 A.2d at 205.

court stressed that the drug test was not random but rather a part of an annual physical.[104] Thus, an employee had a lower expectation of privacy, and the decision to drug test did not require individual reasonable suspicion.[105]

The appellate court also took into account the safety-sensitive nature of a drawbridge operator's work.[106] For guidance on the reasonableness of the search of public employees in safety-sensitive positions,[107] the *Local 194A* court looked to *National Treasury Employees Union v. Von Raab*[108] and *Skinner v. Railway Labor Executives'*

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104 *Id.* at 17, 572 A.2d at 208.

105 *Id.* at 17-18, 572 A.2d at 208 (citing Jones v. McKenzie, 833 F.2d 335, 340 (D.C. Cir. 1987), *vacated and remanded* for further consideration, *sub. nom.* Jenkins, Superintendent of District of Columbia Public Schools v. Jones, 490 U.S. 1001 (1989); Amalgamated Transit Union v. Cambria City Transp. Auth., 691 F. Supp. 898, 902 (W.D. Pa. 1988)). The appellate court reasoned that the Fourth Amendment protected "arbitrary invasions" of an individual's privacy interests. *Id.* at 18, 572 A.2d at 208 (citing *Amalgamated Transit Union*, 691 F. Supp. at 902). The appellate court concluded that because a person forfeited a measurable amount of personal privacy in an annual physical, an undisclosed drug test was "minimally intrusive." *Id.* at 17, 572 A.2d at 208 (citations omitted).

106 *Id.* at 23-24, 572 A.2d at 211-13.

107 *Id.* at 18-22, 572 A.2d at 208-11.

108 489 U.S. 656 (1989). In *National Treasury Employees Union v. Von Raab*, the United States Supreme Court held public employees have a reduced expectation of privacy when public considerations of safety and security outweigh the privacy interests of the employee. *Id.* at 677. In the first half of 1986, the Customs Service implemented a drug testing requirement for employee placement into positions that involved interdicting or enforcing drug possession and distribution laws, carrying of a firearm, or handling of classified material relating to ongoing investigations of drug smuggling. *Id.* at 660-61. The unionized employees of the Customs Service challenged this policy, *inter alia*, as a violation of the Fourth Amendment of the Constitution prohibiting unreasonable searches and seizures. *Id.* at 663. The district court agreed with the employees that probable cause or reasonable suspicion was required for the Customs Service to drug test its employees, and granted an injunction prohibiting the tests. *Id.* (citing National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986)). The Court of Appeals for the Fifth Circuit vacated the district court's order. *Id.* (citing National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987)). The Supreme Court affirmed the court of appeals's decision as to drug testing employees who enforced the drug laws and carried firearms, but remanded as to those employees who handled classified materials. *Id.* at 664-65.

The Supreme Court determined that drug testing was a search that must conform to the requirements of the Fourth Amendment. *Id.* at 665. Because this search was not in pursuance of law enforcement, however, the majority posited that the rigid requirement of a warrant was not necessary. *Id.* at 666. The Supreme Court reasoned further that the probable cause standard was reserved for criminal prosecutions only and was not applicable to the situation in the case at hand in which the employee volunteered to work for the Customs Service knowing the position required a drug test. *Id.* at 667 (quotation omitted). Justice Kennedy, writing for the majority, noted that the integrity of front-line law enforcement personnel in the war on drugs must be preserved. *Id.* at 668. Accordingly, the Supreme Court concluded that the drug enforcement official's reasonable expectation of privacy outweighed the government's

Ass'n.[109] The appellate court adopted the balancing test articulated in *Von Raab* that considered the "special need" of the government to protect public safety and the privacy interests of individuals.[110] Applying this test, the court recognized that drawbridge operators were in a safety-sensitive job in which the government's special need for safety outweighed the employee's reduced expectations of privacy.[111] Accordingly, the court ruled that the employees could be drug tested as part of their annual physicals.[112]

The New Jersey Supreme Court finally confronted the conflict between an employee's right to privacy and the public's interest in safety in *Hennessey v. Coastal Eagle Point Oil Co.*[113] The *Hennessey* court addressed whether the discharge of a privately-employed at-will employee for failing a random drug test violated a clear mandate of public policy.[114] In its analysis, the court balanced the interests of the employee, employer and public.[115] Although determining that a privacy interest in protecting an employee from random drug testing existed, the court held that an employer could discharge an employee for failing such a test because the interest of safety was paramount.[116]

Writing for the majority, Justice Clifford first discussed the evolution of the tort of wrongful discharge as a check on employer abuses of the employment-at-will doctrine.[117] Relying on *Pierce v.*

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desire to conduct suspicionless searches. *Id.* The Supreme Court remanded the issue of applying a drug test to those who handle classified materials because this category of employees was too broad and included people who did not have a reduced expectation of privacy that outweighed the government's interest. *Id.* at 678.

109 489 U.S. 602 (1989). *Skinner* involved drug and alcohol testing of railroad employees pursuant to the Federal Railroad Safety Act, 84 Stat. 971 (1970) (codified as amended at 45 U.S.C. § 431(a) (1992)), after certain rail accidents or violations of safety rules. *Id.* at 606. Although utilizing similar reasoning to that set forth in *National Treasury Employees Union v. Von Raab*, the Supreme Court held these regulations were constitutional under the Fourth Amendment. *Id.* at 618-34. For a discussion of *National Treasury Employees Union v. Von Raab*, see *supra* note 108.

110 *Local 194A*, 240 N.J. Super. at 20, 24, 572 A.2d at 210, 212.

111 *Id.* at 24, 572 A.2d at 212.

112 *Id.* at 11, 25, 572 A.2d at 205, 212.

113 129 N.J. 81, 100, 609 A.2d 11, 20 (1992).

114 *Id.* at 84-85, 609 A.2d at 12.

115 *Id.* at 102, 609 A.2d at 21.

116 *Id.* at 107, 609 A.2d at 23. In this case, the majority decided the concerns of the public and the employer in safety outweighed the privacy interest of the employee. *Id.*

117 *Id.* at 88, 609 A.2d at 14. The New Jersey Supreme Court briefly described the employment-at-will doctrine, believed to have its legal origin in the case of *Payne v. Western & Atlantic R. R. Co.*, 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134 (1915). *Id.* at 88, 609 A.2d at 14 (citing Blades, *supra* note 4, at 1405 & n.10). The *Hennessey* Court observed that in 1959 the California courts were the first to recognize that discharge for "bad cause" was an exception to this doctrine.

Ortho Pharmaceutical Corp.,[118] the majority described the tort of wrongful discharge as a limitation on the employer that protects the employee from being discharged for a cause "contrary to a clear mandate of public policy."[119] Elaborating on the *Pierce* doctrine, the *Hennessey* court restated that legislation, administrative rules, regulations and judicial decisions defined public policy.[120] The New Jersey Supreme Court emphasized that an employee claiming wrongful discharge must articulate the specific violation of public policy that resulted in dismissal.[121] The majority reaffirmed the *Pierce* conclusion that subjective and personal disagreements with the employer would not support a cause of action for wrongful discharge.[122]

After discussing the origins of the *Pierce* doctrine, the New Jersey Supreme Court rejected Coastal Eagle's and *amici's*[123] claims that public policy included only statutes but not federal and state constitutions.[124] Justice Clifford continued that to exclude these constitutions would define public policy too narrowly.[125] The majority posited that *Pierce* required the employee to indicate the specific violation of public policy and not, as defendant and *amici* contended, to show a retaliatory intent by the employer.[126]

The *Hennessey* court explained further the areas in which the New Jersey Constitution had been used as a source of public policy in wrongful discharge cases.[127] The New Jersey Constitution, the supreme court declared, was the "highest source of public policy"

Id. (citing Peterman v. International Brotherhood of Teamsters, Local 396, 344 P.2d 25, 27 (1959)).

118 84 N.J. 58, 417 A.2d 505 (1980). *See supra* notes 36-47 and accompanying text (discussing *Pierce v. Ortho Pharmaceutical Corp.*).

119 *Hennessey*, 129 N.J. at 89, 609 A.2d at 15 (citing *Pierce*, 84 N.J. at 72, 417 A.2d at 512). Justice Clifford engaged in a lengthy discussion of the facts and the holding in *Pierce*. *Id.* at 88-90, 609 A.2d at 14-15.

120 *Id.* at 90, 609 A.2d at 15 (quoting *Pierce*, 84 N.J. at 72, 417 A.2d at 512).

121 *Id.* at 90, 609 A.2d at 15 (citations omitted).

122 *Id.* at 91-92, 609 A.2d at 15-16 (citations omitted).

123 The following groups submitted *amici curiae* briefs supporting various positions of this controversial issue: the American Civil Liberties Union, the New Jersey Department of the Public Advocate, the Employment Law Council, the Washington Legal Foundation and Parents' Association to Neutralize Drug and Alcohol Abuse, and the Equal Employment Advisory Council. *Id.* at 84, 609 A.2d at 12.

124 *Id.* at 92, 609 A.2d at 16.

125 *Id.*

126 *Id.* (citing *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 73, 417 A.2d 505, 512 (1980)).

127 *Id.* at 92-93, 609 A.2d at 16 (citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69 (1960); Radwan v. Beecham Labs., 850 F.2d 147, 151-52 (3d Cir. 1988); Zamboni v. Stamler, 847 F.2d 73, 83 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988)) (further citations omitted).

and therefore a foundation for a claim of wrongful discharge.[128]

With this proposition firmly established, Justice Clifford determined which provision of the state constitution provided a privacy right.[129] Agreeing with the appellate division, the majority asserted that the constitutional protection against unreasonable searches and seizures did not apply to private employers.[130] The supreme court criticized, however, the conclusion that the New Jersey Constitution could not be a source of protection from drug testing mandated by private employers.[131] Justice Clifford found the right of privacy to be an unalienable right derived from the natural law.[132] The majority then described various contexts in which the right to privacy had been used to protect individual liberty and autonomy.[133]

Additionally, the *Hennessey* court looked to the long recognized invasion of privacy tort as another source of public policy.[134]

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128 *Id.* at 93, 609 A.2d at 17.

129 *Id.* at 94, 609 A.2d at 17.

130 *Id.* at 95, 609 A.2d at 17. The Supreme Court criticized, however, the appellate division's interpretation of the Alaska case, *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989), as "misplaced." *Id.* The majority interpreted *Luedtke* to show that the Alaska Supreme Court might allow the use of a constitutional privacy provision as a source of public policy. *Id.* at 94, 609 A.2d at 17 (citing *Luedtke*, 768 P.2d at 1132-33). For a discussion of Luedtke v. Nabors Alaska Drilling, Inc. see *infra* note 138.

131 *Hennessey*, 129 N.J. at 95, 609 A.2d at 17-18. Specifically, the *Hennessey* court admonished the appellate division for giving "short shrift to the notion that privacy could be a source of public policy." *Id.*, 609 A.2d at 18.

132 *Id.* at 95-96, 609 A.2d at 18 (citing McGovern v. Van Riper, 137 N.J.Eq. 24, 43 A.2d 514 (Ch. Div.), *aff'd*, 137 N.J. Eq. 548, 45 A.2d 842 (1945)). The New Jersey Constitution, Article I, Paragraph 1 states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, para. 1 (1947).

133 *Hennessey*, 129 N.J. at 96, 609 A.2d at 18 (citing Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982); *In re* Martin, 90 N.J. 295, 447 A.2d 1290 (1982); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Doe v. Bridgeton Hosp. Ass'n, Inc. 71 N.J. 478, 366 A.2d 641 (1976), *cert. denied*, 433 U.S. 914 (1977); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Comras v. Lewin, 183 N.J. Super. 42, 443 A.2d 229 (App. Div. 1982)).

134 *Id.* at 94-95, 609 A.2d at 17 (citing RESTATEMENT (SECOND) OF TORTS § 652B (1977)). Specifically, the tort of intrusion on seclusion states: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

The New Jersey Supreme Court noted that an invasion of privacy did not have to be physical but could also consist of an investigation into a person's private affairs.[135]

The majority next addressed whether a random drug test violated Hennessey's constitutional or common law privacy rights despite Hennessey's failure to raise this claim.[136] Analyzing this issue, Justice Clifford adopted the holding of *Luedtke v. Nabors Alaska Drilling, Inc.*[137] in which the Alaska Supreme Court employed a balancing test to decide the scope of the employee's privacy interest.[138] The *Hennessey* court recognized that the public policy of

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135 *Hennessey*, 129 N.J. at 95, 609 A.2d at 17 (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977)).

136 *Id.* at 96-97, 609 A.2d at 18. The court pronounced, however, that it was unnecessary to resolve whether those rights supported a cause of action for wrongful discharge under "a clear mandate of public policy." *Id.*

137 768 P.2d 1123 (Alaska 1989).

138 *Id.* at 1135-36. In *Luedtke*, two brothers, Paul and Clarence Luedtke, refused to submit urine for drug testing required by their employer, Nabors Alaska Drilling, Inc. (Nabors). *Id.* at 1124-25. Prior to his refusal to submit a urine sample, Paul had been reprimanded for two workplace violations: in the first an alcohol infraction was involved, and in the second trained dogs discovered marijuana in Paul's luggage on his oil drilling rig. *Id.* at 1125. During a routine physical, Nabors obtained a sample of Paul's urine without notifying him that the sample would be tested for drugs. *Id.* Paul's urine tested positive for marijuana. *Id.* at 1126. Paul was suspended until he could pass two subsequent urine drug tests. *Id.* He refused to take the first test and was discharged. *Id.*

Unlike Paul, a permanent employee of the oil drilling company, Clarence Luedtke was a seasonal worker who was required to submit a urine sample but refused "as a matter of principle." *Id.* Clarence was terminated immediately. *Id.* Both were initially denied unemployment benefits because their refusal was deemed misconduct under Alaska unemployment law. *Id.* As a result of their refusal to submit urine for testing, both Paul and Clarence were denied unemployment compensation benefits on grounds that their noncompliance constituted misconduct. *Id.* Paul and Clarence then successfully appealed the decision to deny benefits to the Department of Labor (DOL). *Id.* In the case of Clarence, the Commissioner of Labor determined that "Nabors [had] not shown that there [was] any connection between off-the-job drug use and on-the-job performance." *Id.* at 1126-27.

Each filed a separate court action against Nabors claiming *inter alia* wrongful discharge and invasion of privacy. *Id.* at 1126-27. The trial court granted Nabors's motion for summary judgment on all of Clarence's claims and on Paul's invasion of privacy claim. *Id.* Paul's wrongful discharge claim was decided in favor of Nabors after a non-jury trial. *Id.* at 1126. The Alaska Supreme Court consolidated the appeals because common legal issues existed. *Id.* at 1125.

The Alaska Supreme Court began by reiterating that a cause of action for wrongful discharge stemmed from contract law, which found an implied covenant of good faith in employment-at-will contracts. *Id.* at 1130. The Alaska Supreme Court then recognized that public policy included a right of privacy that protects certain parts of an employee's life from employer control or inquiry. *Id.* at 1131-32. The public policy supporting this privacy right, the supreme court explained, was evidenced in the common law tort of invasion of privacy, the state constitution and statutes that prohibit employers from inquiring into areas considered private. *Id.* at 1132-33.

protecting safety would compete with the privacy interest of an employee in certain situations.[139] Specifically, Justice Clifford posited that when the nature of the employee's job entailed a responsibility for public safety, the privacy interests of the employee were subordinate and a random drug test was permissible.[140]

Turning to the case at hand, the majority addressed two examples of privacy interests that Hennessey complained Coastal Eagle's random drug test violated: the observation by another when providing a urine sample and the possibility of detecting private information irrelevant to the employer's quest to find illegal substances.[141] Justice Clifford accepted Hennessey's claim that random drug testing by a private employer could be an invasion of privacy that violates public policy.[142] The *Hennessey* court, qualified this proposition, however, stating that an employee's privacy could be invaded permissibly if a competing public policy interest ex-

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The *Luedtke* court clarified, however, that the privacy interests of an individual are reduced when he or she begins to interact with the community. *Id.* at 1135. Specifically, the supreme court continued that where an employee's interaction with the community conflicted with the community's interests in safety, the community's interests outweighed the individual's privacy interests. *Id.* at 1135-36. The Alaska Supreme Court, however, placed two limitations on the employer's right to drug test. *Id.* at 1136, 1137. First, the supreme court advised that the test must be conducted in a way that reasonably connected the performance of the worker to the use of drugs or alcohol. *Id.* at 1136-37. In the case of the Luedtke brothers, the court asserted that testing should have been done either prior to departure or upon return from a drilling operation. *Id.* Second, the *Luedtke* Court continued that the worker must have notice of the drug testing program. *Id.* at 1137. Because the safety interests of the community in having oil rig operators free from alcohol and drugs outweighed the brothers' interests in privacy and the Luedtke brothers had notice of the test, the supreme court affirmed the lower courts' rulings that refusal to submit to a urine test did not support a claim of wrongful discharge. *Id.* at 1136, 1137, 1138.

Justice Clifford recognized that other states have adopted this balancing test when evaluating a wrongful discharge claim resulting from employer drug testing of employees. *Hennessey*, 129 N.J. at 100, 609 A.2d at 20. After re-examining the *Luedtke* decision, the *Hennessey* court described California's approach in *Luck v. Southern Pacific Transp. Co.*, 267 Cal. Rptr. 618 (Cal. Ct. App.), *cert. denied*, 498 U.S. 939 (1990), and West Virginia's approach in *Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W. Va. 1990). *Id.* at 101, 609 A.2d at 20-21. Agreeing with *Luedtke* and *Twigg*, the *Hennessey* majority proclaimed that for an employee to claim successfully wrongful discharge he must show that his privacy interest outweighed the public's interest in safety. *Id.* at 102, 609 A.2d at 21.

139 *Hennessey*, 129 N.J. at 100, 609 A.2d at 20.

140 *Id.* at 102, 609 A.2d at 21. An employee's position involved awareness of public safety, the court concluded, when the employee's duties were "so fraught with hazard that . . . attempts to perform [those duties] while in a state of drug impairment would pose a threat to coworkers, to the workplace, or to the public." *Id.*

141 *Id.* at 99, 609 A.2d at 19. For example, a urine sample to test for the presence of drugs, Hennessey contended, might reveal the presence of epilepsy. *Id.*

142 *Id.*

isted.[143] An employee's privacy interests, the majority concluded, were only one of many competing interests considered in defining public policy.[144]

To weigh these competing interests, Justice Clifford opined that absent guidance by either the legislature or a collective bargaining agreement, a judicial definition of a safety-sensitive position was warranted.[145] A safety-sensitive position, the majority then defined, was one in which the duties were so "fraught with hazard" that performance of them in an altered mental state could pose a threat to co-workers, the work environment or the public.[146]

Applying the balancing test to Hennessey's position as supervisor of the gaugers, the supreme court concluded that public safety outweighed Hennessey's privacy interests.[147] To support this conclusion, Justice Clifford relied on testimony concerning the dangerous nature of a gauger's position[148] from Coastal Eagle's administrators and Hennessey himself.[149]

Furthermore, the majority rejected Hennessey's claim that the holding in *Fraternal Order of Police*[150] required a private employer to use the least intrusive means available to test for drugs.[151] The ma-

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143 *Id.*, 609 A.2d at 19-20.

144 *Id.*

145 *Id.* at 102, 609 A.2d at 21.

146 *Id.*

147 *Id.* at 107, 609 A.2d at 23.

148 *Id.* at 102-03, 609 A.2d at 21. A gauger's duties, the court instructed, included mixing gasoline with additives and supervising the flow of gasoline products throughout the refinery. *Id.* at 85, 609 A.2d at 12-13. The court explained further that a gauger takes direction from the leader pumper who translates instructions and orders into the appropriate gauge levels for the gaugers. *Id.*, 609 A.2d at 13. A lead pumper, therefore, must have an ability to calculate gauge levels precisely, interpret and convey orders effectively, and maintain records accurately. *Id.*

149 *Id.* at 102-03, 609 A.2d at 21. The court noted that several administrators from Coastal Eagle stated that the managers in the gauging area received little supervision and were often required to work overtime to handle emergencies. *Id.* at 103, 609 A.2d at 21. Citing an affidavit from the Movement and Storage Division Manager, the court asserted that the consequences of error in a gauger's position included fires and/or explosions resulting in severe injury or even death, environmental damage and property damage. *Id.* The court also recognized Hennessey's own acknowledgment of the potential dangers associated with a gauger's responsibility to insure against tank overflows. *Id.* Specifically, the court quoted portions of Hennessey's deposition in which he responded to the question of why it was important for him to take care that the oil tanks did not overflow. *Id.* The supreme court reiterated Hennessey's answer which stated: "You don't want oil on the ground for one thing because it's wasted product. And if it's volatile enough, you have an explosion." *Id.*

150 *See supra* notes 87-96 and accompanying text (discussing *Fraternal Order of Police*).

151 *Id.* at 103-04, 609 A.2d at 22. Hennessey argued that an alternative test based on performance and observation would be not only less intrusive but more accurate in detecting behavior such as stress that, like drugs or alcohol, may impair job perform-

jority posited that the availability and practicality of investigative alternatives depended on the facts of each case.[152] Distinguishing *Fraternal Order of Police*, the *Hennessey* court asserted that police officers are heavily supervised and therefore more suitable candidates for the less intrusive observational test.[153] Conversely, because gauge supervisors functioned with little supervision, the majority found that Hennessey occupied a position that rendered an observational test for drug or alcohol impairment impractical.[154] In rejecting Hennessey's claim that urine testing did not indicate actual impairment, the New Jersey Supreme Court adopted the reasoning in *National Federation of Federal Employees v. Cheney*,[155] which recognized that urinalysis, although not perfect, was nonetheless suitable for detecting drugs and therefore promoted public safety.[156]

The majority concluded its decision by recommending that employers provide adequate notice of the test date, limit testing to

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ance. *Id.* at 103, 609 A.2d at 22. The Department of the Public Advocate also supported this argument as *amicus curiae*. *Id.* at 104, 609 A.2d at 22.

152 *Id.* The *Hennessey* court concluded that Coastal Eagle had chosen the best and least intrusive means of finding drug use that could endanger the public. *Id.* at 106, 609 A.2d at 23. The New Jersey Supreme Court reasoned that in this case, unlike *Fraternal Order of Police*, there was an indication that drug use was widespread among the employees, and that this use presented an identifiable danger to the public. *Id.* at 104, 609 A.2d at 22.

153 *Id.* at 105-06, 609 A.2d at 23.

154 *Id.* at 106, 609 A.2d at 23.

155 884 F.2d 603 (D.C. Cir. 1989).

156 *Hennessey*, 129 N.J. at 106, 609 A.2d at 23. In *National Fed'n of Fed. Employees*, the civilian employees of the Department of Defense initiated an action in response to a program that required those employees to submit to a mandatory random urinalysis drug test. *National Fed'n of Fed. Employees*, 884 F.2d at 605. The government justified the testing on three grounds: determining employee fitness; maintaining national security; and identifying and treating drug abusers. *Id.* at 608. The United States Court of Appeals for the Third Circuit relied on National Treasury Employees v. Von Raab, 489 U.S. 656 (1989), and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), for its holding that random drug testing of civilian guards and police officers was constitutional because these individuals had a reduced expectation of privacy that allowed a search without individual reasonable suspicion. *Id.* at 612-13.

The District of Columbia Circuit rejected, however, the government's claim that employees involved in the chain of custody of the drug test specimens were not protected by the more stringent requirements of probable cause under the Fourth Amendment. *Id.* at 615. The court of appeals proffered that a sufficient nexus between the government's interest in reliable testing procedures and the employee's duty did not exist. *Id.* at 614. Additionally, the court refuted the averment that lab personnel who worked in the urine specimen chain of custody had a reduced expectation of privacy analogous to the security guards and police officers. *Id.* at 614-15. Accordingly, the court of appeals vacated and remanded the district court's decision to determine the reasonableness of the government's drug testing program within this category of employees. *Id.* at 615.

drugs, keep the results confidential and inform the employee of the consequences of a positive test and the possible causes of false-positive results.[157] The *Hennessey* court indicated that because an employee's privacy interests are invaded by random drug tests, adequate precautions should be developed.[158] Justice Clifford opined, however, that the establishment of guidelines for drug testing in the workplace was an issue that would be resolved more appropriately by the legislature and collective bargaining agreements than by the courts.[159] The court reasoned that the legislature had more experience in defining the limits of testing individuals in other types of settings.[160] Moreover, other state legislatures had taken steps to control drug testing in different contexts.[161]

Justice Pollock concurred in upholding Coastal Eagle's use of random drug testing of employees in safety-sensitive positions because such testing did not violate public policy.[162] Moreover, the concurrence agreed that both the common law and the New Jersey Constitution were sources of public policy, and that legislation and private agreements could better delineate the boundaries of workplace drug testing.[163] Justice Pollock disagreed, however, that the New Jersey Constitution supported a clear mandate of public policy against an invasion of privacy in wrongful discharge cases.[164] The justice criticized the majority for deciding a constitutional issue when the case did not require such a resolution.[165] Instead, the concurrence posited that the common law tort of invasion of privacy was a more preferable source of public policy because that action addressed and transported fairness and justice into judicial decision-making.[166]

Justice Pollock maintained that the common law rather than the state's constitution provided a more suitable means for resolving disputes between private parties.[167] The New Jersey Constitu-

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157 *Hennessey*, 129 N.J. at 106-07, 609 A.2d at 23.

158 *Id.* at 106, 609 A.2d at 23.

159 *Id.* at 102, 107, 609 A.2d at 21, 23.

160 *Id.* at 107, 609 A.2d at 23-24 (citations omitted).

161 *Id.* at 107-08, 609 A.2d at 24 (citations omitted).

162 *Id.* at 108, 609 A.2d at 24 (Pollock, J., concurring).

163 *Id.*

164 *Id.* at 108-09, 609 A.2d at 24 (Pollock, J., concurring).

165 *Id.* at 109-10, 609 A.2d at 24-25 (Pollock, J., concurring). Because the majority used the New Jersey Constitution as a source of public policy, the concurrence found unpersuasive the majority's contention that the case was not decided on constitutional grounds. *Id.* at 109, 609 A.2d at 24-25 (Pollock, J., concurring).

166 *Id.* at 110, 609 A.2d at 25 (Pollock, J., concurring).

167 *Id.* Specifically, Justice Pollock wrote: "[T]he common law provides an alternative, and potentially more stable, framework for analyzing statements about matters of

tion, the concurrence criticized, controlled the relationship between government and the individual, not the relationship between individuals.[168] Looking to the history of the tort of invasion of privacy, the concurrence concluded that this action originally governed actions among private parties.[169] Justice Pollock emphasized that it was not until *Griswold v. Connecticut*[170] that the right of privacy elevated from a tort to a constitutional right protecting individuals from government action.[171] Accordingly, the majority's reliance on the state constitution, the concurrence contended, abandoned the state's "common-law birthright" to settle disputes between private parties through the common law.[172]

Justice Pollock differentiated between the public policy found by the majority and the public policy found in other wrongful discharge cases.[173] In this case, the concurrence posited that neither the New Jersey Constitution nor any statute specifically expressed a right of privacy that would modify the employment-at-will doctrine.[174] Furthermore, Justice Pollock speculated that a discharge in violation of public policy that protects an individual's privacy rights would be less apparent than a dismissal that violates one's statutory rights.[175] The justice concluded that judicial activism had no role in formulating policy on drug testing in the workplace.[176] The concurrence recommended, therefore, that a holding based exclusively on the common law tort of privacy would give the legislature significant latitude in formulating this policy.[177]

Justice Pollock then explained that the scope of the privacy right found in both the United States Constitution and the New Jersey Constitution involved two interests: autonomy and confiden-

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public interest." *Id.* (quoting Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 139, 516 A.2d 220 (1986)).

168 *Id.* at 109, 609 A.2d at 24-25 (Pollock, J., concurring).

169 *Id.* at 110, 609 A.2d at 25 (Pollock, J., concurring).

170 381 U.S. 479 (1965). In *Griswold*, the United States Supreme Court held that a Connecticut statute that forbade the use of contraceptives between married persons was an unconstitutional invasion of an individual's right to privacy under the Bill of Rights. *Id.* at 480, 485-86.

171 *Hennessey*, 129 N.J. at 110, 609 A.2d at 25 (Pollock, J., concurring) (citing *Griswold*, 381 U.S. at 510 n.1 (Black, J., dissenting)).

172 *Id.* at 111, 609 A.2d at 25 (Pollock, J., concurring).

173 *Id.*

174 *Id.* at 111, 609 A.2d at 25-26 (Pollock, J., concurring).

175 *Id.* at 111, 609 A.2d at 26 (Pollock, J., concurring).

176 *Id.* at 112, 609 A.2d at 26 (Pollock, J., concurring).

177 *Id.* Conversely, using the New Jersey Constitution as support for its ruling, the justice criticized, would limit the legislature's response in regulating drug testing in the workplace. *Id.*

tiality.[178] Of the two, Justice Pollock concluded, autonomy was a fundamental right, and confidentiality was not.[179] Because drug testing only impacted an employee's confidentiality interest, the justice stressed that the majority should not have looked to the New Jersey Constitution as support.[180] Justice Pollock agreed, however, with the majority that because the drug test involved only confidentiality, the public interest in safety was an overriding concern.[181]

Justice Pollock stressed that when a court decides a constitutional privacy issue, it risks placing undefined areas of personal decision-making beyond the control of the Legislature.[182] The concurrence advised that because of the competing interests of the employer and employee, the Legislature could better address an individual's privacy rights by applying common law principles.[183] As an example of how the common law provided a means of resolving privacy issues while allowing the legislature to act, Justice Pollock looked to the court's development of the "right to die."[184]

Finally, Justice Pollock lectured the majority for failing to address the public policy considerations of discouraging illegal drug use.[185] The concurring justice reminded the majority that both the Legislature and Governor had publicly stated that illegal drug use in the workplace should be eradicated by implementing drug testing procedures.[186] The concurrence concluded that the majority had frustrated this attempt to eradicate drug use by relying on the

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178 *Id.* (quotations omitted).

179 *Id.* at 112-15, 609 A.2d at 26-27 (Pollock, J., concurring).

180 *Id.* at 115, 609 A.2d at 27 (Pollock, J., concurring).

181 *Id.* at 114, 609 A.2d at 27 (Pollock, J., concurring).

182 *Id.* at 113, 609 A.2d at 27 (Pollock, J., concurring).

183 *Id.* at 113-14, 609 A.2d at 27 (Pollock, J., concurring). Justice Pollock looked to the administration of drug tests by some federal agencies as an example of how confidentiality could be preserved without direct observation of the employee giving the specimen. *Id.* at 114, 609 A.2d at 27 (Pollock, J., concurring). For a discussion of the federal and state statutes that govern the administration of drug testing, see *supra* notes 9 and 77.

184 *Id.* at 113, 609 A.2d at 26-27 (Pollock, J., concurring). Justice Pollock outlined the evolution of the "right to die" as an example of how the right to privacy had shifted from being a constitutional one to a common law one. *Id.* (Pollock, J., concurring) (citing *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987)).

185 *Id.* at 116, 609 A.2d at 28 (Pollock, J., concurring).

186 *Id.* (citing N.J. STAT. ANN. § 2C:35-1.1(b); Robert Schwaenberg, *Drugs in the Workplace: Chamber of Commerce, State Join to Chart Test Policy*, THE STAR-LEDGER, July 11, 1992, at 1 (reporting on the Governor's establishment of Governor's Council for a Drug Free Workplace)).

New Jersey Constitution.[187]

In *Hennessey v. Coastal Eagle Point Oil Co.* the New Jersey Supreme Court has called on the New Jersey Legislature to set guidelines for private employment drug testing.[188] As a recent study indicated, private employer drug testing has increased over the last five years.[189] Although most of these companies employed over 5,000 people and could afford adequate follow-up tests for positive results, many of the smaller companies did not implement confirmatory procedures.[190]

Because of the risk of inaccurate results, private employment drug testing needs to be regulated by statute. A public debate on this issue should focus on the competing interests of the employee, the employer and the public so that comprehensive guidelines can be implemented to insure accuracy, privacy and accountability. As much of the medical literature has suggested, the effectiveness of drug testing depends upon the accuracy of the results.[191] In enacting legislation for drug testing, the legislature should consider employment drug testing as a form of forensic medicine governed by the same rigid chain of custody rules.[192] Additionally, all front line drug tests should be confirmed with a more accurate test such as a gas chromatography/mass spectrometry test.[193] For guidance, the

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187 *Hennessey*, 129 N.J. at 116, 609 A.2d at 28 (Pollock, J., concurring).

188 *Id.* at 107, 609 A.2d at 23 (1992).

189 Donald Warshaw, *More firms are testing for drugs; positive percentages still decline*, THE STAR-LEDGER, Apr. 2, 1993, at 3. A 1992 survey by the American Management Association showed that 85 percent of the large and medium firms included in the study had drug-tested personnel in one form or another. *Id.* This same survey in 1991 indicated that 74 percent of the firms had tested for drugs. *Id.* The survey showed that 8.5 percent of those tested in New Jersey produced positive results. *Id.*

The survey also reported that for employees who tested positive, 54 percent of the companies offered counselling to the individual and 28 percent dismissed the employee. *Id.* Nationwide, the survey continued, random drug testing of employees was performed by 33 percent of the firms questioned. *Id.*

Of concern to the American Management Association was the employer's failure to confirm positive results with proper validating tests. *Id.* The survey indicated that only 23 percent of the firms did not use a more accurate follow-up test such as a gas chromatology test. *Id.* Surprisingly, the survey revealed that some firms had no follow-up test at all. *Id.*

190 *Id.*

191 For a discussion of the accuracy problems in testing employees for drugs from urine samples, see *supra* note 12. Additionally, the usefulness of the tests hinges on the ability of highly trained individuals to administer and interpret the tests. Dubowski, *supra* note 14, at 418.

192 Dubowski, *supra* note 14, at 417-18.

193 Schwartz & Hawks, *supra* note 14, at 193. Gas chromatography/mass spectrometry involves separating chemicals in a biological extract in order to identify the presence of a particular substance. *Scientific Issues*, *supra* note 14, at 3113. A gas

New Jersey Legislature should look to other states that have enacted employee drug testing statutes.[194] Although follow-up testing will increase employer costs, such procedures will not only insure that the employee is given a fair chance to rebut any false positive results but will fulfill society's goal of having unimpaired workers occupying safety-sensitive positions.

Justice Pollock's criticism of the majority for deciding a constitutional issue when the case did not require the supreme court to do so was misguided.[195] Justice Pollock correctly indicated that both Article I, Paragraph 1 and Article I, Paragraph 7 of the New Jersey Constitution protect the privacy interests of the individual from state action; the majority, however, did not hold on constitutional grounds.[196] Instead, the majority simply looked to the state constitution as a source of public policy for the tort of wrongful discharge.[197] Ultimately, the parameters of public policy, the majority decided, lay in the rubric of the common law tort of wrongful discharge.[198] The supreme court looked only to the state constitution because no legislation existed to guide them on the issue of private employment drug testing.[199] The legislature, therefore, is not restricted in its attempt to enact statutes governing private employment drug testing.

Finally, the *Hennessey* decision indicated the New Jersey Supreme Court's willingness to expand the rights of employees in the area of private employment.[200] The New Jersey Supreme Court

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chromatograph scans the extract and separates compounds into fragments of electrically charged ions. *Id.* No two fragments are alike. *Id.* The mass spectrometer is then used to confirm both a presence and amount of drugs and drug metabolites separated from the biological specimens. *Id.*; Dubowski, *supra* note 14, at 469.

Gas chromatography is one of the most common methods used to confirm positive drug tests. *Id.* Gas chromatography, however, has several drawbacks. *Scientific Issues, supra* note 14, at 3113-14. First, the equipment to perform the procedure is extremely expensive and time consuming as it can only process samples one at a time. *Id.* at 3113. Second, highly trained personnel are required to operate the equipment. *Id.* at 3113-14. *See also* Dubowski, *supra* note 14, at 473 (discussing the skills required of a technician who performs a gas chromatography test). As a result, some commentators advocate using gas chromatography/mass spectrometry only as a confirmatory test. Schwartz & Hawk, *supra* note 14, at 790; *Scientific Issues, supra* note 14, at 3113-14.

194 *See supra* note 9 (outlining Connecticut's statute on employee drug testing).

195 Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 109, 609 A.2d 11, 24-25 (1992) (Pollock, J., concurring).

196 *Id.* at 96-97, 609 A.2d at 18.

197 *Id.* at 97-98, 609 A.2d at 18-19.

198 *Id.* at 90-92, 609 A.2d at 15-16.

199 *Id.* at 102, 609 A.2d at 21.

200 For additional New Jersey cases discussing the tort of wrongful discharge, see *Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 191-92, 536 A.2d 237, 238 (1988) (holding that employment discrimination based on gender is a violation of public policy

properly focused on the duties of the employee to establish the permissible scope of employer inquiry into the private affairs of the employee.[201] The employer should only be permitted only to inquire into employee behavior that will have a recognizable influence on the employee's performance.[202] This task is difficult and varies considerably from job to job. Accordingly, the business community and organized labor should collectively bargain the limits of an employer's intrusion into an employee's private life. For industries in which unions do not have an influence, legislative guidance on the definition of a safety-sensitive position is necessary. The Legislature's failure to define safety-sensitive positions will reduce employer drug testing. Employers will be fearful of litigation over wrongly deciding the employee occupies such a position and then terminating that employee for a positive drug test.[203] Although the majority opinion provided some guidance defining a safety-sensitive position, the question remains as to how an employer is to know which employee occupies a position that is "fraught with hazard" and "pose[s] a threat to coworkers, to the workplace, or the public at large."[204] Articulating standards to determine the nature of a safety-sensitive position would harmonize the interests of society in eradicating workplace drug use with the privacy interests of the employee in preserving confidential information irrelevant to his or her employment.

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and supports a claim of wrongful discharge); *House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 49, 556 A.2d 353, 358 (App. Div.) (holding that merely voicing one's opposition to a corporate policy is insufficient to support a claim of wrongful discharge), *certif. denied*, 117 N.J. 154, 564 A.2d 874 (1989); *Lepore v. National Tool and Mfg. Co.*, 224 N.J. Super. 463, 466, 473, 540 A.2d 1296, 1297, 1301 (App. Div. 1988) (stating that retaliatory discharge for reporting a Occupational Safety and Health Act (OSHA) violation, 29 U.S.C. § 651 *et seq.*, is grounds for wrongful discharge claim), *aff'd*, 115 N.J. 226, 557 A.2d 1371 (1989); *Schwartz v. Leasametric, Inc.*, 224 N.J. Super 21, 30, 539 A.2d 744, 749 (App Div. 1988) (finding no violation of public policy occurred when an employer discharged an employee to avoid paying commissions to that employee); *Cerracchio v. Alden Leeds, Inc.*, 223 N.J. Super. 435, 443-44, 538 A.2d 1292, 1296-97 (App. Div. 1988) (concluding that an employee's wrongful discharge claim in which an employer terminated that employee in an attempt to prevent the filing of a worker's compensation claim should not have been dismissed); *Alexander v. Kay Finley Jewelers, Inc.*, 208 N.J. Super. 503, 508, 506 A.2d 379, 381 (App. Div. 1985) (holding that discharge based on private salary dispute between employer and employee was not a violation of public policy), *certif. denied*, 104 N.J. 466, 517 A.2d 449 (1986).

201 *Hennessey*, 129 N.J. 102-03, 609 A.2d at 21.

202 Blades, *supra* note 4, at 1406-07.

203 *See generally* Knapp & McLester, *supra* note 15 (discussing the implications of *Hennessey v. Coastal Eagle Point Oil Co.*).

204 *Hennessey*, 129 N.J. at 102, 609 A.2d at 21.