INTRODUCTION

The workplace has become the next battleground in America's fight to curb drug use. As one commentator stated, "[T]he most effective weapon in the war on drugs is in business's hands - the paycheck." Increasingly, American companies want to know what their employees are doing, both on- and off-duty. The practice of testing employees for drug use has become commonplace among United States businesses. A recent survey conducted by the American Management Association revealed that of the 794 large and mid-size companies polled, 87.2 percent had tested employees or applicants for drug use. The Institute for a Drug-Free Workplace, a non-profit coalition of United States businesses, estimates that one in twelve work-

1. See infra notes 2-7 and accompanying text.
2. Scott S. Cairns & Carolyn V. Grady, Drug Testing in the Workplace: A Reasoned Approach for Private Employers, 12 GEO. MASON U.L. REV. 491, 493 (1990). The quoted statement was made by Mark A. de Bernado, Executive Director of the Institute on a Drug-Free Workplace. Id.
3. Don't Pry: America's Bosses Are Too Noisy About Their Employees' Lives, 317 ECONOMIST 18 (1990). American businesses are concerned, in the end, with the bottom line. John Elson, Busybodies: New Puritans. Repent! The Hour of the Meddlers is at Hand! And They are Putting Other Americans' Views, Behavior and Even Jobs at Increasing Risk, TIME, Aug. 12, 1991, at 20. Companies can pay less for health insurance for those workers who lead "pure" lifestyles by not, for example, smoking, drinking, overeating, taking drugs, or engaging in risky behavior such as surfing, rock climbing, and riding motorcycles. Id.
4. See infra notes 5-7 and accompanying text. SmithKline Beecham Clinical Laboratories, one of the largest drug testing laboratories in the United States, conducted 3.6 million drug tests in 1994. Drug Use Drops in the Workplace - Marijuana's Popularity Grows, SAN FRANCISCO CHRON., Mar. 7, 1995, at D3; John M. Norwood, Drug Testing in the Private Sector and its Impact on Employees' Right to Privacy, 45 LAB. L.J. 731, 734 n.34 (1994). Of these tests, 7.5 percent were positive, showing a drop of almost one percent since 1993. Drug Use Drops in the Workplace - Marijuana's Popularity Grows, SAN FRANCISCO CHRON., Mar. 7, 1995, at D3. However, marijuana use rose from 39.9 percent of all positive tests to 47.1 percent. Id. SmithKline believes the increase in positive test results for marijuana use may be the result of a decrease in the screening threshold required by the United States Department of Transportation. Id.
5. Stuart Silverstein, Employers Begin to Rely Less on Drug Tests, LOS ANGELES TIMES, Apr. 7, 1994, at 2. The rapid spread of drug testing is explainable. Douglas L. Stanley, Employee Drug Testing, 61 KAN. B. ASS'N 19, 35 (1992). Companies decide to promulgate drug-free policies because they fear that if they do not, they will be forced to employ drug users who could not find employment anywhere else. Id.
ers in America have abused alcohol or drugs.\(^6\) This abuse costs American businesses $60 billion to $150 billion a year.\(^7\)

Even though drug testing has become widespread, state courts have only recently begun to develop a framework with which to analyze the various questions that arise when drug testing is utilized by employers.\(^8\) One issue, in particular, has generated a split among state courts — the issue of whether a positive drug test, considered alone or with other factors, constitutes “misconduct” justifying a denial of unemployment benefits.\(^9\) Because the underlying principle supporting the unemployment benefits system is that the state should give assistance to those who have lost their jobs through no fault of their own, the question then becomes whether an employee who has tested positive for drug use and been subsequently discharged can be considered to be “at fault.”\(^10\)

This Note will first discuss a recent Nebraska Supreme Court case of first impression, *Dolan v. Svitak*,\(^11\) in which the court denied unemployment benefits to an employee who tested positive for marijuana use, holding that a positive drug test alone amounted to “misconduct.”\(^12\) This Note next reviews other state courts’ decisions concerning the question of whether a positive drug test result, considered alone or with other factors, constitutes “misconduct” sufficient to

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6. Ann Merrill, *Drugs in the Workplace Remain a Confusing and Complex Issue Yet Positive Results to Drug Tests are on the Decline*, *Star Trib.*, Aug. 19, 1994, at 1D [hereinafter Merrill]. Representatives from four major corporations founded the Institute for a Drug-Free Workplace in 1989 and today it represents 120 businesses. MARK A. DE BERNARDO, MARCI M. DE LANCEY, & BENJAMIN W. HAHN, Preface to *Guide to State Drug-Testing Laws* at iii (1994) [hereinafter de Bernardo, De Lancey, & Hahn]. The Institute’s goals are to eliminate drug abuse by employees in the workplace and to lessen the effects drug abuse has on American businesses. Id.

7. Merrill, supra note 6, at 1D.

8. See infra notes 72-262 and accompanying text; see also de Bernardo, De Lancey, & Hahn, supra note 6, at 3 (discussing the issues involved, including under what circumstances employees may be tested for drugs, the different varieties of drug testing, and statutory provisions regarding drug testing).


justify a denial of unemployment benefits. This Note then analyzes the reasonableness of drug free policies as work-related rules. Finally, this Note concludes that the Nebraska Supreme Court erred in holding that a positive drug test alone justified a denial of unemployment benefits and offers suggestions for a more satisfactory resolution of the issue.

FACTS AND HOLDING

On August 1, 1992, Chief Industries, Inc. ("Chief Industries") adopted a drug free workplace policy in an attempt "to improve job safety, to ensure quality production for its customers, and to demonstrate to the community its stand against chemical abuse." Chief Industries delayed enforcement, giving its employees thirty days' notice so that employees who suspected they might have difficulty passing the test had the opportunity to "rid [their] system[s] of any chemical traces." Chief Industries' policy required employees to submit to drug testing and set out various penalties for violations of the policy, including discharge.

Chief Industries' policy prohibited certain behavior, including "[u]sing, being under the influence of, or possessing alcohol or illegal drugs while performing Company business or while in or about a Company facility or worksite." The policy defined "being under the influence" as behavior "result[ing] in a positive test result . . . determined by having contained within the body a minimum of the limits of one or more chemicals listed." For example, one of the chemicals listed was cannabinoids, a derivative of marijuana. According to the policy, a

13. See infra notes 72-262 and accompanying text.
14. See infra notes 268-88 and accompanying text.
15. See infra notes 316-36 and accompanying text. See infra notes 263-324 and accompanying text for a discussion of the reasonableness of drug testing policies, the alternative to the Svitak "misconduct" test, and the alternatives to drug testing, but not a discussion of the refusal to submit to drug testing as "misconduct," the use or sale of narcotics on company property as constituting "misconduct," off-duty arrests for narcotics or other infractions amounting to "misconduct," and the use of alcohol as "misconduct."
16. Brief for Appellant at 6, Dolan v. Svitak, 247 Neb. 410, 527 N.W.2d 621 (1995) (No. 93-0543); Dolan v. Svitak, 247 Neb. 410, 412, 527 N.W.2d 621, 623 (1995). The policy underwent minor revisions after Svitak was discharged, but the portions relevant to Svitak's situation were in force when he took the drug test and was terminated. Brief for Appellant at 6, Svitak (No. 93-0543).
17. Svitak, 247 Neb. at 413, 527 N.W.2d at 623.
18. Id. at 412, 527 N.W.2d at 623.
19. Id. at 414, 527 N.W.2d at 624.
20. Id.
21. Id.
drug test result was positive if it attained a minimum level of 100 ng/mL.\footnote{22}

Soon after Chief Industries adopted the policy, Jeffrey J. Svitak, employed as a roof-setter for six years by a division of Chief Industries, received a copy of the policy.\footnote{23} At that time, Svitak signed the company's policy statement regarding the purpose of the thirty-day enforcement delay.\footnote{24} On September 1, 1992, immediately prior to being tested, Svitak also signed a "Drug Screening Consent and Waiver" form, giving Chief Industries permission to test him.\footnote{25}

Chief Industries required Svitak to submit a urine sample that would be analyzed for traces of narcotics.\footnote{26} Svitak's screening test showed a positive result for marijuana metabolites ("THC") at 100 ng/mL, placing him at the threshold level for a positive test result.\footnote{27} A subsequent confirmatory test was conducted on the same sample, yielding a test result level of 15 ng/mL.\footnote{28}

On September 9, 1992, Chief Industries discharged Svitak pursuant to the newly enacted drug policy.\footnote{29} Chief Industries based Svitak's discharge solely on the results of his positive drug test.\footnote{30} Chief Industries was not dissatisfied with Svitak's job performance, nor did Chief Industries claim that Svitak ever reported to work while under the influence of marijuana.\footnote{31}

\footnote{22} Id. The test also measured individuals for alcohol consumption. Id. The measurement "ng/mL" used in the test stands for "nanograms per milliliter." KEVIN B. ZESEE, DRUG TESTING LEGAL MANUAL: GUIDELINES & ALTERNATIVES 2-23 (1988) [hereinafter ZESEE]. A nanogram is equivalent to one-billionth of one gram, and a milliliter is equivalent to one-thousandth of one liter. Weller v. Arizona Dep't of Economic Sec., 860 P.2d 487, 489 (Ariz. App. 1993).

\footnote{23} Svitak, 247 Neb. at 412-13, 527 N.W.2d at 623.

\footnote{24} Id. at 413, 527 N.W.2d at 623 (stating that Svitak signed the policy and memorandum concerning the thirty-day enforcement delay on August 6, 1992).


\footnote{26} Brief for Appellant at 6-7, Svitak (No. 93-0543). The collection of Svitak's specimen was supervised by Aurora Medical Clinic staff and was later sent to Nichols Institute, a certified testing laboratory, for testing. Id.

\footnote{27} Svitak, 247 Neb. at 414, 527 N.W.2d at 624.

\footnote{28} Id. The initial drug screening analyses are typically extremely sensitive. ZESEE, supra note 22, at 2-6. The screening tests are designed to quickly and efficiently separate possible positive results. Id. These tests, however, are prone to errors, including cross-reactions and false positives. Id. at 3-6 - 3-8, 3-10 - 3-20. All positive screening tests must be verified by a confirmatory test before an employer takes action based on a test result. Id. at 2-2. The confirmatory tests, while not foolproof, are generally more accurate than screening tests. Id. at 2-20 - 2-21. Since both tests were conducted using the same sample, it is therefore likely that Svitak's screening test overestimated the amount of drugs in his system. See Svitak, 247 Neb. 410, 527 N.W.2d 621 (1995); ZESEE, supra, note 22, at 2-20 - 2-21, 3-6 - 3-8, 3-10 - 3-20.

\footnote{29} Svitak, 247 Neb. at 412, 527 N.W.2d at 623.

\footnote{30} Id.

\footnote{31} Id.; Brief for Appellant, Svitak (No. 93-0543).
Svitak submitted an application for unemployment benefits following his discharge from Chief Industries. After considering Svitak's application, the Nebraska Department of Labor granted Svitak's request for unemployment benefits, finding that Svitak had not been discharged for misconduct connected with his position. Chief Industries appealed to the Nebraska Appeal Tribunal ("tribunal"), asserting that the Department of Labor should not have granted unemployment benefits to an individual who violated Chief Industries' drug policy.

On October 29, 1992, the tribunal held a hearing regarding Chief Industries' appeal. During the hearing, Chief Industries' personnel development manager testified that Chief Industries discharged Svitak solely because of his positive drug test. The personnel manager also stated that Svitak was not a problem employee and that Svitak had never reported to work while visibly under the influence of

32. Svitak, 247 Neb. at 412, 527 N.W.2d at 623.
33. Id. The Department of Labor applied Neb. Rev. Stat. § 48-628 (Supp. 1994), which provides that in order for individuals to be disqualified from receiving benefits, their misconduct must be "connected with [their] work." Id.; Brief of Appellant at 1, Svitak (No. 93-0543). The statute provides in pertinent part:

An individual shall be disqualified for benefits . . . (b) For the week in which he or she has been discharged for misconduct connected with his or her work, if so found by the commissioner, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner in each case according to the seriousness of the misconduct. If the commissioner finds that such individual's misconduct was gross, flagrant, and willful, or was unlawful, the commissioner shall totally disqualify such individual from receiving benefits with respect to wage credits earned prior to such misconduct. In addition to the seven-week to ten-week benefit disqualification assessed under this subdivision, the commissioner shall cancel all wage credits earned as a result of employment with the discharging employer if the commissioner finds that the individual was discharged for misconduct in connection with the work which was not gross, flagrant, or willful or unlawful but which included being under the influence of any intoxicating beverage or being under the influence of any controlled substance listed in section 28-405 not prescribed by a physician licensed to practice medicine or surgery when the individual is so under the influence on the worksite or while engaged in work for the employer . . . .

35. Svitak, 247 Neb. at 412, 527 N.W.2d at 623.
36. Id.
marijuana or any other substance. The tribunal reversed the Department of Labor's decision, holding that a positive drug test constitutes misconduct, regardless of whether the employee was impaired while at the workplace. Based on these findings, the tribunal withheld unemployment benefits from Svitak for seven weeks.

Following this reversal, the Nebraska Commissioner of Labor, Dan Dolan ("Commissioner"), filed a petition for review with the District Court of Hall County, Nebraska. The district court reversed the tribunal's decision and reinstated Svitak's unemployment benefits. The district court concluded that Chief Industries failed to establish that Svitak had engaged in misconduct connected with work. In considering the nexus between Svitak's off-duty behavior and his employer's interests, the district court determined that Svitak's off-duty activities were not "reasonably related to the employer's interest[s]." Therefore, the district court refused to find that a positive drug test, by itself, constituted misconduct.

Chief Industries appealed the district court's ruling to the Nebraska Supreme Court. On appeal, the Nebraska Supreme Court addressed the issue of whether a positive drug test alone was sufficient to establish misconduct.

Acknowledging that this issue was one of first impression in Nebraska, the supreme court reviewed cases from various other jurisdictions. The court noted a split among jurisdictions on this issue — some courts required a showing of impairment in addition to a positive drug test, while other courts determined that a positive drug test alone demonstrated misconduct.

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37. Brief for Appellee at 5, Svitak (No. 93-0543); Svitak, 247 Neb. at 412, 527 N.W.2d at 623.
38. Id. at 412-13, 527 N.W.2d at 623.
39. Id. at 413, 527 N.W.2d at 623.
40. Id.
41. Id.
42. Id. The district court found that, "in order to disqualify a discharged employee from unemployment compensation, the misconduct must be connected with work performance." Id.
43. Svitak, 247 Neb. at 413, 527 N.W.2d at 623.
44. Id. The district court refused to take judicial notice of a connection between an employee's positive drug test result and any adverse effect on the employer's interests. Id. at 412, 527 N.W.2d at 623.
45. Svitak, 247 Neb. at 413, 527 N.W.2d at 623. The Nebraska Supreme Court, exercising its power to regulate the caseloads of the appellate courts, removed the case from the appellate court system to the supreme court for determination. Id.
46. Svitak, 247 Neb. at 412, 527 N.W.2d at 623.
47. Id. at 415-16, 527 N.W.2d at 625.
48. Id. at 416, 527 N.W.2d at 625.
The parties did not dispute that Chief Industries had discharged Svitak solely because of his positive drug test result.49 The Commissioner argued that Svitak's positive drug test alone could not constitute misconduct without a showing that Svitak had ever been impaired while on duty or had put himself or his co-workers at risk.50

The court noted that, in order to deny unemployment benefits, Nebraska law requires a showing of "misconduct connected with . . . work."51 The court defined misconduct as:

(1) wanton and willful disregard of the employer's interests,
(2) deliberate violation of rules,
(3) disregard of standards of behavior which the employer can rightfully expect from the employee, or
(4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.52

The court next addressed the issue of whether Chief Industries' drug-free policy was reasonably related to its interests as an employer.53 The court noted that Chief Industries contended that its policy was reasonably related to its interests because the policy promoted safety and productivity, cut down on absenteeism and health costs, and increased morale.54 Reviewing the goals of Chief Industries' policy, the court stated that "[a]t the very least" Chief Industries had attempted "to take a stand against illegal conduct by its employees."55

49. Id. at 414, 527 N.W.2d at 624.
50. Id. at 414-15, 527 N.W.2d at 624.
51. Id. at 415, 527 N.W.2d at 624-25.
53. Svitak, 247 Neb. at 417, 527 N.W.2d at 626.
54. Id.
55. Id. The court cited NEB. REV. STAT. § 28-416(11)(a) (Supp. 1994), as demonstrating the type of illegal conduct Chief Industries attempted to prevent through its drug policy. Id. Section 28-416 provides that anyone possessing less than one ounce of marijuana is guilty of an infraction and shall receive a citation, be subject to a fine of $100, and be required to take an alcohol and drug awareness course. NEB. REV. STAT. § 28-416(11)(a) (Supp. 1994).
The court praised the employer’s goals in establishing a drug-free workplace, terming them “salubrious and salutary.”

The court determined that any violation of Chief Industries’ policy by Svitak must have been intentional and deliberate. The court relied on the fact that Svitak had thirty days in which to clear his system between the time Chief Industries announced its drug-free policy and the date testing began, and, therefore, the court inferred that Svitak must have used drugs after receiving notice of the drug-free policy. The court stated that Svitak’s positive drug test was sufficient to show that Svitak had intentionally violated the new policy.

The court then noted that “[i]t would seem beyond dispute that a worker who knowingly and deliberately violates a work rule that unquestionably seeks to enhance the employer’s reputation in the community for taking a stand against drug use” should be temporarily disqualified from unemployment benefits for behavior constituting misconduct.

Based on these factors, the Nebraska Supreme Court reversed the district court’s ruling and remanded the case with directions to affirm the determination of the Nebraska Appeal Tribunal. In so doing, the court denied Svitak unemployment benefits for seven weeks. The court found that a positive drug test alone constituted misconduct justifying a temporary denial of unemployment benefits regardless of whether there was a showing of on-the-job impairment.

BACKGROUND

Drug Testing and Analysis

Currently, analysis of urine samples is the most prevalent method utilized by employers screening employees for alcohol and drugs.

56. Svitak, 247 Neb. at 415, 527 N.W.2d at 624.
57. Id. at 417, 527 N.W.2d at 625-26.
58. Id.
59. Id.
60. Id. at 417-18, 527 N.W.2d at 626.
61. Id. at 418, 527 N.W.2d at 626.
62. Id. at 413, 418, 527 N.W.2d at 623, 626.
63. Id. at 412-13, 418, 527 N.W.2d at 623, 626. The court found it unnecessary to address Chief Industries’ second allegation of error, which concerned the failure of the district court to take judicial notice of the nexus between an employee’s positive drug test result and any resulting harm to an employer’s interests. Id. at 412, 418, 527 N.W.2d at 623, 626.
64. ZESE, supra note 22, at 2-23. Other bodily materials that can be analyzed for traces of drug use include blood, hair, saliva, breath, and feces. Id.; see Scott S. Cairns & Carolyn V. Grady, Drug Testing in the Workplace: A Reasoned Approach for Private Employers, 12 Geo. Mason U.L. Rev. 491, 500-01 (1990). The urine analysis process usually involves two successive tests. ZESE, supra note 22, at 2-2. The first test is the “screening test.” Id. Because the screening test is not a sufficient foundation upon
Urine analyses designed to detect alcohol and drug residues are quick,
relatively inexpensive, and comparatively less invasive than tests utilizing other kinds of bodily fluids or materials. As a result, employers have been eager to adopt urine analysis as a way to combat drug abuse by their workforces.

One of the most common misconceptions regarding drug testing is that a drug test can indicate whether an individual is impaired by his or her drug use while at work. In actuality, a positive drug test cannot reveal whether an individual is currently impaired or was impaired while at the workplace. Drug tests are unable to pinpoint the time an individual ingested a narcotic substance; the tests can only determine that an individual used drugs sometime in the recent past. Drug tests cannot show how much an individual ingested or

Any results of any test performed on the body fluid or breath specimen of an employee, as directed by the employer, to determine the presence of drugs or alcohol shall not be used to deny any continued employment or in any disciplinary or administrative action unless the following requirements are met: (1) A positive finding of drugs by preliminary screening procedures has been subsequently confirmed by gas chromatography-mass spectrometry or other scientific testing technique which has been or may be approved by the department. Id.


66. Zeese, supra note 22, at 1-1. Eighty-eight percent of American workers responding to a survey indicated they would take a drug test if asked by their employers. Test Workers for Drugs? Even Among Managers, It’s a Highly Emotional Issue, 235 Industry Wk. 17 (1987). Only thirty percent believed drug testing would constitute an invasion of privacy. Id.


68. Zeese, supra note 22, at 3-29; see Fogel, Kornblut, & Porter, 42 U. Miami L. Rev. at 563. One manufacturer of an EMIT test stated the following:

A positive EMIT Cannabinoid Assay result does not indicate intoxication. The psychoactive effects of marijuana and hashish do not correlate with urinary metabolite levels obtained by any method. The lack of correlation of psychoactive effects with urinary metabolite levels together with variation in absorption and distribution of drug, method of ingestion and urinary volume indicate that the assay of THC metabolites in urine is useful only as an indicator of the recent use of cannabinoids and not as a measure of intoxication. Zeese, supra note 22, at 3-30 - 3-31. In addition, because drug tests only measure metabolites appearing after the drug has been broken down by the body, an individual who has recently ingested a narcotic substance and is impaired will test negative. Id. at 2-24.

69. Id. at 1-8.
how often an individual uses drugs.\textsuperscript{70} Thus, it is impossible to determine from a positive drug test result whether an individual is a chronic user, an occasional user, or a one-time experimenter.\textsuperscript{71}

**Positive Drug Test Result as “Misconduct”**

*Nature of Work*

Several state courts have held that an employer must show that its rules regulating employees' off-duty behavior bear a reasonable relationship to legitimate interests or concerns of the employer.\textsuperscript{72} The nature of an employee's position has been one determinative factor for many courts.\textsuperscript{73} For example, employees working in security-sensitive, dangerous or high-risk, or transportation-related industries are perceived as a threat to their own safety and the safety of others around them if they use narcotics.\textsuperscript{74} As a result, many courts determine that employers may enforce drug-free policies that touch on employees' private lives if the nature of the employment situation demands such restrictions.\textsuperscript{75}

*Security-Sensitive Positions*

Courts have examined the special significance of the security-sensitive nature of an employee's work position when determining misconduct.\textsuperscript{76} For instance, the Utah Court of Appeals in *Johnson v. Department of Employment Security*\textsuperscript{77} noted that a contractor engaged in the areas of defense and national security had a particular interest in maintaining a drug-free workplace and in preventing employees from using narcotics on- or off-duty.\textsuperscript{78} *Johnson* involved a contractor who had a written drug policy mandating that any employee involved in a work accident must submit to testing.\textsuperscript{79} An employee involved in such an accident subsequently tested positive and was discharged.\textsuperscript{80} The employee filed a claim for unemployment benefits.\textsuperscript{81}

\textsuperscript{70} BANTA & TENNANT, supra note 65, at 81; Schwartz & Hawks, 254 JAMA at 789; ZESEE, supra note 22, at 1-8.

\textsuperscript{71} ZESEE, supra note 22, at 1-9.


\textsuperscript{74} See infra notes 76-128 and accompanying text.

\textsuperscript{75} See infra notes 76-128 and accompanying text.

\textsuperscript{76} See infra notes 77-88 and accompanying text.

\textsuperscript{77} 782 P.2d 965 (Utah App. 1989).

\textsuperscript{78} Johnson v. Dep't of Employment Sec., 782 P.2d 965, 970 (Utah App. 1989).

\textsuperscript{79} Johnson, 782 P.2d at 970.

\textsuperscript{80} Id. at 967, 970.
The court of appeals held that an employee's drug use, even if it occurred off the employer's premises, could disqualify an employee from benefits. The court noted that due to its unique situation, the contractor had good cause to be concerned about any employee drug use, not only because of safety concerns, but also because such employees could be pressured to release information about classified defense projects. The court determined such misconduct had the required connection to legitimate employer interests and, as a result, was justifiably the “subject of legitimate and significant concern to the employer.”

Likewise, in Claim of Atkinson, the New York Supreme Court found that an employee may be disqualified from receiving unemployment benefits because of the employee's high-security job. In Atkinson, the employee who tested positive for cocaine worked as a cashier handling a large volume of cash and receipts. The supreme court stated that an unemployment appeals board could reasonably conclude that this employee's drug use reflected on her “integrity,” and, therefore, constituted misconduct, regardless of when or where the drugs were taken.

Dangerous or High-Risk Positions

Other state courts have ruled that a positive drug test constitutes misconduct when the employee has a dangerous or high-risk position. In Grace Drilling Company v. Director of Labor, the Arkansas Department of Employment Security granted the employee benefits. The employer contested the award before an administrative law judge who affirmed the prior decision, holding that the employer did not have just cause to discharge the employee. The employer again appealed to the Board of Review of the Industrial Commission which reversed, but the case was reopened because the employee had not received sufficient notice of his employer's appeal. The Board directed the ALJ to hold another hearing. The Board refused to rule on an objection concerning expert testimony; the Board subsequently did not allow the testimony and affirmed its prior holding. The employee appealed.

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81. Id. at 967. The Department of Employment Security granted the employee benefits. Id. The employer contested the award before an administrative law judge (“ALJ”) who affirmed the prior decision, holding that the employer did not have just cause to discharge the employee. Id. The employer again appealed to the Board of Review of the Industrial Commission (“Board”) which reversed, but the case was reopened because the employee had not received sufficient notice of his employer’s appeal. Id. The ALJ held another hearing. Id. at 967-68. The ALJ refused to rule on an objection concerning expert testimony; the Board subsequently did not allow the testimony and affirmed its prior holding. Id. at 968. The employee appealed. Id.
82. Johnson, 782 P.2d at 971.
83. Id. at 970.
84. Id. at 970, 972 (Orme, J., concurring). One judge, concurring in the majority's decision, noted that “[a] degree of employer and public confidence is needed, with respect to an environment where rocket motors are being assembled, that simply does not exist in an environment where hamburgers are being assembled.” Id. at 972 (Orme, J., concurring).
88. Id. at 321. The court remanded the case, however, for further inquiry concerning whether the employer presented sufficient evidence as to the chain of custody surrounding the drug analysis of the employee's specimen. Id. at 322.
89. See infra notes 90-111 and accompanying text.
The Arkansas Court of Appeals found that an employee's positive drug test constituted misconduct, even though there was no evidence that the employee was impaired on the job.\(^{91}\) The employee who tested positive had worked as a driller for almost nine years.\(^{92}\) When the drilling company announced its drug free policy, the company required its employees to choose between signing the policy or being discharged.\(^{93}\) The employer had promulgated its drug free policy because of the frequent accidents occurring on the job and the riskiness of working in the drilling business.\(^{94}\) After his discharge, the employee sought unemployment benefits.\(^{95}\) The court of appeals stated the employer's rules were reasonable considering the high-risk nature of drilling work and disqualified the employee from receiving benefits.\(^{96}\)

Similarly, in *Clevenger v. Nevada Employment Security Department*,\(^{97}\) the Nevada Supreme Court determined that there was a reasonable connection between an explosives manufacturer's drug-free policy and valid concerns about employee well-being and public safety.\(^{98}\) In *Clevenger*, an employee working as an explosives operator was suspended and eventually terminated when she failed a drug test.\(^{99}\) Arguing that her termination was unfair and challenging the results of her drug test, the employee pursued a claim for unemployment benefits.\(^{100}\)

On appeal, the supreme court explained that the nature of the work required unimpaired employees.\(^{101}\) The court stated that an employee's judgments on the job could be faulty if the employee was under the influence of narcotics.\(^{102}\) The court held that the employee's behavior demonstrated a willful disregard of her employer's rules and the court denied her benefits.\(^{103}\)

\(^{91}\) Grace Drilling Co. v. Director of Labor, 790 S.W.2d 907, 909 (Ark. App. 1990).
\(^{92}\) *Grace Drilling Co.*, 790 S.W.2d at 908.
\(^{93}\) Id.
\(^{94}\) Id.
\(^{95}\) Id. The Arkansas Employment Security Division granted the employee benefits. *Id.* His employer appealed to the Appeals Tribunal, which reversed and disqualified the employee from benefits. *Id.* On appeal, the Board of Review reversed the Appeals Tribunal, holding that the employee was not discharged for misconduct connected with his work. *Id.* His employer appealed. *Id.*
\(^{96}\) *Grace Drilling Co.*, 790 S.W.2d at 909.
\(^{97}\) 770 P.2d 866 (Nev. 1989).
\(^{99}\) *Clevenger*, 770 P.2d at 867.
\(^{100}\) *Id.* The Unemployment Board originally denied the employee benefits. *Id.* at 867-68. The employee appealed the decision before an appeals referee and benefits were granted. *Id.* at 868. The employer appealed to the Board of Review, which reversed. *Id.* The employee appealed this decision to the district court which found the Board of Review's ruling proper. *Id.* The employee again appealed. *Id.*
\(^{101}\) *Clevenger*, 770 P.2d at 869.
\(^{102}\) *Id.*
\(^{103}\) *Id.* at 866-67, 869.
Likewise, the Louisiana Court of Appeal, in *Atlas Processing Company v. Administrator, Department of Employment Security*,\(^{104}\) focused on the high-risk nature of the employee's position as a quality-control laboratory tester in an oil refinery.\(^{105}\) In *Atlas*, the employee completed several hazardous tasks in the course of his daily employment.\(^{106}\) Workplace conditions were extremely dangerous due to the flammability and combustibility of the oil and chemicals on the job site.\(^{107}\) The employee was required to take a drug test after reporting to work with slurred speech and erratic behavioral problems and was discharged after testing positive for alcohol and marijuana.\(^{108}\) The employee filed for unemployment benefits.\(^{109}\)

The court of appeal held that the employer's drug-free policy was reasonable due to the necessity of safeguarding employees and the public from devastating accidents.\(^ {110}\) The court, taking into consideration the high-risk atmosphere of the workplace, reasoned that any on-duty or off-duty use of controlled substances constituted misconduct.\(^ {111}\)

**Transportation-Related Positions**

Several state courts have determined that the risks and liabilities impaired transportation employees pose to the public outweigh any interests the employees have in keeping their off-duty activities private.\(^{112}\) In *Barkley v. Peninsula Transportation District Commis*...
The Virginia Court of Appeals withheld benefits from a bus driver who tested positive for marijuana. The driver had been required to submit to a drug test when she sought to change her employment status from part-time to full-time. Following a positive test result, the employee admitted using marijuana at a party three weeks prior to the test. However, at the time of usage, she was not on call or scheduled to report to work for two days. Nevertheless, the employee was suspended without pay and required to complete a rehabilitation program. The employee applied for unemployment benefits during this period.

The court of appeals ruled that, if an employer proves that an employee deliberately violated the employer's policy, the employee must show mitigating circumstances that might be balanced against that violation. Although in this case the employee was not scheduled to work for several days following her marijuana use, the court held that the employer had a substantial interest in the safety of its passengers that outweighed any of the employee's justifications.

Similarly, in Singleton v. Commonwealth Unemployment Compensation Board of Review, the Commonwealth Court of Pennsylvania held that the Unemployment Compensation Board properly withheld benefits on grounds of misconduct from a public transit driver who tested positive for drug use, even if the driver was not under the influence of narcotics while on the job. In Singleton, a public transit driver had previously been discharged for discourtesy. Several months later, the public authority agreed to reinstate the employee, provided that he pass a physical examination which

produce evidence of impairment would have "a chilling effect on the public policy prohibiting commercial drivers from ever using drugs".

115. Barkley, 398 S.E.2d at 94.
116. Id. at 95.
117. Id.
118. Id.
119. Id. During the initial hearing, the Virginia Employment Commission found the employee was qualified to receive benefits. Id. at 94. Her employer appealed that determination to an appeals examiner who reversed and disqualified the employee from benefits. Id. The employee appealed to a special examiner who reversed, holding that the employer had not met its burden of proof. Id. The employer appealed to the circuit court, which reversed the determination of the special examiner. Id. The employee appealed. Id.
120. Barkley, 398 S.E.2d at 95.
121. Id. at 96.
124. Singleton, 558 A.2d at 575.
cluded a drug test. On the day the employee returned to work, his test results came back positive, and the employee was removed from his route and discharged. The employee subsequently applied for unemployment benefits. On appeal, the commonwealth court stated that, because the employer transported thousands of people on its system each day, the employer had "compelling concerns for public safety" that prompted the employer's drug-free policy.

Repeated Evidence of "Misconduct"

If an employee has tested positive for narcotic substances, some employers may give the employee a second chance. After testing positive, the employer may place the employee on a kind of "probation." After a subsequent positive test result or failure to complete a rehabilitation program, if an employee is discharged, several state courts and boards examining this situation have sided with the employer on the question of whether the employee's behavior constituted misconduct.

Multiple Positive Drug Test Results

In Batain v. State Department of Industrial Relations, the Alabama Court of Civil Appeals ruled that an employee who repeatedly tested positive for marijuana use could be disqualified from receiving

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125. Id.
126. Id. at 576.
127. Id. Following the original hearing, the Office of Employment Security denied the employee benefits. Id. The employee appealed that determination, and an employment referee reversed, granting benefits. Id. The driver's employer appealed to the Board of Review ("Board") and the Board denied benefits. Id. The employee appealed to the Commonwealth Court, which remanded the case to the Board for further determination. Id. The Board issued a new determination denying the employee benefits. Id. The employee appealed, and the case again came before the Commonwealth Court of Pennsylvania. Id.
128. Singleton, 558 A.2d at 577. Close, personal contact with the public, while acting as a representative of the employer, is another aspect of work performance that may sway a court's determination of misconduct in the employer's direction. See Jensen v. Mary Lanning Memorial Hosp., 233 Neb. 66, 70-71, 443 N.W.2d 891, 894 (1989).
In Jensen, the Nebraska Supreme Court noted that a nurse who reported to work with alcohol detectable on her breath was disqualified from unemployment benefits because of misconduct. Jensen, 233 Neb. at 70, 443 N.W.2d at 894. The court stated, "Such an odor, detected at close range by a hospital patient, could well cause personal distress to the patient and weaken the patient's confidence in the abilities of the hospital's employees to properly care for patients entrusted to the hospital for treatment." Id.
130. See Szostek, 541 A.2d at 50; Batain, 606 So. 2d at 141; Clevenger, 770 P.2d at 867.
131. See infra notes 132-47 and accompanying text.
unemployment benefits because of the employee's "misconduct." The employer warned the employee that drug use would not be tolerated. The employee tested positive for marijuana once and was terminated when he tested positive a second time. The employee then filed for unemployment benefits.

The Alabama Court of Civil Appeals stated that the employee's repeated use of drugs constituted a deliberate violation of the employer's rule. Addressing the question of whether the employer's rule was sufficiently related to its interests, the court noted that an employee working for a public utility company is "charged with serving the public," and that a utility's rule prohibiting the use of drugs by its employees was reasonable. The court ruled that the employee was guilty of misconduct and denied him benefits.

Failing an Employer-Sponsored Rehabilitation Program

In *Szostek v. Commonwealth Unemployment Compensation Board of Review*, the Pennsylvania Commonwealth Court denied an employee unemployment benefits after the employee was discharged for testing positive for marijuana following completion of an employer-sponsored drug rehabilitation program. The employee, a gas meter reader, had recently completed the employer-mandated drug rehabilitation program. The employee consented as part of his "second chance" agreement to remain drug-free after completing the program and to random testing for drug use following his return to work. The employer discharged the employee when he subsequently tested positive for marijuana.

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134. *Batain*, 606 So. 2d at 141-42.
135. *Id.*
136. *Id.* A claims examiner with the Department of Industrial Relations, when first examining the case, determined the employee was eligible for unemployment benefits. *Id.* His employer appealed to an appeals referee who affirmed the prior determination. *Id.* The employer appealed a second time to the Board of Appeals, which reversed the appeals referee's decision. *Id.* The employee then appealed to a circuit court. *Id.* The circuit court denied benefits, and the employee again appealed. *Id.*
137. *Batain*, 606 So. 2d at 141-42.
138. *Id.* at 142.
139. *Id.* at 141-42.
143. *Id.* at 50.
positive for and admitted to the use of marijuana. The employee filed a claim for unemployment benefits. The Pennsylvania Commonwealth Court stated that an employer had a right to expect an employee to remain drug free if the employee had been granted time off to participate in an employer-financed rehabilitation program. Therefore, the court found that the employer could discharge and deny unemployment benefits to an employee who tested positive following the program, even though the employee had not been impaired while in the workplace.

Requiring Multiple Positive Drug Tests Before Disqualification

At least one court has required employees to be given a second chance. In Jones v. Brown and Root Corporate Services, the Alabama Court of Civil Appeals did not disqualify a worker from unemployment benefits on the basis of a single positive drug test. Even though the employer had warned its employee against using drugs while working, the employee tested positive for drug use. The court of civil appeals ruled that, unless the employee repeated such misconduct, the court would not disqualify him from benefits.

Positive Drug Test Alone

Several state courts have determined that a positive drug test alone constituted misconduct justifying a denial of unemployment benefits. These courts ruled that a positive test alone was miscon-
duct, regardless of whether there was an adverse effect on the employer's interests or any impairment of the employee's work abilities.\textsuperscript{154}

In \textit{Overstreet v. Illinois Department of Employment Security},\textsuperscript{155} an employee on sick leave tested positive for cocaine use during a mandatory physical that determined her fitness to return to work.\textsuperscript{156} The employer suspended the employee from her position and encouraged her to complete a rehabilitation program in lieu of termination.\textsuperscript{157} The employee immediately applied for unemployment benefits for the period of her suspension.\textsuperscript{158}

The appellate court held that an employee who tested positive for cocaine use while on sick leave could not receive unemployment benefits.\textsuperscript{159} The court found that the employee's off-duty cocaine use was misconduct, because she had deliberately violated her employer's drug free policy.\textsuperscript{160} The court made this determination even though the employee was on sick leave and was thus not performing any work for her employer when she tested positive.\textsuperscript{161}

Likewise, in \textit{Risch v. State},\textsuperscript{162} the Alaska Supreme Court temporarily disqualified a railroad employee from receiving unemployment benefits when the employee was discharged for testing positive for marijuana use.\textsuperscript{163} In \textit{Risch}, the employee was working as a locomotive engineer and was required to submit a urine sample for random drug testing.\textsuperscript{164} He had difficulty providing a "testable" sample, submitting

\textsuperscript{154} See infra notes 155-69 and accompanying text.
\textsuperscript{156} Overstreet, 522 N.E.2d at 186.
\textsuperscript{157} Id. Following an initial hearing in which the employer argued that the employee had been discharged for misconduct, the claims adjudicator denied the employee's claim for benefits. Id. The employee appealed to a hearing referee, who also concluded the employee had been discharged for misconduct. Id. at 186-87. The employee then appealed to the Board of Review for the Illinois Department of Employment Security ("Board"), which affirmed the referee's decision. Id. The employee then sought review before the circuit court, which reversed the Board's decision. Id. at 187. The employer then appealed to the appellate court. Id.
\textsuperscript{158} Overstreet, 522 N.E.2d at 187.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 186-87.
\textsuperscript{163} Risch, 879 P.2d at 358, 360, 363 (Alaska 1994).
\textsuperscript{164} Id.
three specimens for testing over the course of several hours. The samples was positive for marijuana, and the employee was subsequently discharged. The employee filed for unemployment benefits. On appeal, the Alaska Supreme Court determined that the employee willfully violated the employer's drug-free workplace policy by testing positive for drug use. As such, the court denied the employee unemployment benefits for the mandated period.

**POSITIVE DRUG TEST NOT "MISCONDUCT"

A number of state courts have adopted the position that a positive drug test alone is insufficient to demonstrate misconduct. These courts found that employers must present evidence showing on-the-job impairment to corroborate an employee's positive test result. These courts determined that an employer could not label as misconduct an employee's off-duty drug use merely by prohibiting that behavior. Instead, these courts demand a showing of impairment or some other specific effect on an employer's interests before holding that a positive drug test is equivalent to misconduct.

**Ambiguity of Employer's Policy

The Arizona Court of Appeals carefully examined an employer's drug policy and addressed the care that employers must exercise when drafting such policies. In *Golden Eagle Distributors, Inc. v. Arizona Department of Economic Security*, the employee had been...
working as a truck driver when he tested positive for cocaine. The employer's policy provided for immediate discharge of any employee found to be impaired while on the job. The employer subsequently discharged the employee, and the employee filed a claim for unemployment benefits.

On appeal, the Arizona Court of Appeals withheld unemployment compensation benefits from the employee because he violated federal regulations, preventing him from performing any further work for his employer. The court, however, although it denied benefits, ruled that the employee had not violated the employer's drug policy. The court stated that a positive drug test alone was insufficient to show that the employee had been under the influence of drugs. The court noted that an employer could not regulate its employees' off-duty conduct, unless such off-duty conduct adversely affected the employer's interests and rendered the employees "unsuitable" for work.

**Failing an Employer-Sponsored Rehabilitation Program**

Even though an employee fails to complete a rehabilitation program or violates a "last chance" agreement by repeatedly testing positive for narcotics, two state courts have concluded that the individual may not be disqualified from receiving benefits. Special circumstances existed that persuaded these courts to give unemployment benefits to an employee who did not fulfill his or her rehabilitation requirements.

In *Breithaupt v. Employment Appeal Board*, the Iowa Court of Appeals addressed the issue of whether an employee who had failed to

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177. *Golden Eagle Distrib., Inc.*, 885 P.2d at 1134.
178. *Id.* at 1131. The deputy of the Department of Economic Security disqualified the employee from receiving unemployment benefits. *Id.* The employee appealed to the Appeals Tribunal, which affirmed the prior decision holding that the employee had committed misconduct connected with his employment. *Id.* The employee then appealed to the Board of Review, which reversed, holding that insufficient evidence existed to establish that the employee was "under the influence of intoxicants." *Id.* The employer then appealed. *Id.*
179. *Golden Eagle Distrib., Inc.*, 885 P.2d at 1132-34.
180. *Id.* at 1134.
181. *Id.*
182. *Id.* at 1133.
183. *See infra* notes 185-201 and accompanying text. After an employee has tested positive for drugs, some employers may give the employee a second chance by placing the employee on a kind of "probation." *See Szostek, 541 A.2d at 50; Batain, 606 So. 2d at 141; Clevenger, 770 P.2d at 867.* The employer may force the employee to sign a "last chance" agreement, listing the terms under which the employee may return to work. *Id.*
184. *See Szostek, 541 A.2d at 50; Batain, 606 So. 2d at 141; Clevenger, 770 P.2d at 867.*
complete an employer-mandated rehabilitation program had committed misconduct. The employee reported to the company nurse because he had a sliver of steel in his eye. The nurse smelled alcohol, and the employee failed a blood alcohol test. The employer discharged the employee after he failed to complete a rehabilitation program, and the employee subsequently filed for unemployment benefits.

On appeal, the Iowa Court of Appeals held that an employee who dropped out of a substance abuse treatment program did not commit misconduct. While the court stated that an employer has the right to mandate and enforce a drug-free workplace policy, the court refused to find misconduct in this situation. The court focused on the fact that the employer required the employee to pay for the substance abuse treatment program as a condition of continued employment. Noting that the cost of the treatment program exceeded the employee's salary, the court ruled that the employer could not put its employee in the position of losing his job or being forced to forego supporting his family while he attended the program.

In Weyerhaeuser Company v. Employment Division, the Oregon Court of Appeals determined that an employee who violated a "last chance" agreement with his employer after completing a rehabilitation program was not disqualified from receiving benefits. In Weyerhaeuser, the employee had formerly completed a substance abuse program and, prior to returning to work, signed a "last chance" agreement which was designed to prevent any further drug use by the employee. The employee would be terminated if the agreement was

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187. Breithaupt, 453 N.W.2d at 533.
188. Id. at 533-34.
189. Id. at 534. The claim was initially brought before a Job Service representative, who refused to grant the employee benefits. Id. Following a hearing conducted after the employee's protest, a hearing officer affirmed the prior determination. Id. The employee appealed to the Employment Appeal Board, which also affirmed. Id. The employee sought review before a district court, which reversed and remanded the case for an agency decision. Id. The Employment Appeal Board appealed that decision to the court of appeals. Id.
190. Breithaupt, 453 N.W.2d at 534, 536.
191. Id. at 535-36.
192. Id.
193. Id. at 535 (stating that "[d]ue to the Hobson's choice presented to Breithaupt - apply all of your earnings toward substance abuse treatment or lose your job - we do not find misconduct in this case").
196. Weyerhaeuser, 804 P.2d at 1184.
EMPLOYEE DRUG TESTING

found to have been violated. Following a number of absences and tardy arrivals at work, the employee's supervisor requested the employee submit to a drug test, which showed that the employee tested positive for amphetamines and methamphetamines. The employee was fired and applied for unemployment benefits.

The Oregon Court of Appeals upheld the application of the Employment Appeals Board's rule that, unless the employer presented evidence demonstrating that the employee had been impaired while working, the employee's behavior could not constitute misconduct connected with his work. The court noted the employer's arguments that it was attempting to help the employee avoid the perils of drug abuse and that its generous aid program was slurled by the employee's "ingratitude and incorrigibility," but the court reminded the employer of the difference between determining whether the employee was properly discharged or whether the employee should be disqualified from receiving benefits.

Knowledge; Intentional Violation

In granting benefits, one state court focused on the deliberateness of the employee's violation of his employer's rule. In Blake v. Hercules, Inc. Virginia Employment Commission, an employee tested positive for marijuana after an anonymous telephone call alleged he was using a drug; however, the employee denied smoking the drug. The employee did admit to being in the presence of others who had smoked and alleged that his positive test result was due to passive inhalation. The employee was terminated and filed a claim for unemployment benefits.

197. Id.
198. Id. at 1185.
199. Id. The Employment Appeals Board heard the employee's case and granted the employee benefits. Id. at 1184. The employer appealed that decision to the court of appeals. Id.
200. Weyerhaeuser, 804 P.2d at 1187. To the contrary, in this case, the employer's witnesses only had positive impressions of the employee and his job performance. Id.
201. Weyerhaeuser, 804 P.2d at 1187.
202. See infra notes 203-09 and accompanying text.
205. Blake, 356 S.E.2d at 455.
206. Id. The employee's case was first heard by a deputy commissioner of the Virginia Employment Commission, who disqualified the employee from receiving unemployment benefits. Id. An evidentiary hearing was then held before an appeals examiner, who reversed the prior determination. Id. The employer then appealed this decision to the Virginia Employment Commission, which affirmed the appeals examiner's decision. Id. The employer then appealed to a circuit court, which held the employee was terminated for cause. Id. The case was then moved to the court of appeals for a determination on whether the employer had proven misconduct. Id.
Although the employee tested positive for marijuana use, the Virginia Court of Appeals held that the employee's behavior was not misconduct.\textsuperscript{207} The court noted no correlation between a positive result and on-the-job impairment.\textsuperscript{208} The court stated that, unless the employee knew or should have known that the use or passive inhalation of marijuana would result in a positive test result for a period extending well beyond the time of actual impairment, the employee's violation of his employer's rule was not deliberate so as to constitute misconduct.\textsuperscript{209}

\textit{Nature of Work}

Two state courts determined that employers must demonstrate that their drug policies are reasonable, even if their employees are engaged in risky work.\textsuperscript{210} In \textit{Veneer v. Employment Division},\textsuperscript{211} the Oregon Court of Appeals ruled that an employee's positive drug test and admission of off-duty drug use did not constitute misconduct.\textsuperscript{212} In \textit{Veneer}, the employee was terminated after testing positive for methamphetamines and later applied for unemployment benefits.\textsuperscript{213} Because the employee in question worked with machinery, his employer argued that the special safety needs of his job sufficiently demonstrated a connection between the employee's behavior and harm to the employer's interests.\textsuperscript{214}

On appeal, the Oregon Court of Appeals explained that an employer could not reduce its responsibilities under the unemployment system by unilaterally creating various policy rules.\textsuperscript{215} The court admitted that some kinds of employees should clearly remain drug-free on- and off-duty because of public safety concerns.\textsuperscript{216} However, the court emphasized that, in less clear cases, the employer must prove that a connection exists between an employee's violation of a rule and the employer's legitimate interests.\textsuperscript{217} The court ruled that an em-

\textsuperscript{207} Blake, 356 S.E.2d at 455-56.
\textsuperscript{208} Id. at 455.
\textsuperscript{209} Id. at 456.
\textsuperscript{210} See infra notes 211-26 and accompanying text.
\textsuperscript{211} 804 P.2d 1174 (Or. Ct. App. 1991).
\textsuperscript{213} Veneer, 804 P.2d at 1176. The Employment Appeals Board first heard the employee's case and did not disqualify the employee from receiving benefits. \textit{Id.} at 1175. The employer then appealed the decision to the court of appeals. \textit{Id.}
\textsuperscript{214} Veneer, 804 P.2d at 1175, 1178.
\textsuperscript{215} Id. at 1178 (quoting Glide Lumber Prods. Co. v. Employment Div., 741 P.2d 907, 910 (Or. Ct. App. 1987)).
\textsuperscript{216} Id. (offering, as an example, employees like airline pilots or nuclear submarine commanders).
\textsuperscript{217} Id.
ployer could not satisfy this burden merely by demonstrating that the employee broke the rule.218

Similarly, in Independent School District No. 1 of Tulsa County v. Logan,219 the Oklahoma Court of Appeals held that a positive drug test alone was insufficient proof of misconduct.220 In Logan, four employees, who were school bus drivers and who had shown no signs of erratic or careless behavior on the job prior to testing positive for drug use, were required to take a drug test as part of an annual physical.221 Three of the employees were discharged and the fourth resigned when their drug tests returned positive.222 The discharged employees then filed for unemployment benefits.223

While the Oklahoma Court of Appeals stated that annual drug testing was a reasonable means of "insuring the safety of public school students," the court refused to recognize as a matter of law that a positive drug test unequivocally demonstrated misconduct on an employee's part.224 In so doing, the court accepted the Board of Review for the Oklahoma Employment Security Commission's determination that the employee's behavior was not misconduct because the employer did not present "clear objective evidence of impairment."225 The court also approved the Board of Review's requirement that the employer show that "proper testing and confirmation procedures had been followed."226

Positive Drug Test Alone

Employer's Rule Not Reasonably Connected to Work

In Weller v. Arizona Department of Economic Security,227 the Arizona Court of Appeals found that an employer's rule requiring discharge of any employee who tested positive for drug use was not work-

218. Id. at 1178-80. In regard to the "last chance" agreement between the parties, the court stated that "an employer and an employee acting in concert have no more authority than does an employer acting alone to change the unemployment compensation law or to alter the statutory eligibility and disqualification criteria." Id. at 1176-79.
221. Independent Sch. Dist. No. 1 of Tulsa County, 789 P.2d at 637.
222. Id.
223. Id. The Board of Review ("Board") initially heard the employees' cases and allowed their claims for benefits. Id. at 638. The employer, a school district, then appealed the Board's decision to the district court. Id. The district court held the employees were not entitled to benefits. Id. The employees then appealed to the court of appeals. Id.
225. Id. at 637-38.
226. Id.
related or reasonable.\textsuperscript{228} In \textit{Weller}, the employee, a heavy equipment operator, was requested to submit to a random drug test.\textsuperscript{229} The employer had no reason to believe that the employee was using drugs or alcohol on the premises or that the employee was ever intoxicated or impaired while at work.\textsuperscript{230} The employee was discharged, however, after testing positive for marijuana.\textsuperscript{231} The employee then sought unemployment benefits.\textsuperscript{232}

On appeal, the Arizona Court of Appeals stated the general proposition that a violation of an employer's rule would only result in a denial of unemployment benefits if the rule was "work-related and reasonable."\textsuperscript{233} The court acknowledged that a positive drug test could not show when a narcotic substance was consumed, how much of the drug was ingested, or whether the narcotics detected were intentionally or unintentionally consumed.\textsuperscript{234}

The court refused to find that an employee's behavior amounted to misconduct when the employer presented no evidence of the employee's drug use or its effect on the employee's work performance.\textsuperscript{235} The court also discussed the parameters of an employer's authority in regulating off-duty employee conduct.\textsuperscript{236} The court held that "a rule which infringes without substantial justification on a worker's bodily privacy and personal life is not 'reasonable.'"\textsuperscript{237} The court concluded that "[a]n employer's moral support for a general public policy against drug abuse is not connected with the employee's work."\textsuperscript{238} While conceding that employees who come to work under the influence of narcotics may have a harmful effect on productivity and could endanger other employees, the court emphasized that an employer's work rules must have a "demonstrable and substantial work connection."\textsuperscript{239}

\begin{thebibliography}{99}
\bibitem{229} \textit{Weller}, 860 P.2d at 488.
\bibitem{230} \textit{Id.} at 489.
\bibitem{231} \textit{Id.}
\bibitem{232} \textit{Id.} A deputy with the Department of Employment Security first heard the employee's claim and granted the employee unemployment benefits. \textit{Id.} The employer then appealed to the Department of Employment Security Appeals Tribunal, which affirmed. \textit{Id.} The employer appealed this last determination to the Appeals Board ("Board"), which reversed the decision granting the employee benefits. \textit{Id.} The employee petitioned for review of the Board's decision, and the case was appealed to the court of appeals. \textit{Id.}
\bibitem{233} \textit{Weller}, 860 P.2d at 490.
\bibitem{234} \textit{Id.} at 491-92.
\bibitem{235} \textit{Id.} at 492.
\bibitem{236} \textit{Id.} at 493-95.
\bibitem{237} \textit{Id.} at 493 (stating that generally what an employee does outside of work is of no concern to his or her employer).
\bibitem{238} \textit{Id.} at 494.
\bibitem{239} \textit{Id.} at 495.
\end{thebibliography}
court found that the rule at issue in the case did not meet this standard because the rule required only a positive drug test for discharge.\textsuperscript{240}

Likewise, the Louisiana Court of Appeal, in \textit{Marine Drilling Company v. Whitfield},\textsuperscript{241} held that an employer failed to show a connection between the employee's misconduct and the employer's interests.\textsuperscript{242} In \textit{Whitfield}, the employee was working on a drilling rig when he tested positive for marijuana.\textsuperscript{243} The employee was discharged and filed a claim for unemployment benefits.\textsuperscript{244}

On appeal, the Louisiana Court of Appeal refused to accept a positive drug test result as proof of a nexus between an employee's behavior and an employer's interests, because the employer had produced no evidence demonstrating a correlation between the positive test result and any impairment of mental ability or motor coordination.\textsuperscript{245}

\textbf{No Evidence of On-The-Job Impairment}

Numerous state courts refuse to deny an employee unemployment benefits solely on the basis of a positive drug test.\textsuperscript{246} These courts

\begin{footnotes}
\item\textsuperscript{240} Id.
\item\textsuperscript{241} 535 So. 2d 1253 (La. Ct. App. 1988).
\item\textsuperscript{242} \textit{Marine Drilling Co. v. Whitfield}, 535 So. 2d 1253, 1257 (La. Ct. App. 1988).
\item\textsuperscript{243} \textit{Marine Drilling Co.}, 535 So. 2d at 1254. The employee's work schedule was "seven days on a drilling rig, followed by seven days off duty." \textit{Id.}
\item\textsuperscript{244} \textit{Marine Drilling Co.}, 535 So. 2d at 1254-55. The Agency for the Office of Employment Security, after hearing the employee's claim, disqualified the employee from receiving benefits. \textit{Id.} at 1255. The employee appealed to the Appeals Tribunal, and, during a telephone hearing, the Appeals Tribunal reversed the initial decision and granted the employee benefits. \textit{Id.} The employer appealed to the Board of Review for the Office of Employment Security, which affirmed the determination of the Appeals Tribunal. \textit{Id.} The employer next appealed to the district court, which also affirmed. \textit{Id.} The employer finally appealed to the court of appeal. \textit{Id.}
\item\textsuperscript{245} \textit{Marine Drilling Co.}, 535 So. 2d at 1255-56. \textit{See} Unroyal Goodrich Tire Co. v. Oklahoma Employment Sec. Comm'n, 887 P.2d 1380, 1382-83 (Okla. Ct. App. 1994) (ruling that an employee was not disqualified on the basis of a positive drug test alone, because, while independent evidence of impairment was no longer required, sufficient proof of proper testing methods was still necessary); Grace Drilling Co. v. Novotny, 811 P.2d 907, 909 (Okla. Ct. App. 1991) (stating that an employee would not be disqualified because of a positive drug test alone unless the employee's off-duty conduct "directly and adversely impact[ed]" the employer's interests).
\item\textsuperscript{246} \textit{See infra} notes 249-62 and accompanying text; Stone Forest Indus., Inc. v. Employment Div., 873 P.2d 474, 475-76 (Or. Ct. App. 1994) (holding that an employee's drug use did not constitute misconduct when no additional evidence of on-the-job impairment existed); National Gypsum Co. v. State Employment Sec. Bd. of Review, 772 P.2d 786, 788, 791, 793 (Kan. 1989) (refusing to hold that an employee was disqualified from receiving benefits on the basis of a positive drug test alone and noting the inability of a positive drug test to determine actual impairment); Hammond v. Commonwealth, Unemployment Compensation Bd. of Review, 465 A.2d 79, 80 (Pa. Commw. Ct. 1983) (ruling that an employer offered insufficient proof that an employee was "under the influence" solely on the basis of a positive drug test, without some evidence of physical and mental impairment).
\end{footnotes}
require that an employer produce evidence that drug use impaired or affected the employee on-the-job before denying benefits.\textsuperscript{247} These state courts utilize various rationales to justify the imposition on employers of additional corroborative evidence of employee drug use.\textsuperscript{248}

In \textit{Glide Lumber Products Company v. Employment Division},\textsuperscript{249} the Oregon Court of Appeals held that, in the absence of evidence of impairment, it would not deny unemployment compensation to employees who tested positive for drug use.\textsuperscript{250} In \textit{Glide Lumber Products Company}, an employee tested positive for drug use following a random drug test.\textsuperscript{251} The employee admitted to being aware that drug use was against his employer's policy and confessed to using marijuana two or three weeks before the test.\textsuperscript{252} The employee was discharged and sought unemployment benefits.\textsuperscript{253}

On appeal, the Oregon Court of Appeals noted that "an activity which has no impact on an employee's work is almost by definition not work-connected."\textsuperscript{254} However, the court recognized that there are alternative arguments for finding that a positive drug test constitutes misconduct.\textsuperscript{255} The proponents of drug testing argued that since a drug test cannot pinpoint when a drug was consumed or how long an employee was impaired, all drug use, on- or off-duty, should be prohibited as misconduct.\textsuperscript{256} The court disagreed, stating that the employee's drug use had no actual impact on his conduct while working.\textsuperscript{257}

\textsuperscript{247} See infra notes 249-62 and accompanying text.
\textsuperscript{248} See infra notes 249-62 and accompanying text.
\textsuperscript{249} 741 P.2d 907 (Or. Ct. App. 1987).
\textsuperscript{251} Glide Lumber Prods. Co., 741 P.2d at 908.
\textsuperscript{252} Id. at 909.
\textsuperscript{253} Id. at 908-09. The Employment Appeals Board heard the employee's claim and granted the employee unemployment benefits. \textit{Id.} at 908. The employer appealed this decision to the court of appeals. \textit{Id.}.
\textsuperscript{254} Glide Lumber Prods. Co., 741 P.2d at 910.
\textsuperscript{255} Id. (noting that "the best argument for the opposite answer is that, to assure safety and competence in the workplace, all illegal drug use must be proscribed, because there is no way of knowing before the fact whether a particular drug episode will or will not have on-the-job manifestations").
\textsuperscript{256} Id.
\textsuperscript{257} Id. A year later, in Portland General Electric Company v. Employment Division, an employer suspended a lineman who registered a .138 blood alcohol level three hours into his work shift and subsequently discharged him. Portland Gen. Elec. Co. v. Employment Div., 770 P.2d 940, 941 (Or. Ct. App. 1989). The Oregon Court of Appeals held the employee could be denied unemployment benefits on the basis of this evidence. \textit{Portland Gen. Elec. Co.}, 770 P.2d at 941, 943. The court explained that the employer did not have to let the employee attempt to perform his duties, thereby endangering himself and his co-workers, in order to produce evidence that his on-the-job performance was impaired. \textit{Id.} at 942.
Likewise, in *Silverton Forest Products Company v. Employment Division*, the Oregon Court of Appeals noted that the time span during which an employee who had used drugs could test positive was much longer than the time span during which the employee could have been impaired by the drug. In *Silverton Forest Products Company*, the employee had been discharged following a positive drug test result for cocaine and amphetamines. The employee then sought an award of unemployment benefits. On appeal, the Oregon Court of Appeals held that if no evidence existed that the employee was under the influence of drugs while working, the court would not deny the employee's claim for unemployment benefits.

**ANALYSIS**

In *Dolan v. Svitak*, the Nebraska Supreme Court addressed for the first time the issue of whether a positive drug test constituted misconduct so as to justify a denial of unemployment benefits. The supreme court held that employees who knowingly and deliberately violate an employer's policy, which is reasonably related to the employer's interests, commit misconduct connected with their work. Because Svitak had tested positive for marijuana thirty days after receiving notice of his employer's drug free policy, the court disqualified Svitak from benefits. The court determined that the employer's policy was reasonable because the employer "sought to take a stand against illegal conduct by its employees."
REASONABleness OF DRUG TESTING Policies

Requiring an employer to demonstrate that its rules are reasonable and that a nexus exists between the rules and an employer's legitimate interests can be a valuable safeguard of an employee's privacy interests.268 This nexus must be presented in order to balance the employer's and the employee's competing interests.269

In addressing this issue, the Nebraska Supreme Court noted that Chief Industries designed its policy to improve safety, to insure product quality, and to take "a stand against the detrimental effects associated with chemical abuse out of respect for [its] employees and customers."270 The policy prohibited the use and possession of drugs and alcohol and prohibited performance under the influence of drugs or alcohol "while . . . [on] Company business or while in or about a Company facility or worksite."271

According to Chief Industries' policy, "being under the influence" was testing positive for drug or alcohol use.272 The behavior of "being under the influence," however, has no correlation to a positive drug test, because, unlike a blood alcohol test, a drug test can only detect residues from past drug use, not present impairment.273 Drug testing analyses are unable to detect whether an individual was impaired while performing his or her work-related duties.274 There is no correlation between a certain positive testing level and an individual's level of impairment, because drug metabolism differs among individuals.275 Drug testing analyses cannot detect when the individual used narcotics, how much the individual ingested, or how often an individual uses drugs.276 Furthermore, an individual who is tested shortly after consuming a drug and is impaired can test negative because the drug has not yet been metabolized.277 Perhaps this ambiguity in Chief Industries' policy was due to its misunderstanding of the significance of a

268. See supra notes 227-45 and accompanying text; Weller v. Arizona Dep't of Economic Sec., 860 P.2d 487 (Ariz. Ct. App. 1993) (stating that "a company rule that intrudes on employees' private lives requires a demonstrable and substantial work connection, not a theoretical, remote, or insignificant connection").


270. Svitak, 247 Neb. at 413-14, 527 N.W.2d at 623-24.

271. Id. at 414, 527 N.W.2d at 624.

272. Id.

273. See supra notes 67-71 and accompanying text; BANTA & TENNANT, supra note 65, at 92.

274. See supra notes 67-71, 246-62 and accompanying text.

275. See supra notes 67-71 and accompanying text.

276. See supra notes 67-71, 246-62 and accompanying text.

277. Zeese, supra note 22, at 3-29.
positive result. On the other hand, Chief Industries may have deliberately attempted to prohibit any employee from reporting to work with traces of narcotics in his or her system and incorrectly termed such conduct as “being under the influence.” In addition, Chief Industries offered no substantiated evidence that off-duty drug use by its employees would affect its interests.

In *Weller v. Arizona Department of Economic Security*, the Arizona Court of Appeals dealt with a similar policy against off-duty drug use. The court noted that if an employer is not required to demonstrate that its rule is reasonable and work-connected, an employer could regulate many aspects of its employees’ private lives that the employer might consider “immoral or improper.” In an extreme case, such a rule would grant an employer the authority to mandate that its employees attend church services regularly, donate to or volunteer for charities, or refrain from frequenting bars or casinos, in order to promote the “reputation” of the employer in the community.

While Chief Industries’ attempt to take a stand against drug abuse may be admirable, the motivation behind the enactment of the policy has no bearing on whether Chief Industries’ policy regarding off-duty drug use is reasonably related to its legitimate business interests. The necessity of demonstrating that an employer’s rules are reasonable and work-related cannot be overlooked. Chief Industries had an obligation to provide some evidence that Svitak’s drug use affected its legitimate interests. It is not enough to focus on whether Svitak deliberately violated an employer’s rule because this would allow an employer to circumvent the reasonable requirement by

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278. *See supra* note 271-73 and accompanying text; *Svitak*, 247 Neb. at 414, 527 N.W.2d at 624.

279. *See Banta & Tennant, supra* note 65, at 92.


283. *See supra* notes 236-40 and accompanying text; *Weller*, 860 P.2d at 494.

284. *See, e.g., Weller*, 860 P.2d at 494 (noting that “a company rule banning after-hours use of tobacco or a rule banning cohabitation might promote public policies concerning health and family values,” but such rules would constitute impermissible intrusions upon employees’ privacy interests).

285. *See infra* notes 286-88 and accompanying text.


merely promulgating various policy rules and demonstrating that an employee has violated a rule.\textsuperscript{288}

\textbf{ALTERNATIVES TO THE SVITAK MISCONDUCT TEST}

\textit{Nature of Work}

In cases in which courts have held that positive drug tests alone constitute misconduct, the primary focus was the nature of the employee's work.\textsuperscript{289} State courts have ruled that certain types of employers, like those engaged in security-sensitive or health-care activities, may exercise more control over the off-duty activities of their workforce.\textsuperscript{290} Some employers can demonstrate they have a need to insure that not only their workplace, but their entire \textit{workforce}, be drug-free.\textsuperscript{291} However, many employers cannot demonstrate this necessity.\textsuperscript{292}

Unlike the employee in \textit{Johnson v. Department of Employment Security},\textsuperscript{293} who worked for a defense contractor, Svitak's position was not security-sensitive.\textsuperscript{294} Unlike the bus driver in \textit{Barkley v. Peninsula Transportation District Commission},\textsuperscript{295} Svitak's position did not involve the risks of the transportation industry.\textsuperscript{296} Unlike the nurse in \textit{Jensen v. Mary Lanning Memorial Hospital},\textsuperscript{297} who reported to work with alcohol on her breath, Svitak was not a health-care provider and had no close contact with patients akin to the nurse's responsibilities.\textsuperscript{298} Svitak was merely employed as a roof setter.\textsuperscript{299}


\textsuperscript{289} See supra notes 72-128 and accompanying text.

\textsuperscript{290} See supra notes 76-128 and accompanying text. For example, an employee who is engaged in a security-sensitive, high-risk, or transportation-related employment position may have to sacrifice some privacy interests due to the special character of his or her employment. See Atlas Processing Co. v. Adm'r, Dep't of Economic Sec., 584 So. 2d 1187, 1190 (La. App. 1991).

\textsuperscript{291} See, e.g., \textit{Johnson v. Dep't of Employment Sec.}, 782 P.2d 965, 972 (Utah App. 1989) (Orme, J., concurring).

\textsuperscript{292} See supra notes 210-26 and accompanying text; \textit{Johnson}, 782 P.2d at 972 (Orme, J., concurring).

\textsuperscript{293} 782 P.2d 965 (Utah App. 1989).

\textsuperscript{294} \textit{Johnson v. Dep't of Employment Sec.}, 782 P.2d 965, 970 (Utah App. 1989); \textit{Svitak}, 247 Neb. at 412, 527 N.W.2d at 623.


\textsuperscript{297} 223 Neb. 66, 443 N.W.2d 891 (1989).

\textsuperscript{298} \textit{Svitak}, 247 Neb. at 412, 527 N.W.2d at 623; \textit{Jensen v. Mary Lanning Memorial Hosp.}, 233 Neb. 66, 70, 443 N.W.2d 891, 894 (1989).

\textsuperscript{299} \textit{Svitak}, 247 Neb. at 412, 527 N.W.2d at 623.
Svitak's position may have required him to work atop roofs on job sites. This may have involved some additional risk, similar to the concerns that have prompted state courts to determine that certain workers are engaged in high-risk activities. However, the court did not discuss in its opinion any connection between Chief Industries' policy and the possible high-risk nature of roofing work. Absent this discussion, courts have no guidance as to whether they should consider these kinds of safety concerns in drug testing cases.

**Repeated Evidence of Misconduct**

The supreme court could have developed a less restrictive alternative for the use of drug testing rather than determining that one positive drug test alone constituted misconduct. At least one court has ruled that employers must have evidence of an employee's multiple failed drug tests in order to disqualify that employee from receiving unemployment benefits.

Svitak had not previously tested positive for drug use. No special "last chance" agreement was in place with his employer due to any prior positive test result for drug use. In fact, Svitak had exhibited no signs of drug abuse or impairment prior to testing positive for marijuana. Chief Industries believed Svitak's work performance was satisfactory and those in a position to observe his work performance did not file any complaints against him. Furthermore, Chief Industries admitted that Svitak was discharged solely because of one positive drug test result.

Requiring evidence of multiple failed drug tests would force an employer to establish that an employee has a habit of drug use. Such a requirement would protect those individuals who are infrequent users or one-time experimenters. Those who violate "last

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300. *See Svitak*, 247 Neb. at 412, 527 N.W.2d at 623.
301. *See supra* notes 90-96 and accompanying text (concerning workers on oil-drilling rigs); notes 97-103 and accompanying text (concerning an explosives operator); notes 104-11 and accompanying text (concerning an oil refinery worker).
302. *See Svitak*, 247 Neb. at 410, 527 N.W.2d at 621.
303. *See supra* notes 90-111 and accompanying text.
304. *See infra* notes 306-24 and accompanying text.
306. *See Svitak*, 247 Neb. at 410, 527 N.W.2d at 621.
307. *Id.*
308. *Id.* at 414-15, 527 N.W.2d at 624.
309. *See supra* notes 30-31 and accompanying text; *id.* at 412, 527 N.W.2d at 623; *Brief for Appellant, Svitak* (No. 93-0543).
312. *See supra* notes 69-71 and accompanying text.
chance" agreements and are subsequently discharged would have both fair notice of the consequences of drug use and an adequate opportunity to attempt to overcome drug use or addiction. A pattern of failed tests would also minimize any chances that an error may have been made or that residue traces of prior drug use might be affecting the validity of a drug analysis. This less restrictive alternative would serve as a compromise between the competing goals of protecting employees' privacy rights and allowing employers to regulate their workforces in a fair and reasonable manner.

**Alternatives to Drug Testing**

In searching for policies more reasonably related to an employer's interests in a drug-free workplace, at least two courts have proposed alternatives to drug testing. In *Glide Lumber Products Company v. Employment Division*, the Oregon Court of Appeals suggested alternatives to drug testing. The court reasoned that, if an employee was presently intoxicated or impaired, observation by the employee's supervisors and co-workers would be as effective as drug testing in determining which employees were abusing alcohol or narcotics.

Observation and documentation of an employee's on-the-job behavior has the added benefit of enabling an employer to show that its rule is reasonable and work-related. The employer could demonstrate that an employee's violation of the rule directly affects the employer's interests in preventing impaired employees from endangering themselves or others due to their noticeably decreased motor coordination or sluggish mental abilities.

In *Weller*, the Arizona Court of Appeals noted that alternatives to drug testing analyses exist and are currently being utilized by various employers. Employers could utilize hand-eye coordination tests,

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314. See supra notes 67-71 and accompanying text.
315. See supra notes 306-24 and accompanying text.
319. Id. As one commentator explained, "Like headaches, the presence of a drug condition is not a problem until it interferes with the ability to work or function normally... Standard observation will show when someone has a problem." *Test Workers for Drugs? Even Among Managers, It's a Highly Emotional Issue*, 235 INDUSTRY WK. 17, 18 (1987).
320. See Weller, 860 P.2d at 495.
321. Id.
322. Id.
like those field police officers use to determine if drivers are intoxicated, to expose employees whose off-duty behavior is impairing their work performance. The court noted that the use of these kinds of tests designed to measure on-the-job impairment “may help employers draw the line between a reasonable, work-related rule and one which impermissibly regulates the employee’s private life.”

CONCLUSION

In Dolan v. Svitak, the Nebraska Supreme Court first addressed the issue of whether a positive drug test constituted misconduct sufficient to justify a denial of unemployment benefits. The supreme court held that a positive drug test result would constitute misconduct if certain elements of a test were met. The test as applied by the supreme court consisted of two broad inquiries:

1. Did the employee intentionally and deliberately violate the employer’s policy?
2. Was that policy reasonably related to legitimate business interests of the employer?

The supreme court reasoned that, because Svitak had tested positive for marijuana thirty days after receiving notice of his employer’s drug policy, he must have intended to deliberately violate the policy. While noting that the employer gave various rationales supporting its policy, the court relied on the fact that the employer “sought to take a stand against illegal conduct by its employees.”

In applying this test, the Nebraska Supreme Court allowed a drug test alone to determine misconduct, failing to require a showing of on-the-job impairment or evidence of multiple failed drug tests. The supreme court failed to exercise any sustained inquiry into whether Chief Industries’ rule was reasonably related to its legitimate business interests, accepting as a sufficient nexus that the employer sought to improve its reputation in the community.

Requiring evidence of impairment before denying an individual unemployment benefits would require an employer to prove that some identifiable nexus exists between the employee’s misconduct and the

323. Id.
324. Id. (citing William K. Stevens, Measuring Workplace Impairment, N.Y. TIMES, March 6, 1990, at Cl).
327. Svitak, 247 Neb. at 412-13, 417-18, 527 N.W.2d at 623, 626.
328. Id. at 417-18, 527 N.W.2d at 626.
329. Id. at 417, 527 N.W.2d at 625-26.
330. Id. at 417, 527 N.W.2d at 626.
331. Id. at 417, 527 N.W.2d at 625-26.
332. Id. at 417-18, 527 N.W.2d at 626.
employer's policy. Some showing of a connection between off-duty drug use and an employer's legitimate interests would also help safeguard an employee's privacy interests.

Requiring evidence of repeated failed drug analyses would also serve as a less restrictive alternative. This alternative would help eliminate testing error, allow an employee an opportunity to reform his or her behavior, force an employer to establish that an employee has deliberately and repeatedly violated an employer's policy, and effectively weed out from the American workforce those employers who abuse or are addicted to drugs or alcohol.

Work is a small portion of an individual's life. The Nebraska Supreme Court should not allow employers to invade their employees' private lives unless good reason exists to justify the intrusion. Proof of a nexus between an employer's rule and an employee's misconduct would serve to balance both sides' competing interests and would result in equitable treatment for individuals who test positive for drug use. In addition, by requiring employers to demonstrate this nexus, either by presenting evidence of on-the-job impairment or by producing evidence of multiple failed drug tests, the supreme court could have neutralized employers' tendencies to promulgate additional rules in order to avoid paying unemployment benefits to discharged employees.

Employers must be limited to enforcing policies that address employees' fitness to perform their job-related duties. Allowing employers to arbitrarily enforce policies that do not have any relationship to employers' interests serves as an almost irresistible temptation to interfere in employees' private lives.

The Nebraska Supreme Court failed to develop a rule that adequately protects employees' privacy interests. Instead, the supreme court's opinion gives employers discretion to promulgate rules that merely improve the employers' reputations or attack societal ills, regardless of whether these rules deal with employees' fitness to perform their jobs.

Most disturbing of all, the supreme court has, by failing to address the reasonableness of an employer's policy, effectively limited unemployment determinations to a factual issue of whether the employee has or has not broken the employer's rule. The supreme court's opinion offers no guidance to lower courts as to how to analyze these issues. The supreme court has failed to develop an analysis, as other

333. See supra notes 227-62 and accompanying text.
334. See supra notes 227-45, 268-88 and accompanying text.
335. See supra notes 304-24 and accompanying text.
336. See supra notes 304-24 and accompanying text.
jurisdictions have done, that balances an employer's interests in having a viable workforce with an employee's interests in protecting private activities from an employer's "prying eyes."

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