

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DAVID HAYES
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-470
Case No. 89-11308

SHRM CATERING SERVICES, INC.
(Employer)

Office of Appeals No. VN-18731

The employer appealed from the decision of the administrative law judge which held the claimant was not disqualified from receiving benefits under section 1256 of the Unemployment Insurance Code and the employer's reserve account was not relieved of benefit charges.

STATEMENT OF FACTS

The claimant's last workday was September 26, 1989. He had worked for two and one-half years as a housekeeper for a catering service that maintained living quarters for oil drill workers on offshore platforms. The claimant's work hours were generally 7:00 a.m. to 7:00 p.m., for fourteen days straight and then the claimant had seven days' shore leave before returning for another fourteen-day shift. The claimant lived on the oil platform while working. The claimant was paid hourly at \$4.25.

The employer was under contract with its client, Chevron Corporation, to maintain a drug-free work force. The employer's drug-free policy was set forth in the employer handbook distributed to all employees and was posted on the platforms. Employees were required to take an annual physical which included a drug test and were subject to discharge for refusal to take a drug test. The claimant was aware of the policy. The employees were also subject to random drug testing conducted by the employer, by Chevron Corporation, and by the U.S. Coast Guard. The claimant was also aware of these possibilities.

As part of his pre-employment physical, in 1987 the claimant was given a drug screen in which, according to the claimant, he tested positive for marijuana. He eventually was hired despite the positive test. Although required to take a drug screen as part of his annual physical, he told his then supervisor that he would at the time test positive, and he was not required to take the screen.

In May, 1988, the claimant was given a random drug screen and tested positive for cocaine and marijuana use. He was suspended for approximately three weeks before he was returned to work.

In May, 1989, a new supervisor was appointed and began to enforce strictly the employer's drug-free policy. Shortly prior to September 26, 1989, his last day of work, the supervisor advised the claimant that he would soon be asked to take his annual physical, which would include a drug screen. While the claimant was on his next shore leave, the supervisor scheduled the claimant's physical which was to be completed before the claimant returned to the platform. The claimant was not expecting the physical until the following shore leave. He told the supervisor that he would not take the drug test at this time because he knew he would test positive. When he refused to take the drug test, the employer discharged him.

The claimant acknowledged smoking marijuana while on shore. He stated that, even if he ingested the drug on the night before reporting back to work, its effects would have worn off completely by the time he reached the platform. He explained that, on these occasions, he would make the two-hour drive from his home to the helipad with the car windows open and drink a lot of coffee. He usually had to wait for an hour for a helicopter to carry him to the platform. By the time he reached the platform he would be fine. He knew that the platform was a dangerous place to work and he had witnessed several accidents. He knew that it would pose a danger to himself if he were impaired while working on the platform because it would be easy to slip on one of the many steps or to spill kitchen grease on himself.

The claimant contended that it was not fair for the employer to demand a drug screen with the annual physical when it had waived that requirement for the two preceding years. If he had been given more advance notice of the screen, he would have made certain that he was "clean". The claimant denied any drug usage while offshore.

The employer contended that it was immaterial that the drug policy had not been strictly enforced in the past. The purpose of the drug policy was to enhance safety in the workplace. The tests were not scheduled to provide the employees with an opportunity to get clean for the test while engaging in drug usage during the rest of the year.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work.

Sections 1030 and 1032 of the Unemployment Insurance Code provide that the employer's reserve account shall be relieved of benefit charges if the claimant was discharged for misconduct.

Citing Maywood Glass Co. v. Stewart (1959) 170 Cal.App.2d 719, the California Unemployment Insurance Appeals Board in Precedent Decision P-B-3 defined "misconduct connected with the work" as a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer.

An employee's deliberate disobedience of a lawful and reasonable instruction of the employer, related to the employer's business, is misconduct (Precedent Decision P-B-190).

In Precedent Decision P-B-454 an employee was discharged as a result of refusing to submit to a drug test. The Appeals Board found that although a drug test is a search and is subject to the constraints imposed by the United States and California Constitutions, there is a permissible encroachment on a worker's privacy when there is a reasonable suspicion that a person working in an inherently dangerous occupation is in some way impaired. In that case, the employer did have a reasonable suspicion that the claimant was impaired, based upon direct observation of his conduct.

In Precedent Decision P-B-467 a claimant was discharged by his employer but was reinstated upon the condition he agree to submit to random drug testing. Thereafter, a random drug test was administered and the claimant tested positive. The Appeals Board held that by reporting to work with a detectible level of illegal drugs in his body, the claimant evinced a disregard of a standard of behavior which the employer had a right to expect and the Board concluded that the claimant was discharged for misconduct.

The case before us is distinguishable from P-B-454 because this case involves no reasonable suspicion that the claimant was impaired due to drugs. Unlike P-B-467, the factual situation here does not involve an employee who was reinstated to employment on condition that he would be subject to random testing for drugs. Here, the issue is whether the claimant can be discharged for refusal to take a regularly scheduled annual physical which includes drug screening.

In 1972, Article I, section 1 of the California Constitution was amended to provide that the right of "privacy" is among the people's inalienable rights. California appellate courts and at least one federal court have consistently held, in varying contexts, that Article I, section 1 provides some protection against nongovernmental intrusion, as well as state conduct. (Porten v. University of San Francisco (1976) 64 Cal.App.3d 825; Cutter v. Brownbridge (1986) 183 Cal.App.3d 836; Miller v. National Broadcasting Company (1986) 187 Cal.App.3d 1463; Chico Feminist Women's Health Center v. Scully (1989) 208 Cal.App.3d 230; Chico Feminist Women's Health Center v. Butte Glenn Medical S. (1983) 557 F.Supp. 1190; Wilkinson v. Times Mirror Corporation (1989) 215 Cal.App.3d 1034; Semore v. Pool (1990) 217 Cal.App.3d 1034; Luck v. Southern Pacific Trans. Co. (1990) 218 Cal.App.3d 1.

This case does not involve governmental action. Thus, the right to be free from unreasonable search and seizure protected by the Fourth Amendment of the United States Constitution is not in issue. Nonetheless, in Wilkinson, supra, the Court of Appeals looked to United States Supreme Court decisions under the Fourth Amendment for guidance with regard to the right of privacy under the California Constitution. The Fourth Amendment prohibits only unreasonable searches. In Skinner v. Railway Labor Executives Association (1989) 489 US ____ (103 L.Ed.2d 639, 109 S.Ct. 1402) the Court balanced the intrusiveness of testing against the government's interest served by testing without individualized suspicion and found the testing to be constitutionally permissible. As there were only "limited threats" to employees' justifiable expectations of privacy, the government had a compelling interest in testing without individualized suspicion in order to insure the safety of the public and employees themselves.

In Wilkinson, supra, the Court addressed the issue of mandatory pre-employment physicals with a drug screen and concluded that the right of privacy under Article I, Section 1 of the California Constitution is not absolute. The court engaged in a balancing of interests. Whether an individual's constitutional right of privacy has been invaded depends upon whether the individual had a personal and objectively reasonable expectation of privacy which was infringed and whether the challenged conduct is reasonable and minimizes the intrusiveness on the right of privacy.

Wilkinson involved job applicants and their refusal to be tested for drugs. Luck v. Southern Pacific Trans. Co., supra, involves a non-safety employee who worked as a computer programmer in an office environment. The case addresses the issue of such an employee's refusal to provide a urine sample in the course of a random, first-time, unannounced drug test. The court in Luck held that an employer may overcome an employee's expectation of privacy only upon a showing of compelling need.

Unlike the plaintiff in Luck, the claimant in the case before us was not working in an office but on an offshore oil platform with all of its attendant hazards. He was not being required to submit to a random, unscheduled, first-time drug test as was Luck. His was a regularly scheduled test which had been given in the past. Only the exact date of the test was unknown. Moreover, he had tested positive in the past and had consequently been suspended from his work. Clearly, his expectation of privacy was far less than that of Luck.

In determining the test to be applied, that is, the balancing test of Wilkinson, supra, or the compelling interest test of Luck, supra, the critical factor is the individual's expectation of privacy. It is not the individual's employment status, as the dissent argues. The Wilkinson court does indeed state that perhaps the most important factor in its analysis is that plaintiffs are applicants for employment, not employees (Wilkinson, supra, at 1048). It does so, however, in the context of analyzing their expectation of privacy. "Any individual who chooses to seek employment necessarily also chooses to disclose certain personal information to prospective employers . . . and to allow the prospective employer to verify that information" (Id. at 1048).

Here, the claimant did not have an expectation of privacy sufficient to offset the employer's interest in insuring a drug-free workplace. He knew that his working environment was dangerous. He was aware that his employment was subject to random testing and to an annual physical which included drug screening. He knew from May of 1989 that the new supervisor was enforcing the testing policy. He knew specifically that his physical exam would be scheduled in October. The employer happened to schedule the testing for the claimant's first shore leave in October. We do not believe that the claimant had a reasonable expectation that the testing would occur during a later leave, affording him the opportunity to test "clean".

Given all of the circumstances of this case, we believe that the more appropriate test to be applied is the reasonableness test utilized in Wilkinson, supra, rather than the compelling interest test set forth in Luck, supra.

The employer hired the claimant to work in a dangerous environment on an offshore oil drilling platform. For safety reasons, the employer has an obvious interest in having its work force drug free. The employer was contractually obligated to its client to maintain a drug-free work force. In addition, the claimant had tested positive in the past.

On balance, the employer's interest in having its employees submit to annual drug testing was substantial while the claimant's expectation of privacy was minimal. No issue was raised with regard to the invasiveness of the testing procedure utilized by the employer. Given these circumstances, we do not believe that the claimant's right of privacy was substantially burdened or affected by the annual drug testing requirement. Accordingly, the claimant's rights under Article 1, Section 1 were not violated. In so holding, we are not stating that the employer's testing requirement could not satisfy the more rigorous standard of the compelling interest test. We are simply declining to apply that standard.

By refusing to submit to the drug screen, a reasonable requirement of the employer directly related to its business, the claimant was insubordinate and therefore we conclude that the resulting discharge was for misconduct.

DECISION

The decision of the administrative law judge is reversed. The claimant was discharged for misconduct. Entitlement to benefits shall cease on the date this decision becomes final, unless the claimant earns or has earned five times his weekly benefit amount in bona fide employment after September 27, 1989. The employer's reserve account is relieved of charges.

Sacramento, California, September 6, 1990.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

GEORGE E. MEESE

J. RICHARD GLADE

JAMES S. STOCKDALE

CHARLES W. WARD

DISSENTING - Written Opinion Attached:

LORETTA A. WALKER

DEBRA A. BERG

DISSENTING OPINION

We are unwilling to embrace the majority's rationale in this matter.

We subscribe to the majority's expressed contention that the employer and its employees had a significant legitimate interest in a drug-free work environment. We do not, however, agree that this interest was sufficient to overcome the claimant's guarantees under the California Constitution and the Bill of Rights.

The majority has reached some factual and legal conclusions with which we cannot concur. We think that the legal standard used in the majority's analysis is incorrect, and that the Board should be applying a compelling interest test, rather than a balancing test, to the issues here. And we disagree fundamentally with the majority's treatment of the right of privacy. It is the threat to this inalienable right that compels our dissent.

a. The claimant's job classification.

The claimant here was a housekeeper. He made beds, washed dishes and clothes, and cleaned bathrooms and living quarters as part of a general-purpose utility and catering crew. He was not involved in food preparation. Although his own testimony tended to exaggerate the dangers he said he faced on the job, we see no inherent risk or sensitivity in his job duties. His employment was not the kind that involved safety or security issues. He had the work responsibilities of a maid and a dishwasher.

Earlier this year, the California Court of Appeal, Fourth District, touched on this exact issue in assessing the intrusiveness of a pupillary-reaction drug test on an employee of a chemical plant. In Semore v. Pool (1990) 217 Cal.App.3d 1087, petn. for review den. (SO14590, May 31, 1990), the court stated that ". . . safety concerns may justify daily drug testing of an employee in charge of a chemical process but those same concerns would not be present if the employee was a gardener. The nature of the job therefore would enter into the balancing process." Semore, supra, at 1100.

The issue of the claimant's job category is the most critical factor in this case.

The two drug-testing decisions issued last year by the United States Supreme Court (Skinner v. Railway Labor Executives Association (1989) 489 U.S. ____, 103 L.Ed.2d 639; Treasury Employees v. Von Raab (1989) 489 U.S. ____, 103 L.Ed.2d 685) both emphasize the importance of the job functions and duties performed by the affected workers in striking the balances between the employers' interests and the employees' rights. Those decisions were grounded in the clear safety concerns raised by railroad crew members, or Customs Service employees in drug interdiction, working under the influence of alcohol or drugs.

Those concerns were not present in this case. The employer in this case made no showing that this worker was involved in inherently dangerous or sensitive employment. This claimant's job provided none of the safety or security factors that had earlier provided the basis for the court's guidelines in Skinner and Von Raab. For the guidelines in this case, we look elsewhere.

Mere proximity to a dangerous occupation is not enough either. The busboy in the Customs Service employees' cafeteria does not surrender his constitutional rights just because he is paid to scrape off dirty plates. For this same reason, the oil workers' housekeeper also does not waive his rights. Nor do we place any reliance on the housekeeper's belief that his job was risky. We would not likely vote in favor of a random test for a casual laborer for the phone company who, while delivering the new edition of the classified pages, feared dropping a book on his foot.

The Supreme Court in Von Raab also exhibited an awareness of the significance of particular job duties when it declined to apply its holding in that case to all classes of treasury employees whom the Customs Service had sought to test randomly. After finding insufficient clear evidence that workers in the job categories of baggage clerk, messenger, accountant, and animal caretaker were in positions with access to the kind of sensitive material that had triggered a drug testing requirement for other workers in that case, the Court remanded that question for further hearing. Von Raab, ante, at ____, 103 L.Ed.2d at 710.

In a similar vein, the employers of criminal prosecutors and Justice Department employees with access to grand jury proceedings have not shown sufficient governmental interest to warrant drug testing (Harmon v. Thornburgh (D.C. Cir. 1989) 878 F.2d 484, at 490-492). A case involving county correctional employees who have no reasonable opportunity to smuggle narcotics to prisoners (Taylor v. O'Grady (7th Cir. 1989) 888 F.2d 1189, at 1199-1201) has reached a similar result. Comparable questions have been raised about the propriety of drug testing for secretaries, engineering technicians, research biologists, and animal caretakers who work at chemical and nuclear surety facilities (National Federation of Federal Employees v. Cheney (D.C. Cir. 1989) 884 F.2d 603, at 611-612), and for civilian lab technicians at Army drug testing laboratories (id., at 614), and for police department personnel who neither carry weapons nor participate in drug interdiction procedures (Guiney v. Roache (1st Cir. 1989) 873 F.2d 1557, at 1558).

This issue has been the focus of an important recent California Court of Appeal case involving the testing of computer programmers (Luck v. Southern Pacific Transportation Company (1990) 218 Cal.3d 1, petn. for review den. (SO14832, May 31, 1990)).

Barbara Luck was hired by Southern Pacific as a signal department draftsman and was eventually promoted to a position as a computer programmer, managing data for the engineering department. She wore standard business attire to work and was in no way classified as a safety employee. Southern Pacific instituted a new safety program for the engineering department which, among other things, required all employees in that division to consent to a drug test. She considered the test offensive, refused to take it, and was fired.

In finding in her favor in a wrongful termination action, the First District Court of Appeal distinguished the safety concerns present in Von Raab and in Skinner. In those cases the possibility of a drug- or alcohol-induced mistake was immediate and irreversible, while an error by someone in the engineering department, although possibly dangerous as part of a larger chain of circumstances, was wholly different from the sort of risk involved with someone who carries a gun or drives a train. "Skinner and Von Raab provide no basis for finding that an office employee constitutes a safety risk when the chain of causation between misconduct and injury is greatly attenuated." (Luck, ante, at 23.)

The message from the numerous state and federal courts speaking on the drug testing issue is clear. The worker's job category is a determining factor in whether testing is appropriate. We should be adopting that standard here as well.

b. The compelling interest test.

Article 1, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

The analyses of all of the major recent California court decisions in employment drug testing cases, in Luck, in Semore, and in Wilkinson v. Times Mirror Corp. (1989) 215 Cal.App.3d 1034, petn. for review den. (SO13479, March 15, 1990), are firmly rooted in Article 1, section 1 of the California Constitution. So should this one.

The majority in the case now before us has elected to use the analysis in Wilkinson to delineate the scope of the respective interests of employer and employee in an employment-related drug testing context. Wilkinson, a case involving the preemployment testing of writers and editors for a legal publishing company, advanced the balancing test, and the majority has applied that test here. Luck, on the other hand, utilized the compelling interest test. It is clear to us that the compelling interest test should be applied here, instead of the balancing test, and no less an authority than the court in Wilkinson explains why the majority in this case applied the incorrect test.

The plaintiffs in Wilkinson were job applicants, not employees. They had an expectation of privacy lower than, and wholly different from, the expectation of Barbara Luck, or, for that matter, the claimant in this case. The Wilkinson court underscores this point: "[W]e assess the effect of Matthew Bender's drug-testing policy on plaintiffs' constitutionally protected right of privacy. Perhaps the most important factor in our analysis is that plaintiffs are applicants for employment, not employees, either public or private. Any individual who chooses to seek employment necessarily also chooses to disclose certain personal information to prospective employers, such as employment and educational history, and to allow the prospective employer to verify the information." Wilkinson, ante, at 1048 (emphasis added).

The Luck court is also emphatic on this point. In rejecting Southern Pacific's argument that drug testing was justified under the facts of that case, the court stated: "The constitutional right to privacy does not prohibit all incursion into individual privacy, but provides that any such intervention must be justified by a compelling interest (citations omitted). This test places a heavier burden on Southern Pacific than would a Fourth Amendment privacy analysis, in which the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests (citations omitted). Although Southern Pacific urges us to use the Fourth Amendment test, we see no reason to depart from existing precedent applying the compelling interest test in cases arising under Article 1, section 1 of the State Constitution." Luck, ante, at 20. In a footnote immediately following this quoted material, the Luck court, quoting and relying on Wilkinson, expressly reaffirms the applicability of the compelling interest test, noting that the analysis in Wilkinson was predicated on the plaintiffs' status as preemployment job applicants, not as employees.

The majority has attempted to justify its reliance on the balancing test in Wilkinson by analyzing the matter in terms of a diminished expectation of privacy. We are not in accord with this analysis, and for several reasons. Wilkinson itself expressly disavows this rationale (Wilkinson, ante, at 1048). Nearly every drug-testing case we have found which discusses this issue grounds its analysis in the type of work performed by the party opposing testing, not in the locus where the work is performed (see e.g. discussion of cases ante at pp. 2-3 of dissent, where each reviewing court raised questions about the propriety of drug testing for certain job categories notwithstanding that those job duties were performed in a hazardous or sensitive location). And we think that the diminished expectation rationale is particularly inapplicable in this case, where the employer actively and regularly encouraged in the claimant the belief that it had no interest in the results of a drug test. For almost all of the claimant's four years on the job, this employer either did not pay attention to the results, or it did not bother to request a drug test in the first place.

The claimant in this case had been encouraged by the employer to believe that his marijuana usage, on his own time and away from the employer's facilities, was not a job-related matter (Precedent Decision P-B-189). The claimant was using marijuana recreationally when he was hired, and a preemployment drug test revealed traces of marijuana in his system.

He was hired anyway. In May 1988 he was discharged after another positive drug test, but the employer rehired him after he filed a claim for unemployment insurance benefits and collected for a week or so. The employer thought the claimant was a good worker, and it permitted the claimant on a regular basis to forgo the urinalysis portion of any physical exam. Our reading of the record further indicates that the employer then unexpectedly accelerated the scheduling of the final physical examination and told the claimant, for the first time, that he would now be required to submit to a urinalysis.

Both the court in Wilkinson and the court in Luck agree that the operative test in an in-term employment relationship is not the balancing test in Wilkinson. We think that the majority has erroneously used the balancing test in reaching its conclusion. The compelling interest test in Luck is the correct test.

We can find no compelling interest, established in this record by the employer, sufficient to violate this housekeeper's privacy.

C. Random test.

It is unclear to us in what fashion the majority has resolved the issue of the test's randomness. In the fifth paragraph of their statement of facts the majority concludes that it was a regularly scheduled test, while in the eighth they apparently conclude that it was unscheduled. That eighth paragraph seems to find, as the employer testified at the hearing, that drug tests were ordered randomly.

Since this final physical in our view was accelerated and was outside of the employer's testing schedule, and since no competent evidence appears in the record to justify an unscheduled test (see Precedent Decision P-B-454), this test was random. According to the then-majority's analysis of the issues in Precedent Decision P-B-454, a random drug test required by an employer without reasonable suspicion was by definition not a reasonable requirement of an employee. A refusal to submit to an unreasonable employer request would not be insubordination and therefore would not be misconduct.

d. The right of privacy.

Article 1, section 1 of the State Constitution, as amended by the electorate in 1972, derives its legislative history essentially from the voter information pamphlet (White v. Davis (1975) 13 Cal.3d 757, 775). The language of the amendment the voters of California adopted, which we have quoted above, and of the ballot argument in support of the amendment, is instructive on the importance of the issue we are trying to protect.

The ballot argument provides in pertinent part:

"The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles on every American.

"At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian." (Emphasis in original.)

The argument goes on to state:

"The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us."

The collection and testing of urine samples intrude upon reasonable expectations of privacy (Wilkinson, ante, at 1048; Skinner v. Railway Labor Exec.Assn. (1989) 489 U.S. ___, ___, 103 L.Ed.2d 639, 659-660). The California Supreme Court has held that the taking of a urine sample invokes

". . . privacy and dignitary interests protected by the due process and search and seizure clauses" (People v. Melton (1988) 44 Cal.3d 713, 739 fn.7, cert. den. ___ U.S. ___, 102 L.Ed.2d 346.) Furthermore, the California courts have consistently found a state and federal constitutional right of privacy even though such a right was not enumerated in either constitution, and our courts have consistently read the right of privacy as expansive (Central Valley Chap. 7th Step Foundation v. Younger (1979) 95 Cal.App.3d 212, 234).

The Fourth District in Semore V. Pool, ante, directly addressed some of the policy considerations involved in a refusal to submit to a drug test, a case that like Luck also arose in a wrongful termination setting. The court in Semore stated that such a refusal advanced a public policy interest wholly different from the narrower interest that the Supreme Court had found to be insufficiently fundamental in Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654. "We think . . . that there is a public policy concern in an individual's right to privacy. [Semore's] right not to participate in the drug test is a right he shares with all other employees. In asserting the right, he gives it life. While rights are won and lost by the individual actions of people, the assertion of the right establishes it and benefits all Californians in the same way that an assertion of a free speech right benefits all of us." Semore, ante, at 1097.

That court also foreclosed the argument whether a worker's consent to be tested could be used to compel a drug test contrary to public policy. "While plaintiff could contractually agree not to assert his right to privacy, we think it clear that the employer could not use such an agreement to circumvent the public policy favoring privacy, and the employer could not successfully enforce such a contractual agreement if it intruded on plaintiff's right to privacy." Ibid.

The majority in our view misperceives the nature of this constitutionally protected freedom and liberty. The individual's right to freedom of speech, or the right to petition government for the redress of a grievance, or the right to be free from unwanted intrusions into one's privacy, are all rights that inhere in the person. They are not what is left over after government officials, or an employer, mark off the extent of their interest. We do not believe that the right of privacy, or any comparable right, can be extinguished for the employer's convenience, or when its existence would jeopardize a result in a case.

The majority further states, at pg. 6 ante: "No issue was raised with regard to the invasiveness of the testing procedure utilized by the employer." This to us is a curious statement of the law. It begs the question who would raise the issue. We assume that the employer would see no purpose in questioning the intrusiveness of its own testing procedure. The facts themselves eloquently raise the issue. The claimant implicitly raised it, since he regularly avoided the test with the employer's consent and ultimately refused to submit to it when the employer finally demanded it. We emphatically assert that the right to be free of an unwanted intrusion into one's privacy, or for that matter the right to enjoy any fundamental freedom, exists innately in and of itself. The enjoyment of that right does not depend on whether one "raised" it.

e. Conclusion.

In our separate opinion in Precedent Decision P-B-454 we agreed that a right to personal privacy might yield to the employers overriding concern and responsibility for the safety of its employees and the public ". . . when an employee is employed in an inherently dangerous occupation where there exists a substantial risk of harm to the employee or others" We cannot conclude that the claimant's occupation in this case is inherently dangerous, nor can we find any substantial risk of harm to himself or others.

The claimant here refused to submit to a random urinalysis, following a pattern of continuous prior condonation by the employer of his previous missed or failed tests. We can find no indication of job impairment anywhere in the record, nor does it appear that the employer had a reasonable suspicion before the last test that the claimant was job-impaired. We see no compelling interest justifying the employer's intrusion into the claimant's privacy.

For the reasons stated, we do not conclude that misconduct is established, and we respectfully part company with the majority.

LORETTA A. WALKER

DEBRA A. BERG