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Privacy Please — Direct Observation Drug Testing & Invasion of Privacy

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PRIVACY PLEASE – DIRECT OBSERVATION DRUG TESTING & INVASION OF PRIVACY

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I. INTRODUCTION

In August 2020, the Supreme Court of Ohio in *Lunsford v. Sterilite of Ohio, LLC* held that an at-will employee who consents to submit a urine sample for a drug screening has no cause of action for invasion of privacy.[1]

Sterilite of Ohio, LLC ("Sterilite"), a private company that manufactures plastic storage containers,[2] had a workplace substance abuse policy that applied to all employees. Compliance with the substance abuse policy was a condition of employment.[3] Beginning in October 2016, Sterilite imposed a drug testing procedure that required employees' urine samples to be collected using the direct observation method,[4] which requires a same-sex monitor to accompany the employee into the restroom to visually observe the employee produce a urine sample.[5] In December 2016, current and former at-will employees brought suit against their employer, Sterilite, and the third-party agent U.S. Healthworks Medical Group of Ohio, Inc. ("U.S. Healthworks"), asserting invasion of privacy and wrongful discharge in violation of public policy claims.[6]

The majority, in a 4-3 split decision, found for Sterilite because (1) the at-will employment relationship required compliance with Sterilite's workplace substance abuse policy;[7] (2) no Fourth Amendment protections, Ohio statutes, or constitutional provisions attach due to Sterilite's status as a private company;[8] and (3) the employees willingly consented to the direct observation method, waiving their right to privacy.[9] Under the *Lunsford* decision, a private employer, as standard practice, may subject an at-will employee to highly offensive and intrusive urine collection methods, leaving the employee without legal recourse. The dissenting judges disagreed, arguing that (1) Sterilite's invasive drug testing procedure violated the employees' right to

1. 162 Ohio St. 3d 231 (Ohio 2020).
2. STERILITE CORP., https://www.sterilite.com (last visited Oct. 11, 2022).
3. *Lunsford*, 162 Ohio St. 3d at 233.
4. *Id*.
5. *Id*.
6. *Id*. at 232.
7. *Id*. at 238.
8. *Id*. at 239.
9. *Id*. at 240.

privacy;[10] (2) the at-will employment doctrine does not supplant an employee's right to bring a claim against the employer for invasion of privacy;[11] and (3) the employees did not consent, directly or implicitly, as to the method of the drug test.[12]

This Comment analyzes the close (4-3) divide in the controversial *Lunsford v. Sterilite of Ohio, LLC* decision. This Comment brings attention to the effect the *Lunsford* decision may have on employees working for private employers. Section II of this Comment situates *Lunsford* within the context of Ohio's employment-at-will doctrine and the common law tort claim for invasion of privacy. Section III argues that the Supreme Court of Ohio makes a false distinction between a public and private employer in regard to whether a court should consider an individual's right to privacy. Further, Section III advocates for the Ohio judiciary to adopt a balancing test recommended by the Court of Appeals for the Third Circuit in *Borse v. Piece Goods Shop, Inc.*, which weighs the employer's business interests against the employee's privacy interests and offers guidance as to the proper form of notice and employee consent for private employers who choose to use the direct observation method.[13] Finally, this Comment concludes in Section IV by stating that the Supreme Court of Ohio should have found for the employees, holding that, in some instances, an at-will employee has a cause of action for invasion of privacy if they are compelled to consent to urinalysis via direct observation.

BACKGROUND

This Section begins in Section II(A) by outlining the development and application of the employment-at-will doctrine in Ohio and recognizing the doctrine's essential exceptions. Section II(B) addresses an individual's right to privacy in the context of Ohio's common-law tort claim for invasion of privacy and, more specifically, intrusion upon seclusion. Section II(C) provides a case study examining when unduly invasive investigation measures violate an individual's expectation of privacy. Section II(D) acknowledges that employers have a general right to drug test employees as a condition of employment, highlighting the several urine collection methods available that maintain the integrity of the specimen. Section II(D) further discusses the distinctions between public and private sector employers in utilizing the direct observation method in employment-related drug testing. Section II(E) concludes with

10. *Id*. at 244.
11. *Id*. at 247.
12. *Id*.
13. 963 F.2d 611 (3d Cir. 1992).

a discussion of the Supreme Court of Ohio's ruling in *Lunsford*.

A. Employment At Will

Ohio recognizes the employment-at-will doctrine.[14] The employment-at-will doctrine allows either party – employer or employee – to terminate the employment relationship at any time and for "any reason which is not contrary to law."[15] Traditionally, Ohio's employment-at-will doctrine permitted an employer to dismiss an employee-at-will "'for any cause, at any time whatsoever, even if done in gross or reckless disregard of [an] employee's rights.'"[16]

However, under Ohio's modern employment-at-will doctrine, an employer does not have such unbridled discretion. Both the legislature and the judiciary have limited the employment-at-will doctrine's broad scope.[17] Notably, Ohio has five exceptions to the employment-at-will doctrine.[18] The five exceptions are: (1) an employment contract provides for a specific employment term or job protection;[19] (2) certain facts and circumstances imply an employment contract has been formed;[20] (3) promissory estoppel; (4) the termination was against public policy;[21] and (5) the termination violated state and/or federal law.[22]

Importantly, the Supreme Court of Ohio in *Greeley v. Miami Valley Maintenance Contractors, Inc.*[23] recognized an exception to the

14. La France Elec. Const. & Supply Co. v. International Brotherhood of Electrical Workers, Local No. 8, 108 Ohio St. 61, (Ohio 1923).

15. Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 103 (Ohio 1985). *See also* Lake Land Emp. Grp. Akron, LLC v. Columber, 101 Ohio St. 3d 242, 247 (Ohio 2004) ("If, for instance an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit. Similarly, if the employee proposes to the employer that he deserves a raise and will no longer work at his current rate, the employer may either negotiate an increase or accept the loss of his employee.").

16. Painter v. Graley, 70 Ohio St. 3d 377, 382 (Ohio 1994) (alteration in original) (quoting Phung v. Waste Mgmt., Inc., 491 N.E.2d 1114, 1116 (Ohio 1986)).

17. *Mers*, 19 Ohio St. 3d at 103.

18. Neil E. Klingshirn, *At-Will Employment Is the Rule in Ohio*, OHIO STATE BAR ASS'N (May 12, 2016), https://www.ohiobar.org/public-resources/commonly-asked-law-questions-results/labor--employment/at-will-employment-is-the-rule-in-ohio.

19. *Id*. An example of job protection would be a "termination only for 'just cause'" clause in the employment contract.

20. *Id*. Examples of facts and circumstances that may imply an employment contract include relevant sections in employee handbooks, an employer's oral representation of job security in exchange for good performance, etc.

21. Painter v. Graley, 70 Ohio St. 3d 377, (Ohio 1994). *See also* Greeley v. Miami Valley Maint. Contractors, Inc., 49 Ohio St. 3d 228, 233 (Ohio 1990).

22. Klingshirn, *supra* note 20. Employment-at-will doctrine's broad scope is limited by laws prohibiting (1) retaliatory termination when an injured employee files a workers' compensation claim or participates in union activities and (2) discrimination on the basis of age, race, sex, or disability. *Id.*

23. Greeley v. Miami Valley Maint. Contractors, Inc., 49 Ohio St. 3d 228 (Ohio 1990).

traditionally harsh employment-at-will doctrine by allowing a terminated employee to assert a private tort action where the termination was against sufficiently clear public policy.[24] In *Greeley*, the Supreme Court of Ohio considered whether an at-will employee can be terminated solely because of a court-ordered assignment of the employee's wages, which would have been a violation of Ohio Revised Code Section 3113.[25] The court acknowledged that the employer violated the relevant statute;[26] however, violation of the statute would only have resulted in a minimal fine, leaving the employee without a proper remedy against the employer.[27] The court, pointing to the unbalanced remedial actions, determined that when an employer terminates an employee for a reason prohibited by statute, a civil cause of action is available to the employee for the unlawful termination.[28]

The Supreme Court of Ohio in *Painter v. Graley* expanded what may constitute "clear public policy" by allowing courts to look beyond the four corners of statutory law.[29] The clear public policy necessary to justify an exception to Ohio's employment-at-will doctrine extends beyond public policy explicitly expressed by legislative statute to include the common law. The Court reasoned that "'[w]hen the common law has been out of step with the times, and the legislature . . . has not acted, we have undertaken to change the law . . . .'"[30] *Painter v. Graley* allowed the court to have flexibility outside the bounds of the Ohio General Assembly to determine, based on the facts and circumstances of each case, whether an employer violated clear public policy.[31]

B. Invasion of Privacy / Intrusion Upon Seclusion

The right to privacy is the "right of a person to be let alone, to be free of unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned."[32] Therefore, the tort of invasion of privacy guards a person's

24. *Id*. at 233.

25. *Id*. at 229. "No employer may use an order to withhold personal earnings . . . as a basis for a discharge of, or for any disciplinary action against, an employee, or as a basis for a refusal to employ a person. The court may fine an employer who so discharges or takes disciplinary action against an employee, or refuses to employ a person, not more than five hundred dollars." *Id.* at 230 (emphasis omitted).

26. *Id*. at 231.

27. *Id*.

28. *Id*. at 234.

29. Painter v. Graley, 70 Ohio St. 3d 377, 383–84 (Ohio 1994).

30. *Id*. at 384 (alteration in original) (quoting Gallimore v. Children's Hosp. Med. Ctr., 67 Ohio St. 3d 244, 253 (Ohio 1993)).

31. *Id*. (citing Gallimore v. Children's Hosp. Med. Ctr., 67 Ohio St. 3d 244, 253 (Ohio 1993)).

32. Lunsford v. Sterilite of Ohio, LLC, 108 N.E.3d 1235, 1240 (Ohio Ct. App. 2018) (quoting

right to "personal dignity and self-respect."[33] The common law tort claim for invasion of privacy in Ohio dates back to the Supreme Court of Ohio's 1956 decision in *Housh v. Peth*.[34]

A person who intentionally intrudes upon the privacy of another in such a manner that would be "highly offensive to a reasonable person"[35] is subject to liability under a tortious invasion of privacy claim.[36] In *Housh*, a woman had outstanding debt and was consequently systematically harassed by her debt collector.[37] The debt collector telephoned the woman incessantly at all hours of the day.[38] The phone calls intruded upon the woman's daily affairs.[39] For example, the debt collector called the woman's employer, a public school, to inform them of the debt.[40] The phone calls interrupted her teaching as she was called out of her classroom three times within fifteen minutes.[41] The debt collector also called the woman at her residence, a rooming house.[42] The continuous calls resulted in her employer threatening termination as well as the loss of a tenant at her rooming house.[43] The woman subsequently filed suit against the debt collector, claiming invasion of her right to privacy.[44]

The Supreme Court of Ohio in *Housh* determined that the debt collector had a right to take reasonable action to recover the outstanding debt.[45] However, the court recognized that the debt collector went too far and used unreasonable tactics in his efforts to satisfy the debt.[46] Based on the facts of this case, the court was compelled to institute an actionable claim for invasion of privacy. To warrant a claim for invasion of privacy, a plaintiff must demonstrate the "unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering,

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Housh v. Peth, 133 N.E.2d 340, 341 (Ohio 1956)).

33. Lunsford v. Sterilite of Ohio, L.L.C., 162 Ohio St. 3d 231, 243 (Ohio 2020) (Stewart, J., dissenting) (quoting Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426, 451 (1938)).

34. Housh v. Peth, 165 Ohio St. 35 (Ohio 1956).

35. Sustin v. Fee, 69 Ohio St. 2d 143, 145 (Ohio 1982) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

36. *Housh*, 165 Ohio St. at 35.

37. *Id*. at 44.

38. *Id*.

39. *Id*.

40. *Id*.

41. *Id*.

42. *Id*.

43. *Id*.

44. *Id*. at 41.

45. *Id*.

46. *Id*.

shame or humiliation to a person of ordinary sensibilities."[47] Here, the debt collector's actions showed a systematic pattern of harassment that breached the boundaries of what a reasonable person would find acceptable.[48] Therefore, the Supreme Court of Ohio held that the debt collector wrongfully intruded upon the woman's right to privacy, ultimately causing her mental suffering.[49]

The tort claim of intrusion upon seclusion focuses on the third element of an invasion of privacy claim – "the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities . . . ."[50] Intrusion upon seclusion is premised on the "right to be left alone."[51] The Restatement (Second) of Torts outlined the scope of liability for intrusion upon seclusion: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[52]

The tort of intrusion upon seclusion is not limited to a physical invasion of another.[53] The Restatement provides the example of *Hamberger v. Eastman* in which a married couple brought suit against their landlord for installing and concealing a recording device in their bedroom.[54] In *Hamberger*, the Supreme Court of New Hampshire determined that the landlord had intentionally invaded the couple's right to privacy and was subject to liability.[55] The court noted that the determination for intrusion is based on whether the action would be offensive to a reasonable person.[56]

The Supreme Court of New Hampshire assessed that in this case, and generally, the "limits [of decency] are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public."[57] It was immaterial that the landlord's recordings were never publicly released.[58] The mere act of intrusion and threat of

47. *Id*. at 35.

48. *Id*. at 41.

49. *Id*. at 35.

50. *Id*. at 35.

51. PETA v. Bobby Berosini, Ltd., 111 Nev. 615, 630 (Nev. 1995).

52. Sustin v. Fee, 69 Ohio St. 2d 143, 145 (Ohio 1982) (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

53. Hamberger v. Eastman, 106 N.H. 107, 111 (N.H. 1964).

54. *Id*. at 107.

55. *Id*. at 111.

56. *Id*.

57. *Id*.

58. *Id*. at 112.

public release are enough to offend a reasonable person.[59] Therefore, the Supreme Court of New Hampshire held that a person can be liable for an intrusion upon seclusion without physically invading the private space of another.[60]

The right to privacy is not absolute. In the employment law discipline, consent is typically an absolute defense to an invasion of privacy claim.[61] The Restatement (Third) of the Law of Employment states: "One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it."[62] Therefore, if the person consented to the intrusion, the intruder is not subject to liability even if the intrusion would be found highly offensive to a reasonable person.

C. When Investigation Measures Go Beyond the Reasonable Scope: Safford Unified School District No. 1 v. Redding

The United States Supreme Court has recognized that the school setting requires a higher level of suspicion of wrongful activity before an invasive search is justified.[63] Generally, a law enforcement officer must determine that there is a "fair probability" or "substantial chance" of discovering evidence of criminal activity prior to conducting an evidentiary search.[64] In contrast, for school searches, the school administrator must determine that there is a "moderate chance" of discovery.[65] The Supreme Court understood "moderate chance" to be a "lesser standard" than the "fair probability" or "substantial chance" standards relating to discovering criminal activity.[66] A school search will be "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[67]

In a permissible school search, the degree of intrusion must align with a school administrator's reasonable suspicion.[68] In *Safford Unified School District No. 1 v. Redding*, a thirteen-year-old girl was brought into the

59. *Id*.

60. *Id*.

61. Lunsford v. Sterilite of Ohio, LLC, 162 Ohio St. 3d 231, 240 (Ohio 2020).

62. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.06, cmt. h (AM. L. INST. 2015) (quoting RESTATEMENT (SECOND) OF TORTS § 892A(1) (AM. L. INST. 1979)).

63. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370 (2009) (citing New Jersey v. T.L.O., 469 U.S. 325 (1985)).

64. *Id*. at 371 (quoting Illinois v. Gates, 462 U.S. 213, 238, 244, n.13 (1983)).

65. *Id*. at 371.

66. *Id*.

67. *Id*. at 370 (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

68. *Id*. at 364.

assistant principal's office for suspicion of drug possession and distribution.[69] The assistant principal had received reports that the thirteen-year-old student was distributing over-the-counter and prescription anti-inflammatory drugs to other students.[70] The student denied the accusations and consented to a search of her person and belongings.[71] After the assistant principal was unable to find any evidence within the student's belongings, the assistant principal took the student to the school nurse to conduct a search of her person.[72] The school nurse instructed the student to remove her jacket, t-shirt, pants, socks, and shoes.[73] Then, the student was ordered to pull her bra out to the side and to pull on the elastic of her underpants, exposing her breasts and pelvic area.[74] No drugs were found after conducting the extensive search.[75] The thirteen-year-old student, by and through her mother, sued the Safford Unified School District and school employees, claiming the strip search violated her Fourth Amendment rights.[76]

The Supreme Court found both the school nurse and assistant principal had sufficient suspicion to justify searching the student's belongings and clothing.[77] However, the school nurse did not have sufficient suspicion to justify extending the search to the thirteen-year-old's bra and underwear.[78] First, the drugs were not a significant threat to the school community.[79] Second, there was no indication that the drugs would be in the student's bra or underwear.[80] Thus, the Court found that the invasive search violated the student's "reasonable societal expectations of personal privacy."[81] The Supreme Court determined that the "meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."[82] While an intrusive evidence search may be justified in certain circumstances, it must be reasonably related in scope to justify the

69. *Id*.

70. *Id*. at 368.

71. *Id*.

72. *Id*. at 369.

73. *Id*.

74. *Id*.

75. *Id*.

76. *Id*. The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

77. *Safford*, U.S. 364 at 374.

78. *Id*.

79. *Id*. at 376.

80. *Id*.

81. *Id*. at 374.

82. *Id*. at 377.

humiliation and indignity endured by the student.[83] Therefore, the Supreme Court held that the search of the student's bra and underwear went beyond the reasonable scope, was unreasonably intrusive, and violated the Fourth Amendment.[84]

D. Drug Screening During Course of Employment

Employers have a general right to drug test employees as a condition of their employment.[85] Urine drug screens are the most common method of drug analysis due to the ease of sampling.[86] There are several urine collection methods that ensure an unadulterated sample is captured for testing. The collection precautions include the following: ensuring that the collection area is secure, adding colored dye to toilet water,[87] turning off running water during the collection process, asking employees to leave jackets and other personal belongings outside the collection area, checking the temperature of the urine specimens immediately after voiding,[88] or having a monitor accompany the employee into the restroom while providing the employee a closed-door stall for privacy.[89]

The most invasive method of drug testing is direct observation. Direct observation entails a third-party monitor observing the individual's genitals while he or she urinates into a collection cup.[90] The direct observation method "represents a significant intrusion" into an individual's expectation of privacy.[91] Society expects an individual's genitals to be kept private.[92] Therefore, while direct observation is not a prohibited drug testing method, it is likely a humiliating, degrading, and intrusive experience for the individual.

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83. *Id*. at 375.

84. Id. at 379.

85. State *ex rel.* Ohio AFL-CIO v. Ohio Bur. Workers' Comp., 97 Ohio St. 3d 504, (2002).

86. Karen E. Moeller et al., *Urine Drug Screening: Practical Guide for Clinicians*, 83 MAYO CLIN. PROCS. 66, (2008).

87. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 661 (1989).

88. Bill Current, *Thwarting Drug Test Cheaters*, QUEST DIAGNOSTICS EMP. SOLS. BLOG (May 4, 2021) https://blog.employersolutions.com/thwarting-drug-test-cheaters.

89. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995). The Supreme Court upheld the school's drug testing program for student athletes that maintained the student athletes' personal boundaries by having the monitor listen rather directly observe the collection process. *Id.*

90. Wilcher v. City of Wilmington, 139 F.3d 366, 375–76 (3d Cir. 1998).

91. *Id*. *See also* Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981) ("Most people . . . have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.").

92. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 617 (1989). *See also* Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1543 (6th Cir. 1988); Schaill by Kross v. Tippecanoe Cnty. Sch. Corp., 864 F.2d 1309, 1312 (7th Cir. 1988) ("There can be little doubt that a person engaging in the act of urination possesses a reasonable expectation of privacy as to that act . . . .").

1. Drug Testing – Federally Regulated Professions

Federal regulations do provide some safeguards for the urine collection process. Section II(D)(1)(i) discusses the federal regulations for drug testing government employees, emphasizing the federal regulations' prohibition of the direct observation method as standard practice. Further, Section II(D)(1)(ii) focuses on the delicate balancing test between the government's public safety interests and the employee's privacy interests when conducting employment-related urine drug tests.

i. Federal Regulations

The federal government has promulgated regulations for employment-related drug testing. The Code of Federal Regulations ("C.F.R.") implemented drug testing collection procedures for safety-sensitive jobs in the following industries: aviation, rail, motor carrier, mass transportation, maritime, and nuclear power.[93] The detailed drug collection procedures seek to ensure the integrity of the urine collections, while also keeping the federally regulated employees' privacy rights at the forefront.

Federal regulations prohibit direct observation method as a standard practice.[94] Instead, the federal government adopts certain protocols to safeguard the collection process, including, but not limited to: restricting access to the designated restroom,[95] removing outer clothing that could conceal items that could be used to tamper with the specimen,[96] leaving any personal belongings (e.g., a purse) outside the designated restroom,[97] tasking the monitor to astutely observe the employee for any conduct that could indicate an intent to interfere with the testing process,[98] and immediately checking the produced specimen's temperature and color.[99] These mandated procedures for safety-sensitive jobs are thorough, yet maintain the employee's dignity and privacy.

Because the direct observation method is an excessive intrusion of privacy, federal regulations only allow direct observation when there is a

93. 49 C.F.R. pt. 40. *See also* 14 C.F.R. pt. 120 (implemented within the Federal Aviation Administration); 49 C.F.R. § 219.701 (implemented within the Federal Railroad Administration); *id.* § 382.105 (implemented within the Federal Motor Carrier Safety Administration); *id.* § 655.51 (implemented within the Federal Transit Administration); *id.* § 199.5 (implemented within the Pipeline and Hazardous Safety Administration); 46 C.F.R. § 16.113 (implemented within the U.S. Coast Guard).

94. 49 C.F.R. pt. 40.

95. *Id.* § 40.43(c)(1)–(2).

96. *Id.* § 40.61(f).

97. *Id*.

98. *Id.* § 40.63(e).

99. *Id.* § 40.65.

reasonable suspicion as to the validity of the urinalysis.[100] Pursuant to federal regulations, the direct observation method may only be employed under the following limited circumstances: lab results show the urine sample was adulterated without an "adequate medical explanation,"[101] the urine sample is outside the allowable temperature range,[102] the monitor observes conduct indicating an attempt to cheat,[103] an employee previously failed a workplace drug or alcohol test,[104] or the test is a follow-up or return-to-duty for an employee who has been on alcohol or substance abuse leave.[105] As demonstrated above, the federal government acknowledges the efficacy of other non-invasive collection methods for drug testing employees in safety-sensitive jobs, reserving the direct observation method for exceptional circumstances.

ii. A Balancing Test

If the government can demonstrate the underlying public safety interest, drug testing without "reasonable suspicion" does not violate an employee's right to privacy.[106] In *Skinner v. Railway Labor Executives' Association*, the Federal Railway Association ("FRA") enacted regulations to mandate drug and alcohol tests for railroad employees.[107] The FRA regulations stemmed from railroad employees abusing drugs and alcohol during the course and scope of their employment, posing a significant threat to public safety.[108] The FRA regulations prohibited railroad employees from using or possessing drugs or alcohol during employment.[109] The regulations provided that railroad companies were (1) required to bring all railroad employees to an independent testing facility for blood and urine testing following major accidents, impact accidents, or crew member fatalities and (2) permitted to mandate urine and breath tests upon "reasonable suspicion" that the employee was under the influence of drugs or alcohol.[110] The Railway Labor Executives' Association brought suit against the government, claiming the FRA regulations violated the railroad employees' privacy interests and Fourth

100. *Id.* § 40.67.
101. *Id.* § 40.67(a)(1)–(3).
102. *Id.* § 40.67(c)(3).
103. *Id.* § 40.67(c)(2).
104. 10 C.F.R. § 26.69.
105. 49 C.F.R. § 40.67(b)(5).
106. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 634 (1989).
107. *Id.* at 603.
108. *Id*. at 606.
109. 49 C.F.R. § 219.101(a)(1).
110. *Skinner*, 489 U.S. at 609–11.

Amendment rights.[111]

The Supreme Court found that the government effectively demonstrated that requiring a reasonable suspicion prior to subjecting the railroad employee to drug testing would frustrate its efforts to improve public safety.[112] The Supreme Court acknowledged that individuals have a reasonable expectation of privacy, and the FRA regulations intruded upon this expectation.[113] Yet, when the government has a legitimate interest, the government's intrusion on the individual's expectation of privacy is justified.[114]

While the majority determined the public safety interest trumped the individual privacy interest, the Supreme Court devoted considerable time to discussing the inherently private task of urination.[115] Pointing to the Court of Appeals for the Fifth Circuit's opinion in *National Treasury Employees Union v. Von Raab*, the Supreme Court reiterated:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.[116]

The Supreme Court determined that the FRA's method of urinalysis drug testing was not invasive.[117] However, if the collection method required visual or auditory monitoring of the employee during the excretory function, the employee's privacy interests should be considered.[118] Because the drug testing maintained a minimal privacy right to the railroad employees, the Supreme Court primarily focused on the public need for guaranteed safe railway travel.[119] Therefore, the Government's public safety interest outweighed the railroad employees' privacy concerns.[120]

Justice Marshall and Justice Brennan dissented, finding that the majority placed too much emphasis on the government's interests against the railroad employees' privacy interests, eroding Fourth Amendment protection.[121] The dissenters determined that employees do not shed their

111. *Id.* at 612.

112. *Id.* at 621.

113. *Id.*

114. *Id.*

115. *Id.* at 617.

116. *Id.* (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

117. *Id.*

118. *Id.*

119. *Id.* at 604, 634.

120. *Id.*

121. *Id.* at 646 (Marshall, J., dissenting).

Fourth Amendment rights at the workplace door.[122] Under the majority's decision, a railroad employee's right to privacy would be substantially invaded.[123] While acknowledging the importance of the FRA's efforts to protect the public, Justices Marshall and Brennan concluded that the majority too easily diminished the railroad employees' right to personal liberty.[124]

Specifically, the dissent addressed the issues surrounding urination under the direct observation method.[125] Society considers urination among the most private, personal activities. Urination is prohibited in public, avoided in conversation, and completed in spaces designed to maintain personal privacy.[126] Collecting an employee's urine sample by direct observation is humiliating and intrusive.[127] The dissent, quoting law professor Charles Fried, asserted, "[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem."[128] The dissent found that the majority's decision glossed over the profound implications of urination under the direct observation method and failed to properly weigh the railroad employees' privacy rights.[129] Therefore, the dissent advocated for a fairer balancing approach between the government's interest in public safety and the railroad employees' interest in personal seclusion.[130]

Courts have continued to follow the balancing test applied in *Skinner*[131] in which the government interests are weighed against the individual's right to privacy in cases between a public employer and its employee.[132] In balancing the interests of the federally regulated employer and the employee, courts have typically recognized that "the degree of intrusion depends on the manner in which production of the urine sample is monitored" rather than the urine sample production itself.[133]

122. *Id*. at 648 (citing O'Connor v. Ortega, 480 U.S. 709, 716–18 (1987)).

123. *Id*. at 650, 655.

124. *Id*.

125. *Id*. at 645.

126. *Id*. at 645–46 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

127. *Id*.

128. *Id.* at 646 (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

129. *Id*. at 647.

130. *Id*.

131. *Id.*

132. *See* BNSF Ry. Co. v. U.S. Dep't Transp., 566 F.3d 200 (D.C. Cir. 2009); Wilcher v. City of Wilmington, 139 F.3d 366 (3rd Cir. 1998); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

133. *Acton*, 515 U.S. at 658.

2. Drug Testing – Private Employer

There is no such balancing test for the private sector. A private employer may terminate an at-will employee for any reason so long as it does not violate public policy.[134] Further, employers have a general right to drug test employees as a condition of their employment.[135] For example, in *Baggs v. Eagle-Picher Industries, Inc.*,[136] the Court of Appeals for the Sixth Circuit held that a surprise mandatory drug screening did not invade the at-will employees' privacy rights, as the drug screening was reasonably related to employment matters.[137]

However, the Court of Appeals for the Third Circuit Court determined that, in some circumstances, a private employer terminating an at-will employee for refusing to consent to drug testing and to personal searches might violate public policy on the basis of the common law tort claim for invasion of privacy.[138] In *Borse v. Piece Goods Shop, Inc.*, the employer implemented urinalysis drug screenings and personal property searches pursuant to its drug and alcohol policy.[139] The employer requested that its employees sign a form consenting to the new drug and alcohol policy.[140] One employee who refused to sign the consent form was eventually terminated.[141] The employee sued her former employer,[142] claiming her termination violated public policy because the employer infringed upon her right to privacy.[143]

The Third Circuit acknowledged that the Pennsylvania Supreme Court had not yet addressed the question of whether terminating an at-will employee for refusing to submit to urinalysis drug testing and personal property searches violates public policy.[144] However, the Third Circuit aimed to offer its best prediction and guidance in the event that the question ever reached the Pennsylvania Supreme Court.[145] Like Ohio, Pennsylvania has adopted a wrongful discharge cause of action for an at-will employee based on a public policy exception.[146] Additionally, Pennsylvania also recognizes a tortious action for intrusion upon

134. Section II(A) *infra*.
135. Lunsford v. Sterilite of Ohio, L.L.C., 162 Ohio St. 3d 231, 238 (Ohio 2020).
136. Baggs v. Eagle-Picher Indus., Inc., 957 F.2d 268 (6th Cir. 1992).
137. *Id*. at 247.
138. Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992).
139. *Id.* at 611.
140. *Id*. at 613.
141. *Id*.
142. The case was brought in federal court due to diversity of citizenship.
143. *Borse*, 963 F.2d at 613.
144. *Id*. at 614.
145. *Id*.
146. *Id*. at 615. *See* Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (1978).

seclusion,[147] which requires an intentional invasion of privacy that would be "highly offensive to a reasonable person."[148]

The Third Circuit envisioned at least two ways in which a private employer's urinalysis program could intrude upon an employee's right to seclusion.[149] First, the "particular manner in which the program is conducted" may constitute an intrusion upon seclusion.[150] The Third Circuit reasoned that "[t]he process of collecting the urine sample to be tested clearly implicates 'expectations of privacy that society has long recognized as reasonable.'"[151] Further, there are many methods of monitoring urine collection to ensure the employee does not cheat.[152] The Third Circuit concluded that "monitoring the collection of the urine sample appears to fall within the definition of intrusion upon seclusion because it involves the use of one's senses to oversee the private activities of another."[153] So, if the collection method fails to adequately consider the employee's privacy, it could constitute a "substantial and highly offensive" intrusion upon seclusion.[154] Second, urinalysis can divulge private medical information about the employee.[155]

The Third Circuit further found that an employer's unprompted search of an employee's personal property also constituted a tortious invasion of privacy.[156] The Third Circuit reasoned that there must be some limitations and boundaries between a private employer and the at-will employee.[157] The employer should not be able to justify any action as employment-related and to threaten termination if the employee fails to comply.[158] The Third Circuit effectively stated:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.[159]

Therefore, the Third Circuit predicted that if the Pennsylvania Supreme

147. *Borse*, 963 F.2d at 620. *See* Marks v. Bell Telephone Co., 460 Pa. 73, 331 A.2d 424, 430 (1975).

148. *Borse*, 963 F.2d at 620 (quoting RESTATEMENT (SECOND) OF TORTS § 652B).

149. *Borse*, 963 F.2d at 621.

150. *Id*.

151. *Id*. (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 617 (1989)).

152. *Id*. (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 660 (1989)).

153. *Id*.

154. *Id*.

155. *Id*. (For example, urinalysis can reveal whether an employee is pregnant, diabetic, or epileptic.)

156. *Id*.

157. *Id*. at 622.

158. *Id*.

159. *Id*. (quoting Geary v. U.S. Steel Corp., 319 A.2d 174, 180 (1974)).

Court determined that an employee's termination was related to a "substantial and highly offensive"[160] invasion of the employee's privacy, the Pennsylvania Supreme Court would conclude that the termination violated public policy.[161] To determine whether the employer invaded the employee's right to privacy, the Third Circuit recommended the Pennsylvania Supreme Court apply a fact-intensive balancing test, weighing the employee's privacy interests against the employer's interest in maintaining a drug-free workplace.[162] However, in the case at hand, the Third Circuit found the employee's allegations were vague and insufficient to adequately apply the balancing test.[163] The employee's case was ultimately remanded to the district court, granting the employee leave to amend her complaint.[164]

Other jurisdictions have also evaluated a private employer's mandated urinalysis drug testing program. These jurisdictions, regardless of the holding, all balance the employee's privacy interest against the employer's business interests to determine whether the employee's discharge violated public policy.[165]

E. Lunsford v. Sterilite of Ohio, LLC

In December 2016, Adam Keim and Laura Williamson, former at-will employees, and Donna Lunsford and Peter Griffiths, current at-will employees, brought suit against their employer, Sterilite, and the third-party agent U.S. Healthworks Medical Group of Ohio, Inc. ("U.S. Healthworks"), asserting invasion of privacy and wrongful discharge in violation of public policy.[166]

Sterilite, a private company that manufactures plastic storage containers, had a workplace substance abuse policy that applied to all employees.[167] Compliance with the substance abuse policy was a condition of employment.[168] The policy's purpose was to "promote a healthy, safe and productive workplace for all employees."[169] Sterilite

160. *Id*.

161. *Id*.

162. *Id*. at 625.

163. *Id*.

164. *Id*. at 626.

165. *See* Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989); Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990); Hennessey v. Coastal Eagle Point Oil Co., 589 A.2d 170 (N.J. Super. Ct. App. Div. 1991).

166. Complaint at ¶¶1-40, Lunsford v. Sterilite of Ohio, LLC, No. 2016-CV-02774, 2016 WL 11499616 (filed Dec. 22, 2016).

167. STERILITE CORP., *supra* note 1.

168. Lunsford v. Sterilite of Ohio, L.L.C., 162 Ohio St. 3d 231, 232 (Ohio 2020).

169. *Id*.

preserved the right to change the policy at any time.[170] The policy outlined three circumstances in which Sterilite may exercise its discretion to submit an employee to drug testing: (1) while investigating a workplace incident; (2) when there is reasonable suspicion that an employee is under the influence of drugs or alcohol; and (3) at random.[171] The policy established that urinalysis would be used to test for the presence of illegal substances and/or the improper use of over-the-counter and prescription drugs.[172] However, the policy did not mention how the urine sample would be collected.[173] Under the policy, the employee must produce a valid urine sample within two and a half hours.[174] If the employee failed to provide a urine sample within the allotted time, the employee would be considered to have refused the test and subject to immediate termination.[175] If the employee's sample tested positive for illegal drugs or the improper use of prescription or over-the-counter drugs, the employee would be subject to disciplinary action and, potentially, termination.[176] Sterilite reserved an office restroom to conduct the drug testing.[177] In October 2016, Sterilite hired U.S. Healthworks to administer the workplace drug-testing program.[178]

Also in October 2016, U.S. Healthworks, at Sterilite's direction, began collecting urine samples by the direct observation method which requires a same-sex monitor to accompany the employee into the restroom to visually observe the employee produce a urine sample.[179] Three of the employees – Lunsford, Williamson, and Griffiths – were randomly selected for drug testing on October 4, October 12, and November 8, 2016, respectively.[180] On October 9, 2016, the fourth employee, Keim, was asked to submit a urine sample due to a reasonable suspicion of impairment.[181] The employees were instructed to report to the designated restroom to submit a urine sample.[182] Prior to entering the restroom, a U.S. Healthworks agent handed each employee a consent form.[183] The consent form provided:

170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*.
174. *Id*. at 233.
175. *Id*.
176. *Id*.
177. *Id*.
178. *Id*.
179. *Id*.
180. *Id*.
181. *Id*.
182. *Id*.
183. *Id*.

> I hereby give my consent and authorize U.S. Healthworks staff and its designated laboratory to perform any testing necessary to determine the presence and/or level of drugs in my body on behalf of my * * * current employer, whose name I entered above. I further give my consent for U.S. Healthworks to release any and all results to the aforementioned employer. I agree to hold harmless all U.S. Healthworks employees, physicians, and agents involved in the performance of the testing, from any action that may arise from the disclosure of such test results to the aforementioned employer * * *[184]

The consent form did not specify how the urine sample was to be collected.

Before October 2016, Sterilite's collection methods did not include direct observation.[185] The employees, never having undergone direct observation collection, signed the consent form.[186] The employees were not informed of the direct observation method until after executing the consent form.[187] The employees were notified of the new collection method when they reported to Sterilite's designated restroom.[188] The employees reluctantly proceeded with the drug test under direct observation.[189] Lunsford and Griffiths were able to produce a urine sample; however, Williamson and Keim were unable to produce a urine sample within the required two-and-a-half-hour window.[190] Sterilite subsequently fired Williamson and Keim pursuant to its substance abuse policy.[191]

The employees then filed against Sterilite and U.S. Healthworks in the Stark County Court of Common Pleas on December 22, 2016, claiming that Sterilite and U.S. Healthworks invaded their privacy by requiring them to produce urine samples under the direct observation method.[192] Both Sterilite and U.S. Healthworks filed separate motions to dismiss.[193] The trial court granted both motions to dismiss, concluding that Ohio "does not recognize an invasion-of-privacy claim by an at-will employee based solely on an employer's use of the direct-observation method during drug testing, particularly when the at-will employee agreed to be tested as a condition of employment."[194] The employees appealed the

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 234.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 234–35.
194. *Id.*

decision and the Fifth District of the Court of Appeals of Ohio unanimously reversed, holding that the employees had stated a valid claim for invasion of privacy pursuant to the requirement of the Supreme Court of Ohio in *Housh v. Peth.*[195] The Fifth District found that employees have "a reasonable expectation of privacy with regard to the exposure of their genitals."[196] Sterilite and U.S. Healthworks then appealed the Fifth District's decision to the Supreme Court of Ohio.[197]

1. Employer's Argument

Sterilite argued that, in Ohio, employees of a private employer do not have a reasonable expectation of privacy when undergoing a drug test.[198] Sterilite, an at-will employer, required compliance with the substance abuse policy as a condition of employment.[199] Sterilite reasoned the drug testing was job-related, and therefore, within the acceptable bounds of at-will employment conditions.[200]

Sterilite further contended that the employees signed the consent form and were notified that the drug test would be collected by direct observation method prior to entering the restroom.[201] The employees thus waived their invasion of privacy claim by consenting to the drug test via direct observation.[202] Therefore, according to Sterilite, an at-will employee does not have a cause of action against an employer for invasion of privacy claim.[203] U.S. Healthworks agreed with Sterilite's argument.[204]

2. Employees' Argument

The employees conceded that they were at-will employees and that Sterilite was justified in adopting its workplace substance abuse policy.[205] The employees also took no issue regarding an employer's general right to drug test its employees.[206] However, the employees claimed that they

195. Lunsford v. Sterilite of Ohio, LLC, 108 N.E.3d 1235, 1242 (Ohio Ct. App. 2018); *see generally* Housh v. Peth, 165 Ohio St. 35 (Ohio 1956).

196. Lunsford, 108 N.E.3d at 1242.

197. Lunsford v. Sterilite of Ohio, L.L.C, 162 Ohio St. 3d 231, 250 (Ohio 2020).

198. *Id*. at 235.

199. *Id*.

200. *Id*.

201. *Id*. at 236.

202. *Id*.

203. *Id*.

204. *Id*.

205. *Id*.

206. *Id*. at 243.

had a reasonable expectation of privacy with regard to the exposure of their genitals.[207] The highly intrusive direct observation method was unwarranted, acting as a "wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."[208] Therefore, the direct observation method was an invasion of that right to privacy.[209]

The employees argued that at-will employers should not have unrestricted discretion as to the method of drug testing.[210] In support of the employees, the Ohio Employment Lawyers Association (the "OELA") submitted an *amici curiae* brief to the Supreme Court of Ohio.[211] The OELA wanted to highlight the importance of maintaining the basic right to bodily privacy in Ohio workplaces.[212] The OELA outlined how direct observation is not the sole method to ensure a urine sample is safe from corruption.[213] Because the employees did not perform safety-sensitive tasks at Sterilite, they argued that Sterilite's use of the direct collection method was unnecessary and unreasonable.[214] Instead, the employees contended, Sterilite should have been required to strike the proper balance between its right to drug test and the privacy rights of its employees.[215]

Finally, the employees stated that while they signed the consent form for the drug test, the consent form failed to describe the collection method.[216] Further, the employees contended that they should not have been forced to choose between displaying their genitalia for a random drug test or being terminated.[217] The employees felt pressured to continue the drug test when being informed of the collection method as they entered the designated restroom.[218] The employees did not have proper notice to make a fully considered decision as to whether to submit to drug testing under the unduly intrusive direct observation method.[219] Therefore, because no consent was given to the method of collection, the employees contended that they were not barred from bringing their

207. *Id*. at 239.

208. *Id*. (quoting Housh v. Peth, 165 Ohio St. 35, 35 (Ohio 1956)).

209. Lunsford v. Sterilite of Ohio, LLC, 108 N.E.3d 1235, 1241 (Ohio Ct. App. 2018).

210. *Id*.

211. *See generally* Brief for Ohio Employment Lawyers Association, as Amici Curiae Supporting Appellees, Lunsford v. Sterilite of Ohio, LLC, 108 N.E.3d 1235 (Ohio Ct. App. 2018) (No. 2018-1431).

212. *Id*. at 1.

213. *Id*. at 12.

214. Lunsford v. Sterilite of Ohio, L.L.C, 162 Ohio St. 3d 231, 239 (Ohio 2020).

215. *Id*.

216. *Id*. at 236.

217. *Id*.

218. *Id*.

219. *Id*. at 248.

common law invasion of privacy claim.[220]

3. A Divided Court

In a (4-3) decision, the Ohio Supreme Court held that an at-will employee who consents to submit a urine sample for a drug screening has no cause of action for invasion of privacy.[221]

i. The Majority Opinion

Justice Kennedy, writing for the majority,[222] reversed the Fifth District's holding, concluding that at-will employees who consented to a drug test by direct observation do not have an actionable invasion of privacy claim.[223] The majority found for the employer because (1) the at-will employment relationship required compliance with Sterilite's workplace substance abuse policy;[224] (2) no Fourth Amendment protections or Ohio statutes or constitutional provisions attach due to Sterilite's status as a private company;[225] and (3) the Employees willingly consented to the direct observation method, waiving their right to privacy.[226]

First, the majority situated an employee's right to privacy within the context of an at-will employment relationship.[227] Sterilite was entitled to condition employment on consenting to and successfully passing a drug test by direct observation.[228] If either party to the at-will employment relationship is dissatisfied, the party may dissolve the relationship.[229] The majority acknowledged there are limitations to an at-will employment relationship outlined in legislative statutes;[230] however, the employees' invasion of privacy claim fell outside the scope of these statutes.[231]

Second, the majority confined the employees' invasion of privacy claim to the common law right to privacy.[232] Sterilite is a private

220. *Id*. at 236.

221. *Id*. at 232.

222. French, Fischer, and DeWine, JJ., joined in the opinion.

223. *Lunsford*, 162 Ohio St. 3d at 232.

224. *Id*. at 238.

225. *Id*. at 239.

226. *Id*. at 240.

227. *Id*. at 238.

228. *Id*. at 242.

229. *Id*. at 238 (citing Lake Land Emp. Group of Akron, LLC v. Columber, 101 Ohio St. 3d 242 (Ohio 2004)).

230. Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 103 (Ohio 1985).

231. *Lunsford*, 162 Ohio St. 3d at 238.

232. *Id*. at 239.

company, not a state actor, and thus not subject to a Fourth Amendment claim.[233] Further, the employees' claims were not based on an Ohio statute or constitutional provision.[234] Therefore, Sterilite had no obligation to consider its business interests against the employees' privacy interests.[235]

Third, the majority determined that employees' consent to the drug test by direct observation invalidated their invasion of privacy claim because consent acts as an absolute defense to such a claim.[236] Sterilite's workplace substance abuse policy centered on the employee's consent, which the majority found to be essential to the right to privacy: "the individual's exclusive right to determine the occasion, extent, and conditions under which [the individual] will disclose his [or her] private affairs to others."[237] Further, an employee who agrees to a drug test cannot later claim the testing procedure was highly offensive and invasive.[238] The majority acknowledged that the consent form did not provide the drug collection method; however, the majority found this fact immaterial to the outcome of its decision.[239] The majority determined that once the employees were made aware of the collection method, they were given a second chance to either consent or refuse the drug test.[240] By consenting the second time, the employees waived their right to privacy.[241] Therefore, the majority held the employees had no cause of action for invasion of privacy against Sterilite and U.S. Healthworks.[242]

ii. The Dissenting Opinion

Justice Stewart, writing for the minority,[243] concluded that the employees' complaint stated a valid claim for invasion of privacy sufficient to defeat a motion to dismiss.[244] The minority found for the employees because: (1) Sterilite's invasive drug testing procedure violated the employees' right to privacy;[245] (2) the at-will employment

233. *Id*.

234. *Id*.

235. *Id*.

236. *Id*. at 241 (citing RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 7.06, cmt. h (AM. L. INST. 2015)).

237. *Id*. (quoting Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 500 (Tex. App. 1989)).

238. *Id*. (citing Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1137-1138 (Alaska 1989)).

239. *Lunsford*, 162 Ohio St. 3d at 241.

240. *Id*.

241. *Id*.

242. *Id*. at 242.

243. O'Connor, C.J., and Donnelly, J., joined.

244. Lunsford v. Sterilite of Ohio, L.L.C., 162 Ohio St. 3d 231, 243 (Ohio 2020).

245. *Id*. at 244.

doctrine does not supplant an employee's right to bring a claim against the employer for invasion of privacy;[246] and (3) the employees did not consent, directly or implicitly, as to the method of the drug test.[247]

First, the minority concluded that Sterilite's drug test collection method was highly invasive, violating the employees' right to privacy.[248] The minority stated that the direct observation method is contrary to societal norms.[249] Society dictates that urination be kept private.[250] The minority acknowledged that there are some circumstances in which direct observation is necessary, for example, if there is some reason to suspect the employee will tamper with the urine sample.[251] However, because of the invasion of privacy concerns, the use of direct observation method should be limited.[252] Therefore, the minority concluded that Sterilite could have used less intrusive means to achieve the same drug test results while preserving the employees' right to privacy.[253]

Second, the minority determined that the at-will employment doctrine had no relationship to the employees' claim, nor did it lessen an employee's expectation of privacy.[254] Further, upon agreeing to be at-will employees, the employees likely did not anticipate the employment relationship to include the requirement to put their genitalia on display.[255] Therefore, the minority concluded that the at-will employment doctrine "does not supersede an employee's right to obtain redress for the violation of his or her privacy rights."[256]

Third, the minority found the employees neither directly nor implicitly consented to the direct observation method.[257] The employees did not explicitly consent because the form failed to include the new collection method.[258] The employees did not implicitly consent, despite proceeding with the drug test even after receiving notice that direct observation method would be used, because of the at-will employment power dynamics in play.[259] The employees were faced with a difficult decision:

246. *Id*. at 247.
247. *Id*.
248. *Id*.
249. *Id*.
250. *Id*.
251. *Id*.
252. *Id*. at 245.
253. *Id*. at 246.
254. *Id*.
255. *Id*.
256. *Id*. at 247 (Stewart, J., dissenting).
257. *Id*.
258. *Id*.
259. *Id*. at 248.

either provide a urine sample under direct observation or be dismissed.[260] The minority determined that the employees were left with no appropriate choice, underscoring the principle, "consent [is] not valid if given under compulsion."[261] Therefore, because no consent was given, the employees should not be barred from bringing their invasion of privacy claim.[262]

The minority concluded its dissent with the following warning:

> What indignities must an at-will employee suffer to avoid losing his or her income and benefits before the employee has a cause of action for invasion of privacy? Make no mistake, the majority's decision today will disproportionately affect workers who have no meaningful choice and no recourse for their employers' intentional torts.[263]

III. DISCUSSION

The Supreme Court of Ohio's decision in *Lunsford* embraced a private employer's unbridled discretion in unwarranted, intrusive drug testing methods.[264] The *Lunsford* decision leaves an at-will employee with no expectation of privacy in the workplace and no legal recourse for their employers' intentional torts.[265] As Justice Stewart's dissent underscored, the majority's decision permits a private employer to subject an at-will employee to unrestricted humiliation, citing the at-will employment doctrine as justification.[266] This result demands that the employee submit or be terminated.

Consequently, Section III(A) discusses why the Supreme Court of Ohio, in an effort to distinguish between a public and private employer, inadvertently subsumes the private employee's right to privacy. Next, Section III(B) recommends that Ohio adopt the balancing test recommended by the Third Circuit in *Borse v. Piece Goods Shop, Inc*.[267] This balancing test would respect both the private employer's business interests for a drug-free workplace and the employee's reasonable expectation of privacy. Finally, Section III(C), acknowledging the *Lunsford* decision as binding precedent, discusses how an Ohio private employer that chooses to adopt a direct observation drug testing policy similar to Sterilite should employ an explicit consent form to protect itself

260. *Id*.

261. *Id*. (citing Leibowitz v. H.A. Winston Co., 492 A.2d 111, 114-116 (Pa. Super. 1985)). *See also* Doyon v. Home Depot U.S.A., Inc., 850 F. Supp. 125, 130 (D. Conn. 1994); Polsky v. Radio Shack, 666 F.2d 824, 825–27 (3d Cir. 1981).

262. *Lunsford*, 162 Ohio St. 3d at 249.

263. *Id*.

264. *Id.* at 231.

265. *Id*. at 249.

266. *Id*.

267. 963 F.2d 611 (3d Cir. 1992).

against similar employee claims.

A. A False Distinction

In an effort to distinguish between a public and private employer, the Supreme Court of Ohio inadvertently subsumes the private employee's right to privacy. The court errs in assuming that, without the Fourth Amendment protections afforded to employees of public employers, employees of private employers are left without any right to privacy. The Supreme Court of Ohio found that, unlike an individual working for a public employer who has Fourth Amendment protections, an employee working for a private employer should have a reduced expectation of privacy.[268] However, an individual should not be subjected to this highly intrusive and offensive invasion of privacy simply because they work for a private employer. Employees who work for a private employer should not be forced to display their genitals to a stranger while urinating as a baseline condition of employment. Further, an employer should not be permitted to intrude upon an employee's right to privacy absent a showing of reasonable suspicion or a workplace safety concern. This level of unwarranted intrusion is a well-established violation of public policy,[269] falling into the public policy exception to the employment-at-will doctrine.

Looking beyond the public vs. private employer distinction, the direct observation method is unduly invasive. The Supreme Court of Ohio, in its majority decision, even acknowledged that an employee's privacy rights are implicated when direct observation is used.[270] It is unclear why the Supreme Court of Ohio did not give more weight to *Housh v. Peth*.[271] In *Housh*, the Supreme Court of Ohio held that a person who intentionally intrudes upon the privacy of another in such a manner that would be "highly offensive to a reasonable person" is subject to liability under a tortious invasion of privacy claim.[272] The Supreme Court of Ohio in *Housh* determined that the debt collector had a right to take reasonable action to recover the outstanding debt.[273] However, the debt collector went too far and used unreasonable tactics in his efforts to satisfy the debt.[274] Analogous to *Housh*, Sterilite had a right to drug test its

268. *Lunsford*, 162 Ohio St. 3d at 242.

269. *See generally* Housh v. Peth, 165 Ohio St. 35 (Ohio 1956); Hamberger v. Eastman, 106 N.H. 107, 111 (N.H. 1964); Sustin v. Fee, 69 Ohio St. 2d 143, 145 (Ohio 1982).

270. *Lunsford*, 162 Ohio St. 3d at 240.

271. 165 Ohio St. 35 (Ohio 1956).

272. *Lunsford*, 162 Ohio St. 3d at 240.

273. *Housh*, 165 Ohio St. at 41.

274. *Id*.

employees to ensure a safe work environment. However, Sterilite overstepped by using an excessively invasive urine collection method. Therefore, the Supreme Court of Ohio should have set aside the employment-at-will doctrine and focused solely on the invasion of privacy claim. The public vs. private distinction should not matter in regard to an individual's right to privacy.

B. Adopting a Balanced Approach

The Ohio judiciary should adopt the balancing test recommended by the United States Court of Appeals for the Third Circuit in *Borse v. Piece Goods Shop, Inc.*[275] As outlined in Section II(D)(2),[276] to determine whether the employer invaded the employee's right to privacy, the Third Circuit recommended the Pennsylvania Supreme Court apply a fact-intensive balancing test, weighing the employee's privacy interests against the employer's interest in maintaining a drug-free workplace.[277] If the collection method fails to adequately consider the employee's privacy, it could constitute a "substantial and highly invasive" intrusion upon seclusion.[278]

Considering an employee's privacy interests will not sacrifice the integrity of the drug test. Direct observation is not necessary to ensure the veracity of the employee's drug test results.[279] The multi-step urine collection methods outlined in the Code of Federal Regulations are designed to maintain the specimen's integrity, while still preserving the government employee's right to privacy.[280] To that end, the federal regulations prohibit direct observation as a standard collection practice.[281] If these two competing interests can be adequately balanced for safety-sensitive and government professions (e.g., commercial airline pilots, nuclear power plant workers, the U.S. Coast Guard, etc.), then surely the competing interests between Sterilite, a private employer that manufactures plastic containers, and its employees can also be satisfied by applying this balancing test.

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275. 963 F.2d 611 (3d Cir. 1992).

276. Section II(D)(2), *infra*.

277. *Id*. at 625.

278. *Id*. at 611.

279. Section II(D)(1)(ii), *infra*.

280. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 49 C.F.R. § 40. *See also* 14 C.F.R. § 120 (Federal Aviation Administration)l 49 C.F.R. § 219.701 (Federal Railroad Administration); *id.* § 382.105 (Federal Motor Carrier Safety Administration); *id.* § 655.51 (Federal Transit Administration); *id.* § 199.5 (Pipeline and Hazardous Safety Administration); 46 C.F.R. § 16.113 (U.S. Coast Guard).

281. Section II(D)(1)(i), *infra*.

C. The Importance of Fully Informed Consent

The Supreme Court of Ohio wrongly found that the employees consented to the direct observation method. This conclusion barred the employees from their invasion of privacy claim, as consent is typically an absolute defense.[282] Therefore, if the person consented to the intrusion, the intruder is not subject to liability even if the intrusion would be highly offensive to a reasonable person.[283] Yet, as discussed by the minority *Lunsford* opinion, the employees neither directly nor implicitly consented to the direct observation method.[284] The provided consent form failed to identify the new collection method.[285] Further, the employees were not informed of the new collection method until they entered the designated restroom.[286] The employees' consent was compelled by the threat of termination and thus, did not truly have a consequence-free choice when deciding to succumb to Sterilite's invasive direct observation method. As addressed by the Third Circuit in *Borse v. Piece Goods Shop, Inc*, an employer should not be able to justify any action as employment-related and to threaten termination if the employee fails to comply.[287] The Third Circuit underscored:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power to discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.[288]

Now that *Lunsford* is binding precedent, if an Ohio private employer seeks to use the direct observation method, it is advisable to draft a substance abuse policy and/or consent form that explicitly identifies the collection method. This action will provide a private employer with a clear defense against a similar employee invasion of privacy claim and allow the employee additional time to decide whether to consent. By allowing additional time to consent, an Ohio private employer can avoid arguing whether consent was unwillingly given under duress. Further, *Sterilite* also created conflicting precedent regarding invasion of privacy claims, which will lead to confusion in the lower courts.

282. Lunsford v. Sterilite of Ohio, L.L.C., 162 Ohio St. 3d 231, 240 (Ohio 2020).
283. *Id*.
284. *Id*. at 247-249.
285. *Id*.
286. *Id*.
287. Borse v. Piece Goods Shop, Inc., 963 F.2d at 622.
288. *Id*. (quoting Geary v. U.S. Steel Corp., 319 A.2d 174, 180 (3d Cir. 1974)).

IV. CONCLUSION

Ultimately, the Supreme Court of Ohio should have found for the employees in *Lunsford v. Sterilite of Ohio, LLC*, by holding that, in some instances, an at-will employee has a cause of action for invasion of privacy if they are compelled to consent to urinalysis via direct observation. Further, the court should have found that the employees stated a valid claim for invasion of privacy pursuant to the requirements outlined in its decision in *Housh v. Peth*. The direct observation method is highly intrusive, offending a person of ordinary sensibilities and a private employer should not have unbridled discretion to subject at-will employees to such indignity and humiliation. Employees, when choosing to work for a private employer, should be able to maintain the basic right to bodily privacy. An employee's right to bodily privacy can be respected and an employer's business interests can be concurrently satisfied while using other less intrusive drug testing procedures.