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PRIVACY LAW

Employee urine samples taken by 'direct observation method' don't invade privacy, state supreme court rules

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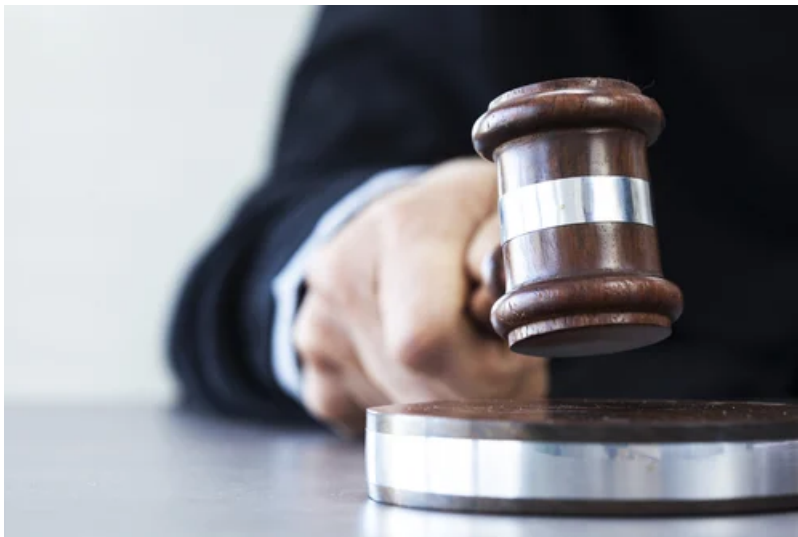


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The Ohio Supreme Court ruled 4-3 on Wednesday that an employee can't sue for invasion of privacy when an employer uses the "direct observation method" to collect a urine sample for drug testing.

"We conclude that when an at-will employee consents, without objection, to the collection of his or her urine sample under the direct observation method, the at-will employee has no cause of action for common law invasion of privacy," the court majority said.

Court News Ohio summarized (<http://www.courtnewsohio.gov/cases/2020/SCO/0826/181431.asp>) the Aug. 26 opinion (<http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4193.pdf>).

The dissent argued that the employees who sued had to choose between providing the urine sample or being fired on the spot.

“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?” the dissent asked.

The plaintiffs were three employees selected for random drug tests and a fourth employee tested because of a suspicion of impairment. Their employer, Sterilite of Ohio, required all employees to submit to drug tests as a condition of employment.

Any employee who failed to produce a valid urine sample within two and a half hours after being ordered to do so was subject to immediate termination. An employee who tested positive for drugs could be fired or disciplined.

Sterilite of Ohio began using the direct observation method in October 2016. When the employees reported to the testing area, they signed consent forms without knowing that they would be observed. They were told that they would be watched by a same-sex employee of a medical group hired to conduct the tests when they arrived at the restroom.

The employees had argued that they could not be watched absent just cause, such as a past positive drug test or a suspicion of tampering.

Justice Sharon Kennedy wrote the majority opinion. She said the case involved two common law principles: the doctrine of employment at will, which generally allows firing for any nondiscriminatory reason, and the tort of invasion of privacy.

Kennedy said the employees’ claims fail because they consented to the drug test, and consent is generally an absolute defense to an invasion of privacy claim.

Even though the consent form did not mention direct observation, the employees learned that the method would be used when they reported to the restroom. At that time, they “had a second opportunity—consent or refuse—and [the employees] consented by their action,” Kennedy wrote.

Because the employees were at will, Sterilite of Ohio had the right to fire them if they did not submit to the tests, Kennedy said.

The case is *Lunsford v. Sterilite of Ohio*.

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