

# West Virginia Supreme Court Addresses *Drug Testing of Job Applicants*

The West Virginia Supreme Court of Appeals has recently issued a decision regarding drug testing that is important to broadcasters considering implementing pre-employment drug tests. In *Baughman v. Wal-Mart Stores, Inc.* our Supreme Court addressed drug testing as it relates to applicants for employment and found Wal-Mart's pre-employment testing did not violate the applicant's right to privacy.

By way of background, in 1990 our Supreme Court held in *Twigg v. Hercules Corp.* that West Virginia law prohibited an employer from requiring an employee to submit to a drug test. However, the Court in *Twigg* did recognize two exceptions to this public policy:

Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon a reasonable good faith objective suspicion of an employee's drug usage or while an employee's job responsibility involves public safety or the safety of others.

Syl. Pt. 2, *Twigg*. Thus, in West Virginia an employer should recognize that drug testing is generally prohibited as contrary to public policy, except in two limited circumstances. First, a drug test may be performed where there is "reasonable good faith objective suspicion" of the employee's drug use by the employer. Secondly, an employee whose job responsibility involves "public safety or the safety of others" may also be subject to drug testing in certain circumstances. Thus, for example, broadcasters with employees that perform work on broadcast towers or with broadcast equipment that poses a serious risk of electrocution may fall into this "safety" exception that may permit drug testing. However, these exceptions still remain to be further defined by our Supreme Court. Thus, any station subjecting employees to drug tests based upon these two exceptions must be careful as to whether their particular circumstances would permit such testing.

In *Baughman*, the plaintiff challenged the employer's pre-employment drug test claiming that it was an invasion of privacy. In the *Baughman* decision, the Court recognized that: [I]n the pre-employment context, it is apparent –

although not necessarily dispositive in every case – that a person clearly has a lower expectation of privacy. Employers regularly perform pre-employment background checks, seek references, and require pre-employment medical examinations, etc., that are far more intrusive than what would be considered tolerable for existing employees without special circumstances.

Recognizing that an applicant had a lower expectation of privacy than an employee, the Court went on to rule that:

[W]e agree that with the Circuit Court that the principles of *Twigg* do not extend to the pre-employment situation and thus do not preclude the granting of summary judgment to Wal-Mart in the instant case. We conclude that the appellant put forth no facts that would show that her right to privacy was violated in the instant case simply as a result of Wal-Mart's requiring her, prior to starting work, to give a urine sample for drug testing purposes.

Thus, the Court in *Baughman* did find that a pre-employment drug test of an applicant for employment did not constitute an invasion of privacy. However, the Court used cautious language that suggests the possibility that under some circumstances such a pre-employment test could go beyond what the Court would consider permissible and violate an applicant's right to privacy. However, generally speaking, an employer, under *Baughman*, may require an applicant to submit to a pre-employment drug test.

Thus, given the current state of West Virginia law, any broadcaster considering implementing any type of drug testing program should be careful in determining whether or not it would be permissible under *Twigg* and *Baughman*. Therefore, an employer should consult with legal counsel in order to best determine whether drug testing would be appropriate.

Should you have any questions, please call Scott Evans at Jackson Kelly PLLC at 340-1246 or your general counsel, David Barnette at 340-1327.

This document was created with Win2PDF available at <http://www.win2pdf.com>.  
The unregistered version of Win2PDF is for evaluation or non-commercial use only.  
This page will not be added after purchasing Win2PDF.