

# Supreme Court of Ohio Gives Employers the Green Light to Drug Test At-Will Employees Under Direct Observation When the Employees Give Broad Consent

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Authors: [W. Eric Baisden](#), [Joseph N. Gross](#), [Eric M. Flagg](#)

If an employer's substance abuse policy requires employees to undergo random urinalysis drug testing, and employees sign consent forms authorizing "any testing necessary" but not specifically discussing direct observation testing, do the employees have a cause of action if their only options are to proceed with testing or face termination? In a 4-3 decision, the Supreme Court of Ohio answered this question in the negative in *Lunsford v. Sterilite of Ohio, L.L.C.*, Slip Op. No. 2020-Ohio-4193, when it found that employees under those circumstances failed to state a claim for invasion of privacy.

In *Lumsford*, current and former at-will employees of Sterilite brought an action for invasion of privacy against their employer and the administrator of Sterilite's drug-testing program. The employees alleged that, although they signed a "Consent and Release" form at the beginning of the testing process authorizing "any testing necessary," that form did not specifically indicate that direct observation testing-in which a same-sex administrator would observe the employees producing a urine sample-would be used. Therefore, the employees argued that they did not consent to that *type* of testing-or if they did, that consent was involuntary because it was predicated on the threat of termination if they failed to comply.

The Supreme Court of Ohio disagreed. The Court began by noting that an employee's privacy rights must be construed within the context of the employee's "at-will" status and that consent is generally an absolute defense to an invasion of privacy claim. The Court found that the employees provided their consent in two stages: first, they consented to testing generally when they signed the consent form. Second, after being advised that the direct observation method would be used, the employees consented by proceeding with the testing. Here, the employees had two options: consent or refuse. By agreeing to proceed through their actions, the employees provided their consent to the direct observation method, regardless of the broad language in the consent form.

## Key Takeaways for Employers

Employers maintain substance abuse policies and administer random-selection drug testing for a variety of reasons, not the least of which are providing a safe workplace and a safe environment for others. The Court's opinion in *Lumsford* tells employers that they need not share every detail of the drug testing procedures with at-will employees in advance of their tests, and serves as a reminder to at-will employees that their employment is just that: at will. An employee who chooses to work in a setting where continued employment is predicated on random drug testing based on a valid

substance abuse policy, and who consents to drug testing, has two options when faced with a testing method s/he disagrees with: proceed with the test, or accept the consequences of refusal.

**For more information, please contact a member of the firm's Labor & Employment Practice Group.**

**W. Eric Baisden** | [ebaisden@beneschlaw.com](mailto:ebaisden@beneschlaw.com) | 216.363.4676

**Joseph N. Gross** at [jgross@beneschlaw.com](mailto:jgross@beneschlaw.com) or 216.363.4163

**Eric M. Flagg** at [eflagg@beneschlaw.com](mailto:eflagg@beneschlaw.com) or 216.363.6196