

## IN THIS ISSUE:

- The Rights of Employees to a Fair Predisciplinary Process: Part XVI – The Legality of Other Workplace Searches.



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## The Cline Newsletter

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### THE RIGHTS OF EMPLOYEES TO A FAIR PREDISCIPLINARY PROCESS: PART XVI – THE LEGALITY OF OTHER WORKPLACE SEARCHES.

This is the next in a series of articles discussing the legality of various internal investigation techniques. In this article we consider miscellaneous types of workplace searches.

Prior to the enactment of the Americans with Disabilities Act (ADA), there were at least two cases where the courts had sustained public employer orders or its employees to be tested for HIV or Hepatitis B. But the ability of an employer to mandate other types of medical or psychological tests is severely circumscribed by the ADA, which will be discussed in a different article at a later point. Under the ADA, an employer would only be allowed to compel such tests when it had a reasonable basis to conclude that there was a business necessity for the test.

One court addressed the issue of an employer's order to a police officer to submit to a penile

*“Under the ADA, an employer would only be allowed to compel such tests when it had a reasonable basis to conclude that there was a business necessity for the test.”*

plethysmograph examination after allegations of sexual misconduct arose. The court remanded to a lower trial court to make a determination about whether the test would violate the employee’s “substantive due process.” The court stated several serious concerns it had in the order of giving the test, and directed the trial court to make a factual determination on at least two questions: Is the plethysmograph a reliable examination; and are there other reasonable alternatives to this test?

There was no subsequent published decision as a follow-up to the court’s order and we are aware of no other published decision regarding plethysmograph examinations. Nonetheless, we believe the court’s concerns regarding employee due process are valid and likely to be raised by other courts when facing similar employer orders for intrusive tests.

**To learn more about Predisciplinary rights and the other rights of public safety employees visit the Cline and Associates website where you can order our book “THE RIGHTS OF WASHINGTON PUBLIC SAFETY EMPLOYEE: REPRESENTATIVE’S MANUAL.” This book is a 468 page compendium of labor law materials written especially for those involved in union-side representation of Washington public safety labor organizations.**

***Jim Cline***

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