The Supreme Court of Ohio held that an at-will employee has no cause of action for common law invasion of privacy after the employer required the employee to submit to a directly-observed urine collection drug test. *Lunsford v. Sterilite of Ohio, LLC*, slip op. No. 2020-Ohio-4193 (August 26, 2020).

Sterilite is a private employer with a substance abuse policy that requires reasonable suspicion testing, post-accident testing and random testing. The policy requires urine testing for drugs but is silent as to how the specimens will be collected. According to the four plaintiffs (two current employees and two former employees), Sterilite began using the direct observation method in October 2016. Under that method, a same-sex monitor was required to accompany the employee to the restroom to visually observe the employee produce the urine specimen. Three of the plaintiffs were subjected to random testing while the fourth was subjected to a
reasonable suspicion drug test. All four signed a consent form which did not mention directly-observed collection of the urine specimens. When they reported for testing, the employees were required to submit to directly-observed urine collections. All four did so without objection.

The four employees asserted that the directly-observed urine collections violated their privacy because the direct observation method is “highly offensive to a person of ordinary sensibilities.” Among other things, they argued that by way of comparison, the U.S. Department of Transportation requires directly-observed urine collections only in very specific circumstances, such as when an employee is suspected of tampering with the specimen.

The lower court dismissed the employees’ claims but an appellate court reversed, holding that the employees had a “reasonable expectation of privacy with regard to the exposure of their genitals.” Sterilite and its drug testing vendor appealed.

The Supreme Court of Ohio held that the facts as alleged by the employees could not sustain a common law invasion of privacy claim, primarily because the employees consented to the drug testing. Moreover, when the employees reported for testing and were told that the urine collections would be directly observed, they did not object. In effect, the employees consented a second time when they did not object to the direct observation. The employees argued that they did not consent because the alternative (if they had not agreed to direct observation) would have been termination. The Court rejected this argument because the employees were employed at-will.

In a lengthy dissenting opinion, three justices stated that employees have a legitimate expectation of privacy when urinating and direct observation by a stranger is highly intrusive. Whether Sterilite had a legitimate reason to use the direct observation method was an issue of fact that should not have been resolved through a motion to dismiss.

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