

Ten Years Ago the Texas Supreme Courts Reversed a False Positive Result Despite Numerous Collector Errors

There were five errors in the employers collection process and before it was concluded the Texas Supreme Court favored the employer...

Background

Mission Petroleum Carriers Inc. required its 520 truck drivers to submit to random drug testing pursuant to DOT regulations.

As authorized by these regulations, Mission used its own employees to collect the drivers' urine samples for testing by outside laboratories. On April 3, 1997, Roy Solomon, an at-will truck driver at Mission's Beaumont terminal, was randomly selected to provide a urine sample for drug testing. When Solomon arrived for the test, his immediate supervisor, terminal manager Ed Hillebrandt, gave Solomon an unsealed collection container that had been sitting exposed on a desk in the terminal dispatcher's office. Solomon went unaccompanied into an adjacent restroom to provide the specimen. Solomon returned to the dispatcher's office and set the collection container on the table. He then went back to the restroom to wash his hands, leaving the container behind.

When he returned from the restroom approximately one minute later, Hillebrandt divided the sample into two separate containers. Solomon then sealed each container, initialed the tamper-proof seals, and placed the containers in a plastic bag. Solomon signed an informed consent form confirming the "identity and integrity of [the] sample throughout the collection and testing process." Mission sent one of the containers to Bayshore Clinical Laboratories in Brown Deer, Wisconsin for analysis; the other was set aside in the event further testing was required. The Bayshore Laboratory analyzed the specimen and discovered THC metabolite, a chemical produced by the human body after marijuana use.

A Medical Review Officer (MRO), charged with ensuring the accuracy of the test results, informed Solomon that he had tested positive for THC metabolite. Solomon told the MRO that the positive result could not possibly be accurate because he had never used marijuana. Solomon denied taking medication or any other product that might have caused the THC metabolite to appear in his sample. He did not, however, suggest that the results might have been compromised by Mission's faulty collection procedures. Following his discussion with the MRO, Solomon called Mission and requested a retest. Mission sent the second sample to a different laboratory for analysis. On April 9, 1997, when the second test also confirmed the presence of THC metabolite, Mission terminated Solomon's employment.

The next day, Solomon applied for truck-driving positions at Coastal Transport and MCX Trucking. The DOT regulations require a prospective employer to review the applicant's test results from previous employers for the preceding two years from the date of the application. Consequently, as part of each employment application, Coastal Transport and MCX Trucking asked Solomon to sign a consent form authorizing Mission to release those drug test results. Mission reported Solomon's test results to Coastal and MCX after Solomon consented to the disclosure (employers may only release test results with the informed written consent of the employee). Neither Coastal Transport nor MCX Trucking hired Solomon.

Eighty-four days after the urine test, Solomon passed an independent laboratory's hair-follicle test, which was designed to detect marijuana consumption. Although there is evidence that hair follicle testing is a scientifically recognized procedure, the test purports only to reveal the persistent use of marijuana over time, not isolated uses. Solomon concedes that the hair-follicle test would establish at most that he was not a regular user of marijuana, but could not confirm or refute that he smoked marijuana around the time Mission collected his urine sample.

Solomon sued Mission, first alleging only defamation but later adding claims for business disparagement and negligence. The trial court granted Mission's motion for summary judgment on the defamation and disparagement claims, and Solomon has not challenged that judgment on appeal. The negligence claim proceeded to trial. Solomon testified that he had never smoked marijuana. He also presented evidence that Mission violated each of the following collection protocols, which are designed to ensure the validity of the drug test result:

(1) DOT regulations prohibit an employee's immediate supervisor from collecting the employee's urine sample unless it is impractical for any other individual to perform the collection. Here, however, Solomon's immediate supervisor collected the specimen, and Solomon presented evidence that non-supervising employees could easily have performed that task.

(2) Both the employee and the collector must be present when the collection container is removed from a sealed collection kit. In this case, however, the container had been removed from the collection kit before Solomon arrived to provide his specimen.

(3) The collector must tell the employee to wash his hands before providing the sample and not again until after the sample is returned. Hillebrandt did not give Solomon this admonition.

(4) The collector is required to restrict

access to the collection site. Mission's collection site, however, was unrestricted.

(5) The collection container must be kept in view of the collector and the employee between the time the employee has urinated and the time the specimen is sealed. But Solomon was separated from the container for at least 60 seconds while he washed his hands.

Solomon argued that Mission's failure to follow these DOT protocols resulted in "false positive" test results. He presented evidence that the test results were the catalyst for a series of adverse consequences, culminating in his inability to find employment as a truck driver. He sought damages for mental anguish and lost wages.

The jury found that Mission's negligence proximately caused Solomon's injuries and awarded Solomon past and future damages for medical care, loss of earning capacity, and mental anguish totaling \$802,444.22. The jury also assessed \$100,000 in exemplary damages on a finding that Mission acted with malice. The trial court rendered judgment on the verdict.

The court of appeals affirmed, holding that Mission owed its employees a duty of care when collecting urine samples for drug testing. It also held that the evidence was legally and factually sufficient to support the jury's finding that Mission's failure to follow DOT testing protocols proximately caused THC metabolite to be present in Solomon's urine sample. The court concluded that Mission's conduct, coupled with Solomon's resulting loss of earning capacity, supported the recovery of mental anguish damages. Finally, the court upheld the punitive damages award, concluding that there was clear and convincing evidence that Mission disregarded an extreme risk of serious harm.

The Texas Supreme Court reversed the court of appeals, ruling that the employer did not owe a duty of care to the driver. The court focused on two main issues in making its decision. First, the court considered the DOT regulation themselves and the avenues of redress provided for an employee who believes the specimen collection was faulty. For example, the employee can refuse to sign the custody and control form or refuse to initial the specimen collection container seal, either of which would make it impossible for the MRO to certify the drug-test result. The employee also can raise issues with the MRO such as defects with the collection process. The court also noted that an employee may bring an administrative action if he believes his employer has violated the DOT regulations. Given these safeguards, the court reasoned that the DOT regulation provide sufficient protection for employees so that it is not necessary to impose a common law duty of care on the employer as well. Second, the court considered the fact that the driver was hired as an at-will employee, and thus could be terminated at any time for any reason or no reason.