

# Key Court Cases Involving Hair Testing

(A representative sampling of cases with rulings on the various aspects of hair drug testing.)

## **I. Employment/Unemployment**

**In the Matter of Patrick Forte**, New York Appeal Board No.477610 (4/7/00), the Unemployment Insurance Appeal Board upheld the determination of the Administrative Law Judge, (A.L.J. Case No.097-08521), in affirming the decision of the Department of Labor to disqualify a probationary police officer, (“claimant”), from receiving benefits. The claimant was disqualified after his termination due to willful misconduct. The claimant submitted to a hair test, which results were positive for cocaine use. The claimant argued that either the hair sample was contaminated due to his exposure to crack cocaine vapors, or that he “passively ingested” small amounts of cocaine. The Appeal Board found that due to the fact that the claimant’s results showed a cocaine level 4-8 times the cutoff level and that benzoylecgonine, a cocaine metabolite, was also detected, it was unlikely that the claimant “passively ingested” cocaine. The Appeals Board recognized that it had previously been demonstrated to the Board successfully that Psychemedics’ laboratory’s washing techniques eliminated the issue of external contamination.

**Gregory Hicks et al. v. City of New York et al.**, Index No.119154 (1999), the Supreme Court of the State of New York upheld the termination of three officers through the use of hair analysis drug testing.

**Matter of Brown v. City of New York**, 250 AD2d 546, 673 NYS2d 643, (1998), the New York Supreme Court Appellate Division affirmed the New York Police Department’s discharge of a New York City police officer for failure to pass a hair analysis drug test. Claims of contamination and inadequacies of testing were determined to be devoid of merit.

**Brinson v. Safir, et.al**, 680 N. Y.S. 2d 500, 255 A.D. 2d 247, (N. Y.A.D. ,1 Dept. 1998), the New York Supreme Court Appellate Division upheld the lower court’s determination of the accuracy of Psychemedics hair testing performed on an NYPD officer. Subsequent to this decision, the plaintiff filed suit in federal court, (E.D.N.Y. Civil Action No. 98-CV-2784 (ERK)(JMA)), claiming, in part, that he had not been afforded procedural due process before he was terminated from his position. The court, in granting the defendants’ motion for summary judgment, found that the plaintiff was afforded, and took advantage of, every opportunity to appeal his dismissal. The court also referenced the Appellate Division’s holding that “there was reasonable suspicion to order the testing ... and there was no reason to doubt the accuracy of the test results.”

**Nevada Employment Security Department et. al. v. Cynthia Holmes**, 914 P.2d 611

(Nev. 1996), the Nevada Supreme Court held the following with regard to a hair test utilized to deny unemployment benefits:

**We acknowledge that there are, arguably, no certainties in science. See** Daubert v. Merrell Dow Pharmaceuticals, Inc., \_\_\_U.S.\_\_\_, 113 S.Ct. 2786 279 (1993). Nonetheless, we conclude that [hair] testing especially when coupled with a confirmatory GC/MS test, is now an accepted and reliable scientific methodology for detecting illicit drug use.

...we conclude that Holmes' ingestion of cocaine, subsequently proven by the RIA screening and confirmatory GC/MS test constitutes misconduct within the definition of NRS. 612.385.

**Nevada State Gaming Commission v. Binion**, 1996.

Factual Background: Under its jurisdiction as licenser of all gaming establishments in the State of Nevada, the Board suspended Mr. Binion's gaming license and ordered him to undergo quarterly hair tests for drugs of abuse. Mr. Binion is part owner of the Horseshoe Casino in Las Vegas. During the period of suspension, Mr. Binion was required to adhere to a number of the Board's demands including random hair tests.

Mr. Binion had negative results from the hair testing until the end of the year when several tests produced positive results. A public license suspension hearing was conducted with the laboratory defending its methods and technology and Mr. Binion's two expert witnesses questioning the validity of hair testing. During the hearing Mr. Binion's experts agreed that they could not find flaws in the testing methods or forensic procedures used by the laboratory.

Decision: The Nevada Gaming Commission continued Mr. Binion's license suspension for an additional year. As a result of the positive hair tests, Mr. Binion was ordered to continue testing. Since Mr. Binion had cut his hair extremely short and had been providing duplicate samples to his own laboratory, the Board decided it wanted the same testing coverage that hair would provide, but they would use urine since so little hair was available.

In order to equal the time coverage of hair testing, Mr. Binion was ordered to provide a urine sample three days per week (Monday, Wednesday and Friday) with an additional two random urine samples per month.

**In re Claim of Delbert Otto (Consolidated Biscuit Co.)**, Case No. B 95-02542-000 (1996), the State of Ohio Unemployment Compensation Board of Review, ("Board of Review"), overturned the Hearing Officer's ruling that the claimant was discharged without just cause and was entitled to benefits. The Board of Review found that expert testimony demonstrated the reliability of the hair test which detected quantities of marijuana in the claimant's hair.

**Bass v. Florida Department of Law Enforcement**, (Fla. Dist. Ct. of Appeals 1993), 627 So.2d 1321. The plaintiff, a corrections officer, appealed from the decision of a hearing officer that her criminal justice certification should be revoked based on a positive urinalysis. The court held that evidence of a negative hair analysis was erroneously excluded and that “analysis of human hair to determine cocaine use is generally accepted in the scientific community.” On remand, the hearing officer disregarded the hair analysis results as well as a subsequent negative urinalysis result and again recommended the revocation of the plaintiff’s certification. The plaintiff appealed a second time in **Bass v. Fla. Department of Law Enforcement**, 712 So. 2d 1171 (Ct. App. Fla 1998), in which case the Court affirmed the ruling of the lower court holding that hair analysis should be admitted as it is “precisely the tool which is used when there is a claim of error in a urinalysis for cocaine.”

**Holmes v. Hotel San Remo**, Nevada Employment Security Department Office of Appeals, Decision No. V3-1403 (June 10, 1993), affirmed on appeal In the Matter of Cynthia Holmes, (Hotel San Remo), Nevada Employment Security Department of Review, Decision No. BV3-0625 (V3-1403) August 20, 1993

**Factual Background:** Cynthia Holmes was fired in February, 1993, after a test of her hair showed she had used cocaine. The San Remo Hotel and Casino had advised its employees that they would be subject to random drug tests. Holmes was entrusted with San Remo’s computer system and handled large amounts of cash.

When the results of her random hair test came back positive for cocaine, Ms. Holmes was terminated according to company policy and immediately filed for unemployment benefits. Denial of unemployment benefits continued through the process until it reached the District Court where hair analysis reliability was questioned. The San Remo appealed to the Nevada Supreme Court.

**Decision:** The Nevada Supreme Court reversed the trial court’s holding that hair tests are scientifically unreliable and should not be used to deny unemployment benefits.

In its decision the Court said employers “have compelling reasons, both economic and social, to test their employees for drugs. We conclude that San Remo’s drug free policy had a reasonable relation to the work performed by Holmes”. Ms. Holmes was denied unemployment benefits.

**Jones et al. v. City of Chicago**, Civil Action No.99 C 8201, (N.D. IL, November 28, 2000), a case involving claims of race bias in hair testing, the United States District Court granted summary judgment in favor of the City of Chicago and dismissed the case. The Court found that not only was some of the evidence inadmissible, but also that “the remaining admissible evidence would be insufficient for a trier of fact to find that the hair test is more likely to result in false positive results for African-American applicants than for white applicants...”

**Cruse v. Whirlpool Corp.**, Civil Action No.99-2129, (U.S.D.C., Dist. AR, June 23, 2000), the United States District Court found no merit to plaintiffs allegations that the [...] hair test, was racially biased against African Americans and, as such, granted the defendant's motion for summary judgment. "Summary judgment is not appropriate unless all the evidence points toward one conclusion. ..." (citing Hardin v. Hussman Corp., 45 F. 3d 262 (8th Cir. 1995)). The defendant's expert offered through written testimony that "there is absolutely no scientific support for the notion that plaintiffs test result could be positive because of her race." The court considered the plaintiff's failure to offer any statistical evidence in support of her claim of racial bias in granting the defendant's motion.

## **II. Probation/ Parole**

**United States v. Medina.** 749 F. Supp. 59 (E.D.N.Y. 1990). The court ordered a hair test to determine if a probationer had violated his parole by utilizing drugs in the preceding months. In revoking parole, after a positive hair test, the court found that:

Extensive scientific writings on hair analysis establishes both its reliability and its acceptance in the field of forensic toxicology when used to determine cocaine use.

In his decision, Judge Weinstein, the author of a treatise on evidence, analyzed the admissibility of hair analysis under the Federal Rules of Evidence and under Frye. He concluded that hair analysis was admissible under both.

## **III. Arbitrations**

**Hair analysis has been upheld in arbitrations between Anheuser-Busch, Inc. and its unions:**

In an October 1999 decision, the collection of body hair for analysis was upheld.

In a July 1999 decision, union claims of improper specimen collection, and age, race and gender bias related to slow hair growth were found to have no merit and the issues were resolved in favor of the Company.

In an August 2000 decision, it was determined that random hair testing of employees in safety sensitive positions did not violate their state constitutional rights to privacy. The [...] hair test was deemed “a reliable method for detecting employee drug use, [which] therefore served to further the Employer’s legitimate safety interest.”

**Similarly, in United States Steel, A Division of USX Corp. and United Steelworkers of America, Local 1557 (1999), the Arbitrator ruled:**

We find that hair testing for drugs is legitimate under the LCA and scientifically valid. [HAIR] wash procedures are effective in removing environmental contamination. The 5.0ng/10mg cutoff level for cocaine is appropriate in light of field studies. There was no bias here on the basis of race or hair color. The chain of custody was unbroken. The Company has satisfied us that Grievant ingested cocaine during the period covered by the Last Chance Agreement. That material violation of the LCA was proper cause for discharge.

**Hair analysis was also upheld in US Steelworkers Local 4134 & Lone Star Steel Co., Case No. 022-96 (1997) and Battle Mountain Gold Co. & Operating Engineers Local 3 (1998).**

Rodney Pinkerton v. Chemical Lime Co., April 4, 1997. Labor Arbitration. Claimant had been terminated after his hair test was found to be positive for an abused substance. The Arbitrator upheld the termination and the Claimant’s request for reinstatement was denied.

#### **IV. Child Custody**

**The Marriage of Ibrahim A. Moussa and Nastassja Kinski**, Superior Court, State of California, City of Los Angeles, Case No. BD077286, July 16, 1999.

Factual Background: During the custody hearings, the husband submitted to a number of urine tests that resulted in no detection of drug use. The wife insisted drugs were being used and asked the court to order a hair analysis. Two hair samples were taken one year apart. Both indicated drug use. A **Kelly-Frye** hearing was ordered to challenge the scientific validity of hair testing.

Result: The court reviewed the information on the scientific efficacy of hair testing with both sides submitting declarations from experts. The declaration in support of hair testing was authored by Dr. Kelly and the opposing declaration by Dr. Vina R. Spiehler, a Southern California toxicology consultant. The judge also heard oral arguments from legal counsel for both sides. The court held

that hair testing met the legal standards established for the admissibility of scientific evidence and admitted the results of the hair tests.

**Custody Hearing – Pending**, Livonia, Michigan, 1998.

**Factual Background:** Concerned by his ex-wife's behavior while with his child, the husband retained the services of an investigator. The investigator suspected that the mother was smoking marijuana in a closed car with the 5 year old girl. Frustrated with the inability to obtain video evidence, the father collected a sample of the child's hair when the mother delivered her to him for scheduled visitation.

**Result:** This sample presented an unusual problem. The question being asked was not whether the 5 year old child had ingested marijuana, but rather was the child exposed to the drug in a confined space – a car. The normal procedure in handling hair samples is to chemically wash the hair of external contaminants. In this situation, the sample was prepared without the chemical washes. The sample was positive for THC, the active metabolite of marijuana.

**In the Matter of the Adoption of Baby Boy L.**, 157 Misc. 2d 353, 596 N.Y.S. 2d 997 (1993).

**Factual Background:** The adoptive parents of Baby Boy L. sought to introduce the results of a hair test of the biological parents' hair to demonstrate cocaine use. The parties had previously stipulated to the production of hair samples for the purpose of testing for the presence of illicit drugs. Although the parties stipulated to the production of hair samples, the biological parents objected to the introduction of the testing results into evidence on the grounds that hair analysis (for purposes of detecting the extent of drug use) had not been shown to be endorsed by the general scientific community as reliable and scientifically acceptable.

A hearing was held on the acceptance of hair testing in the scientific community, which included the testimony of the adoptive parents' expert, Dr. Bidanset, as well as the biological parents' expert, Dr. Manning. Dr. Bidanset testified that the hair analysis process was generally accepted by the scientific community, and was not only accurate, but becomes even more probative and reliable when used in conjunction with other related testing procedures, such as gas chromatography mass-spectrometry (GCMS). Dr. Manning testified that the hair analysis test was not entirely accepted by the Society of Forensic Toxicologists, but acknowledged that he personally and professionally regarded the test as accurate and reliable.

**Result:** The court concluded that the hair analysis was generally accepted in the scientific community, and was, therefore, admissible. Finally, the court observed that the criticism of the hair test centered on the need for individual testing controls, not the scientific validity of the process itself.

**Burgel v. Burgel**, 141 A.2d 215, 533 N.Y.S. 2d 735 (1988) or No. 1651E, 1651 AE, New York Superior Court Appellate Division, 1988.

**Factual Background:** During a child custody suit, the husband sought to have his wife submit to a hair test to determine if she had recently used cocaine.

The Supreme Court of Westchester County, New York, ordered the wife to submit to the test. On appeal, the Supreme Court, Appellate Division affirmed.

**Result:** The Court initially stated that the broad scope of discovery takes on particular significance in child custody disputes, and in this case, the wife had placed her physical and mental condition in issue. Principally, the information sought concerned her continuing use of cocaine and thus, was relevant to her fitness to be granted custody of the children.

The Court pointed out that the matter under review was a civil matter, in which the wife not only admitted to cocaine use, but had put her mental and physical health in issue. Particularly under these circumstances, argued the Court, neither the alleged novelty of the procedure nor the potential for its abuse provides a tenable analogy to the Fourth Amendment concerns articulated by the courts in the criminal cases cited by the dissent. The Court observed that even if the evidence was not admissible, the material may be discovered if it could lead to the discovery of admissible evidence.

Finally, the court characterized the testing as “minimally intrusive”, and held that the trial court did not improvidently exercise its discretion in ordering the test.

**The Marriage of Turner, King County Superior Court**, Case No.97-3-00075-4 KNT, Tacoma, Washington.

**Factual Background:** During a custody hearing, the mother was accused of using methamphetamine. The attorney for the father obtained a hair sample and submitted it for testing. The sample was positive for methamphetamine.

**Result:** The father was awarded custody. The mother was retested several months later and was negative. The mother was awarded visitation as long as there is no further suspicion of drug use.

**The Parentage of B.L.W.**, Tacoma, Washington.

**Factual Background:** In this case the father sought a major modification of residential schedule. Based on his allegation of mother’s use of methamphetamines.

**Result:** A hair test corroborated her use of methamphetamines. Custody was awarded to the father.

**The Marriage of Hicks**, Pierce County Superior Court, case No. 97-3-01970-1, Tacoma, Washington.

**Factual Background:** The mother was accused of drug use. A hair test was submitted and was reported negative for all drugs.

**Result:** The mother was awarded custody and the father was awarded liberal visitation.

**Warner v. Dion** Idaho Contact: Kimberly Blas, 208-344-8535.

**Discussion:** each party accused the other of illicit drug use. Urine testing had not produced satisfactory results and a hair sample was submitted. What makes this case unusual is that hair had not been previously employed in this court system.

**Result:** With testimony, the hair analysis was accepted as evidence of drug use. The court system in this area now routinely uses hair testing to detect drug abuse.