

## EtG Testing Resources / Cases

Kent Lawrence, Judge State Court of Clarke County

U.S. Dept. Health and Human Services, Substance Abuse and Mental Health Services Administration, Substance Abuse Treatment Advisory, Sept. 2006, Volume 5, Issue 4  
[www.kap.samhsa.gov/products/manuals/advisory/.../0609\\_biomarkers.pdf](http://www.kap.samhsa.gov/products/manuals/advisory/.../0609_biomarkers.pdf)

- "Currently, the use of an EtG test in determining abstinence lacks sufficient proven specificity for use as primary or sole evidence that an individual prohibited from drinking, in a criminal justice or a regulatory compliance context, has truly been drinking. Legal or disciplinary action based solely on a positive EtG, or other test discussed in this *Advisory*, is inappropriate and scientifically unsupportable at this time. These tests should currently be considered as potential valuable clinical tools, but their use in forensic settings is premature."

5 Mod. Sci. Evidence § 41:4 (2010-2011 Edition) Validity of the Underlying Theory or Principle – Tests for Biomarkers

- Review of recent caselaw ( included below) regarding EtG testing.

Miller v. Redwood Toxicology Lab., Inc., 2011 U.S. Dist. LEXIS 57014 (D. Minn. May 25, 2011).

- Miller is on probation, ordered not to use/ possess alcohol, and is subject to random alcohol testing. Urine sample given and sent to Redwood lab – positive EtG level of 1130 ng/mL and positive EtS level of 603 ng/mL. Miller denied drinking.
- Redwood expert: "there is considerable discussion concerning what is a good cutoff and whether there truly is one that could absolutely delineate between exposure to secondary products and exposure to only ethanol."
- Miller's expert: "[T]here [i]s no agreed upon or known cutoff level for EtG levels to indicate that someone has been drinking."
- When his probation was not revoked, Miller sued Redwood Lab seeking an injunction enjoining them from communicating consumer statements regarding EtG testing. The Court denied the request because Miller could not show harm.

Murphy v. Board of Parole and Post-Prison Supervision, 241 Or. App. 177; 250 P.3d 13 (Or. Ct. App. 2011).

- Murphy's parole revoked based upon a positive EtG test, odor of alcoholic beverage, bloodshot eyes, and positive breath test. Murphy denied drinking and stated he used Nyquil and Listerine regularly. Murphy appealed the revocation.
- Redwood toxicologist sent letter for parole hearing stating that "EtG serves an excellent 'biomarker' for determining recent use and/or chronic alcoholism."
- The parole board accepted the reliability of the EtG test when supplemented by testimony of those who smelled alcohol on Murphy's breath and observed his bloodshot eyes. The appellate court affirmed the revocation of Murphy's parole.

Fujisawa v. Compass Vision, Inc., 735 F. Supp. 2d 1171 (N.D. Cal., August 13, 2010).

- Plaintiff, a licensed pharmacist, entered a substance abuse rehabilitation program to maintain her licensure. She was terminated from the program due to positive EtG

tests. Plaintiff contended that results were due to incidental exposure to hand sanitizer and soy sauce, and that she did not consume alcohol. Plaintiff then sued Compass and NMS for negligently implementing and administering the EtG test in California. The EtG testing was done at a cut-off level of 250 ng/mL.

- The Court denied the Defendants' motions for summary judgment.

Gonzalez v. Compass Vision, Inc., 2010 U.S. Dist. LEXIS 106161 (S.D. Cal., Oct. 5, 2010).

- Plaintiffs, healthcare professionals, agreed to participate in diversion programs where some had a history of substance abuse. The programs were supervised by Maximus, who contracted with Compass to administered EtG testing.
- Compass set a cut-off level of 250 ng/mL. Maximus proposed a higher cut-off level, but Compass responded that it would not be worth testing at a higher cut-off level.
- Plaintiffs alleged that the EtG testing was unreliable. The Court, while not analyzing the Plaintiff's claims, found that Compass was not entitled to indemnity from Plaintiff's claims and Maximus' negligence.

Byrum v. Compass Vision, Inc., 2010 U.S. Dist. LEXIS 14850 (E.D. Cal., Feb. 2, 2010).

- The State of California moved for a protective order preventing Plaintiffs' medical records from being disclosed to Compass. Plaintiffs are all nurses or pharmacists who admitted a drug or alcohol addiction. Plaintiffs claimed that false positives were reported in EtG testing and that the cut-off levels were too-low.
- The protective orders were denied because the privilege belonged to the nurses and pharmacists who waived their privilege regarding their medical records.

Berry v. National Medical Services, Inc., 41 Kan. App. 2d 612; 205 P.3d 745 (2009).

- Plaintiff lost her nursing license after testing positive twice on EtG testing. Plaintiff filed suit against NMS and Compass alleging that the cut-off levels were arbitrary and scientifically unreliable and invalid.
- The court found that Plaintiff had an actionable claim against Defendants for negligence and remanded the case.

Garlick v. Quest Diagnostics, Inc., 309 Fed. Appx. 641 (U.S. Ct. App. 3<sup>rd</sup> Cir. 2009).

- Garlick, a healthcare worker with a history of substance abuse, voluntarily submitted to EtG testing. The EtG test came back positive and she was disciplined by the licensing board. Garlick, as well as other plaintiffs, then sued the labs and collectors of the samples arguing that a properly performed EtG test had an unreasonably high likelihood of generating a false positive for alcohol consumption. The appellate court allowed Plaintiffs to refine the allegations and amend the complaint.

Johnson v. State Medical Board of Ohio, 147 Ohio Misc. 2d 121; 893 N.E.2d 565 (Ohio C.P. 2008).

- Plaintiff, a physician's assistant with alcohol dependence/abuse was supervised by the medical board. After four years of negative alcohol screens, she was suspended based on a single positive EtG test. Plaintiff appealed the suspension.
- The court referred to the 2006 SAMHSA advisory Vol. 5, Issue 4 regarding EtG testing. Finding that the medical board relied too heavily on the single positive EtG test, and

focusing on the cautionary language of the SAMHSA advisory of 2006, the court reversed the suspension.

Wilson v. Compass Vision, Inc., 2007 U.S. Dist. LEXIS 95500 (N.D. Cal., Dec. 27, 2007).

- Plaintiff, a registered nurse with a prescription painkiller addiction, entered the nursing board's diversion program which required random alcohol and drug screens. Plaintiff tested positive on two EtG tests, but denied consuming any alcohol. Plaintiff was removed from the diversion program and faced the loss of her nursing license. She then sued the Defendants, Compass, and NMS, contending Defendants were negligent.
- The court found that Plaintiff's negligence claim could proceed, but Plaintiff's claim for intentional infliction of emotional distress which was dismissed.

Quisenberry v. Compass Vision, Inc., 618 F. Supp. 2d 1223 (S.D. Cal., 2007).

- Plaintiff, a registered nurse, agreed to a recovery program based upon her prior history of alcohol abuse. Plaintiff was required to submit to EtG tests performed by Defendants. Plaintiff was suspended and faced a revocation of her nursing license when she tested positive. She denied drinking alcohol. Plaintiff sued Defendants claiming they were negligent in running the EtG program.
- The court, found that Defendants owed a duty of care to Plaintiff and denied Defendants' motion to dismiss the claim of negligence. However, the court dismissed Plaintiff's claim of intentional infliction of emotional distress.

Perez-Rocha v. Commonwealth of Pennsylvania, 933 A.2d 1102 (Pa. Commw. Ct. 2007).

- Plaintiff's medical license was suspended due to three positive EtG tests when the Plaintiff was in a consent agreement with the medical board. Plaintiff filed a motion to exclude the EtG testing arguing that it had not gained national acceptance in the scientific community as evidence of alcohol consumption. (*Pennsylvania follows the Frye test regarding admission of scientific evidence*). The medical board concluded that EtG testing was generally accepted in the scientific community.
- The court affirmed the board and found that there was no evidence of unreliability in the EtG tests given to Plaintiff based upon the elevated levels.

Bergin v. McCall, 2007 U.S. Dist. LEXIS 60353 (D. Or., Aug, 15, 2007).

- Plaintiff filed a 1983 civil rights claim asserting that Defendants conspired to revoke his medical license and have him participate in a drug rehabilitation facility that uses religious indoctrination.
- The case itself does not address EtG testing, but the factual findings made by the medical board that are included in the case go into great detail about EtG testing.

People v. Oehler, 12 Misc.3d 1101; 821 N.Y.S.2d 380 (N.Y. County Ct., 2006).

- Defendant, on probation for driving under the influence, had a positive EtG test and his probation officer observed several empty beer cans at his home. Defendant was found in violation of his probation.
- The court held that EtG testing is sufficiently reliable evidence of an alleged violation when it is corroborated by alcohol observed in the Defendant's home.

**IN THE STATE COURT OF CHEROKEE COUNTY  
STATE OF GEORGIA**

STATE OF GEORGIA

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CASE NO.  
10M49

V.

CHRISTOPHER DAMIANO

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**ORDER AS TO THE SCIENTIFIC RELIABILITY OF ETHYL GLUCURONIDE  
(ETG) TESTING EVIDENCE**

In the above matter, the Defendant was alleged to have violated his probation sentence by consuming alcohol. The matter was decided by the Court on January 3, 2012. The State had the burden of proof and the standard used by the Court was PREPONDERANCE OF THE EVIDENCE.

As a preliminary matter in the probation hearing, the Court considered the admissibility and reliability of on-site urinalysis employed by the Cherokee County DUI/Drug Court Laboratory for the presence of ethyl glucuronide (ETG), a metabolite formed by the human body after the consumption of alcohol.

The sequence of events is as follows regarding the testing procedure: The person under supervision, who has been pre-assigned a specific color, is required to call a phone number. When the person calls the phone number, he will hear a recorded message that will tell him if his color has been selected for testing. If the person's color is to be tested, he has a specific time in which a urine sample must be produced. The person appears and produces a urine sample. The person sometimes provides this sample at the DUI/Drug Court Lab. Other times the sample is given at the probation office and such sample is refrigerated a short time until DUI/Drug Court personnel pick it up. The sample is labeled and loaded onto an immunoassay analyzer with all of the other samples for that

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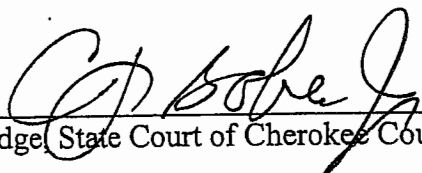
day. The analyzer is capable of testing a urine sample for, among other things, a level of ETG.

A cutoff of 500 nanograms per milliliter (ng/mL) is used to separate positive ETG results which may be due to innocent exposures as opposed to an actual drinking event. (In the present case, the ETG results were greater than 2000 ng/mL.) At the request of the person, the results can be sent to an independent drug laboratory for further testing. (The independent lab in the present case found the ETG level in the Defendant's specimen to be at 3997 ng/mL.)

During the probation revocation hearing, the Court received testimony from Dr. Leo Kadehjian who was accepted by the Court as an expert witness in this area of testing. Dr. Kadehjian, among other things, testified that a cutoff level of 500 ng/mL is sufficient to separate innocent exposures of alcohol from drinking events. From the evidence presented, the Court concludes that the above testing for ETG to determine alcohol consumption to be a procedure which has reached a scientific stage of verifiable certainty for use in criminal cases. *See Harper v. Georgia*, 249 Ga. 519 (1982). Furthermore, the Court finds that the ETG testing employed by the Cherokee County DUI/Drug Court Lab meets the *Daubert* standard for admissibility in civil matters, as codified in O.C.G.A. § 24-9-67.1. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Lastly, a transcript of the above-referenced hearing is attached to, and made part of, this ORDER.

DATED:

March 7, 2012

  
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Judge (State Court of Cherokee County

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