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Constitutional Concerns in Drug Testing of Public Employees

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Today, public attention is strongly focused on drug abuse. One manifestation of this concern has been the move toward drug testing of employees in both the public and private sectors. A public employer's decision to implement drug testing involves important policy considerations, including its substantial cost. Of equal importance, however, are the legal issues involved in such testing. This article will examine one key legal issue: the Fourth Amendment questions involved when a state, city, or county government undertakes to test its employees for drug use. In exploring this issue, it will examine some recent court decisions on drug testing and offer some conclusions on the constitutional limits of drug testing.

Is Drug Testing a Search Within the Fourth Amendment?

Public employees have challenged the use of drug tests as a violation of their constitutional right to be free of unreasonable searches. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

At first reading, it might not appear that this prohibition against unreasonable searches and seizures would apply to a public employer's administration of a drug test. In a related context, however, the United States Supreme Court has ruled that when a police officer directs a physician to take a blood sample from a defendant involved in an automobile accident to determine alcohol content, that officer has conducted a search under the Fourth Amendment.[1] Using similar reasoning, some lower courts have recently ruled that a public employer who conducts a blood or urine test of employees is carrying out a search within the meaning of the Fourth Amendment.[2]

When Is Drug Testing Permitted?

Assuming that the administration of a blood or urine test to detect drug use represents a search of a person, in what circumstances may a public employer conduct such a search without violating the Constitution?

It should be noted at the outset that the Constitution does not prohibit *all* searches; it prohibits only *unreasonable* searches.[3] As the Supreme Court has stated, the question of what constitutes an unreasonable search

> is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner

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1. Schmerber v. California, 384 U.S. 757, 767 (1966) ("compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment").

2. Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); Jones v. McKenzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986); McDonell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985); Allen v. City of Marietta, 601 F. Supp. 482, 489 (N.D. Ga. 1985); Patchogue-Medford Congress of Teachers v. Board of Educ., No. 6095042, slip op. (N.Y. App. Div. Aug. 11, 1986); *but see* Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009-11 (D.C. Ct. App. 1985) (Nebeker, J., concurring) (questioning whether Fourth Amendment concerns are implicated in urinalysis); Hester v. City of Milledgeville, 598 F. Supp. 1456, 1457 n.2 (M.D. Ga. 1984) (striking down use of polygraph examination to determine drug use by firefighters or police but stating that urinalysis procedures do not violate employees' constitutional rights).

3. Carroll v. United States 267 U.S. 132 (1925).

in which it is conducted, the justification for initiating it, and the place in which it is conducted.[4]

In other words, the Fourth Amendment protects against intrusions in circumstances in which the individual has a legitimate expectation of privacy.[5] That legitimate expectation in turn depends on two requirements: "first, that [the] person have . . . an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[6]

Applying these standards in the context of public employee drug testing, the courts have recognized that an employee's legitimate expectation of privacy is implicated if he or she is required by the employer to give a blood or urine sample for analysis.[7] A public employee does not lose basic constitutional protections by virtue of his employment, but retains certain privacy interests. The inquiry does not end there, however, because the employee's "boss," the government, also has a legitimate interest in ensuring responsible and safe performance of duties by the employee.[8] In the public sector, then, the employee's privacy interest and freedom from unreasonable searches must be balanced against the government's competing interest to determine whether the drug test—the search—is reasonable.

"Probable Cause" and "Reasonable Suspicion"

Whether a public employer's decision to implement drug testing will be deemed "reasonable" appears to be a function of the nature of the work of the employees to be tested. Simply stated, some employees have less of a privacy interest than others. Although the cases are not uniform, some courts have ruled that employees whose work does not involve high risk to themselves or to the public may be tested only if an employer has "probable cause"—reasonable grounds for believing that a particular employee is probably using drugs.[9] When, on the other hand, questions of public safety are paramount, some courts have applied a less stringent standard: that an employer have a "reasonable suspicion" that an employee is using drugs. Although this standard requires only that the employer have reasonable grounds to suspect drug use by an employee, it still must be supported by evidence that supports a suspicion that a particular employee is using drugs. Under either standard, employee privacy interests are balanced with employer safety and performance interests. The weighing of these interests by various courts has led to mixed results. Five recent court decisions show some of the pitfalls that a state, city, or county government may encounter in conducting a drug-testing program.

Recent Court Decisions

When the "Probable Cause" Standard Is Used

In *Jones v. McKenzie,*[10] the federal district court for the District of Columbia struck down the D.C. city school system's requirement that each of its 200 Transportation Division employees submit to urine testing. Concerned that these employees—many of whom drove and serviced school buses—were using drugs, the city carried out the blanket urinalysis screening. A number of employees, including plaintiff Juanita Jones, tested positive for THC metabolites, which indicate marijuana use. She was later discharged for use of marijuana. Asserting that she had never used drugs of any type, Ms. Jones sued, maintaining that the city's administration of the urine test constituted an unreasonable search and violated her right to privacy.

Balancing the interests of the city government and the employee, the court said that the issue to be decided was:

> whether plaintiff, serving as a bus attendant assisting students, particularly handicapped ones, in traveling by bus to and from school had a reasonable expectation of privacy from a search by mandatory urine testing for drugs and whether any such expectation is outweighed by public safety considerations.[11]

The court ruled that Ms. Jones's privacy interest outweighed the government's desire to test all of its employees under the guise of ensuring public safety. Further, the city had no reason to believe—that is, it had no probable cause—that those employees used drugs. Thus in this case, when the employee was not responsible for actually transporting school children or assuring that their school buses were in safe working order, the balance was struck in her favor. The court noted that lesser expectations of privacy might be found if the employee in ques-

4. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

5. Terry v. Ohio, 392 U.S. 1 (1968); Schmerber, 384 U.S. at 767. ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.")

6. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979).

7. *See, e.g.,* McDonell, 612 F. Supp. at 1127 ("urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds...").

8. Allen, 601 F. Supp. at 489; McDonell, 612 F. Supp. at 1128; Jones, 628 F. Supp at 1508.

9. For further elaboration on the probable cause standard, *see* Illinois v. Gates, 462 U.S. 213 (1983); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984).

10. 628 F. Supp. 1500 (D.D.C. 1986).

11. Jones, 628 F. Supp. at 1508.

tion was a bus driver or mechanic, with whom obvious and direct safety concerns would arise—or if the employee was a police officer whose drug use could pose serious risks to the safety of fellow employees and the public.[12]

Allen v. City of Marietta[13] involved sixteen city employees who worked with high-voltage electric wires. The city manager of Marietta, Georgia, had received allegations of drug use on the job by these employees; he therefore authorized an undercover agent, posing as a city employee, to observe drug use by those sixteen.

The agent reported that employees smoked marijuana on the job. The employees were summoned to the city manager's office and told that they would be terminated unless they immediately took a urine test. Six employees tested positively and were fired. They sued, claiming that the urinalysis was an unconstitutional search in violation of the Fourth Amendment.

The Georgia federal district court ruled that the city had probable cause, on the basis of the undercover agent's report, to believe those employees were using drugs. Weighing the government's interest in the safe performance of work against the employees' privacy interest, it upheld the urine test. The court characterized the drug test as "part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work."[14] *Allen* differs from *Jones*, then, in that (a) the testing was triggered by the employer's knowledge of drug use by a discrete group of employees, and (b) the risk to the public and other employees was high.

When the "Reasonable Suspicion" Standard Is Used

In *McDonell v. Hunter,*[15] three correctional officers challenged the Iowa Department of Corrections' drug-testing policy, which required employees to submit to a urinalysis or blood sampling "when requested." Drug tests could be administered to employees at any time under this policy, without any evidence of drug use by the employee. The state argued that the policy was intended to prevent the smuggling of drugs by prison guards to inmates, reasoning that employees who use drugs are more likely than nonusers to engage in drug smuggling.

Because of the inherent safety risks involved in operating a prison, the courts had previously established a less stringent standard than "probable cause" to justify searches of prison inmates and visitors.[16] The Iowa federal district court in *McDonell* similarly ruled that a search of a prison employee could be conducted using the standard of "reasonable suspicion, on the basis of specific objective facts and rational inferences that may be drawn from those facts in light of experience."[17] The court actually limited drug testing to those instances in which the employer had a reasonable suspicion that the employee was then under the influence of drugs or alcohol. Stated the court:

> No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. [Drug testing] can yield a wealth of information useful to the searcher. That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.[18]

In this case, the court balanced the government's interest in preventing drug smuggling by prison guards with the employee's privacy interest and found the government's rationale for its blanket drug-testing policy (which allowed drug testing without any evidence of drug use) "far too attenuated to make seizures of body fluids constitutionally reasonable."[19]

In a similar context involving police officers, the District of Columbia Court of Appeals in *Turner v. Fraternal Order of Police*[20] upheld a department regulation requiring any police officer suspected of drug use to submit to urinalysis. The court construed the term "suspected" as "requiring a reasonable, objective basis for medical investigation through urinalysis."[21] In other words, testing was upheld only where there was "a reasonable objective basis to suspect that a urinalysis will produce evidence of an illegal drug use";[22] blanket testing was not enforced.

The court weighed the police officer's privacy interest against the public interest in safe performance of duties and struck the balance in favor of testing. Noted the court, "[P]olice officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen."[23]

In *Patchogue-Medford Congress of Teachers v. Board of Education,*[24] a New York state court struck down blanket drug testing for school teachers as unconstitutional. In this case, probationary school teachers were ordered to submit to urinalysis as a condition of obtaining tenured positions. The union representing the teachers sued, asserting a Fourth Amendment violation.

Balancing the teachers' privacy interest against the government's need for drug testing so it could identify which probationary teachers were unfit to teach, the court

12. *Id.* at 1508-9.
13. 601 F. Supp. 482 (N.D. Ga. 1985).
14. Allen, 601 F. Supp. at 491.
15. 612 F. Supp. 1122 (S.D. Iowa 1985).
16. Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982); McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978).
17. McDonell, 612 F. Supp. at 1129.
18. *Id.* at 1130.
19. *Id.*
20. 500 A.2d 1005 (D.C. App. 1985).
21. Turner, 500 A.2d at 1008-9.
22. *Id.* at 1009.
23. *Id.* at 1008.
24. No. 6095042, slip op. (N.Y. App. Div. August 11, 1986).

ruled that the teachers' expectation of privacy prevailed.[25] In so doing, it contrasted the teacher's job with other public positions:

> [T]he need of public employers to conduct urine tests to ascertain illegal drug usage in the teaching profession, important as it may be, is not as crucial as in other governmental positions, such as that of police officer, firefighter, bus driver, or train engineer, where, given the nature of the work, the use of controlled substances would ordinarily pose situations fraught with imminent and grave consequences to public safety.[26]

But the court rejected the claim that probable cause should be required before drug testing may be imposed, noting that such a standard is more appropriate when the search is concerned with discovery of evidence for use in a criminal trial; rather, the court said, the appropriate standard is reasonable suspicion. In this case, the court found that the school district had absolutely no indication of drug use by any teacher; the superintendent's order was thus "an act of pure bureaucratic caprice."[27]

Implications for the Public Employer

What can we learn from these recent cases?

First, if an employer has probable cause to believe that an employee is using drugs, drug testing is constitutionally permitted. However, as noted above, a court may hold a public employer to the less stringent reasonable-suspicion standard in circumstances in which public safety concerns are high. Note that in each case discussed above, in balancing these interests the court considered the nature of the employee's duties and responsibilities. A court would likely hold, for example, that drug use by a school bus attendant, a secretary, or a mail room employee poses less danger to the safe transaction of the public's business than drug use by a high-voltage utility worker, a school bus driver, or an air traffic controller.

Second, whether the court holds an employer to the higher standard or the lower standard, it appears that blanket testing (that is, testing without any evidence of drug use) is not permissible.

Third, although the courts closely scrutinize across-the-board drug testing of employees, they seem prepared to give job applicants less protection. Although neither case squarely presented the question, both the *McDonell* court and the *Jones* court stated that drug testing could be required as part of a pre-employment physical examination.[28] Thus it would appear that an employer may require drug testing as part of its applicant-screening process; but when the person to be tested is already an employee, the balancing test noted above is to be applied.

Fourth, clearly the mere fact that blanket drug testing nets some employees who test positive does not mean that the testing itself will be upheld. The positive results do not justify the constitutionally impermissible means.

Fifth, the employer should use reasonable procedures to ensure the validity of the test results. In *Jones*, the instructions for the city-administered screening test directed those who gave the test to confirm a positive result by an alternative method. The city's failure to do so was criticized by the court and contributed to the decision to overturn the employee's dismissal.[29]

Finally, an employer who proposes to remove an employee who tests positively for drug use must be aware of the employee's due process rights, both before and after discharge. The United States Supreme Court has ruled that a public employee with a property interest in the job (that is, a continued expectancy of employment) may be dismissed, but the employee must be given notice and an opportunity for some type of pretermination hearing " appropriate to the nature of the case."[30] A full discussion of an employee's due process rights is beyond the scope of this article; as a minimum, however, these rights require that the employee be told why he is to be removed and given an opportunity to respond.[31]

Conclusion

Employers should use care in establishing drug-testing programs. The Constitution does allow a city, state, or county both to test an employee who is specifically suspected of drug use and to remove the employee if that suspicion is confirmed. What is *not* allowed, however, is wholesale testing and dismissal of employees without regard to their right to be free from unreasonable searches.

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25. *Id.* at 9.
26. *Id.* at 8.
27. *Id.* at 10.

28. McDonell, 612 F. Supp. at 1130 n. 6; Jones, 628 F. Supp. at 1502.
29. *Id.* at 1506.
30. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. _____, _____, 84 L.Ed.2d 494, 503 (1985), *quoting* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313, (1950). The formality and nature of the "hearing" may vary with the importance of the interests at stake. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).
31. For a full discussion of the subject, see Ennis, *Due Process Before a Public Employee Is Dismissed: Cleveland Board of Education v. Loudermill*, 17 School L. Bull. 9 (Summer 1986). It should be noted that most local government employees have no property interest in their jobs. But when a board of county commissioners extends the provisions of G.S. Chapter 126 (the State Personnel Act) to its employees, they have due process rights.

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