Notes

MANDATORY DRUG TESTING: BALANCING THE INTERESTS

Mary E. Hamm

INTRODUCTION: PUBLIC POLICY BACKGROUND TO EMPLOYEE DRUG TESTING

The pervasive influence of drug use in the workplace has been widely publicized. For example, an article in *Business Week* reported that within two hours of being placed at the Carolina Power and Light Co.'s Shearon Harris nuclear power plant, an undercover investigator purchased $100 worth of cocaine from a fellow employee.[1] Over the next eight weeks the investigator bought narcotics more than twenty times.[2] The evidence gathered resulted in the arrest of eight employees who were charged with selling narcotics at the nuclear facility.[3]

Another article, in *Time* magazine, noted that between 1975 and 1983 there were 50 train accidents attributable to drugs or alcohol.[4] These accidents resulted in 37 deaths and 80 injuries as well as $34 million in property destruction.[5] The same article quoted Dr. Howard Frankel, the medical director of Rockwell's space shuttle division between 1981 and 1983, who estimated that 20 percent to 25 percent of the workers at the final assembly plant for the four space shuttles were under the influence of drugs or alcohol while on the job.[6]

Unfortunately, these examples are not isolated incidents. They are part of a much larger pattern which indicates that drug use permeates every level of the workplace. Regardless of whether it results from the need to escape the boredom of working an assembly line or the high pressure competition of a board room, drug abuse has drained our economy of precious resources.

Dr. Michael Walsh of the National Institute on Drug Abuse estimates

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1. Starr, *Drug Abuse at Nuclear Plants: The Alarms Are Ringing*, BUS. WK., Oct. 28, 1985, at 35.
2. *Id.*
3. *Id.*
4. Castro, *Battling the Enemy Within*, TIME, Mar. 17, 1986, at 52.
5. *Id.*
6. *Id.*

that there are as many as 23 million Americans using marijuana and 6 million using cocaine.[7] Not only are these drug users subject to 3 to 4 times as many on-the-job accidents, but their absenteeism is twice as high, and medical costs three times as high.[8] Productivity losses resulting from drug abuse are estimated to be as high as $60 billion a year.[9]

Such statistics have prompted both public and private employers to implement programs aimed at curbing the deleterious effects of drug abuse in the workplace. Following implementation of a drug testing program at the company's Vogtle nuclear power plant, Georgia Power Company reported a reduction in on-the-job injuries from 5.4 per 200,000 man hours in 1981, to less than .5 per 200,000 man hours in 1985.[10] Southern Pacific Railroad announced similar success with its drug testing program.[11] In 1985 the railroad reported a 71 percent drop in on-the-job accidents due to human error as compared to the previous year.[12]

On September 15, 1986 President Ronald Reagan announced mandatory drug testing for federal employees working in "sensitive" positions commensurate with a high degree of public trust.[13] The program gives the employee the option of either receiving counseling or being dismissed; however, a second confirmed incident brings automatic termination.[14] Drug testing programs implemented by the Department of the Army[15] and the United States Customs Service[16] have recently withstood constitutional challenges. The cases in which the courts assessed the constitutionality of the government testing programs are discussed later in this Note.[17]

Some employers have established employee-assistance programs for dealing with the drug abuse problem, believing that it is more economical to rehabilitate experienced employees than to hire and train new ones.[18] Other employers, thinking the problem will only worsen, believe that terminating

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7. These figures do not include on-the-job alcohol abuse or the abuse of other controlled substances. Marcotte, *Drugs at Work: Employee Testing Challenged*, 72 A.B.A. J. 34, 34 (1986).

8. Bensinger, *Drugs in the Workplace: A Commentary*, 3 BEHAV. SCI. & L. 441, 442 (1985).

9. English, *Getting Tough on Worker Abuse of Drugs, Alcohol*, U.S. NEWS & WORLD REP., Dec. 5, 1983, at 85.

10. Angarola, *Mandatory Drug Testing in the Workplace, Protect Safety, Not Drug Abuse*, 72 A.B.A. J. 34, 34 (1986).

11. *Id.*

12. *Id.*

13. The "sensitive" positions covered by Executive Order No. 12,564 involve 1.2 million federal employees working in areas of law enforcement, public health and safety, and air traffic control in addition to presidential appointees, and employees with access to classified information. Reidinger, *Reagan's Drug Testing Policy*, 72 A.B.A. J. 53, 53 (1986).

14. *Id.*

15. Mullholland v. Department of the Army, 660 F. Supp. 1565 (E.D. Va. 1987).

16. National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

17. *Id. See also Mullholland*, 660 F. Supp. at 1565.

18. Employee assistance programs numbered about 5,000 in 1983 and the trend has been to increase the number of such programs. Southern California Edison tracked ten employees through its program and compared expenditures for employee medical benefits before and after treatment. Edison found a $15,000 savings in sick leave and medical benefits. Digital Equipment Corporation and DuPont also encourage employees to enter rehabilitation without fear of recrimination. English, *supra* note 9, at 85.

In a recent survey, Professor Judy D. Olian at the University of Maryland found that 49% of the largest United States companies test some job applicants and employees for drugs. Christian Sci. Monitor, Feb. 1, 1988, at 3.

employment is the best deterrent of drug abuse.[19]

Neither advocates nor opponents of drug testing deny the desirability of a drug-free workplace to protect the health and safety of innocent people from the actions of drug-impaired employees.[20] The controversy arises over what measures are implemented to achieve this goal.[21] Advocates of drug testing emphasize their concerns for a safe workplace,[22] increased productivity,[23] and the protection of property from destruction or theft.[24] Additionally, employers are concerned about their increased potential for liability when they employ drug abusers.[25]

Opponents assert that drug testing is unduly intrusive on the individual's privacy rights[26] and that the test results are inherently unreliable.[27] These critics emphasize that testing invades a person's privacy and dignity, forcing the individual to prove his or her innocence.[28] Furthermore, they point out that the Enzyme Multiplied Immunoassay Technique (EMIT), the most commonly used drug test, frequently results in false positives and does not measure the level of impairment, only the presence of the drug.[29]

Opponents of testing are also concerned that test results can be misused to initiate criminal proceedings for the use of illegal drugs or to uncover other physiological information about the person,[30] e.g. pregnancy, diabetes

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19. *Id.*

20. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 210 (1986); Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 AM. BUS. L.J. 309, 309 (1986).

21. *Id.*

22. Miller, *supra* note 20, at 204; Comment, *At Work While 'Under the Influence': The Employer's Response to a Hazardous Condition*, 70 MARQ. L. REV. 88, 117 (1986).

23. Miller, *supra* note 20, at 204.

24. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (1985); Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 EMPL. REL. L.J. 422, 422 (1985-86).

25. Comment, *supra* note 22, at 117; Christian Sci. Monitor, Feb. 1, 1988, at 3. Employers are potentially liable to fellow workers and third parties injured by the actions of impaired employees as well as to customers injured by defective products produced by impaired employees. Bible, *supra* note 20, at 315-16.

In *Otis Engineering Corp. v. Clark*, the Supreme Court of Texas held that the employer had a duty to act reasonably when he exercised control over an incapacitated employee and, thus, the employer was a proper party to the suit. In *Otis* a supervisor sent an employee home from the workplace in an intoxicated condition and that employee subsequently became involved in a fatal car accident. The employee, Matheson, had a history of drinking on the job which was known by his supervisor. On the date of the accident the supervisor noted Matheson's impaired condition, and subsequently testified that he feared Matheson would be involved in an auto accident that night. Matheson's blood alcohol content was 0.268%. Otis Engineering Corp. v. Clark, 668 S.W.2d 307, 308 (Tex. 1983).

26. Miller, *supra* note 20, at 208; Bible, *supra* note 20, at 309; Edwards, *Mandatory Drug Testing in the Workplace, Drug Testing Violates Privacy*, 72 A.B.A. J. 34, 34 (1986).

27. Miller, *supra* note 20, at 231; Bible, *supra* note 20, at 309.

28. Miller, *supra* note 20, at 209; Bible, *supra* note 20, at 320; Edwards, *supra* note 26, at 34.

29. Miller, *supra* note 20, at 205-06; Bible, *supra* note 20, at 311.

The EMIT results in false positives 5-20% of the time, frequently misidentifying legal over-the-counter substances as illegal. Because urine retains the trace of a drug long after the drug ceases to affect mental capacity, the test does not measure the degree of impairment at the time of the test. The EMIT may thus be detecting off-duty use of drugs which opponents contend is none of the employer's business. Rust, *Drug Testing: The Legal Dilemma*, 72 A.B.A. J. 50, 51-52 (1986).

30. Miller, *supra* note 20, at 207; Bible, *supra* note 20, at 320.

or chemical treatment for epilepsy or depression.[31] Such information could be turned over to law enforcement or to other employers or could be used against the employee by the employer detecting the information.[32]

The purpose of this Note is to devise a proposal which would accommodate the respective interests of both advocates and opponents of drug testing, while at the same time comply with constitutional strictures. Such an endeavor must begin with an examination of the basis for a right of privacy and the identification of those acts which constitute a violation of that right. Secondly, the United States Supreme Court's test for determining the reasonableness of government intrusions on the right of privacy must be analyzed to assess its applicability to drug testing cases.

THE RIGHT OF PRIVACY

Background and History

In 1890 Samuel D. Warren and Louis D. Brandeis wrote that the right of privacy is a fundamental personal right to be protected from unreasonable intrusion.[33] They further acknowledged that the nature and extent of this protection requires redefinition when justified by new facts and circumstances.[34] In *Olmstead v. United States*,[35] Justice Brandeis succinctly described privacy as ". . . .the right to be let alone."[36]

Although the United States Supreme Court has repeatedly recognized a right of privacy, no such right is specifically mentioned in the Constitution.[37] "Zones of privacy" are created by the penumbras of the more specific constitutional guarantees.[38] Only personal rights which are deemed "fundamental" or "implicit in the concept of ordered liberty" are protected by this right of privacy.[39]

The constitutional guarantees of the first eight amendments to the Constitution regulate only government conduct.[40] They apply to the federal government and are incorporated and applied to actions of the states by the

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31. *Von Raab*, 816 F.2d at 175-76.

32. Miller, *supra* note 20, at 207.

33. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 193 (1890).

34. "That the individual shall have full protection in person and property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection." *Id.* at 193.

35. 277 U.S. 438 (1928).

36. ". . . .the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478.

37. Paul v. Davis, 424 U.S. 693, 712 (1976); Carey v. Population Serv. Int'l, 431 U.S. 678, 684 (1977); Roe v. Wade, 410 U.S. 113, 152 (1973).

38. *Paul*, 424 U.S. at 712-13; Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *Wade*, 410 U.S. at 152.

In *Griswold*, the Supreme Court found that several of the Bill of Rights guarantees created penumbras which extend the person's privacy interest from that explicitly stated in the individual amendments. For example, the first amendment protection of the freedoms of speech and of the press create a penumbra which protects freedom of association as a peripheral right not specifically mentioned in the Constitution. It is these penumbras which give the specific guarantees of the Bill of Rights "life and substance." *Griswold*, 381 U.S. at 484.

39. *Paul*, 424 U.S. at 713. *Griswold*, 381 U.S. at 479; *Wade*, 410 U.S. at 152; Palko v. Connecticut, 302 U.S. 319, 326 (1937).

40. Edwards, *supra* note 26, at 34; Bible, *supra* note 20, at 321.

fourteenth amendment.[41] Privately conducted activities do not fall within the prohibitions of those amendments; only state actions are restricted. The Supreme Court has hesitated to extend the doctrine of state action such that the conduct of private individuals would also be proscribed.[42] In *Lugar v. Edmondson Oil Co.*[43] the Court stated that adherence to the state action doctrine preserves individual freedom by restricting the reach of federal law and federal judicial power.[44]

Because the constitutional protections set forth in the first eight amendments are not activated unless government action is involved, intrusions on privacy by private employers are not governed by the Constitution.[45] Absent state legislation or state constitutional guarantees, the only protection available to employees in the private sector lies in collective bargaining and legislation.[46] Although this Note initially examines the constitutional protection afforded government employees, the guidelines later proposed for implementation of a valid drug testing program are applicable in both the public and the private sector. However, where state legislation or a state constitution provides broader protections than those of the Constitution, those broader guarantees will prevail.[47]

Few things happen to an individual that do not interfere with his or her

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41. Bible, *supra* note 20, at 321.

42. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982).

43. 457 U.S. 922 (1982).

44. *Id.* at 936-37.

45. *Palko*, 302 U.S. at 323; Bell v. Wolfish, 441 U.S. 520 (1979). *See* Edwards, *supra* note 26, and accompanying text; *see supra* notes 40-41 and accompanying text.

46. Edwards, *supra* note 26, at 34.

The United States Supreme Court stated in *Katz v. United States* that protection of the individual's general right to privacy is largely left to the law of the individual states. Katz v. United States, 389 U.S. 347, 350 (1967). Several states have expressly provided for a right of privacy: ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 55; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10. The California provision states that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

Additionally, some states recognize a right to freedom from intrusion into one's private affairs: ARIZ. CONST. art. II, § 8; WASH. CONST. art. I, § 7. Arizona provides that "[n]o person shall be disturbed in his private affairs, or his home, without authority of law." ARIZ. CONST. art. II, § 8.

These privacy rights can be invoked against private employers as well as public employers by those seeking to challenge the constitutionality of a particular drug testing program.

47. Depending on the facts and circumstances, status as a handicapped individual pursuant to federal or state statutes is an avenue warranting consideration by attorneys who represent employees alleging employment discrimination based on their alcohol or drug use.

The federal Rehabilitation Act of 1973 prohibits employment discrimination against "qualified handicapped individuals" by employers receiving federal financial assistance. A "handicapped individual" is defined as

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. . . .[S]uch term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7)(B) (1982).

The definition clearly includes alcoholics and drug users as "handicapped individuals." It is noteworthy that the last sentence of the definition was added in 1978. This limitation on the protection accorded handicapped individuals permits employers to take disciplinary action if the em-

privacy to some extent.[48] The issue is whether the intrusion violates a stricture of the Constitution because only then will the individual's privacy interest enjoy constitutional protection.[49] The Supreme Court has held that a privacy right exists if an individual's subjective expectation of privacy is one which society sees as reasonable.[50] This test differs depending upon the context in which it is asserted since the context will determine what a reasonable expectation of privacy is, and, thus, what degree of constitutional protection will be given.[51]

In the area of drug testing, government employees' expectations of privacy must be balanced against the government's need to operate the workplace effectively and efficiently.[52] For example, in *Committee for GI Rights v. Callaway*[53] the Supreme Court held that conditions peculiar to the military may justify regulations which would otherwise be considered unconstitutional.[54]

Additionally, the right to privacy is not absolute but can be outweighed by a compelling government interest.[55] Existence of a constitutionally protected interest does not automatically invalidate any government regulation in the area.[56] A compelling state interest can justify even an onerous regulation.[57] Such regulations will only be upheld, however, if they are narrowly drawn and implemented by the least restrictive means necessary to achieve a legitimate government interest.[58]

Applicability to Drug Testing

The case law regarding drug testing of employees has established that society generally accepts an expectation of privacy in one's urine.[59] The

ployee's current alcohol or drug use impairs job performance or threatens the safety or property of others.

Whereas the Rehabilitation Act protects handicapped individuals from employment discrimination in the public sector, most states also have statutes prohibiting such discrimination by private employers based on an individual's handicap. Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMPL. REL. L.J. 181, 184 (1985).

48. *Katz*, 389 U.S. at 350 n.5 (1967).

49. *Id.*; United States v. Choate, 576 F.2d 165, 173 (9th Cir. 1978).

50. *Katz*, 389 U.S. at 350; United States v. Jacobsen, 466 U.S. 109, 113 (1984); O'Connor v. Ortega, 107 S. Ct. 1492, 1497 (1987); New Jersey v. T.L.O., 469 U.S. 325, 338 (1985).

51. *O'Connor*, 107 S. Ct. at 1498; Committee for GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975).

52. *O'Connor*, 107 S. Ct. at 1499.

53. 518 F.2d 466 (D.C. Cir. 1975).

54. *Id.* at 476.

55. *Carey*, 431 U.S. at 686; *Choate*, 576 F.2d at 182; *Griswold*, 381 U.S. at 497; *Wade*, 410 U.S. at 162-63; Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810, 818 (1978).

56. *Carey*, 431 U.S. at 685-86.

57. *Id.* at 686.

58. *Choate*, 576 F.2d at 182; *Wade*, 410 U.S. at 155; *Carey*, 431 U.S. at 686.

59. City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. App. 5 Dist. 1985); Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986); *Von Raab*, 816 F.2d at 175; Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Bostic v. McClendon, 650 F. Supp. 245 (N.D. Ga. 1986); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35; 505 N.Y.S.2d 888 (1986); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); *Mullholland*, 660 F. Supp. 1565; Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510 (D. Neb. 1987); Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987).

The individual's reasonable expectation of privacy in the act of urination is readily accepted.

cases have held that the act of urination is a private function, traditionally performed in private and typically prohibited in public.[60] They note that urinalysis involves a bodily intrusion analogous in kind if not in degree to the blood testing at issue in *Schmerber v. California*.[61] The taking of the urine specimen for drug testing is referred to as embarrassing, degrading, and generally a violation of the individual's dignity.[62] Moreover, the cases specify that a person has a reasonable expectation of privacy in the personal information contained in his or her bodily fluids.[63]

Given the existence of this right of privacy, the issue then becomes whether the government has a sufficiently compelling interest which outweighs the individual's right of privacy.[64] Making this determination involves examining the facts and circumstances of a particular case of drug testing within the meaning of the "search and seizure" clause of the fourth amendment.[65]

SEARCH AND SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT[66]

The "search and seizure" clause of the fourth amendment is generally thought of in terms of government investigation into alleged criminal activity. However, the fourth amendment itself places no such limitation on its application. The Supreme Court has taken the test developed in criminal cases for determining the reasonableness of a particular search and seizure and applied it to civil cases as well.[67] Judicial review of the constitutionality

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However, the privacy right extends beyond the bodily function of urination to the urine itself because analysis of the specimen permits investigation into the individual's private life.

"There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." *Von Raab*, 816 F.2d at 175.

Note the concurring opinion in *Turner v. Fraternal Order of Police* asserting that "[i]t would strain logic to conclude other than that" an individual "cannot hold a subjective expectation of privacy in body waste that must pass from his system." Turner v. Fraternal Order of Police, 500 A.2d 1005, 1011 (D.C. App. 1985).

60. *Bostic*, 650 F. Supp. at 249; *Capua*, 643 F. Supp. at 1511; *Von Raab*, 816 F.2d at 175.

61. *Bostic*, 650 F. Supp. at 248; *Capua*, 643 F. Supp. at 1514; *Von Raab*, 816 F.2d at 177; *Allen*, 601 F. Supp. at 488; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d 35; 505 N.Y.S.2d at 890; *McDonell*, 809 F.2d at 1307.

62. ". . .the drug testing plan constitutes an overly intrusive policy of searches and seizures. . .in violation of legitimate expectations of privacy." National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986).

"A urine test done under close surveillance. . . regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience." *Capua*, 643 F. Supp. at 1514.

63. It is well established that urinalysis reveals information unrelated to the use of illegal drugs. *See* notes 30-32 and accompanying text. Edwards, *supra* note 26, at 34; *Bostic*, 650 F. Supp. at 249; *Capua*, 643 F. Supp. at 1511; *Jones*, 833 F.2d at 339.

64. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); *T.L.O.*, 469 U.S. at 341; *O'Connor*, 107 S. Ct. at 1499.

65. *Bell*, 441 U.S. 520.

66. 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.

U.S. CONST. amend. IV.

67. *O'Connor*, 107 S. Ct. 1492.

of employee drug testing programs has also employed the reasonableness test established in criminal cases to adjudicate civil controversies.[68]

Any examination of the "search and seizure" clause of the fourth amendment necessarily involves determining what constitutes "unreasonable" conduct. Only searches and seizures which are unreasonable violate the strictures of the fourth amendment.[69] The Supreme Court set out the test for evaluating the reasonableness of a search and seizure in *Terry v. Ohio*.[70] This was later refined by the Court in *New Jersey v. T.L.O.* and most recently in *O'Connor v. Ortega*.[71] The test promulgated in *Terry* is two-pronged.[72] It requires a determination of (1) whether the search was justified at its inception and (2) whether the scope of the search was reasonably related to the circumstances which initially justified the intrusion.[73]

The first prong examines whether there were reasonable grounds to believe the search would produce the evidence sought.[74] The second prong requires that the measures used to conduct the search must relate to the objectives of the search and must not be overly intrusive under the circumstances.[75] The reasonableness test is applied on a case-by-case basis, weighing the government's need to search against the nature and extent of the invasion on the individual's privacy rights.[76] In *Bell v. Wolfish*[77] the Supreme Court enumerated four factors to be considered in evaluating reasonableness: 1) the extent of the particular intrusion, 2) the manner in which the intrusion is performed, 3) the justification for initiating the intrusion, and 4) the area or location in which the intrusion is conducted.[78] These factors coincide well with the two-pronged test in *Terry*.

Additionally, courts must determine the level of suspicion necessary to justify implementation of a search and seizure in a particular set of circumstances. A determination of the applicable standard is inexorably tied to the

68. *Bostic*, 650 F. Supp. at 249; *Capua*, 643 F. Supp. at 1513-16; *Von Raab*, 816 F.2d at 179; *Allen*, 601 F. Supp. at 488-89; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d 35; 505 N.Y.S.2d at 889-90; *Suscy*, 538 F.2d at 1267; *Turner*, 500 A.2d at 1007; Shoemaker v. Handel, 795 F.2d 1136, 1143 (3rd Cir. 1986); *Mullholland*, 660 F. Supp. at 1569; *Rushton*, 653 F. Supp. at 1520; *Jones*, 833 F.2d at 339-340.

69. The fourth amendment imposes a standard of reasonableness to protect individuals from arbitrary intrusions by government officials. Delaware v. Prouse, 440 U.S. 648, 653-654 (1979).

Reasonableness is not amenable to precise definition nor can it be mechanically applied to all situations. *Bell*, 441 U.S. at 559. At a minimum, reasonableness requires that the facts and circumstances of a particular intrusion be measured against an objective standard, be that probable cause or a less stringent test. *Prouse*, 440 U.S. at 654.

70. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

71. *T.L.O.*, 469 U.S. at 341; *O'Connor*, 107 S. Ct. at 1503.

72. *Terry*, 392 U.S. at 19-20.

73. *Id.*

74. In *Terry* the police officer observed Terry for some time as he engaged in behavior which the officer hypothesized was leading up to a robbery. The Court held that a reasonably prudent man would have been justified in believing that Terry was armed and that he was a danger to the officer's safety. *Id.* at 21-30.

75. In *Terry* the officer restricted his search to a "pat down" of Terry's outer clothing. The officer did not reach into Terry's pockets until he felt what he believed to be a weapon. He then merely reached in and removed the gun. There was no general exploration or search for evidence of criminal activity. *Id.* at 25-30.

76. *Camara*, 387 U.S. at 536-37; *T.L.O.*, 469 U.S. at 341; *O'Connor*, 107 S. Ct. at 1499.

77. 441 U.S. 520 (1979).

78. *Id.* at 559.

determination of reasonableness. The applicable standard may range from no suspicion to probable cause.[79] Although individualized suspicion is usually a prerequisite to a constitutional search and seizure, the fourth amendment does not impose such a requirement as an "irreducible minimum".[80] Public interest and safety can also justify using a lower standard than probable cause.[81] When the balancing of state and private interests suggests that the public interest is best served by a standard of reasonableness that is less stringent than probable cause, the Court has not hesitated to adopt such a standard.[82]

CASE LAW ON DRUG TESTING

Nature of the Privacy Interest

Division 241 Amalgamated Transit Union v. Suscy[83] was the first case to address the issue of mandatory employee drug testing.[84] In *Suscy* the bus drivers' union challenged the constitutionality of transit authority regulations which required blood or urine tests following a driver's involvement in a serious accident or when a driver was suspected of being "under the influence".[85] The court held that urinalysis constituted a search and seizure within the meaning of the fourth amendment and that the government could place reasonable conditions on public employment.[86] It further held that the government interest in ensuring the safety of mass transit riders outweighs an individual's interest in not disclosing physical evidence of intoxication or drug abuse.[87] It was about ten years after *Suscy* that the proliferation of employee drug testing resulted in the current line of cases. Although no clear consistency exists in these holdings, some general guidelines are emerging.

The right of privacy is a threshold question considered by every court addressing the issue of drug testing. As previously stated, unless the individual has an expectation of privacy which society accepts as reasonable, no search occurs and the fourth amendment provides no protection from government intrusion. The courts reviewing employee drug testing programs generally concur that an individual has a legitimate privacy interest in his or

79. No suspicion and probable cause represent opposite ends of a continuum commonly referred to as the "sliding scale of suspicion". Determining the degree of suspicion necessary to execute a search and seizure involves balancing the public's interest in a safe society and the individual's interest in his privacy. The more compelling the government's interest, the greater the intrusiveness which is allowed into personal privacy.

80. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976); *T.L.O.*, 469 U.S. at 342 n.8 (1985).

The requirement of a warrant and the concept of probable cause pertain to the reasonableness of a search, but in some circumstances neither is required. Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973). Additionally, the warrant requirement may be dispensed with when the burden of obtaining it would frustrate the governmental purpose behind the search. *Camara*, 387 U.S. at 532-33.

81. *Prouse*, 440 U.S. at 654-55; *T.L.O.*, 469 U.S. at 341; *Terry*, 392 U.S. at 30.

82. *T.L.O.*, 469 U.S. at 341.

83. 538 F.2d 1264 (7th Cir. 1976).

84. *Id.*

85. *Id.* at 1266.

86. *Id.* at 1267.

87. *Suscy*, 538 F.2d at 1267.

her urine[88] and that urinalysis testing constitutes a search and seizure within the meaning of the fourth amendment.[89] The courts have pointed out that urine is discharged and disposed of in such a manner as would reasonably elicit an expectation of privacy.[90] The privacy interest lies not only in the bodily function of urination but also in the urine itself because analysis of the specimen allows inquiry into the individual's private life.[91]

The extent of the employee's privacy interest is determined by the context in which it is asserted.[92] Thus, not everyone enjoys the same expectation of privacy and consequently not the same degree of fourth amendment protection.[93] Courts reviewing employee drug testing programs have found lowered privacy expectations for some employees.[94] This lowered expectation of privacy derives from the nature of the work performed. If the work inherently involves extensive regulation or a potential risk of harm to the public at large, the courts have held that the employees have a lowered expectation of privacy.[95]

Reasonableness of the Search

By its explicit context, the fourth amendment prohibits only those searches and seizures which are unreasonable. Although the courts generally concur regarding the individual's privacy interest in his or her urine and the conclusion that urinalysis constitutes search and seizure, the holdings regarding the reasonableness of drug testing programs are split. To determine reasonableness or to weigh the need for the particular search against the

88. *Bauman*, 475 So. 2d at 1324; *Bostic*, 650 F. Supp. at 248; *McDonell*, 612 F. Supp. at 1127; *Capua*, 643 F. Supp. at 1513; *Von Raab*, 816 F.2d at 175. *See Allen*, 601 F. Supp. 482; *Turner*, 500 A.2d at 1005; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35; 505 N.Y.S.2d at 888; *McDonell*, 809 F.2d 1302; *Mullholland*, 660 F. Supp. at 1565; *Rushton*, 653 F. Supp. at 1510; *Jones*, 833 F.2d at 338. *Contra Suscy*, 538 F.2d at 1264.

89. *Suscy*, 538 F.2d at 1267; *Allen*, 601 F. Supp. at 488; *Bauman*, 475 So. 2d at 1324; *Bostic*, 650 F. Supp. at 249; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35; 505 N.Y.S.2d at 890; *Capua*, 643 F. Supp. at 1513; *McDonell*, 809 F.2d at 1307; *Mullholland*, 660 F. Supp. at 1569; *Rushton*, 653 F. Supp. at 1519; *Von Raab*, 816 F.2d at 175; *Jones*, 833 F.2d at 338. *See Turner*, 500 A.2d at 1005; *Shoemaker*, 795 F.2d at 1136.

90. One does not reasonably expect to make one's urine available to others for the purpose of having personal physiological secrets discovered. *Bauman*, 475 So. 2d at 1324; *Bostic*, 650 F. Supp. at 249; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35; 505 N.Y.S.2d at 891; *Capua*, 643 F. Supp. at 1511; *Mullholland*, 660 F. Supp. at 1565; *Rushton*, 653 F. Supp. at 1520; *Von Raab*, 816 F.2d 170; *Turner*, 500 A.2d at 1009.

91. *Jones*, 833 F.2d at 339.

92. *Turner*, 500 A.2d at 1007-08; *Allen*, 601 F. Supp. at 491; *Bauman*, 475 So. 2d at 1324; *Bostic*, 650 F. Supp. at 250; *Shoemaker*, 795 F.2d at 1144; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35; 505 N.Y.S.2d at 890; *Capua*, 643 F. Supp. at 1517; *McDonell*, 809 F.2d at 1306; *Mullholland*, 660 F. Supp. at 1570; *Rushton*, 653 F. Supp. at 1520; *Von Raab*, 816 F.2d at 178-79.

93. *Turner*, 500 A.2d at 1007-08; *McDonell*, 809 F.2d at 1306; *Mullholland*, 660 F. Supp. at 1570; *Rushton*, 653 F. Supp. at 1520. *See Allen*, 601 F. Supp. at 491; *Bostic*, 650 F. Supp. at 250; *Shoemaker*, 795 F.2d at 1141-42; *Von Raab*, 816 F.2d at 178-79.

94. *Rushton*, 653 F. Supp. 1510 (employees working in a restricted area of a nuclear power plant); *Mullholland*, 660 F. Supp. at 1565 (civilians working in critical positions in the military); *McDonell*, 809 F.2d 1302 (employees of a correctional facility); *Bauman*, 475 So. 2d 1322 (fire fighters); *Turner*, 500 A.2d 1005 (police officers); *Bostic*, 650 F. Supp. 245 (police officers); *Suscy*, 538 F.2d 1264 (bus drivers); *Allen*, 601 F. Supp. 482 (employees working around high voltage wires); *Von Raab*, 816 F.2d 170 (employees involved in federal drug enforcement); *Shoemaker*, 795 F.2d 1136 (employees in the highly regulated horse racing industry).

But see Capua, 643 F. Supp. 1507; *Bostic*, 650 F. Supp. 245 (fire fighters).

95. *Id.*

intrusion on privacy interests which the search entails, the courts have used the standards articulated in *Terry* and *Bell v. Wolfish*.[96] The courts examine (1) the scope of the intrusion, (2) the manner in which the search is conducted, (3) the justification for implementing it, and (4) the place in which it occurs.[97]

The first element of reasonableness examined by the courts is the scope of the intrusion. Although one might interpret this to mean the extent of the intrusiveness, the courts have used it to characterize the procedure by which particular employees are singled out for testing. Employees have been singled out due to a reasonable suspicion that a particular employee is operating under the influence of drugs.[98] Tests have also been administered randomly,[99] following an on-the-job accident involving human error,[100] or as part of a pre-employment or annual physical examination.[101]

The second element used in evaluating reasonableness is the manner in which the search is conducted. This involves the extent of the intrusiveness and the attempts made to minimize the invasion. *Capua v. City of Plainfield*[102] was a case characterized by extreme intrusiveness.[103] Government officials entered the fire stations, locked the doors, awakened the fire fighters, and demanded that urine specimens be given under the direct surveillance of testing agents.[104] The District Court for the District of New Jersey noted that employees had not been notified of the existence of a drug testing program.[105]

In contrast, *National Treasury Employees Union v. Von Raab*[106] reflects efforts to minimize the inherent intrusiveness of drug testing.[107] Only employees seeking to enter critical positions were tested and then only after the employee was tentatively approved for the position.[108] Employees were notified of the date and time for testing in advance[109] and there was no direct

96. *Bostic*, 650 F. Supp. at 249; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d at 35; 505 N.Y.S.2d at 890; *Capua*, 643 F. Supp. at 1513; *McDonell*, 809 F.2d at 1305; *Mullholland*, 660 F. Supp. at 1569; *Rushton*, 653 F. Supp. at 1520; *Von Raab*, 816 F.2d at 176. *See Bauman*, 475 So. 2d at 1324; *Turner*, 500 A.2d at 1007; *Suscy*, 538 F.2d at 1267.

97. *Bell*, 441 U.S. at 559; *Terry*, 392 U.S. at 19-20.

98. *Suscy*, 538 F.2d at 1264; *Bauman*, 475 So. 2d at 1322; *Turner*, 500 A.2d at 1005; *Bostic*, 650 F. Supp. 245; Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co., 802 F.2d 1016 (8th Cir. 1986); *Rushton*, 653 F. Supp. 1510; *McDonell*, 809 F.2d 1302; *Allen*, 601 F. Supp. 482.

99. *Shoemaker*, 795 F.2d 1136; *McDonell*, 809 F.2d 1302; *Rushton*, 653 F. Supp. 1510; *Mullholland*, 660 F. Supp. 1565.

100. *Suscy*, 538 F.2d 1264; *Brotherhood of Maintenance of Way Employees*, 802 F.2d 1016.

101. *Bauman*, 475 So. 2d 1322; *Brotherhood of Maintenance of Way Employees*, 802 F.2d 1016; *Rushton*, 653 F. Supp. 1510; *Jones*, 833 F.2d 335.

102. 643 F. Supp. 1507 (D.N.J. 1986).

103. *Id.* at 1515.

104. *Id.* at 1511.

105. The New Jersey district court held that the means chosen by the city to ensure that employees were free of drug induced impairments and capable of performing their jobs was unreasonable within the meaning of the fourth amendment. *Id.* at 1520.

106. 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

107. The critical positions covered by the program were limited to those in drug enforcement, those where the employee carried a firearm, and those where the employee had access to classified information. *Id.* at 173.

108. *Id.* at 177.

109. *Id.* at 173.

observation of the employee during the act of urination.[110] Ironically, direct observation of the act of urination makes a test more reliable, but also makes it more intrusive.

The third element in determining reasonableness is the justification for implementation of the search. This element evaluates the legitimacy of the employer's purpose in initiating a drug testing program. In *Jones v. McKenzie*[111] the school district implemented a drug testing program for all employees of the transportation division having responsibility for the transportation of handicapped children.[112] Testing was held to be justified given the repeated incidents of dangerous drug-impaired behavior by transportation employees who were directly responsible for the safety of children.[113]

The last element scrutinized by the courts in determining reasonableness involves the testing location. An independent testing laboratory with staff trained in proper "chain-of-custody"[114] procedures to ensure reliability and confidentiality is far more acceptable to the courts than the collection of samples in the field by untrained personnel.[115]

Standard of Suspicion

The standard of suspicion required by the courts for implementation of drug testing ranges from no suspicion[116] to a reasonable suspicion.[117] Public interest,[118] safety, [119] and the fact that the searches are conducted pursuant to the government's authority as an employer rather than for criminal purposes[120] have been cited as justification for reducing the fourth amendment standard of probable cause. The more compelling the government interest, the more likely the courts are to uphold drug testing, even random testing,

110. *Id.* at 174.
111. 833 F.2d 335 (D.C. Cir. 1987).
112. *Id.*
113. *Id.*
114. "Chain-of-custody" is an accounting of who has had custody of an item, e.g. a urine specimen, and where it has been kept from the time it was taken until it is offered as evidence. To ensure reliability and confidentiality, detailed procedures must be exactly executed by all persons participating in the testing program, including the employee being tested, the testing officer, the courier transporting the specimen to the laboratory, and the laboratory technicians. Additionally, there must be absolute control over the specimen itself to prevent any possibility of contamination.
115. The courts in *Mullholland, Von Raab* and *Shoemaker* commented favorably on the elaborate chain-of-custody procedures utilized by the employers. The constitutionality of the drug testing program in each of these cases was upheld. *Mullholland*, 660 F. Supp. at 1566; *Von Raab*, 816 F.2d at 174; *Shoemaker*, 795 F.2d at 1143.

On the other hand, *Bauman* and *Capua* involved drug testing programs which the courts criticized for their lack of protection to the employees. These programs were subsequently struck by the courts. *Bauman*, 475 So. 2d at 1325; *Capua*, 643 F. Supp. at 1520.
116. *Shoemaker*, 795 F.2d at 1140; *McDonell*, 809 F.2d at 1308; *Rushton*, 653 F. Supp. at 1515; *Mullholland*, 660 F. Supp. at 1566; *Von Raab*, 816 F.2d at 177.
117. *Capua*, 643 F. Supp. at 1518; *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1023; *Bauman*, 475 So. 2d at 1326; *Bostic*, 650 F. Supp. at 250; *Turner*, 500 A.2d at 1009.
118. *Suscy*, 538 F.2d at 1267; *Bauman*, 475 So. 2d at 1326; *Turner*, 500 A.2d at 1008; *Bostic*, 650 F. Supp. at 250; *Rushton*, 653 F. Supp. at 1513; *Mullholland*, 660 F. Supp. at 1570; *Von Raab*, 816 F.2d at 178.
119. *Suscy*, 538 F.2d at 1267; *Bauman*, 475 So. 2d at 1326; *Turner*, 500 A.2d at 1009; *Bostic*, 650 F. Supp. at 250; *Rushton*, 653 F. Supp. at 1513; *Mullholland*, 660 F. Supp. at 1570; *Von Raab*, 816 F.2d at 178; *Allen*, 601 F. Supp. at 491; *McDonell*, 809 F.2d at 1308; *Jones*, 833 F.2d at 340.
120. *Allen*, 601 F. Supp. at 491; *Patchogue-Medford Congress of Teachers*, 119 A.D.2d 35; 505 N.Y.S.2d at 891.

provided the government has established detailed guidelines to ensure reliability, confidentiality, and a prohibition of arbitrary discretion by government officials.[121]

In *Rushton v. Nebraska Public Power District*,[122] the court upheld the compelling government interest in the security of protected areas in a nuclear power plant.[123] The interest upheld in *Von Raab* involved the need by the government to ensure security and safety among federal drug enforcement personnel as well as field agents carrying firearms and employees with access to classified information.[124] The compelling interest upheld in *Mullholland v. Department of the Army*[125] was one of national security and public safety.[126]

In the context of drug testing, reasonable suspicion must be based on articulable facts and reasonable inferences from those facts, that a urinalysis will produce evidence of illegal drug use by that particular employee.[127] The courts reviewing drug testing have held that suspicion that an employee is operating "under the influence" is sufficient justification for a warrantless search.[128] Additionally, courts have upheld drug testing as reasonable following an accident caused by an error in human judgment.[129] Courts reviewing issues of drug testing during pre-employment and annual physical examinations have upheld this method of testing as an appropriate measure for ensuring the employee's fitness for duty.[130]

Rulings in Federal Appellate Courts

Although trial courts generally find mandatory drug testing to be an unreasonable invasion of the individual's right of privacy, those cases reaching the appellate level often receive a ruling more favorable to the proponent of the testing.[131]

Von Raab represents the clearest contrast in rulings between the district and appellate levels. The union challenged the constitutionality of a drug

121. *See Rushton*, 653 F. Supp. 1510; *Mullholland*, 660 F. Supp. 1565; *Von Raab*, 816 F.2d 170.
122. 653 F. Supp. 1510 (D. Neb. 1987).
123. *Id.* at 1520.
124. *Von Raab*, 816 F.2d at 173.
125. 660 F. Supp. 1565 (E.D. Va. 1987).
126. *Id.* at 1570.
127. *Bostic*, 650 F. Supp. at 250; *McDonell*, 809 F.2d at 1307; Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 587 (9th Cir. 1988).
128. *Bauman*, 475 So. 2d at 1326; *Turner*, 500 A.2d at 1009; *Bostic*, 650 F. Supp. at 250; *Capua*, 643 F. Supp. at 1518; *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1023.
When specific objective facts regarding an individual's conduct and reasonable inferences drawn from those facts would justify a prudent person's belief that a urinalysis would provide evidence of that individual's use of illegal drugs, an individualized suspicion has been established. *Bostic*, 650 F. Supp. at 250.
129. *Suscy*, 538 F.2d at 1267. *Brotherhood of Maintenance of Way Employees* extended the reasonableness of testing to include all members of a work crew when responsibility for the accident could not be attributed to a particular person. *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1023. *Contra Railway Labor Executives' Ass'n.*, 839 F.2d at 587.
130. *Brotherhood of Maintenance of Way Employees*, 802 F.2d at 1024; *Bauman*, 475 So. 2d at 1326; *Jones*, 833 F.2d at 340.
131. Cox, *Juries Sympathetic in Drug-Test Cases*, NAT'L L.J., Dec. 7, 1987. *Von Raab*, 816 F.2d 170; *Brotherhood of Maintenance of Way Employees*, 802 F.2d 1016; *McDonell*, 809 F.2d 1302; *Jones*, 833 F.2d 335; *Turner*, 500 A.2d 1005.

testing program implemented by the United States Customs Service to analyze the urine of employees seeking transfers into certain sensitive jobs involving the interdiction of illegal drugs, requiring the carrying of a gun, or involving access to classified information.[132] The District Court for the Eastern District of Louisiana permanently enjoined all drug testing, holding that the program involved an unconstitutional search and seizure which violated legitimate expectations of privacy in the absence of individualized suspicion.[133] The Court of Appeals for the Fifth Circuit vacated the permanent injunction issued by the district court and held that although the testing did constitute a search within the meaning of the fourth amendment, it was reasonable considering the weight of the government interest.[134]

In *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad*[135] the union sought to enjoin implementation of the railroad's new drug testing procedures.[136] The District Court for the Northern District of Iowa ruled that drug testing following an accident is reasonable; however, the railroad was enjoined from testing employees returning to work from a furlough.[137] The Eighth Circuit Court of Appeals held that both post-incident and post-furlough testing are reasonable.[138] The appellate court noted that the drug screen was merely an addition to the urinalysis already conducted as part of an established procedure of post-furlough medical examination to determine the employee's fitness for duty.[139]

In *McDonell v. Hunter*[140] Department of Corrections employees challenged the constitutionality of the Department's search policy which provided for drug testing of an employee at the request of a Department official.[141] The District Court for the Southern District of Iowa permanently enjoined the Department of Corrections from conducting drug testing absent a reasonable suspicion that the employee was currently under the influence of alcohol or drugs.[142]

In balancing the state's interest in security at correctional institutions against the invasion of the individual employee's right to privacy the district court held that reasonable suspicion, rather than probable cause, is the appropriate standard for justifying the implementation of drug testing.[143] The Eighth Circuit Court of Appeals found that urinalysis is a limited intrusion on privacy which society would accept as reasonable given a state's compelling interest in prison security.[144] The appellate court held testing to be reasonable when conducted uniformly or by systematic random selection.[145]

132. *Von Raab*, 816 F.2d at 173.
133. *Id.* at 174.
134. *Id.* at 173.
135. 802 F.2d 1016 (8th Cir. 1986).
136. *Id.* at 1017.
137. *Id.*
138. *Id.* at 1024.
139. *Id.*
140. 809 F.2d 1302 (8th Cir. 1987).
141. *Id.* at 1304.
142. *Id.*
143. *Id.*
144. *Id.* at 1308.
145. *McDonell*, 809 F.2d at 1308.

Additionally, the court permitted testing based on a reasonable suspicion that the individual employee had used controlled substances within twenty four hours prior to the required test.[146]

In *Jones* a discharged school bus attendant challenged the school system's discharge decision which was based on the attendant's alleged marijuana use.[147] The District Court for the District of Columbia enjoined the school system from terminating Jones where the termination decision was based upon a positive EMIT but was not confirmed by an alternative drug test.[148] The court further enjoined the school system from conducting any drug test in the absence of probable cause.[149]

The issue on appeal to the Court of Appeals for the District of Columbia was whether the school system was required to establish probable cause to believe the employee was under the influence of illegal drugs before it could implement drug testing.[150] The appellate court held that testing was not unreasonable, regardless of probable cause, where the employee's duties are directly related to the safety of school children and the testing is part of a routine medical examination to determine fitness for duty.[151]

Turner v. Fraternal Order of Police[152] involved a suit for injunctive relief from enforcement of a police department policy of testing officers suspected of using illegal drugs.[153] The District Court for the District of Columbia held the policy to be unreasonable and therefore violative of the fourth amendment because it did not provide guidelines for conducting the testing.[154] The Court of Appeals for the District of Columbia found that the term "suspected" required a reasonable and objective basis to believe the individual officer was using illegal drugs. Such a finding, in addition to the public interest in having police officers operate free from the influence of drugs, made the testing program reasonable within the meaning of the fourth amendment.[155]

In *Suscy* the bus drivers' union challenged the constitutionality of a policy requiring drug testing after a driver's involvement in a serious accident or when a driver was suspected of being under the influence of alcohol or illegal drugs.[156] The District Court for the Northern District of Illinois ruled that the policy was desirable and necessary and therefore not unreasonable within the meaning of the fourth amendment.[157] The Court of Appeals for the Seventh Circuit affirmed, holding that the state has a paramount interest in protecting public safety, an interest which outweighs any reasonable expectation of privacy the employee might have regarding

146. *Id.* at 1309.
147. *Jones*, 833 F.2d at 336.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. 500 A.2d 1005 (D.C. App. 1985).
153. *Id.* at 1006.
154. *Id.* at 1006-07.
155. *Id.* at 1008-09.
156. *Suscy*, 538 F.2d at 1265-66.
157. *Id.* at 1266.

urinalysis.[158] The appellate court found that the scope of the intrusion and the manner in which it was performed were reasonable.[159]

In *Shoemaker v. Handel*[160] jockeys challenged a program of random drug testing implemented by the New Jersey Racing Commission.[161] This case must be distinguished from other cases in which employee drug testing has been challenged. The Court of Appeals for the Third Circuit noted that horse racing has been a highly regulated industry in New Jersey since it was legalized by a 1939 amendment to the state constitution which established the racing commission and gave it broad regulatory authority.[162] The court further noted that the intense regulation was justified due to the public wagering involved and the need to insure public confidence in the integrity of the industry.[163] This was the appellate court's basis for affirming the district court's ruling that in the heavily regulated industry of horse racing random drug testing is reasonable.[164]

Railway Labor Executives' Ass'n v. Burnley[165] is the most recent appellate decision on drug testing. The suit challenged the constitutionality of Federal Railroad Administration regulations requiring urine and blood tests of employees involved in certain on-the-job accidents and rule violations.[166] The Court of Appeals for the Ninth Circuit held that drug and alcohol testing could be required of an employee only when articulable facts exist to justify a reasonable suspicion that the employee is currently drug or alcohol impaired.[167] The court reasoned that only when such facts exist is the search justified at its inception as required by the first prong of the *Terry* test.[168]

The majority opinion of the Ninth Circuit is in conflict with the decisions of other circuit courts.[169] The District of Columbia Circuit, the Fifth Circuit, the Eighth Circuit, and the Seventh Circuit balanced the need for the search against the intrusion which the search entailed in order to determine if testing was justified at its inception and therefore reasonable.[170] The Ninth Circuit indicates that by using the balancing test, these courts did not properly address the issue of whether the search is justified at its inception.[171]

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158. *Id.* at 1267.

159. Drug testing was not conducted in an arbitrary manner. Only those employees who were involved in a serious accident or who appeared to be operating under the influence were required to undergo drug testing. *Id.*

160. 795 F.2d 1136 (3rd Cir. 1986).

161. *Id.* at 1137.

162. *Id.* at 1141.

163. *Id.* at 1144.

164. *Id.* at 1143.

165. 839 F.2d 575 (1988).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Jones*, 833 F.2d 335; *Von Raab*, 816 F.2d 170; *Suscy*, 538 F.2d 1264; *McDonell*, 809 F.2d 1302.

170. *Jones*, 833 F.2d at 340; *Von Raab*, 816 F.2d at 173; *McDonell*, 809 F.2d at 1308; *Suscy*, 538 F.2d at 1267.

171. *Railway Labor Executives' Ass'n*, 839 F.2d at 590.

DRAFTING A DRUG TESTING PROGRAM THAT WILL SURVIVE JUDICIAL SCRUTINY

Reasonable Justification

When considering implementation of any kind of employee drug testing program, the employer must first examine the goal sought to be achieved by such a program. Punitive, as compared to rehabilitative, programs are generally struck down by the courts.[172] In *Chicago Transit Authority*,[173] the arbitrator held discharge to be too severe a "punishment," despite the fact that the employee had caused significant damage to CTA property and had knowingly disobeyed company rules.[174] The arbitrator decided that the employee should be given the opportunity to enter a treatment program.[175]

A second factor to examine when considering the appropriateness of implementing a drug testing program is the character of the particular employer's enterprise and the nature of the employees' duties. The need for testing must be directly related to the job.[176] Generally, the employer's only legitimate concern should be with conduct that directly affects job performance. A review of the case law shows that, with the exception of *Von Raab*, drug testing of public employees has been upheld only where the employees worked in "critical" positions such that they were directly responsible for the safety of fellow workers or the public at large.[177] In upholding the drug testing program implemented by the Customs Service in *Von Raab*, the 5th Circuit Court of Appeals cited not only safety concerns but also the need for people to have confidence in public officials.[178] The court noted that drug use by customs employees could seriously impair the agency's ability to enforce drug laws, thus undermining public confidence.[179]

Procedural Considerations

If analysis of the preceding issues reasonably justifies implementation of a drug testing program, the next step is articulation of narrowly drawn regulations which utilize the least intrusive means necessary to achieve the legitimate government interest.[180] Several courts have commented on the

172. Chicago Transit Auth., 80 Lab. Arb. (BNA) 663, 667-68 (1983); Mallinckrodt, Inc., 80 Lab. Arb. (BNA) 1261, 1265 (1983). *See Capua*, 643 F. Supp. 1507.

173. Chicago Transit Auth., 80 Lab. Arb. (BNA) 663 (1983).

174. *Id.* at 669.

175. A study of arbitration decisions from 1973 to 1982 where the employees were discharged for possession or use of drugs shows that arbitrators set aside two-thirds of the dismissals as being "excessive punishment". *Id.*

176. Angarola, *supra* note 10, at 35.

177. *Suscy*, 538 F.2d 1264 (bus drivers); *Allen*, 601 F. Supp. 482 (employees working around high voltage wires); *Turner*, 500 A.2d 1005 (police officers); *Bostic*, 650 F. Supp. 245 (police officers); *McDonell*, 809 F.2d 1302 (employees at correctional facility); *Mullholland*, 660 F. Supp. 1565 (employees in positions involving national security); *Von Raab*, 816 F.2d 170 (agents of Federal Drug Enforcement Agency); *Rushton*, 653 F. Supp. 1510 (employees with access to critical area of nuclear power facility); *Jones*, 833 F.2d 335 (school employees transporting handicapped children).

178. *Von Raab*, 816 F.2d at 178.

179. *Id.*

180. *Wade*, 410 U.S. at 155; *Opinion of the Justices to the Senate*, 375 Mass. 795, 806, 376 N.E.2d 810, 818 (1978).

employer's attempts,[181] or lack thereof,[182] to establish a comprehensive testing program which is narrowly drawn so as to accomplish the employer's legitimate interest while minimizing the intrusion on the employee's privacy. This has proven to be a critical factor in judicial reviews of the reasonableness of drug testing programs.[183]

A comprehensive drug testing plan must set out clear rules regarding the sale, use, or possession of illegal substances in the workplace.[184] It must state specific behavior and substances which are prohibited and indicate the penalities attached to violation of the regulations. All employees should be notified of the plan's purpose[185] and the specific procedures by which the plan will be implemented. Additionally, the policy should be in writing. This method of notification may also lower the employee's expectation of privacy because new employees seeking employment in the field will enter with full knowledge of the drug testing regulations already in place.[186]

In order for a drug testing program to be successful, management personnel would need to be trained in implementation of the program and would have to be fully aware of their responsibilities in the detection of drug-impaired performance.[187] Management's ability to carefully document evidence of drug related impaired performance would be vital in establishing the individualized suspicion requisite for initiating drug testing in enterprises which do not possess a sufficiently compelling interest to warrant random testing.

Under the most effective system, rehabilitation alternatives would be established.[188] Typically, rehabilitation of drug users is more cost effective than hiring and training new staff. It can also promote better employer-employee relations.

An oversight committee would be useful in maintaining effectiveness and efficiency and implementing changes as needed. Because the determination of which employees will be tested cannot be left to the arbitrary discretion of field personnel, an oversight committee should be used to make the determination. Such a committee should also be used to establish a proper chain-of-custody, to ensure the confidentiality of test results, and to initiate disciplinary action when justified.[189] At a minimum, the committee should

181. The courts cite the detailed procedures implemented by these employers to ensure reliability and confidentiality of the test results while minimizing the intrusiveness of the testing as much as possible. *Shoemaker*, 795 F.2d at 1140; *Mullholland*, 660 F. Supp. at 1566-67; *Von Raab*, 816 F.2d at 177; *Rushton*, 653 F. Supp. at 1515.

182. *Bauman*, 475 So. 2d at 1325 (no written standards existed for the policy); *Capua*, 643 F. Supp. at 1518 (no confidentiality safeguards and no opportunity to refute the test results).

183. *See Shoemaker*, 795 F.2d 1136; *Mullholland*, 660 F. Supp. 1565; *Von Raab*, 816 F.2d 170; *Rushton*, 653 F. Supp. 1510; *Bauman*, 475 So. 2d 1322; *Capua*, 643 F. Supp. 1507; *Brotherhood of Maintenance of Way Workers*, 802 F.2d 1016; *Jones*, 833 F.2d 335.

184. Susser, *supra* note 24, at 53.

185. *Id.* at 53-54; Angarola, *supra* note 10, at 35; Marcotte, *supra* note 7, at 35.

186. *See Shoemaker*, 795 F.2d 1136; *McDonell*, 809 F.2d 1302; *Von Raab*, 816 F.2d 170; *Rushton*, 653 F. Supp. 1510.

187. Susser, *supra* note 24, at 54.

188. *Id.* at 53.

189. For an indication of how the existence of an oversight committee has been received by the court, see *Shoemaker*, 795 F.2d 1136.

be comprised of management representatives, employee representatives, and a health care consultant with expertise in substance abuse.

Implementation

With regard to the testing procedure itself, strict guidelines must be adhered to in order to minimize the inherent intrusiveness of the testing and to prevent chain-of-custody problems. The oversight committee should have authority to determine which employees will be tested.

If testing is to be initiated only when reasonable suspicion exists, the committee should make the determination that testing is warranted based on documentation from field personnel in direct contact with the employee. The determination of reasonable suspicion must be derived from articulable facts which are reasonable in light of experience, that a particular employee's faculties are impaired, and he or she cannot perform his or her job safely.[190]

If random testing is used, a method of selection must be devised to ensure randomness. For example, a computer could be used for the selection process or selection could be based on the last digit of the social security number. Regardless of whether testing is administered randomly or pursuant to an individualized suspicion, it must not be left to the arbitrary discretion of field personnel.

Employees should be notified of the scheduled date and time prior to the testing. Notice should not be given more than five days in advance because the EMIT will generally be negative when five days have elapsed between the last drug usage and the testing date.[191] Notification, even if given less than five days before testing, is at least an acknowledgment of an employee's dignity and an attempt by the employer to promote good employer-employee relations.

At the time of testing, a questionnaire should be completed by the employee regarding his or her use of prescription and non-prescription drugs within the past 30 days.[192] Use of prescription drugs should be verified by a physician's statement. The questionnaire should be placed in a sealed envelope and only opened if the test results are positive.[193] Even then, it should only be opened by laboratory testing staff for use in their examination of the specimen. The questionnaire is an important protection to the employee because some prescription and non-prescription drugs are misidentified by the EMIT as being illegal substances.[194]

Testing must be conducted in an independent laboratory by trained technicians. Studies by the National Institute of Drug Abuse show that the EMIT is most accurate when conducted in this fashion.[195] The testing laboratory must report to the employer only information relating to the presence of illegal substances. Any other physiological information obtained as a re-

190. *Bauman*, 475 So. 2d at 1326; *Capua*, 643 F. Supp. at 1518; *Bostic*, 650 F. Supp. at 250; *McDonell*, 809 F.2d at 1307.
191. *Von Raab*, 816 F.2d at 174.
192. *Id.* at 173-74.
193. *Id.* at 174.
194. *See supra* note 29.
195. *Id.*

sult of the urinalysis is not the employer's legitimate concern, and should remain confidential.

During testing, the employee should not be allowed access to clothing or other personal items, such as purses or packages.[196] A hospital gown could be substituted to allow the employee some maintenance of dignity while ensuring there is no tampering with the sample. A restroom stall should be used to provide the employee privacy.[197] The testing officer should not directly observe the employee during the act of urination; however, his or her presence in the restroom is necessary to listen for the normal sounds of urination, and, thus, to ensure there is no tampering with the specimen.[198] Additionally, the specimen itself must be warm; it should be rejected if it is hot or cold.[199]

An identification number, rather than the employee's name, should be affixed to the specimen container. The label and a tamperproof seal should be affixed to the container in the employee's presence.[200] The employee should also sign that the identification number on the container is the same one as assigned to him by the testing officer, and this record should be forwarded to the committee.

Generally the EMIT is used to detect the presence of illegal substances because it is an inexpensive test.[201] Since the test produces false positives 5-20 percent of the time[202], the laboratory which produces the EMIT recommends an alternative confirmation test to establish positive use of a drug.[203] Gas chromatography/mass spectrometry is commonly used for such confirmation and is considered extremely reliable.[204] It reduces constituent chemicals to a molecular level and identifies the "fingerprint" of a specific drug.[205] It is vital that any positive EMIT be confirmed by an alternative test prior to initiation of any disciplinary action. Additionally, if test results are positive, the employee must be allowed to have the specimen re-tested at a laboratory of his or her choice.[206]

If the employee is in a critical position and the first test is positive, the employer must have the option of transferring him or her to a less critical position pending the results of the alternative test.[207] If the employee elects

196. *See Von Raab*, 816 F.2d at 174.

197. *Id.* at 177.

198. *Id.* at 174.

199. This is necessary to ensure that the sample being submitted for analysis is not one which was produced earlier. *Id.*

The proliferation of drug testing has generated a new business for entrepreneurs offering urine specimens. Jeffrey Nightbyrd offers "100 percent pure urine" that is "suitable for unanticipated demand". Marcotte, *Drug Test Rules Struck*, 73 A.B.A. J. 18, 18 (1987).

200. *See Von Raab*, 816 F.2d at 174.

201. Rust, *supra* note 29, at 51-52.

202. *Id.*

203. *Id.*

204. Peter Bensinger, the former director of U.S. Drug Enforcement Agency, is quoted as saying that gas chromatography/mass spectrometry is "100 times 99.9 percent accurate in confirming the presence of the nine most commonly abused drugs — amphetamines, barbiturates, benzodiazepines, cocaine, marijuana, opiates, PCP, methaqualone and methadone." *Id.* at 52.

205. *Id.*

206. *See* Marcotte, *supra* note 7, at 35.

207. *Jones*, 628 F. Supp. at 1507.

to enter treatment for his or her drug use, the employer must again be able to transfer him or her to a less critical position pending completion of the treatment program.

Disciplinary action cannot be initiated solely on the basis that an employee uses illegal drugs. Illegal use of controlled substances may justify criminal prosecution but it does not necessarily constitute good cause for termination of employment. Any disciplinary action taken against an employee must be based on job performance or violation of company regulations which prohibit use, possession or sale of illegal drugs while on the job or on the company's property. It cannot be based on the drug use itself. Regulations must be consistently enforced and progressive discipline should be applied.[208] The employee should be given clear notice that he or she will be discharged if his or her conduct does not improve. A clear warning and an offer of rehabilitation should precede any action to terminate employment. Once a decision is made to discharge an employee, a hearing must take place prior to such termination.[209] The pre-discharge hearing is necessary to comply with due process requirements which protect an individual's property interest in his employment.[210]

Ensuring reliability and confidentiality of test results is a significant factor in minimizing the invasion of personal rights. Test results must be held in the safekeeping of the oversight committee. The results must remain inaccessible except by authority of the committee's chairperson or the employee, and kept confidential from law enforcement and other employers. The legitimate purpose for testing is to ensure fitness for duty, not to pursue a fishing expedition for evidence of criminal activity. The stigma attached by society to drug abuse and the ramifications of such a label necessitate strict confidentiality.

CONCLUSION

Illegal drug use has become a national concern due to its potentially devastating impact on the general welfare of the nation. Within the workplace, the severity of the problem has resulted in a myriad of employee drug testing programs, many of which are ill-conceived and, in fact, unconstitutional.

The employer has the right to expect that his or her employees will be reasonably productive and efficient and that the employees will not intentionally jeopardize that objective nor the safety of the workplace. On the other hand, employees have the right to prevent unwarranted intrusions on their privacy, particularly when such intrusions involve invasions which are both embarrassing and degrading.

An individual's anatomy and bodily functions are endowed with constitutional protection. Any abridgment of this protection must be justified by a compelling government interest. Reasonableness is the touchstone. Neither

208. Susser, *supra* note 24, at 54.
209. Bible, *supra* note 20, at 346; Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1494 (1985).
210. *Loudermill*, 105 S. Ct. at 1495.

public nor private interests are absolute. In any given set of facts and circumstances the interests of both parties must be judiciously weighed to determine the reasonableness of a particular government intrusion on a constitutionally protected interest. When there is mandatory employee drug testing, any invasion of the individual's right of privacy which is not pursuant to a reasonable suspicion must be strictly limited to critical positions where the employee's drug related impaired performance presents a substantial threat to the safety of fellow workers and/or the public at large. Even random testing is warranted by such a compelling state interest, provided the testing procedure is narrowly circumscribed to ensure the utmost reliability and confidentiality.