

Spring 1987

City of Palm Bay v. Bauman, 475 So. 2d 1322 (5th DCA 1985)

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Recommended Citation

Wm. A. Hamilton, *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (5th DCA 1985), 15 Fla. St. U. L. Rev. 101 ().
<http://ir.law.fsu.edu/lr/vol15/iss1/5>

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Constitutional Law—DRUG TESTING OF FLORIDA'S PUBLIC EMPLOYEES: WHEN MAY A PUBLIC EMPLOYER REQUIRE URINALYSIS?—*City of Palm Bay v. Bauman*, 475 So. 2d 1322 (5th DCA 1985)

DRUG abuse has been discussed increasingly in the last few years, and has commanded significant media and legal attention.¹ The health effects of drug abuse on drug users are well known. Many recent court decisions, however, have focused on the damage and danger to others caused by employees who use drugs on and off the job.²

Recent studies trace staggering amounts of damage to drug using employees. The Research Triangle Institute reported that drug abuse drained the United States economy of approximately \$60,000,000,000 in 1983, up thirty percent from 1980.³ Other studies have indicated that drug users are more likely to steal from their employers, miss over ten times as many workdays, and perform less productively than nonusers.⁴

More importantly, drug abusers injure themselves and others three times more than do nonusers.⁵ This tendency has frightening implications when drug users are employed as police officers, mass transit operators, air traffic controllers, and in other positions where human error can have catastrophic results. For example, since 1975, workers impaired by drug or alcohol use have caused nearly fifty train accidents, resulting in thirty-seven deaths and eighty injuries, along with \$34,000,000 in property damage.⁶ These figures were released before the Conrail-Amtrak train collision which occurred in January 1987. That accident killed sixteen people and injured 175 others. Both the Conrail engineer and brake-

1. *Human Performance*, TIME, Jan. 26, 1987, at 23; *Questions from a Wreck*, TIME, Jan. 19, 1987, at 25; *Tomorrow*, U.S. NEWS & WORLD REPORT, Jan. 19, 1987, at 28; *Drug Testing: The New Inquisition*, TIME, Sept. 15, 1986, at 71; Battiatia, *Drug Tests: The Pros & Cons*, Washington Post, May 5, 1986, at B8, col. 5; Castro, *Battling the Enemy Within*, TIME, Mar. 17, 1986, at 52, 53.

2. *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1984), modified, 809 F.2d 1302 (8th Cir. 1987); *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Capua v. City of Plainsfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986).

3. H. HARWOOD, D. NAPOLITANO, P. KRISTIANSSEN, J. COLLINS, *ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS*: 1980, at 3, G-16 (Research Triangle Institute June 1984)[hereinafter *RTI report*].

4. Castro, *Battling the Enemy Within*, TIME, March 17, 1986, at 52, 53.

5. *Id.* at 53.

6. *Id.*

man were found to have marijuana in their systems at the time of the mishap.⁷

Understandably, private and governmental employers have taken steps to reduce employee drug use. One-fourth of the FORTUNE 500 companies now screen employees for drugs. Employers have used undercover agents, lie detector tests, blood tests, and searches ranging from pat-downs to body cavity searches. Compelled urinalysis currently is a widely used method of drug use detection.⁸ Many private employers have introduced urinalysis as part of regular physical examinations and have conducted unannounced inspections of randomly selected employees with startling results.⁹ Because of mass testing, the threat of being detected and consequently losing one's job is real, and provides a greater deterrent to drug usage than the more remote chance of criminal penalties.¹⁰

While employers have been pleased with the results of drug testing, employees predictably have been disturbed. The EMIT (Enzyme Multiplied Immunossay Technique) test is a simple, inexpensive urinalysis testing procedure which can be administered by nontechnical personnel.¹¹ Unfortunately, the EMIT test measures only the presence of marijuana in the system, and does not reveal intoxication or time of use. Thus, it is impossible for an EMIT test to reveal whether use occurred on or off the job, or if the user was ever actually drug-impaired.¹²

7. *Human Performance*, TIME, January 26, 1987, at 23; *Questions from a Wreck*, TIME, January 19, 1987, at 25.

8. *Tomorrow*, U.S. NEWS & WORLD REPORT, Jan. 19, 1987, at 28.

9. The Georgia Power Company reported that its accident rate decreased 90% from 1981, when testing was implemented, to 1985. *Washington Post*, May 5, 1986, at B8, col. 5. Southern Pacific Railroad experienced a 71% decrease in accidents and injuries attributable to human error after it implemented drug and alcohol screening. *Putting Them All to the Test*, TIME, Oct. 21, 1985, at 61. Confidential surveys in the U.S. Armed Forces also show dramatic declines in drug usage because testing is more frequent. *Drug Testing: The New Inquisition*, TIME, Sept. 15, 1986, at 71.

10. *Drug Testing: The New Inquisition*, TIME, Sept. 15, 1986, at 71. The private sector's success in detecting drug use has prompted speculation that a concerted effort by private employers could wipe out the drug problem by 1990. Schwed, *Miami Attacks Drugs in Official Circles: Common as the Coffee Break*, PROPRIETARY TO UNITED PRESS INTERNATIONAL, Dec. 1, 1985 (available on NEXIS). As part of his war on drugs, President Reagan issued an executive order calling for each agency chief to establish random testing procedures for employees in "sensitive positions." *N.Y. Times*, Dec. 11, 1986, at A1, col. 1.

11. SYVA COMP., SYVA SYSTEMS AND SERVICES FOR ON-SITE DRUG DETENTION (1983).

12. SYVA COMP., FREQUENTLY ASKED QUESTIONS ABOUT SYVA AND DRUG ABUSE TESTING 8 (1986). The manufacturer of the EMIT test, the Syva Company, reports that the test detects drugs up to 19 days after use. *Id.* at 7.

Several successful testing challenges have been brought by public employees.¹³ These employees have argued that urinalysis tests are unreasonable searches and seizures banned by the fourth amendment. Federal courts generally have allowed testing of certain public employees in safety-related jobs when there was a particularized suspicion that the employees were drug users. Sometimes called "reasonable suspicion," this particularized suspicion has several formulations but is always less stringent a standard than probable cause. Two recent federal circuit court of appeals decisions would allow random testing,¹⁴ and some federal district court decisions have implied that random testing would be allowed if a drug problem were shown to exist among a certain group of workers in safety-related jobs.¹⁵

*City of Palm Bay v. Bauman*¹⁶ is the leading Florida case on public employee drug testing. In *Bauman*, the Fifth District Court of Appeal held that random testing of municipal fire fighters and police officers is improper, but that testing of those employees would be permissible if the reasonable suspicion standard was met.¹⁷

Before the *Bauman* decision, several cities had experimented with random testing of employees ranging from garbage collectors and sewer department workers to police officers.¹⁸ Post-*Bauman*, most Florida public employers likely will avoid random testing until its legality is decided conclusively. Several Florida employers, however, have interpreted *Bauman* to approve reasonable suspicion testing for *all* public employees, not only those whose drug use threatens public safety. The Florida Department of Law Enforcement and several major Florida cities have adopted the reasonable suspicion standard for all employees.¹⁹ While this means

13. *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. 5th DCA 1985).

14. *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 577 (1986); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

15. *Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986); *Lovvorn*, 647 F. Supp. at 882 (E.D. Tenn. 1986).

16. 475 So. 2d 1322 (Fla. 5th DCA 1985).

17. *Id.* at 1325.

18. Schwed, *supra* note 10.

19. Telephone interview with Al Dennis, Special Agent, Florida Department of Law Enforcement (Jan. 30, 1987). The Miami Police Department is a notable exception. The Department reinstated random, on-the-spot testing of all 1,087 of its officers this March. The Miami Herald, March 24, 1987, at 1B, col. 6.

that those employees are not subject to random testing, the blanket imposition of testing based on reasonable suspicion compromises the right of thousands of state and municipal employees such as clerical workers, secretaries and janitors to be free from unreasonable searches. These employees would be treated the same as armed police officers.

In this Note, the author analyzes *City of Palm Bay v. Bauman* in conjunction with federal case law. He advocates adoption of the reasonable suspicion standard for only those public employees whose human error threatens public safety, and concludes by proposing random testing by public employers who can show the existence of a drug problem among a specific, safety-threatening group of public employees.

I. THE *Bauman* DECISION

In June of 1983, the Fire Chief of the City of Palm Bay ordered all fire fighters to take annual physicals, including urine tests. The physicals were prompted when two fire fighters told the Fire Chief that they had used marijuana. The City later ordered that all fire fighters submit to urine testing or be dismissed.²⁰

In 1984, the Palm Bay City Manager and Chief of Police declared that all members of the police department would be subject to random urine tests. Those members who tested positive for "illegal substance" use would be subject to discipline or discharge. Members who refused to give a sample could be fired or otherwise disciplined. There apparently were no indications that any member of the Palm Bay Police Department had actually used illegal substances. Actions for declaratory and injunctive relief were brought in Brevard County Circuit Court.²¹

Circuit Judge Johnson recognized that fire fighters and police officers must be in control of all their mental and physical faculties on the job, and that public employees in general are subject to more regulation than private sector employees. The court further recognized that use of illegal substances by law enforcement officers undermines public confidence. On the other hand, Judge Johnson noted that non-probationary municipal employees deserve

20. *Bauman*, 475 So. 2d at 1323-24.

21. *Id.* at 1322-23, 1327.

constitutional protection from unjust and unlawful job deprivation.²²

Judge Johnson decided the case under the fourth amendment of the United States Constitution and the Florida parallel provision, article I, section 12 of the Florida Constitution.²³ Under the court's analysis, citizens have a reasonable expectation of privacy in their urine, and compelled urine tests constitute fourth amendment searches and seizures.²⁴

The next question was whether the testing was unreasonable when the private rights of the city workers were balanced against the immediate end sought by the city, in light of the "scope, nature, incidence and effect" of the testing. Since the city produced no evidence of illegal substance use by most of the employees involved, Judge Johnson decided that the testing was unreasonable; he held that urine testing to identify illegal substance users, administered other than at the annual physical examination or times specified by city personnel policy, may be required only "on the basis of probable cause." Judge Johnson defined "probable cause" as "reasonable suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the police officer or fire fighter to have been on the job using, or after having recently used, a controlled substance."²⁵ Furthermore, the city manager must designate persons authorized to require the

22. *Id.* at 1324 (citing *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla.), *cert. denied*, 464 U.S. 816 (1983)).

23. *Id.* at 1324-25. Because urine tests are not testimonial communications, the court stated that the fifth and fourteenth amendments to the United States Constitution and article I, section 9 of the Florida Constitution, which prohibit compelled self-incrimination in any criminal case, did not apply. *Id.* at 1324. *See also* *Storms v. Coughlin*, 600 F. Supp. 1214, 1217 n.2 (S.D.N.Y. 1984)(self-incrimination arguments by prisoners subjected to urinalysis rejected).

One other possible challenge to employee drug testing should be noted. A Louisiana federal district court has held that drug testing is "so fraught with dangers of false positive readings" as to violate due process rights. *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986); *See* *Capua v. City of Plainsfield*, 643 F. Supp. 1507 (D.N.J. 1986). The courts in *Von Raab* and *Capua*, however, also based their decisions on fourth amendment concerns. Apparently no federal court yet has upheld a urinalysis challenge based solely on due process grounds. It appears doubtful that a plaintiff could successfully challenge urinalysis on due process grounds unless he also prevailed under the fourth amendment.

24. *Bauman*, 475 So. 2d at 1324-25. The court pointed out that coerced production rendered the written "consent" obtained by the city invalid. *See also* *American Fed'n of Gov't Employees, AFL-CIO v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986)(governments may not condition employment on relinquishment of fourth amendment rights).

25. *Bauman*, 475 So. 2d at 1325.

tests. All other urine testing of police officers and fire fighters was permanently enjoined.²⁶

The Fifth District Court of Appeal affirmed the trial court's final judgment with two modifications. It described the circuit court's probable cause requirement as "too severe," and replaced it with the "reasonable suspicion" standard adopted by several federal courts. In order to satisfy the reasonable suspicion standard and vindicate the use of urine testing, the official imposing the test must "point to specific objective facts and rational inferences that they are entitled to draw from these facts in light of their experience."²⁷

Next, the court dispensed with a restriction allowing discipline only for on-duty intoxication. The court held that the city could prohibit controlled substances use at any time, either on or off the job. In support of this modification, the court cited evidence that the effects of marijuana use could be severe in both the long and short term, depending on the individual user and the potency of the marijuana. Further, the court reasoned that police officers lose credibility when they violate the laws they are hired to enforce, and should be disciplined for drug use whenever it occurs.²⁸

II. FEDERAL FOURTH AMENDMENT CASE LAW

The fourth amendment to the United States Constitution protects people from unreasonable searches of things in which they have a reasonable expectation of privacy and from unreasonable searches of the person.²⁹ The fourteenth amendment makes this right applicable to the States.³⁰ In determining whether drug testing is permissible under the fourth amendment, a court must decide whether the plaintiff had a reasonable expectation of privacy

26. *Id.*

27. *Id.* at 1325-26. Judge Orfinger, in the unanimous district court opinion, based his acquiescence to the federal standard on article I, section 12 of the Florida Constitution. That section addresses searches and seizures, and provides that it "shall be construed in conformity with the fourth amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12.

28. *Bauman*, 475 So. 2d at 1326.

29. *Carroll v. United States*, 267 U.S. 132, 147 (1925). Amendment IV of the United States Constitution provides:

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 an oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

30. *Wolf v. Colorado*, 338 U.S. 25, 26-28 (1949).

in the thing searched or seized and whether the intrusion was reasonable. In order to make these determinations, the interests of the public must be weighed against the individual's privacy interest.³¹

A. *Is There a Reasonable Expectation of Privacy in Urine?*

The *Bauman* trial court, affirmed by the Fifth District Court of Appeal and supported by most federal case law, found that all citizens have a reasonable expectation of privacy in the discharge and disposition of their urine.³² More than one federal court has concluded, however, that reasonable expectations of privacy may vary among people, and that all people do not enjoy the same degree of fourth amendment protection.³³

The United States Supreme Court has not yet decided whether people have a reasonable expectation of privacy in their urine. However, in *Schmerber v. California*,³⁴ the Court held that since blood samples taken from a drunken driving suspect for chemical analysis constitute a fourth amendment search and seizure, only reasonable takings would be allowed.³⁵

Several federal courts have cited *Schmerber* in deciding that persons have a reasonable expectation of privacy in their urine. In *McDonell v. Hunter*,³⁶ the Federal District Court for the Southern District of Iowa recognized that urine, unlike blood, can be taken without intrusion into the body. However, the court stressed that people ordinarily urinate under circumstances where they have a reasonable expectation of privacy, and that they certainly do not expect to have to surrender urine for testing.³⁷ The *McDonell* court also recognized that urine tests reveal personal information that has nothing to do with recent drug usage. Accordingly, the *McDonell* court concluded that governmental urine testing is a fourth

31. *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).

32. *Bauman*, 475 So. 2d at 1324.

33. See *Suscy*, 538 F.2d at 1267, cert. denied, 429 U.S. 1029 (1976); *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987).

34. 384 U.S. 757 (1966).

35. *Id.* at 767.

36. 612 F. Supp. 1122 (S.D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987).

37. *Id.* at 1127-28.

amendment seizure, subject to the *Schmerber* reasonableness requirement.³⁸

In *Storms v. Coughlin*,³⁹ another federal district court relied on *Schmerber* and asserted that "involuntary extraction of body fluids" made urine tests a bodily intrusion as defined in *Schmerber*. The court in *Storms* differentiated blood and urine tests from "traditional searches of clothing or possessions" and quoted *Schmerber* in holding that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid [searches involving intrusions beyond the body's surface] on the mere chance that desired evidence might be obtained."⁴⁰

While most courts have concluded that urine testing constitutes a fourth amendment search and seizure, some federal cases seem to hold that persons in certain occupations have no reasonable expectation of privacy, or have at most a diminished expectation of privacy.⁴¹ One could argue, however, that those courts really balanced the expectation of privacy all citizens have against the increased governmental interests in certain generally safety related situations. Since this involves essentially the same balancing analysis used to determine whether a particular seizure of urine was reasonable in light of governmental interests and the privacy expectation of the individual, both types of cases will be considered in the next section.

B. When is Testing Reasonable?

Given that citizens have a reasonable expectation of privacy in their urine, a court must decide whether the seizure of urine was

38. *Id.* See also *Capua v. City of Plainsfield*, 643 F. Supp. 1507, 1515 (D.N.J. 1986) (employers have no legitimate interest in access to some revelations of urinalysis, such as whether subject has diabetes or epilepsy).

39. 600 F. Supp. 1214 (S.D.N.Y. 1984).

40. *Id.* at 1218 (quoting *Schmerber*, 384 U.S. at 769-70). Indeed, most recent decisions have echoed the *McDonell* district court's application of *Schmerber* to urine testing. See *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985); *National Treasury Employees Union v. Von Raab*, 55 U.S.L.W. 2284 (E.D. La. 1986); *Capua*, 643 F. Supp. at 1507. *Railway Labor Executives' Ass'n v. Long Island R.R. Co.*, 651 F. Supp. 1284 (E.D.N.Y. 1987); *American Fed'n of Gov't Employees, AFL-CIO v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986). See also *McDonell*, 809 F.2d at 1302 (urine tests are less intrusive than blood tests, but still constitute fourth amendment searches and seizures). *But see Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1009 (D.C. 1985) (Nebeker, Assoc. J., concurring).

41. See *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975). Compare *McDonell*, 809 F.2d 1302 (prison employees in regular contact with inmates have diminished privacy interest in their urine).

reasonable under the circumstances. This is determined by balancing the claimant's fourth amendment rights against the governmental interest served by urinalysis testing. With a few limited exceptions, searches of private property or persons without consent are deemed unreasonable without a valid warrant.⁴² Federal courts generally have held urinalysis unreasonable in the absence of probable cause unless the government shows a safety interest served by testing. When a safety interest exists, courts have relaxed the government's burden of affirmatively demonstrating that drugs likely will be found, and sometimes have allowed random testing.

The first case involving urine testing of government employees was *Division 241 Amalgamated Transit Union v. Suscy*.⁴³ The plaintiff in *Suscy* was a union representing bus operators employed by the Chicago Transit Authority. The Authority required its operators to submit urine samples if they had been involved in "serious" accidents or if they were suspected of being under the influence of drugs or alcohol while on duty. No testing could be required under either event unless two supervisors agreed it was necessary.⁴⁴

The Seventh Circuit held that the Authority's interest in protecting bus patrons and the public at large was sufficient to deprive members of the union of *any* reasonable expectation of privacy regarding blood and urine testing. The opinion followed this unequivocal statement by pointing out the reasonableness of the Authority's policy proscribing testing absent prior accident or suspicion of use.⁴⁵

The court in *Suscy* approved the Chicago Transit Authority's urinalysis procedures, but exactly what else the Seventh Circuit would have allowed is unclear. If the court really meant that bus operators had *no* reasonable expectation of privacy, then random testing of all operators would have been permissible. However, if the court was saying that the operators' expectation of privacy was outweighed by the combination of the government's safety interest and the reasonableness of procedures for determining who would be required to take the tests, then random testing might not have been allowed.

42. *Coolidge v. New Hampshire*, 430 U.S. 443, 454-55 (1971).

43. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

44. *Id.* at 1267.

45. *Id.*

The district court opinion in *McDonell v. Hunter*⁴⁶ fairly represents the majority of the current federal law on public employee urinalysis. The plaintiff, an Iowa prison correctional officer, refused to submit a urine sample requested by his superiors. The Iowa Corrections Department had no written standards detailing when prison employees could be compelled to provide urine samples or who had authority to require samples. The Director and Chief Administrator of the Department of Corrections stated that urine samples were not requested as a practical matter unless there was "some articulable reason to believe that there may be a problem."⁴⁷ Provisions permitting random strip searches and automobile searches were also challenged.⁴⁸

After deciding that urinalysis was an intrusion into an area where plaintiff normally had a reasonable expectation of privacy, the district court recognized the state's interest in reducing the flow of contraband in the prison system and noted that the need for security justified some otherwise unreasonable intrusions. Security considerations did not, however, cause prison employees to "lose *all* of their fourth amendment rights at the prison gates."⁴⁹

The court found that the government's interest in security was sufficient to allow the use of pat-down searches or metal detector tests of all employees, but that the possibility of finding drugs was "far too attenuated to make seizures of body fluids constitutionally reasonable."⁵⁰ The Department of Corrections could require an employee to submit urine samples "only on the basis of reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances."⁵¹ The court also approved urine or blood

46. *McDonell*, 612 F. Supp. 1122 (S.D. Iowa 1984), *modified*, 809 F.2d 1302 (8th Cir. 1987).

47. *Id.* at 1126.

48. *Id.* at 1125.

49. *Id.* at 1128 (citing *Armstrong v. New York State Comm'r of Correction*, 545 F. Supp. 728, 730 (N.D.N.Y. 1982)(emphasis in original)).

50. *Id.* at 1130.

51. *Id.* (citing *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 426 U.S. 1029 (1976)). The court also found that a consent form which plaintiff had signed upon commencing employment at the prison could not be interpreted as a consent to an unreasonable search, and that "[a]dvance consent to future *unreasonable* searches is not a reasonable condition of employment." *Id.* at 1131 (emphasis in original).

Most recent cases have adopted the reasonable suspicion standard for employees whose errors have safety implications. See *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986)(police officers); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn.

samples taken as part of routine periodic or preemployment physical examinations.⁵²

The Eighth Circuit modified the district court opinion. The court agreed that urinalysis was a fourth amendment search and seizure, but pointed out that warrantless searches were acceptable under the fourth amendment when a legitimate government interest made a privacy intrusion reasonable. Since prisons are "fraught with serious security dangers,"⁵³ the court decided that the state had a legitimate interest in prison security. The majority also noted that drug-using employees could smuggle drugs to inmates and threaten security, and that drugs could impair prison employees' ability to handle dangerous guests.⁵⁴

The majority concluded that uniform and random testing was the only way to satisfactorily control employee drug use, and that urinalysis was the least intrusive method of detection available. Under this reasoning, the court modified the district court's order so that prison employees in regular contact with the prisoners could be tested either "uniformly or by systematic random selection," so long as selection of urinalysis subjects was not discriminatory or arbitrary. However, employees not in regular contact with prisoners could be tested only on the basis of reasonable suspicion that the employees had used controlled substances within twenty-four hours of the test.⁵⁵

Chief Judge Lay, dissenting, would have affirmed the district court. He recalled judicial approval of persecution of Japanese-Americans during World War II, and argued that courts should be loathe to "whittle away basic constitutional rights," lest they later regret rulings made "in times of hysteria."⁵⁶ Judge Lay criticized the majority's imposition of random testing without factual find-

1986)(firefighters); *Penny v. Kennedy*, 648 F. Supp. 815 (E.D. Tenn. 1986)(police officers); *Capua v. City of Plainsfield*, 643 F. Supp. 1507 (D.N.J. 1986)(police officers and fire fighters); *Railway Labor Executives' Associations v. Dole*, No. C-85-7958 CAL (N.D. Cal. 1985)(railroad employees). See also *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986)(police officers cannot be tested absent reasonable suspicion). Compare *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057 (5th Cir. 1987) (unclear whether reasonable suspicion or probable cause is required for testing of key U.S. Customs Service employees).

52. *McDonell*, 612 F. Supp. at 1132.

53. *McDonell*, 809 F.2d 1302 (8th Cir. 1987) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

54. *McDonell*, 809 F.2d 1302 (8th Cir. 1987).

55. *Id.* The court affirmed the district court's imposition of the reasonable cause standard for strip searches of prison employees.

56. *Id.* (Lay, C. J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

ings on the record to prove the institution's real needs. The Chief Judge concluded that the majority had succeeded only in "driv[ing] another nail into the coffin of discarded individual constitutional rights."⁵⁷

*Allen v. City of Marietta*⁵⁸ is another recent federal decision validating compelled urinalysis of government employees. After receiving reports of on-the-job drug use by employees who worked with high voltage wires and concluding that drug usage may have contributed to an unusually high number of employee injuries, the City Manager of Marietta hired an undercover agent to gather information about worker drug use. After a case was built against the plaintiffs, they were given the option of submitting to urinalysis or losing their jobs. All cooperated, tested positive, and were fired. It was unclear, however, whether these firings were based on the reports of the undercover agent or on the results of the urinalysis tests.⁵⁹

While recognizing that the employees had a reasonable expectation of privacy in their urine, the court in *Allen* upheld the urine tests as reasonable. The court distinguished the government's burden when acting as law enforcer from its burden as an employer. Although government employees have the same right as private sector employees to resist warrantless searches, the court held that the government has the same right as other employers to investigate potential misconduct relevant to the employee's job performance. Since the search was undertaken in a purely employment context, not in conjunction with any criminal investigation, and since plaintiffs had not been criminally charged as a result of the investigation, the tests were held valid. The court introduced the idea that the government as employer has a lesser burden of showing cause than the government as law enforcer.⁶⁰

57. *Id.* (Lay, C. J., dissenting).

58. 601 F. Supp. 482 (N.D. Ga. 1985).

59. *Id.* at 484-485.

60. *Id.* at 490-491. The court's reasoning in *Allen* that governmental searches which would be impermissible if performed by an enforcement branch may be permissible if conducted by a government employer has been criticized. For example, the district court in *McDonell* held that such a contention was meritless, and wrote that "[a]ll of us are protected by the fourth amendment all of the time, not just when police suspect us of criminal conduct." *McDonell*, 612 F. Supp. at 1127. *But see* *Capua v. City of Plainsfield*, 643 F. Supp. 1507 (D.N.J. 1986) (employers whose searches possibly could lead to later criminal prosecutions "must meet a much higher burden of reasonableness" in order for testing to be allowed).

Regardless of the validity of its employer versus enforcer rationale, the court in *Allen* could easily have reached the same conclusion under a reasonable suspicion model by rely-

*Turner v. Fraternal Order of Police*⁶¹ involved an order of the District of Columbia Metropolitan Police Department permitting any Department official to order any police officer or fire fighter suspected of drug use to submit to urinalysis. Police officers and firefighters could also be ordered to submit to urinalysis at the discretion of any member of the Board of Police and Fire Surgeons. The Circuit Court of Appeals for the District of Columbia considered only the facial constitutionality of the order.⁶²

In balancing the interests of the members of the Department against those of the government, the court focused on the safety interests involved. It cited *Committee for GI Rights v. Callaway*,⁶³ which upheld random drug inspections of armed services personnel conducted without probable cause or any particularized suspicion that the subjects of the inspections had been using drugs.⁶⁴ The court in *Turner* described the police force as a "para-military organization" and concluded that the Department's order was reasonable. The court did mandate that the suspicion or discretion used to justify testing be based on a "reasonable, objective basis," although that basis need not amount to probable cause.⁶⁵

The Third Circuit Court of Appeals upheld random urine testing of race horse jockeys in *Shoemaker v. Handel*.⁶⁶ Unlike decisions justifying privacy intrusions as necessary to further governmental safety interests, the court in *Shoemaker* held that horse racing, as a closely regulated industry, fell within an exception to the fourth amendment warrant requirement and that pervasive regulation had reduced participants' reasonable expectation of privacy. Fur-

ing on the "extremely hazardous" character of the plaintiff's work, and on the fact that the city had objective evidence that each of the plaintiffs had been using drugs on the job before they were asked to provide urine samples. The court mentioned the hazardous work rationale only briefly, in a conclusory manner. *Allen*, 601 F. Supp. at 491.

61. 500 A.2d 1005 (D.C. 1985).

62. *Id.* at 1006.

63. 518 F.2d 466 (D.C. Cir. 1975).

64. *Id.* at 477. The inspections in *Callaway* did not include urinalysis. The court in *Callaway* held that conditions peculiar to the military dictated different standards of reasonableness from those in civilian life, and based its decision that the inspections were reasonable on the following factors: (1) drug use diminishes the ability of the armed forces to protect the country's citizens; (2) a soldier's expectation of privacy is lowered by traditional inspections and extensive regulation; (3) the purpose of the drug inspections was to protect the health of the unit, not to punish, although punishment could follow incidental to discovery of drug use; (4) unannounced drug inspections are the best way to identify drug users; and (5) some measures were taken to guard the dignity and privacy of the soldier. *Id.* at 476-77.

65. *Turner*, 500 A.2d at 1008-1009.

66. *Shoemaker*, 795 F.2d 1136 (3d Cir.), cert. denied, 107 S. Ct. 577 (1986).

thermore, the court decided that New Jersey had a strong interest in maintaining public confidence in the integrity of the gambling industry. This interest was sufficient to override the jockeys' diminished expectation of privacy.⁶⁷

In *McDonell* and *Shoemaker*, circuit courts focused on the drug problems of particular employee groups rather than on problems of particular individuals working within those groups. Another recent federal case, *Jones v. McKenzie*,⁶⁸ alluded to the possibility of testing employees in drug-troubled areas despite the absence of particularized suspicion of those tested.

In 1984, the Transportation Division of the District of Columbia School System, charged with busing the District's school children, noted significant increases in absenteeism and traffic accidents among Division employees. Syringes and bloody needles had been found in restrooms used by Division employees. As part of an effort to alleviate the perceived drug problem, the Division instituted urinalysis testing of all employees in conjunction with annual physical examinations. Plaintiff Jones, employed by the Division to assist handicapped students on and off the bus, was fired when she tested positive. Prior to testing, the school system had no particularized suspicion that the plaintiff had ever used drugs, on or off the job.⁶⁹

The court in *Jones* found that plaintiff's termination was arbitrary and capricious. The court also found that the urinalysis was an unreasonable search under the fourth amendment, since a school bus attendant's reasonable expectation of privacy to be free from random urine testing was not outweighed by the school system's safety interest.⁷⁰ The court did, however, suggest that employees whose errors had more direct safety implications might be less protected, in that "school bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to [random] urine and blood tests"⁷¹

67. *Id.* at 1142.

68. 628 F. Supp. 1500 (D.D.C. 1986).

69. *Id.* at 1502-03.

70. *Jones*, 628 F. Supp. at 1508-09.

71. *Id.* at 1508. At least one other federal court has alluded to more lenient fourth amendment standards when a problem is shown among a particular group of employees in safety-threatening positions. In *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), for example, the court required reasonable suspicion for testing of Chattanooga fire department employees, but acknowledged the *Callaway* court's allowance of mass testing for members of the U.S. armed forces. The court in *Lovvorn* interpreted the *Callaway*

It would seem that the overwhelming majority of federal district courts hold that all public employees have at least some reasonable expectation of privacy in their urine. Federal decisions generally have held that one's expectation of privacy is at least partially outweighed when it interferes with public safety. If the employer had some particularized suspicion that the test will yield a positive result, most courts will allow the state to require urinalysis even in the absence of probable cause. Both recent decisions of the circuit courts of appeal allowed random testing. The *McDonell* court did so to protect the states' interest in prison security, while the *Shoemaker* court relied on the lowered expectation of privacy of participants in closely regulated industries.

III. ANALYSIS

Both public and private employers have a legitimate interest in maintaining a workforce unimpaired by drug use. If state and local governments did not have to contend with the constitutional rights of its employees, random urinalysis of all employees would be a most efficient, cost-effective management tool.⁷² Fortunately, however, public employers must act within the confines of the fourth and fourteenth amendments, and may not conduct unreasonable searches where employees have a reasonable expectation of privacy.⁷³

All citizens should have a reasonable expectation of privacy in their urine.⁷⁴ The whole urinalysis process intrudes on the privacy and dignity of those tested. Witnesses sometimes actually watch subjects urinate into vials to prevent employees from submitting "clean" samples rather than their own urine.⁷⁵ Apart from the indignity involved in the actual testing procedure, urinalysis reveals

decision to allow testing because increases in drug abuse in the armed forces threatens public security. The court in *Louvorn* found that the city did not show that its fire department had so threatened the public safety, and implied that fire fighters thus have a greater expectation of privacy than do members of the armed forces. *Id.* at 882. The court's language, however, may foreshadow a future ruling favorable to some public employer who could show that drug use among employees threatened public safety.

72. Unconstitutional searches are often very effective, which "is why King George III's men so frequently searched the colonists." *McDonell v. Hunter*, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985).

73. Unfortunately, the fourth amendment applies only to governmental action, so private employers may usually test as they please. See *American Fed'n of Gov't Employees, AFL-CIO v. Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986).

74. *Capua v. City of Plainsfield*, 643 F. Supp. 1507, 1517-18 (D.N.J. 1986).

75. *Louvorn*, 647 F. Supp. at 877; *Weinberger*, 651 F. Supp. 726.

personal information which has nothing to do with the employee's performance on the job.⁷⁶ Finally, a positive result does not prove that an employee has used drugs recently, or that he has ever used them to the point of impairment.⁷⁷

Of course, the government does have the responsibility to protect its citizens from all illegal drugs, including those used by government employees. Law enforcement branches of government must adhere to probable cause and warrant restrictions prior to searching citizens. The question is when, if ever, is the government's interest in ferreting out employee drug use sufficient to justify relaxation of or release from the probable cause standard?

The court in *Bauman* decided that a city could not employ random urinalysis testing under the facts of that case. However, it did validate testing of individual police officers and fire fighters on a "reasonable suspicion" showing. A public employer could meet the reasonable suspicion standard by showing specific facts which, in light of his experience, led to the conclusion that testing of a particular employee was necessary.⁷⁸

The court's adoption in *Bauman* of the reasonable suspicion standard is a valid relaxation of the fourth amendment requirement of obtaining a warrant based on probable cause. Most federal decisions have allowed testing on reasonable suspicion of drug use by public employees whose human error threatens public safety. As adopted by the court in *Bauman* and by the federal courts, the reasonable suspicion standard facilitates removal of dangerous employees from safety-threatening positions without subjecting all employees to the intrusions of random testing.

Despite its overall onerousness, random testing has a valid place in the public workforce. The government's safety interest outweighs the privacy rights of individual workers when there is objective evidence of drug impairment among a specific group of workers whose human error poses safety problems. Random testing should be allowed in these situations to avoid the very real threat of catastrophic injury. In *Jones v. McKenzie*, significant increases in accidents and absenteeism, as well as the discovery of drug paraphernalia on work premises in places frequented by Transportation Division Employees, led school board officials to institute random testing.⁷⁹ The evidence in *Jones v. McKenzie* may exemplify

76. See *supra* note 38 and accompanying text.

77. See *supra* note 12 and accompanying text.

78. *Bauman*, 475 So. 2d at 1325.

79. 628 F. Supp. 1500, 1507-08 (D.D.C. 1986).

the standard of objectivity sufficient to justify random testing of safety-threatening employees.

Random urinalysis forces dedicated employees to prove their innocence.⁸⁰ It is unquestionably intrusive and can be justified by only the most important government interests. When drug-induced accidents can cause death or bodily injury to others, the worker's right to be free from urinalysis no longer outweighs the government's public safety interests. Further, the reasonable suspicion standard requires objective evidence, usually in the form of aberrant behavior or other evidence of on-the-job drug use. However, the effects of drug use can remain for some time after manifestations of impairment have passed.⁸¹ Random testing, then, would expose dangerous habits that otherwise would go undetected under the reasonable suspicion standard. Although some public workers were found to have a constitutional right in *Bauman* to stay on the public payroll, workers whose habits endanger the lives of other people should be forced to work in less critical areas. The right to keep a state or municipal job cannot interfere with the right of others to live in safety.

It should be noted that random testing is advocated only when a drug problem is shown by objective evidence in a workplace where human error has safety implications. Applying these criteria to the facts in *Bauman*, where prior to testing only two employees were known to have used drugs in the police and fire departments combined, random testing would not be permitted. Conversely, the well-documented propensity of Miami police towards drug use and drug-related corruption⁸² might make employees of the Miami Police Department prime candidates for random testing.

Although no federal court has clearly enunciated this standard for random testing, support can be drawn from several federal decisions. The court in *Jones v. McKenzie* ruled against the school

80. *Bauman*, 475 So. 2d at 1325.

81. There is growing evidence that off-duty, as well as on-the-job use, is dangerous. A preliminary study conducted by Stanford University School of Medicine and the Palo Alto Veterans Administration Medical Center reported that pilots performed at potentially dangerous levels 24 hours after smoking marijuana, after noticeable signs of impairment had passed. Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325-29 (1985).

82. Over the past few years, many Miami Police Officers have been fired or arrested for "everything from drug use to cocaine trafficking." The Miami Herald, March 24, 1987, at 1B, col. 6. Seven current or former Miami police officers are now facing charges of running a million dollar cocaine ring which resulted in three deaths. The Miami Herald, April 8, 1987, at 3B, col. 2.

system in favor of a nonsafety-threatening school bus attendant, but it opened the door for random testing in situations where a sufficient safety interest is shown. Presumably because of the strong evidence of a drug problem among Division employees involved in public safety, the court implied that random testing might have been permissible had public safety been threatened.⁸³

The circuit court in *McDonell* allowed random testing of prison employees who had regular contact with inmates. While the existence of a drug problem among the prison employees is not clear from the opinion, the evidence of workplace safety considerations is undeniable. Moreover, the court in *Bauman* stated that admitted drug use by two employees did not constitute a "legal springboard" sufficient to justify random testing. This implies that there is some quantum of objective evidence of departmental drug problems that would have been sufficient to constitute such a "legal springboard."⁸⁴

At least one writer has proposed that the *Bauman* decision imposes the reasonable suspicion standard for urinalysis testing of all public employees. This interpretation was based on that portion of the opinion which "alluded to the high standards of conduct and job performance that a public employer has the right to expect of all its employees, not simply police and firefighters."⁸⁵ Several of Florida's largest public employers have adopted this blanket interpretation in drafting their own drug policies.⁸⁶

A fair reading of the *Bauman* decision can lead only to the conclusion that the Fifth District Court of Appeals intended to allow use of the reasonable suspicion standard for employees in safety-threatening positions only. In the first place, the final judgment handed down by the circuit court and modified by the Fifth District was specifically addressed to fire fighters and police officers, not public employees in general.⁸⁷ Secondly, although the decision

83. *Jones*, 628 F. Supp. 1500 (D.D.C. 1986).

84. *Id.*

85. *Helsby, Drug Testing in the Work Place*, FLORIDA B. J. June, 1986, at 74 (emphasis in original). See also Note, *Drug Testing: America's New Work Ethic?* 15 STETSON L. REV. 883, 907-08 (1986) (interprets *Bauman* to apply reasonable suspicion standard to all public employees). This view apparently is grounded in the trial court's statement, affirmed by the Fifth District Court of Appeals, that "[public] employees are legitimately subject to more regulation of their activities than the general populace." *Bauman*, 475 So. 2d at 1324. Compare *Committee for GI Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (members of the armed forces are subject to more regulation, so they have a lower expectation of privacy than civilians).

86. See *supra* note 19 and accompanying text.

87. *Bauman*, 475 So. 2d at 1325.

occasionally referred to "employees" rather than "fire fighters and police officers," the term "employees" was always discussed in the context of situations involving police officers and fire fighters, or in policy arguments that could not apply to the public workforce as a whole.

Finally, the court in *Bauman* clearly attempted to follow existing federal case law regarding the reasonable suspicion standard.⁸⁸ While many decisions have approved the reasonable suspicion standard for employees in safety-threatening jobs, none have allowed the imposition of a reasonable suspicion standard on all public workers. Certainly the court's statement in *Bauman* that public employees are subject to more regulation than their private sector counterparts cannot justify blanket invalidation of the fourth amendment rights of the public workforce.

If the *Bauman* decision would allow public employers to subject all employees to compelled urinalysis on reasonable suspicion, it is flawed. It is entirely unreasonable to diminish constitutional rights based solely on the supposed right of the state to expect good performance from its employees. Only the most fundamental interest in human safety is sufficiently compelling to override the individual employee's constitutionally protected right to be free from searches not supported by probable cause. Nonsafety costs of drug abuse such as theft, absences, accidents, substandard work and bad public image, should be attacked by government employers through the same channels used to discipline and discharge those nondrug-using employees who commit similar offenses.

IV. CONCLUSION

Employee drug use has struck fear in the hearts of America's private and public employers. Each year, drug-induced human error costs our economy billions of dollars. The problem is especially alarming when human error causes injury and death. Random urinalysis has proven one of the most effective methods for reducing the number of drug-related accidents. Florida municipal and state employers have instituted a variety of drug testing policies.

Although private employers apparently may test employees at will, public employers must operate within the confines of the fourth amendment. That provision protects citizens from unrea-

88. The majority in *Bauman* explicitly followed the leading federal cases and noted that the Florida Constitution provided that its search and seizure provisions should be construed so as to conform with federal decisions. *Id.* at 1326 n.1.

sonable governmental searches of areas in which they possess a reasonable expectation of privacy. Since people have a reasonable expectation of privacy in their urine, public employers may test employees only when the state interest furthered by testing outweighs the individual's right to be free from such tests.

Searches of areas in which a person has a reasonable expectation of privacy usually are deemed unreasonable unless there is probable cause that the prospective subject will test positively for illegal substances. Federal courts generally have relaxed the probable cause requirement to "reasonable suspicion" when public safety is implicated, and have in some instances allowed random testing. The "reasonable suspicion" standard is met when an employer has a particularized suspicion that a certain employee will test positive for illegal substance use.

Illegal drugs threaten our society. Still, media hype and public outcry should not pressure courts into abandoning constitutional protections. Public employees occupying nonsafety-related jobs should enjoy full fourth amendment rights, and should not be subjected to unwarranted testing. Public employers can deal with absenteeism, incompetency, employee theft, and other common employment problems without engaging in constitutionally repugnant witch hunts.

However, the public employee's right to be free from urinalysis is overridden by the right of others to live in safety. When public safety is threatened by an objectively proven drug problem, employees may have to choose between the right to keep a dangerous job and the right to avoid forced urine tests.

The Florida Fifth District Court of Appeal recognized this distinction in *City of Palm Bay v. Bauman*. The court in *Bauman* held that municipal police officers and fire fighters ordinarily could not be subjected to random urinalysis, but indicated that testing based on reasonable suspicion would be allowed. The best reading of the case permits reasonable suspicion testing of employees in safety-threatening positions only.

In addition, random testing should be allowed when a drug problem is shown to exist among a specific group of public employees whose human error has safety-threatening implications. While random testing was not necessary under the *Bauman* facts, public employers should not be forced to wait until catastrophe strikes to identify the source of a problem known to exist. Where safety-threatening problems are shown, the government's interest in protecting the public outweighs the privacy right of workers. This in-

terest warrants compelling employees in safety-threatening jobs either to submit to testing or to transfer to less dangerous public positions.

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