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1990]

CONSTITUTIONAL LAW—ISSUES INVOLVED IN THE DISMISSAL OF  
POLICE OFFICERS BASED ON REFUSAL TO SUBMIT TO DRUG  
URINALYSIS TESTING

*Fraternal Order of Police Lodge No. 5 v. Tucker* (1989)

I. INTRODUCTION

As part of the nation's "War on Drugs," many public and private employers have instituted urinalysis testing to detect drug use among their employees.<sup>1</sup> In response, employees and their representatives have raised numerous constitutional challenges to the legality of these drug testing initiatives.<sup>2</sup> The nation's courts, struggling in recent years to prescribe the constitutional standards by which employee drug testing cases are to be decided, have issued varying decisions on the legality of drug testing in the workplace.<sup>3</sup> The legal issues raised by public-sec-

1. See Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem If Competing Interests of Employer and Employee Are Equitably Balanced*, 25 DUQ. L. REV. 597, 603 n.8 (1987). In 1986, President Reagan set the example by signing an executive order mandating a drug-free workplace in the federal government, the nation's largest employer. The order required the head of each executive agency to establish a drug testing program for employees. Exec. Order No. 12,564, 3 C.F.R. 224 (1986), *reprinted in* 5 U.S.C. § 7301 (1988).

2. Drug testing of employees has been constitutionally challenged as violative of the fourth amendment (unreasonable search and seizure), the fifth amendment (protection against self-incrimination), the ninth amendment (protection of liberty), the fourteenth amendment (due process rights and equal protection) and the penumbral right of privacy. See *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 567-608 (1988); see also Comment, *supra* note 1, at 691-833 (assessing constitutionality of employee drug testing under fourth amendment, due process clause, right of privacy and equal protection clause). See generally Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing*, 11 NOVA L. REV. 307 (1987); Note, *Mandatory Drug Testing of Public Sector Employees: Constitutional Implications*, 65 U. DET. L. REV. 315 (1988).

3. See *Policeman's Benevolent Ass'n of New Jersey v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (allowing random testing of police officers), *cert. denied*, 109 S. Ct. 1637 (1989); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir.) (prohibiting random testing of police officers absent reasonable suspicion), *reh'g granted and judgment vacated*, 862 F.2d 567 (6th Cir. 1988); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir.) (prohibiting random testing of fire fighters absent reasonable suspicion), *reh'g granted and judgment vacated*, 861 F.2d 1388 (6th Cir. 1988); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (allowing random testing of nuclear power plant employees); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988) (upholding "reasonable suspicion" testing of police officer), *cert. denied*, 109 S. Ct. 1636 (1989); *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988) (prohibiting testing of railroad employees after major accidents absent reasonable suspicion), *rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989);

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tor employee drug testing are not limited solely to the question of whether an employee can or cannot lawfully be required to submit to urinalysis, but also include questions as to what procedural due process must be afforded an employee before he or she is dismissed for refusing to submit.<sup>4</sup>

In *Fraternal Order of Police Lodge No. 5 v. Tucker*,<sup>5</sup> four police officers claimed that their dismissals for disobeying an order to submit to urinalysis violated their fourteenth amendment right to procedural due process, and that the order itself violated their fourth amendment right to be free from unreasonable searches and seizures.<sup>6</sup> Although the United States Court of Appeals for the Third Circuit held that the order to submit to urinalysis was not violative of the fourth amendment, it also held that the police officers' dismissal without being given sufficient information to make a meaningful response to the charges against them was violative of their due process rights.<sup>7</sup> It is submitted that the Third Circuit has provided public employers and their attorneys with a useful guide on the constitutional standards to be applied by courts in the Third Circuit when determining the constitutionality of public employee

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Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) (allowing reasonable suspicion testing of fire fighter); Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987) (allowing random testing of school bus attendants), *cert. granted and judgment vacated sub nom.* Jenkins v. Jones, 109 S. Ct. 1633 (1989); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987) (allowing testing of all candidates for promotion or appointment to certain Customs Service jobs), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989); Mack v. United States, 814 F.2d 120 (2d Cir. 1987) (allowing reasonable suspicion testing of FBI agent); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (allowing random testing of certain correctional officers); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.) (allowing random testing of jockeys), *cert. denied*, 479 U.S. 986 (1986); Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.) (allowing testing of bus drivers after accident absent reasonable suspicion), *cert. denied*, 429 U.S. 1029 (1976).

4. The fifth and fourteenth amendments provide that no person shall be deprived of "life, liberty, or property" without due process of law. U.S. CONST. amends. V & XIV, § 1. For a discussion of the due process issues involved in employee urinalysis testing, see *Yellow Rows of Test Tubes: Due Process Constraints on Discharges of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV. 1623 (1987).

5. 868 F.2d 74 (3d Cir. 1989).

6. *Id.* at 76. The four police officers sued the City of Philadelphia and its police commissioner, Kevin M. Tucker, alleging violations of their constitutional rights. *Id.* For a discussion of the facts of *Tucker*, see *infra* notes 9-25 and accompanying text.

7. *Tucker*, 868 F.2d at 77-83. The case was argued before Circuit Judges Stapleton, Scirica and Cowen. *Id.* at 76. Judge Stapleton wrote the opinion of the court. *Id.* Judge Cowen filed a separate opinion in which he concurred in part and dissented in part from the majority's opinion. *Id.* at 83 (Cowen, J., concurring and dissenting). For a discussion of the Third Circuit's holding and rationale in *Tucker*, see *infra* notes 26-65 and accompanying text.

dismissals based on employees' refusal to submit to urinalysis testing.<sup>8</sup>

## II. FACTS

On February 26, 1986, the Philadelphia police department received an anonymous telephone call from a "West Philadelphia community leader" reporting that numerous area residents had observed police officers congregating and behaving unusually behind neighborhood tennis courts.<sup>9</sup> The police department's Internal Affairs Division began an investigation, sending out a surveillance team to observe the area.<sup>10</sup> After observing the area from February 27 to March 17, the investigators determined that four particular officers were spending a substantial amount of time behind the tennis courts.<sup>11</sup> The surveillance team had observed a small flash of fire on one occasion and several instances of both "reckless" and "bizarre" driving by the police officers in question.<sup>12</sup> During a subsequent inspection of the site, the surveillance team recovered various items which were later identified by the police narcotics unit as items consistent with the use of "crack" cocaine.<sup>13</sup>

As a result of this investigation, the four officers were called to police headquarters on March 17, 1986 and asked to submit to urinalysis.<sup>14</sup> Upon their refusal, the Police Commissioner ordered them to submit to the test, but the four officers, on the advice of counsel, again refused.<sup>15</sup> The four officers were then suspended with intent to dismiss.<sup>16</sup> The police department subsequently issued a press release which stated that the officers had been suspended for refusing an order to submit to urinalysis testing based on suspected drug use.<sup>17</sup> The four suspended

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8. For an analysis of the *Tucker* court's opinion, see *infra* notes 66-83 and accompanying text.

9. *Tucker*, 868 F.2d at 76. The caller claimed that people were afraid of the officers, as they were apparently using drugs and "acting crazy." *Id.*

10. *Id.*

11. *Id.* While the surveillance team was able to identify the officers, it could not get close enough to determine specifically what the officers were doing behind the tennis courts. *Id.*

12. *Id.*

13. *Tucker*, 868 F.2d at 76. The surveillance team recovered a partially burned police report, a burned bottle cap and a straw. *Id.* The recovered items were taken to the Internal Affairs Division headquarters to determine whether they had been used to consume drugs. *Id.* The police department's chemical laboratory advised that the items would be "worthless as evidence," and the items were discarded. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* The suspensions were without pay for 30 days pending dismissal. *Id.* On April 4, 1986, the officers were served with formal notices of intention to dismiss which charged them with refusing to submit to urinalysis, falsifying police logs and being out of their assigned duty sectors. *Id.* at 77.

17. *Id.* at 76. The contents of the press release, including photographs of the four officers, were subsequently printed in newspapers and broadcast on local television news shows. *Id.*

officers immediately challenged their suspensions and dismissals by filing a grievance with the police department.<sup>18</sup> After the grievance was denied by the Police Commissioner, the matter was submitted to binding arbitration wherein the grievance was sustained and the officers' dismissals ruled improper.<sup>19</sup>

In March 1987, the four police officers and their union brought an action in the United States District Court for the Eastern District of Pennsylvania, alleging that the officers had been deprived of constitutional rights.<sup>20</sup> The officers claimed that the defendants, Police Commissioner Tucker and the City of Philadelphia, had violated their fourth amendment right to be free from unreasonable searches by demanding that they submit to urinalysis.<sup>21</sup> Prior to trial, the district court granted the defendants summary judgment on the officers' fourth amendment claim.<sup>22</sup> Remaining for trial was the officers' claim that the City and

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18. *Id.* at 77. The grievance was filed pursuant to a collective bargaining agreement between the police officers' union and the City of Philadelphia. *Id.*

19. *Id.* On January 27, 1987, the arbitrator ruled that the city lacked authority under the collective bargaining agreement to order the officers to submit to urinalysis. *Id.* Thus, the dismissal of the officers for refusing to submit to urinalysis was ruled improper. *Id.* The arbitrator reasoned that, in the absence of any written authorization or rule on compulsory drug testing in the Philadelphia Home Rule Charter, the order to submit to urinalysis was unlawful as an information gathering procedure. *Id.* at 77 n.2. The arbitrator's decision in favor of the police officers was subsequently affirmed by the Philadelphia County Court of Common Pleas and that court's decision was affirmed by the Commonwealth Court of Pennsylvania. See *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 114 Pa. Commw. 96, 538 A.2d 131 (1988).

The City of Philadelphia has since instituted a written directive detailing the implementation of a urinalysis drug screening program. The police officers' union has sought to enjoin implementation of the program, but has failed in both the federal and state court systems. See *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 88-8511 (E.D. Pa. Apr. 7, 1989) (1989 WL 33870); *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 125 Pa. Commw. 209, 557 A.2d 805 (1989).

20. *Tucker*, 868 F.2d at 77.

21. *Id.* The fourth amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. For a discussion of the Third Circuit's decision on the officers' fourth amendment claim, see *infra* notes 26-32 and accompanying text.

22. *Tucker*, 868 F.2d at 77. While ruling on the pre-trial summary judgment motion, the district court first determined that urinalysis testing is a search and seizure within the meaning of the fourth amendment. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 87-1430 (E.D. Pa. Apr. 6, 1988) (1988 WL 33882); accord *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412-13 (1989); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1143 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1636 (1989). Having determined that urinalysis is a search subject to fourth amendment constraints, the district court, in order to determine whether the order was reasonable, weighed the privacy interests of the police officers against the City's interest in maintaining a drug-free police force. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 87-1430 (E.D. Pa. Apr. 6, 1988) (1988 WL 33882). With these competing interests in mind, the district court found that, in order for compelled urinalysis to be a

Police Commissioner had violated the officers' right to procedural due process by having deprived them of their property interests in their jobs and their liberty interests in their good names and reputations, without having provided the officers with a meaningful opportunity to respond to the charges against them.<sup>23</sup> After a trial, the district court entered judgment for the defendants on the officers' due process claims.<sup>24</sup> The four police officers and their union then appealed to the United States Court of Appeals for the Third Circuit.<sup>25</sup>

### III. DISCUSSION

In *Tucker*, the Third Circuit began its analysis by addressing the police officers' assertion that the investigation conducted by the police department did not give rise to a "reasonable suspicion" of drug use.<sup>26</sup>

*reasonable* search and seizure, the City would need to have a reasonable suspicion that a police officer was under the influence of drugs while on the job. *Id.* The requirement of "reasonable suspicion" has been the generally accepted standard applied by courts in determining the constitutionality of employee urinalysis testing under the fourth amendment. See Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063, 1072-76 (1987); Note, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969, 992-98 (1988).

Applying the "reasonable suspicion" standard to the facts of the case, the district court found that the City of Philadelphia had reasonable suspicion to believe that the four police officers were using drugs while on duty. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 87-1430 (E.D. Pa. Apr. 6, 1988) (1988 WL 33882). Therefore, the district court found that the urinalysis order did not violate the officers' fourth amendment right to be free from unreasonable searches and seizures. *Id.* Accordingly, the district court granted the City and Police Commissioner summary judgment on the officers' search and seizure claim. *Id.* The Third Circuit affirmed the district court's grant of summary judgment in favor of the defendants on this issue. *Tucker*, 868 F.2d at 76. For a discussion of the Third Circuit's application of the "reasonable suspicion" standard, see *infra* notes 26-32 and accompanying text.

23. *Tucker*, 868 F.2d at 77. For a discussion of the Third Circuit's decision on the officers' due process claims, see *infra* notes 33-59 and accompanying text.

24. *Tucker*, 868 F.2d at 77. See *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 87-1430, slip op. at 6 (E.D. Pa. May 23, 1988) (judgment entered for defendants on procedural due process claims).

25. *Tucker*, 868 F.2d at 77. The Third Circuit affirmed the district court's judgments for the defendants on the officers' fourth amendment and deprivation of liberty without due process claims. *Id.* at 78, 82. The Third Circuit reversed the district court's judgment for the defendants on the officers' claim that they were deprived of their property interests in their jobs without procedural due process, however, and remanded the case for further proceedings consistent with its opinion. *Id.* at 83. For a full discussion of the Third Circuit's holding and rationale in *Tucker*, see *infra* notes 26-59 and accompanying text. For a discussion of the district court's decision on remand, see *infra* note 52.

26. *Tucker*, 868 F.2d at 77. The district court found that the City and Police Commissioner had a reasonable suspicion of drug use by the four police officers and entered summary judgment for the defendants on the officers' unreasonable search and seizure claim. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 87-1430 (E.D. Pa. Apr. 6, 1988) (1988 WL 33882). For a discussion

The court evaluated whether the defendants' suspicion of the officers' drug use was reasonable by applying the objective standard established by the Third Circuit in *Copeland v. Philadelphia Police Department*.<sup>27</sup> The *Copeland* court had determined that the important factors in evaluating whether the suspicion of a police officer's drug use was reasonable were "'(1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof.'"<sup>28</sup>

The *Tucker* court, applying the *Copeland* factors, found that the anonymous telephone tip did come from an apparently reliable source ("the West Philadelphia community leader") and that the tip included detailed accounts of observations made by several people on a number of different occasions (neighborhood residents' statements about the officers' unusual behavior).<sup>29</sup> The court held that this information, combined with the subsequent corroborating observations of the surveillance team, satisfied the objective test used to evaluate whether the suspicion of the officers' drug use was reasonable.<sup>30</sup> Thus, finding that the Police Commissioner did have a reasonable suspicion of on-duty drug use by the four officers, the *Tucker* court held that the urinalysis order was not violative of the fourth amendment.<sup>31</sup> The Third Circuit therefore af-

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of the district court's use of the "reasonable suspicion" standard, see *supra* note 22.

27. 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1636 (1989).

The *Tucker* court held that the *Copeland* "reasonable suspicion" test was applicable because the urinalysis testing of the four officers was not ordered pursuant to a random drug urinalysis program of the type approved by the Third Circuit in *Shoemaker v. Handel*. *Tucker*, 868 F.2d at 77 (citing *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) and *Policeman's Benevolent Ass'n of New Jersey v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989)). *Shoemaker* and *Washington* involved defined drug testing programs, whereas in *Tucker* the City of Philadelphia did not as yet have a written, operative drug testing program for its police officers. For a discussion of the City of Philadelphia's efforts to implement such a program, see *supra* note 19.

In *Copeland*, a Philadelphia police officer had similarly challenged a urinalysis test ordered by the Police Commissioner as a violation of his fourth amendment right to be free from unreasonable searches and seizures. *Copeland*, 840 F.2d at 1143. The police department had conducted an investigation of the officer after a fellow police officer had accused him of using illegal drugs in her presence. *Id.* at 1142. Subsequently, the accused officer submitted to urinalysis as ordered, and tested positive for marijuana. *Id.* The Third Circuit objectively evaluated the information gathered in the investigation of the officer and held that the police department did have a reasonable suspicion that the officer was using illegal drugs. *Id.* at 1144. The order for him to submit to urinalysis was thus found to be constitutional under the fourth amendment. *Id.*

28. *Copeland*, 840 F.2d at 1144 (quoting *Security & Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 205 (2d Cir. 1984)).

29. *Tucker*, 868 F.2d at 78. For a discussion of the anonymous tip and the police department's investigation, see *supra* notes 9-13 and accompanying text.

30. *Tucker*, 868 F.2d at 78.

31. *Id.*

firmed the district court's grant of summary judgment for the defendants on the officers' fourth amendment claim.<sup>32</sup>

The *Tucker* court then turned its attention to the officers' claim that they were deprived of their property interests in their jobs without due process of law.<sup>33</sup> The Third Circuit began by listing the district court's findings of fact and conclusions of law concerning the process afforded the police officers on March 17, 1986, the day they refused the urinalysis order and were subsequently suspended with intent to dismiss.<sup>34</sup> The Third Circuit interpreted the district court's opinion as finding that the officers were warned that refusal of the urinalysis order could result in discipline, that they therefore had an opportunity to state any objections and that their only response was to refuse to obey the order.<sup>35</sup> The court held that these findings of the district court were not clearly erroneous and used them as a basis for analyzing whether the process afforded the plaintiffs met the standards of the fourteenth amendment.<sup>36</sup>

32. *Id.* Judge Cowen, who concurred in part and dissented in part from the majority opinion, agreed that the defendants had sufficient evidence to establish a reasonable suspicion that the officers were using drugs. *Id.* at 83 (Cowen, J., concurring and dissenting).

33. *Id.* at 78. The defendants conceded that the plaintiffs had cognizable property interests in their positions as police officers that were sufficient to trigger the fourteenth amendment's procedural due process protection. *Id.* at 79 (citations omitted). Since this issue was not contested in *Tucker*, the Third Circuit did not provide any guidelines for determining when a public employee has a property interest in his or her job. Most public employees do have a property interest in their employment. *Yellow Rows of Test Tubes*, *supra* note 4, at 1624. For a discussion of employment as a property interest, see *id.* at 1635-37.

34. *Tucker*, 868 F.2d at 78. As required by Rule 52(a) of the Federal Rules of Civil Procedure in all actions tried without a jury, the district court listed its findings of fact and conclusions of law separately. Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, No. 87-1430 (E.D. Pa. May 23, 1988). This separation of factual findings and legal conclusions became a key issue in Judge Cowen's opinion. *Tucker*, 868 F.2d at 86 (Cowen, J., concurring and dissenting). Judge Cowen, disagreeing with the majority's interpretation of the district court's opinion, stated that "[b]y reviewing all of the district court's 'findings' for clear error, the majority erroneously transforms the legal conclusions of the district court into findings of fact." *Id.* (Cowen, J., concurring and dissenting). For a discussion of Judge Cowen's disagreement with the majority holding, see *infra* note 43.

35. *Tucker*, 868 F.2d at 79. The district court had concluded that the police officers' opportunity to respond to the urinalysis order was manifested in their refusal to obey the order. Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, No. 87-1430, slip op. at 5 (E.D. Pa. May 23, 1988). The district court wrote that "[h]aving chosen to respond in this manner, plaintiffs cannot claim lack of opportunity to respond to the charges." *Id.* The district court thus entered judgment for the defendants on the police officers' claim that they were deprived of their property interests in their jobs without due process of law. *Id.* at 6.

36. *Tucker*, 868 F.2d at 79. The "clearly erroneous" standard applied by the court is required by Rule 52(a) of the Federal Rules of Civil Procedure, which states in part that "[f]indings of fact . . . shall not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a).



The *Tucker* court framed its analysis by first discussing three prior cases which explained the due process required before a public employee could be deprived of his property interest in his job.<sup>37</sup> First, the court noted that, in *Cleveland Board of Education v. Loudermill*,<sup>38</sup> the Supreme Court had held that a public employee with a property interest in his job is entitled to a pretermination hearing consisting of "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."<sup>39</sup> Next, the *Tucker* court cited two Third Circuit cases in which the court had found the pretermination procedures afforded dismissed Philadelphia police officers to have been constitutionally adequate.<sup>40</sup> In both of these cases, the officers had been informed of the charges against them and given an opportunity to explain their side of the story, which met the due process requirements of notice and an opportunity to be heard.<sup>41</sup>

Applying the *Loudermill* and Third Circuit decisions to the district court's findings, the *Tucker* court agreed that the oral warning given to the plaintiffs stating that they would be disciplined for refusing the urinalysis order constituted adequate notice, and that the officers had a sufficient opportunity to state any objections they might then have had to the proposed discipline.<sup>42</sup> Thus, the court found that the process

37. *Tucker*, 868 F.2d at 79. For a discussion of these cases, see *infra* notes 38-41 and accompanying text.

38. 470 U.S. 532 (1985).

39. *Tucker*, 868 F.2d at 79 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). In *Loudermill*, the Supreme Court held that two school district employees had been denied due process when they were fired without a pretermination opportunity to respond to the charges against them. *Loudermill*, 470 U.S. at 547. The Court explained that the required pretermination hearing need not be elaborate or formal so long as it afforded the employee an opportunity to make any "plausible arguments that might . . . prevent [the] discharge." *Id.* at 544-45. For a full discussion of *Loudermill*, see Bethel, *Recent Labor Law Decisions of the Supreme Court*, 45 MD. L. REV. 179, 229-35 (1986).

40. *Tucker*, 868 F.2d at 79. The court referred to *Gniotek v. City of Philadelphia* and *Copeland v. Philadelphia Police Department*. *Id.* (citing *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) and *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1636 (1989)). In *Gniotek*, six police officers charged with receiving unlawful bribes were suspended with intent to dismiss. *Gniotek*, 808 F.2d at 242. The Third Circuit held that such suspensions constituted "de facto dismissals," thus entitling the officers to pretermination procedures as required by *Loudermill*. *Id.* at 244.

The officers in *Tucker* were similarly suspended with intent to dismiss, thus entitling them to the required pretermination procedures. *Tucker*, 868 F.2d at 76, 79. For a discussion of *Copeland*, see *supra* notes 27-28 and accompanying text.

41. *Tucker*, 868 F.2d at 79-80 (citing *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244-46 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) and *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1145 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1636 (1989)).

42. *Tucker*, 868 F.2d at 80.

afforded the plaintiffs was adequate with respect to any plausible arguments they could have then made as to the validity of the urinalysis order.<sup>43</sup> The court then went on to examine the process afforded the plaintiffs prior to their dismissals.<sup>44</sup>

The Third Circuit observed that the Supreme Court in *Loudermill* had held that public employees with property interests in their employment are entitled to a *meaningful* pretermination hearing.<sup>45</sup> The *Tucker* court also noted that the *Loudermill* Court had determined that “a *sine qua non* of a meaningful hearing is a sufficient explanation of the employer’s evidence to permit a meaningful response.”<sup>46</sup> Applying the *Loudermill* standard to the factual findings of the district court,<sup>47</sup> the

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43. *Id.* Judge Cowen, although concurring in the majority’s ultimate holding that the plaintiffs were deprived of their property interests in their jobs without procedural due process, nevertheless contended that the majority erred when it concluded that the plaintiffs did have a constitutionally adequate opportunity to respond to the urinalysis order. *Id.* at 83 (Cowen, J., concurring and dissenting). Judge Cowen asserted that the majority confused the district court’s factual findings and legal conclusions. *Id.* at 84, 86 (Cowen, J., concurring and dissenting). He stated that by applying a “clearly erroneous” standard to the district court’s “finding” that the plaintiffs were afforded a constitutionally adequate opportunity to respond when given the chance to comply with or refuse the urinalysis order, the majority transformed a legal conclusion into a factual finding. *Id.* at 86 (Cowen, J., concurring and dissenting). Judge Cowen interpreted the district court’s opinion to have concluded as a matter of law that the officers had an adequate opportunity to respond and thus disagreed with the majority’s application of a “clearly erroneous” standard in its review. *Id.* at 84, 86 (Cowen, J., concurring and dissenting). He also contended that even if the district court had made such a factual finding, that finding would have been clearly erroneous. *Id.* at 84 (Cowen, J., concurring and dissenting).

Judge Cowen opined that the weakness in the district court’s analysis was that it did not address the issue that the officers had no opportunity to respond to the charge that they should be *dismissed* for their refusal to submit to urinalysis. *Id.* at 86 (Cowen, J., concurring and dissenting). He stated that “[t]here is a significant difference between responding ‘no’ to an order to submit to urinalysis and responding to a charge that one’s refusal to submit to urinalysis is a sufficient basis to warrant dismissal from one’s job.” *Id.* (Cowen, J., concurring and dissenting). Judge Cowen disputed the district court’s ruling that the plaintiffs had been given an adequate opportunity to respond when, having been warned that refusal could result in discipline, the plaintiffs simply refused the order to submit to urinalysis. *Id.* (Cowen, J., concurring and dissenting). Judge Cowen asserted that the plaintiffs were denied procedural due process when they were given no opportunity to respond to the charge that they should be *dismissed* for refusing the urinalysis order. *Id.* (Cowen, J., concurring and dissenting). He pointed out that, in fact, the officers did have a legal right to refuse the urinalysis order, as later confirmed by the arbitration award in their favor. *Id.* at 86 n.2 (Cowen, J., concurring and dissenting). For a discussion of the arbitrator’s decision that the defendants had no authority to require the officers to submit to urinalysis, see *supra* note 19 and accompanying text.

44. *Tucker*, 868 F.2d at 80.

45. *Id.*

46. *Id.*

47. *Id.* The district court made a factual finding that the plaintiffs were advised upon arrival at the Internal Affairs Division of the Philadelphia Police Department that “there was a complaint of drug use involving police officers.”

*Tucker* court concluded that the defendants had not given the officers an explanation of the evidence which gave rise to the "reasonable suspicion" that the officers had used drugs.<sup>48</sup> The defendants' wrongful withholding of this information thus gave the officers no opportunity to explain or rebut the evidence which had caused the "reasonable suspicion" of on-duty drug use.<sup>49</sup> The court held that the defendants' failure to give the officers an opportunity to meaningfully respond prior to the deprivation of their property interests in their jobs constituted a denial of the plaintiffs' right to procedural due process.<sup>50</sup> The court clarified its holding by stating:

We emphasize that it is not necessary to reveal to the officer during an investigation the facts giving rise to the reasonable suspicions; nor does due process require even an informal notice and hearing prior to an order that he or she submit to urinalysis. We hold only that a meaningful opportunity to be heard on the underlying charge is required *before the officer can be deprived of his or her employment*.<sup>51</sup>

The court vacated the district court's judgment for the defendants on the plaintiffs' property interest claim and remanded the case to the district court for a determination of damages.<sup>52</sup>

Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, No. 87-1430, slip op. at 1 (E.D. Pa. May 23, 1988). The district court also found, however, that the officers "were not told anything specific about the drug use allegations being investigated or the evidence regarding this drug use allegation." *Id.* at 1-2.

48. *Tucker*, 868 F.2d at 80.

49. *Id.*

50. *Id.* The court noted that it did not question the district court's finding that the officers were dismissed for disobeying the urinalysis order and not for on-duty drug use per se. *Id.* The court pointed out that it was doubtful, however, that refusal of the urinalysis order alone, without the evidence of drug use, would necessitate a discharge under police department policy. *Id.* Since the allegation of drug use was the underlying factor in the plaintiffs' dismissals, the court held that the officers should have been given a meaningful opportunity to explain the evidence giving rise to the allegations before being dismissed. *Id.* at 81 & n.6.

51. *Id.* at 81 n.6 (emphasis in original).

52. *Id.* at 81. The case was remanded so that the district court could determine whether the parties had an implicit understanding that the issues of liability and damages would be bifurcated for the purpose of the trial. *Id.* The *Tucker* court noted that the record reflected no such understanding and that no evidence of damages was tendered at trial. *Id.* This led the court to believe that there might have been an off-the-record agreement to bifurcate the liability and damages issues. *Id.* The Third Circuit stated that, if the district court should find that there was no bifurcation understanding, then it should enter a declaratory judgment stating that the plaintiffs' right to procedural due process was violated and enter a damage judgment in the officers' favor in the amount of one dollar. *Id.* (citing *Carey v. Piphus*, 435 U.S. 247 (1978) (where record contains no evidence of actual damages, students denied procedural due process before school suspensions are entitled to nominal damages, not to exceed one dollar)). The Third Circuit stated that, if there was a bifurcation understanding, the dis-

The Third Circuit then addressed the officers' claim that the defendants had deprived them of their liberty interests in their good names and reputations without procedural due process.<sup>53</sup> The officers' liberty interest claim arose from the police department's issuance of a press release which reported that the officers had been discharged for refusing to obey a urinalysis order based on suspected drug use, without affording the officers an opportunity to respond to the content of the statement.<sup>54</sup> The *Tucker* court began by examining the Supreme Court's decision in *Codd v. Velger*.<sup>55</sup> The *Codd* Court held that a prior hearing is required only if the employer is alleged to have created and disseminated "a false and defamatory impression about the employee in connection with his termination."<sup>56</sup> Examining the complaint of the officers regarding the press release, the Third Circuit observed that the plaintiffs in *Tucker* had alleged only that their names and pictures were released in conjunction with "unconfirmed and unsubstantiated" allegations of drug use.<sup>57</sup> The officers had failed to claim that the defendants' allega-

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trict court should conduct another trial to afford the plaintiffs an opportunity to prove damages causally related to the due process violation. *Tucker*, 868 F.2d at 81.

On remand, the district court held that there had been no agreement to bifurcate the issues of liability and damages and entered a damage judgment in the plaintiffs' favor in the amount of one dollar. *Fraternal Order of Police v. Tucker*, No. 87-1430 (E.D. Pa. Apr. 13, 1989), *aff'd without opinion*, 888 F.2d 1379 (3d Cir. 1989).

53. *Tucker*, 868 F.2d at 82. The plaintiffs alleged that the police department's issuance of a press release about their dismissals subjected them to public humiliation and degradation, affected their standing in the community and deprived them of their liberty interests in their reputations without due process of law. *Id.* For a discussion of the press release, see *supra* note 17 and accompanying text.

54. *Tucker*, 868 F.2d at 82. The district court held that the plaintiffs' liberty interest rights were not violated by the press release, ruling that the officers had an opportunity to refute any charges made and to clear their names at the time the urinalysis order was given and also in the arbitration proceedings. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, No. 87-1430, slip op. at 6 (E.D. Pa. May 23, 1988). The district court thus entered judgment for the defendants on the plaintiffs' liberty interest claim. *Id.*

55. 429 U.S. 624 (1977).

56. *Id.* at 628. In *Codd*, a New York City police officer claimed that before being dismissed from his position, the due process clause required that he be given a hearing due to the stigmatizing effect of information in his personnel file about a suicide attempt. *Id.* at 625-26. The dismissed officer claimed that he had been deprived of a liberty interest without due process of law since the defendants imposed a stigma on him that foreclosed his freedom to take advantage of other employment opportunities. *Id.* at 625. The Supreme Court held that an essential element of such a claim is to allege and prove that the information given out by the employer was not true. *Id.* at 627. Since the dismissed officer had failed to assert that the report of the suicide attempt was substantially false, and the lower courts had made no such finding, the *Codd* Court held that the absence of any such assertion or finding was fatal to the officer's due process claim that he should have been given a hearing. *Id.*

57. *Tucker*, 868 F.2d at 82.

tions in the press release were false.<sup>58</sup> Because of the absence of an offering of evidence at trial to support a finding that the press release was false, the *Tucker* court held that the plaintiffs had failed to prove their liberty interest claim as required by *Codd*.<sup>59</sup>

Judge Cowen dissented from the majority's conclusion that the plaintiffs had not proven their claim of deprivation of liberty interests without due process.<sup>60</sup> He asserted that the majority erred when it concluded that the officers did not present any evidence to support a finding that the press release was false and defamatory.<sup>61</sup> Relying on the arbitrator's determination that the defendants had no legal authority to issue the urinalysis order,<sup>62</sup> Judge Cowen argued that the press release was false since it created an impression that the officers had done something that warranted a discharge when they refused to comply with the police commissioner's urinalysis order.<sup>63</sup> He also found the press release to be defamatory in nature since it gave the impression that the officers had committed a dischargeable offense.<sup>64</sup> Since the officers were not given an opportunity to respond to the defendants' allegations prior to the issuance of the press release, Judge Cowen concluded that the defendants had deprived the officers of their liberty interests in their good names and reputations without procedural due process.<sup>65</sup>

#### IV. ANALYSIS

It is submitted that the Third Circuit's opinion in *Tucker* provides useful insight into the constitutional standards to be applied by courts in the Third Circuit when determining the legality of compelled urinalysis testing of public-sector employees as well as the legality of their subsequent dismissals for refusing to submit to such testing.<sup>66</sup> Addi-

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58. *Id.* at 83. The court drew a distinction between the officers' claim that the defendants' allegations in the press release were "unconfirmed and unsubstantiated" and a claim that the allegations were untrue. *Id.* The court stated that "if the plaintiffs had alleged and proved . . . that they had not used drugs . . . or that they had substantial evidence to tender at a hearing in support of such an allegation, they, at least arguably, would have made out a stigmatization case under the Due Process Clause." *Id.*

59. *Id.* at 82 (citing *Codd v. Velger*, 429 U.S. 624, 625-27 (1977)).

60. *Tucker*, 868 F.2d at 86-88 (Cowen, J., concurring and dissenting).

61. *Id.* at 84 (Cowen, J., concurring and dissenting).

62. *Id.* at 87 (Cowen, J., concurring and dissenting). For a discussion of the arbitrator's decision, see *supra* note 19 and accompanying text.

63. *Tucker*, 868 F.2d at 87 (Cowen, J., concurring and dissenting).

64. *Id.* (Cowen, J., concurring and dissenting).

65. *Id.* at 87-88 (Cowen, J., concurring and dissenting).

66. It is important to note that the four police officers in *Tucker* were not ordered to submit to urinalysis under a compulsory or random drug testing program. *Tucker*, 868 F.2d at 77. The City of Philadelphia did not have a written, operative drug testing program for its police officers at the time the *Tucker* plaintiffs were ordered to submit to urinalysis. See *supra* notes 19 & 27. Challenges to the legality of drug testing programs present constitutional issues which differ in

tionally, the *Tucker* opinion provides public employers and their attorneys with important guidance as to the proper procedures to be followed in order to legally compel an employee to submit to urinalysis and, if necessary, to properly dismiss the employee for refusing to test.<sup>67</sup>

The *Tucker* court confirmed that the fourth amendment requires a public employer to have a reasonable suspicion that a particular employee is using drugs before that employee can be ordered to submit to urinalysis testing.<sup>68</sup> This "reasonable suspicion" standard has been generally accepted by courts as the appropriate standard to determine the constitutionality of compelled urinalysis.<sup>69</sup> Commentators have attacked the "reasonable suspicion" standard, however, as being too uncertain and undefined to eliminate arbitrariness from the ordering of urinalysis testing.<sup>70</sup> The *Tucker* court used an objective evaluation based on four factors to determine whether the defendants had a reasonable suspicion that the officers were using illegal drugs.<sup>71</sup> It is submitted that the Third Circuit's objective evaluation approach provides public employers with a more definitive basis to decide whether their suspicion is reasonable. A public employer can analyze its suspicion that an employee is using drugs by evaluating the evidence against these four factors. The public employer would then be in a position to objectively

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context from those presented in *Tucker*. The Supreme Court has recently issued two important opinions on the constitutionality of such programs. See *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1391-96 (1989) (upholding drug testing program for certain Customs Service employees); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989) (upholding drug testing program for railroad employees after major accidents).

67. As more public-sector employers implement drug screening programs which have already been deemed constitutionally adequate in the judicial system, the necessity of conforming to the *Tucker* court's guidelines will be diminished. Public-sector employers, with implemented programs for drug testing, would only need to ensure compliance with the procedures detailed in their written regulations.

68. *Tucker*, 868 F.2d at 77-78. For a discussion of the *Tucker* court's analysis of the officers' fourth amendment claim, see *supra* notes 26-32 and accompanying text.

69. See *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1143 (3d Cir. 1988) ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.") (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)), *cert. denied*, 109 S. Ct. 1636 (1989).

70. See, e.g., Comment, *supra* note 1, at 782-86 (asserting that "reasonable suspicion" standard is too uncertain and without sufficient guidelines to be capable of eliminating arbitrariness in drug testing).

71. *Tucker*, 868 F.2d at 77-78. The Third Circuit found the important factors in an objective evaluation to be "(1) the nature of the tip or information; (2) the reliability of the informant; (3) the degree of corroboration; and (4) other facts contributing to suspicion or lack thereof." *Id.* at 78 (quoting *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1144 (3d Cir. 1988)), *cert. denied*, 109 S. Ct. 1636 (1989). For a discussion of how the Third Circuit used these factors, see *supra* notes 28-30 and accompanying text.

decide whether the suspicion of drug use meets the “reasonable suspicion” standard before it orders the employee to submit to a urinalysis test. The public employer would thus have a greater degree of certainty that the urinalysis order does not abridge the employee’s fourth amendment right to be free from unreasonable searches and seizures.

The *Tucker* court’s opinion also provides clear guidance as to the procedural due process which must be afforded a public employee with a property interest in his job before being dismissed for refusing an order to submit to urinalysis.<sup>72</sup> Noting the substantial intrusion on privacy interests occasioned by compelled urinalysis, the court asserted that there are many reasons, other than guilt of drug use, for a public employee to refuse such a urinalysis order.<sup>73</sup> The court indicated that dismissal solely for refusing the order would be unfair when the underlying reason for dismissal is actually the allegations of the employee’s drug use.<sup>74</sup> Relying on the Supreme Court’s holding in *Loudermill* that public employees with property interests in their jobs are entitled to meaningful pretermination hearings,<sup>75</sup> the Third Circuit found that a public employer must inform the employee of the evidence giving rise to the allegations of drug use for a pretermination hearing to be *meaningful*.<sup>76</sup> Additionally, recognizing that an employer’s “reasonable suspicion” may often not correspond with reality, the *Tucker* court held that due process requires that the public employee be afforded an opportunity before being dismissed to explain why the employer’s suspicion of drug use is unfounded.<sup>77</sup>

The *Tucker* court’s analysis provides public employers in the Third Circuit with clear guidance as to the proper procedures to be followed before dismissing an employee for refusing a urinalysis order. The *Tucker* opinion clearly sets out the necessary actions which a public employer must follow to ensure that the employee’s right to procedural due process is not violated when he or she is dismissed for refusing to

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72. For a discussion of the *Tucker* court’s holding and rationale on the plaintiffs’ claim of deprivation of property interests in their jobs without due process of law, see *supra* notes 33-52 and accompanying text. It is important to note that different due process issues arise when an employee submits to a urinalysis order and is subsequently dismissed for testing positive for drug use. See *Yellow Rows of Test Tubes*, *supra* note 4, at 1641-55. Employee dismissals based on positive urinalysis results, rather than refusal to submit to the test, will often give rise to due process claims that the testing procedure used by the employer had a high risk of error or was improperly administered. *Id.* For a discussion of the due process issues involved in the dismissal of public employees based on positive results from urinalysis testing, see *id.*

73. *Tucker*, 868 F.2d at 80.

74. *Id.*

75. *Id.* at 79, 80. For a discussion of the *Tucker* court’s use of the *Loudermill* decision, see *supra* notes 38-46 and accompanying text.

76. *Tucker*, 868 F.2d at 80.

77. *Id.* at 80-81.

obey such an order.<sup>78</sup> The public employer confronted with an employee who has refused a urinalysis order must conduct some kind of pretermination hearing in which the employer informs the employee of the evidence gathered which gave rise to the suspicion that the employee was using drugs. The employee must then be afforded an opportunity to explain or rebut this evidence and perhaps demonstrate his or her innocence to the charges of drug use. The public employer could then make an informed decision as to whether the employee's refusal to obey the urinalysis order warrants job dismissal. It is submitted that such a procedure serves both the public employee's interest in his or her due process right to notice and an opportunity to be heard before being dismissed as well as the public employer's interest in being able to fairly discharge an employee suspected of drug use.

The *Tucker* court's analysis of the officers' claim that they were deprived of their liberty interests in their reputations without due process of law centered on the plaintiffs' failure to allege and prove that the press release issued by the defendants contained false information.<sup>79</sup> The majority held that this failure by the plaintiffs prevented their liberty interest claim from being successful.<sup>80</sup> In dicta, the majority seemed to assert, however, that the officers could have been successful on this claim had they alleged and made a substantial showing that the defendants' allegations of drug use in the press release were untrue.<sup>81</sup> Thus, the majority's holding was apparently predicated on the plaintiffs' failure to allege clearly in their complaint that the defendants' allegations were false. Judge Cowen wrote in dissent, however, that the plaintiffs had sufficiently alleged and shown that the press release was false as well as defamatory.<sup>82</sup> Judge Cowen thus asserted that the defendants violated the officers' due process rights by failing to give them notice and an opportunity to refute the information in the press release before it was issued.<sup>83</sup>

Although the *Tucker* majority and Judge Cowen disagreed over

78. *Id.* at 80.

79. *Id.* at 82-83. For a discussion of the *Tucker* majority's holding and rationale on the plaintiffs' liberty interest claim, see *supra* notes 53-59 and accompanying text.

80. *Tucker*, 868 F.2d at 82.

81. *Id.* at 83. The majority stated that "if the plaintiffs had alleged and proved that they had not used drugs . . . or that they had substantial evidence to tender at a hearing in support of such an allegation, they, at least arguably, would have made out a stigmatization case under the Due Process Clause." *Id.*

82. *Tucker*, 868 F.2d at 84, 87 (Cowen, J., concurring and dissenting). Since an arbitrator had decided that the defendants had no authority to order the plaintiffs to submit to urinalysis, Judge Cowen found that the impression, given by the press release, that the plaintiffs had done something wrong by refusing the order was false. *Id.* at 87 (Cowen, J., concurring and dissenting). For a discussion of Judge Cowen's dissent from the majority holding on the plaintiffs' liberty interest claim, see *supra* notes 60-65 and accompanying text.

83. *Tucker*, 868 F.2d at 87-88 (Cowen, J., concurring and dissenting).



whether the officers had sufficiently alleged the falsity of the press release, both opinions provide public employers with important insight into what due process requires before an employer may publicize an employee's dismissal for refusing a urinalysis order. After dismissing an employee for refusing to submit to urinalysis, a public employer must be cognizant of the possible damage to the employee's liberty interest in his reputation and ability to gain other employment. Before releasing information of the dismissal to third parties, a public employer must respect the employee's due process right to notice and an opportunity to be heard. At a hearing, the dismissed employee may be able to sufficiently refute the information and clear his reputation of the stigmatization of drug use. Such a hearing would serve the public employer's interest in avoiding future litigation as well as the dismissed employee's liberty interest in his reputation and good name.

#### V. CONCLUSION

The Third Circuit's decision in *Tucker* provides public employers with useful information on the proper procedures to be followed in compelling an employee suspected of drug use to submit to urinalysis. The *Tucker* court also gives guidance as to the process which a public employer must carry out before dismissing an employee for refusing to obey a urinalysis order.

First, the Third Circuit confirms that the fourth amendment requires a public employer to have "reasonable suspicion" of an employee's drug use before the employer can constitutionally compel the employee to undergo urinalysis. It is submitted that the *Tucker* court's use of an objective evaluation based on four factors provides public employers with a more definitive basis on which to analyze the reasonableness of their suspicion before issuing a urinalysis order.

Second, the court clearly points out that due process requires a public employer to conduct a pretermination hearing in which the employee, who has refused to submit to urinalysis, is informed of the evidence which gave rise to the suspicion that he or she was using drugs. The employee must then be given a meaningful opportunity to explain or refute this evidence before the public employer makes a decision to dismiss the employee.

Finally, the *Tucker* opinion makes it clear that before publicizing an employee's dismissal for refusing a urinalysis order, a public employer should give the dismissed employee an opportunity to refute the information to be released and thus the chance to possibly clear his or her reputation of the stigmatization of drug use. A public employer who follows the *Tucker* court's guidance will be assured that an employee's constitutional rights have not been violated and thus avoid liability in

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any legal action the employee may bring against him on constitutional grounds.

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