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Craig M. Ayers

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## CONSTITUTIONAL ISSUES IMPLICATED BY PUBLIC EMPLOYEE DRUG TESTING

CRAIG M. AYERS\*

*Public employers and employees have both reacted strongly to the implementation of drug testing programs in the workplace. While the issue of drug testing has generated significant controversy in both unionized and nonunionized settings, the majority of the litigation has occurred in the public union setting. This Article reviews current decisions on employers' attempts to implement drug testing in the public union workplace, focusing on the constitutional issues. The author provides a framework to determine when the employers' need to test will outweigh the constitutional concerns.*

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\* Mr. Ayers is currently an Assistant State Negotiator for the Minnesota Department of Employee Relations. He is a 1982 graduate of William Mitchell College of Law. He is a frequent lecturer in the area of Public Sector Collective Bargaining, Drug Testing, Interest Arbitration and Arbitration Advocacy tactics.

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INTRODUCTION

Public employers have reacted aggressively to America’s drug use problem. A multitude of compelled drug-testing programs have been created in response to public employer concern over the growing use of illegal drugs by public employees, both at work and off-duty. These programs have been developed to combat drug use which affects the employees’ job performance and could result in danger to the public or corruption of law enforcement activities. Public sector unions have countered by suing on constitutional grounds to invalidate or circumscribe the scope of such testing.<sup>1</sup>

The United States Supreme Court has not yet ruled on the constitutionality of a public employer’s drug testing program.<sup>2</sup> Although both federal and state courts have addressed these constitutional challenges, they have not approached the constitutional questions in a consistent manner.<sup>3</sup> Thus, public employers, public unions and public employees are unsure of the scope of constitutionally permissible drug testing. Some confusion has resulted from public employers reacting viscerally to the nation’s drug problem. Overly broad drug testing programs have been implemented by some public employers. The lower courts have contributed to this confusion by expressing their distaste for the fundamental presumption inherent in drug testing: that testing necessarily exposes the employee’s previously private off-duty activities, “just as surely as someone had been present and watching.”<sup>4</sup>

Despite the variety of conflicting court decisions, general principles are emerging which will serve to tailor drug testing

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1. See *infra* note 34 and cases cited therein.

2. In *O’Connor v. Ortega*, 107 S. Ct. 1492, 1504 n\*\*; (1987), the Supreme Court expressly declined to decide how its fourth amendment analysis might apply to searches based on drug and alcohol testing of employees by government agents.

3. See *infra* note 34 and cases cited therein.

4. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986). Judge Sarokin characterized the employer’s mass urine testing of fire fighters and police without a general job-related basis and without an individualized basis as “George Orwell’s ‘Big Brother’ Society come to life.” *Id.* at 1511. See also *American Fed’n of Gov’t Employees v. Weinberger*, 651 F. Supp. 726, 736 (S.D. Ga. 1986), stating “[t]hat the Department of Justice should contend that the government is unduly limited by the fourth amendment in its employee relations is disturbing, and seems to this Court [sic] to be an entirely inappropriate and dangerous argument.”

programs within the confines of constitutional acceptance. Before exploring these principles and emerging trends, a brief discussion of the reasons for drug testing will be provided.

## I. BACKGROUND

Historically, employees in certain occupations have been subject to strict alcohol and illegal drug use regulations. In some cases, this regulation extended to a time period preceding the performance of duties. Airline pilots, railroad engineers and bus drivers are examples of employees who have lived under employment rules that span off-duty time as well as on-duty time. In an early case involving bus drivers, the Seventh Circuit Court of Appeals authorized testing of employees in two situations.<sup>5</sup> Testing was allowed after the occurrence of an accident or upon individualized cause because the employer had a recognizable paramount interest in protecting the public from drivers who were unfit to perform.<sup>6</sup>

In the late 1980's, a series of highly publicized, mass transportation accidents led to the discovery that the involved employees had detectable levels of illegal drugs in their systems.<sup>7</sup> Reacting to public outrage, public employers began to institute unannounced, random or mass urinalysis testing of employees. Public employer response was also spurred by President Reagan's televised address of August 4, 1986. During the address, he called upon all levels of government to develop plans to ensure drug-free workplaces.<sup>8</sup>

In some of these early challenges of drug testing programs,

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5. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976).

6. *Id.* at 1267.

7. Several highly publicized mass transportation accidents involving employee drug use occurred in the past year. For instance, Federal Railroad Authority officials stated that the engineer involved in the January 4, 1987 Amtrak-Conrail collision outside of Baltimore that killed 16 and injured 175 people had used marijuana before the crash. Stuart, *Drug Trace Found in 2 Rail Workers After Fatal Crash*, New York Times, January 15, 1987, at A1, col. 4. An engineer involved in a Bronx, New York train wreck in February of 1987 tested positive for marijuana. New York Times, May 13, 1987, at B2, col. 5. Likewise, the engineer of a Conrail train that struck another train near Pittsburgh in April of 1987 tested positive for traces of barbituates. New York Times, May 14, 1987, at A19, col. 1.

8. In one instance, the day following President Reagan's address, a local mayor ordered all municipal employees to be tested yearly by random selection. This testing was found to be unconstitutional. Policemen's Benevolent Ass'n of New Jersey Local 318 v. Township of Washington, 672 F. Supp. 779, 796 (D.N.J. 1987).

the government argued that illegal drug use is incompatible per se with government employment. Generally, courts have focused on the means the government has used to acquire the evidence of such drug use rather than the fact of use itself, which is universally deplored.<sup>9</sup>

Recognizing the reluctance of the courts to authorize unrestricted drug testing of public employees without individualized, reasonable suspicion,<sup>10</sup> President Reagan narrowed the focus of drug testing of federal employees to those individuals holding sensitive positions. Positions were defined as sensitive based on the agency's mission, the employee's duties, the efficient use of agency resource and the potential danger to the public health, safety or national security resulting from the employee's inability to perform his/her job as a result of illegal drug use.<sup>11</sup> As public employers have attempted to focus on testing programs for employees determined to be in sensitive positions, constitutional issues have required employers to determine which employees in what type of work environment may be tested, when they may be tested and what procedural safeguards are minimally required.

Terminology relative to employee drug testing is extraordinarily confusing because many terms are used interchangeably. In this analysis, drug testing will be grouped in several broad headings: 1) "for cause" testing (individual employees are tested once the employer has a reasonable suspicion as to that employee's use of illegal drugs); 2) events testing (employees involved in a particular event, such as an accident, injury to another employee, discharge of a gun or high-speed chase are subject to drug testing, as well as employees seeking transfers, promotions and return from leaves of absence); 3) category

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9. *American Fed'n of Gov't Employees*, 652 F. Supp. at 735.

10. *Bostic v. McClendon*, 650 F. Supp. 245, 250 (N.D. Ga. 1986) (police department allowed urine testing only on the basis of a reasonable suspicion, based on objective facts and reasonable inferences); *Capua*, 643 F. Supp. at 1517 (individualized suspicion required to "protect against arbitrary government intrusion"); *Allen v. City of Marietta*, 601 F. Supp. 482, 495 (N.D. Ga. 1985) (city had evidence of on-the-job drug use before testing employees); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008-09 (D.C. 1985) (testing of police officer upon suspicion of drug abuse allowed where suspicion construed as a reasonable, objective basis for urine analysis); *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985) (police officers not required to supply urine samples in the absence of reasonable suspicion supported by the circumstances).

11. Exec. Order No. 12,564, 3 C.F.R. 224, 226 (1986).

testing (individuals belonging to the category are tested by virtue of their participation: Critical Incident Response Team (SWAT) members, bomb squad employees, organized crime unit and narcotics bureau members); 4) drug treatment monitoring (employees in this group are tested after having self-reported use, been found using drugs and/or entered treatment); 5) annual medical evaluation testing (drug testing is often included as a component of annual physical fitness examinations); 6) pre-employment testing (applicants, once given a conditional offer of employment, are subject to drug testing prior to commencing work); and 7) random testing (although capable of other meanings, random testing refers to any employee drug testing where the degree of suspicion concerning drug use is general and not specific to the individual, and the testing does not fall into any of the other groupings; consequently, it may involve testing the entire workforce en masse or selecting out persons to be tested by random methods, with all employees having equal opportunity to ultimately be tested). Although several of these topic areas have generated legal challenges, the most litigated area is random testing.

## II. CONSTITUTIONAL GROUNDS TO CHALLENGE DRUG TESTING PROGRAMS

### A. Fourth Amendment Analysis

The fourth amendment<sup>12</sup> is enforceable against the various states through the fourteenth amendment<sup>13</sup> but prohibits only searches and seizures which are unreasonable.<sup>14</sup> A search is reasonable if, at its inception, there are reasonable grounds to show that the proposed search will uncover evidence (work-related drug use), and if the means adopted is reasonably related to the objective of the search and not excessively intrusive.<sup>15</sup>

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12. U.S. CONST. amend. IV. The fourth amendment provides:

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

*Id.*

13. U.S. CONST. amend. XIV. *See also* *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Ker v. California*, 374 U.S. 23, 30 (1963).

14. *See, e.g., Smith v. White*, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987).

15. *Taylor v. O'Grady*, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987).

Deciding what is reasonable under the fourth amendment is an arduous task, since it "is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."<sup>16</sup> Consequently, the inquiry must start with an examination of the facts of each case to determine whether or not the individual or individuals affected by the search possess a legitimate expectation of privacy. The expectation may be subjective,<sup>17</sup> but it also must be one which society will accept as reasonable.<sup>18</sup>

The Supreme Court has reinforced the uncertainty prevalent in the fourth amendment area by noting in *O'Connor v. Ortega*<sup>19</sup> that "[w]e have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable."<sup>20</sup> By doing so, the court signals that the disposition of public sector search cases will be fact-specific and will not be controlled by broadly announced principles of law. The Court added that "[i]n the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace."<sup>21</sup>

Turning to the warrant requirement, although broadly speaking, a warrant is necessary to meet the reasonableness test, warrantless searches have been upheld in narrowly defined administrative inspection settings.<sup>22</sup> For instance, the United States Court of Appeals for the Third Circuit has held

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

17. *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

18. *Hudson*, 468 U.S. at 525 n.7. The Court notes not only the importance of the acceptance by society factor over the subjective expectation of privacy, but also remarks that "constitutional rights are generally not defined by the subjective intent of those asserting the rights." *Id.*

19. 107 S. Ct. 1492 (1987).

20. *Id.* at 1497.

21. *Id.* at 1499.

22. *See, e.g.*, *Donovan v. Dewey*, 452 U.S. 594, 602-05 (1981) (coal mines); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (gun selling); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (liquor industry). More recently, the Court has decided that warrantless searches in an administrative context may be held permissible where the delay to obtain a warrant will frustrate the governmental purpose behind the search. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (search of school students). Whether a search is unreasonable is grounded in the context in which it occurs. *Id.* at 337.

that the administrative search exception for closely regulated industries is applicable to private employees governed by the New Jersey Racing Commission, a governmental body.<sup>23</sup> A federal district court has held that the administrative search exception applies to unescorted access employees working within a nuclear plant.<sup>24</sup>

Conversely, a number of courts have refused to apply an administrative search exception to permit random drug testing of employees engaged in general police and fire fighting activities.<sup>25</sup> In *McDonell v. Hunter*,<sup>26</sup> the United States Court of Appeals for the Eighth Circuit upheld Iowa's drug testing program within its prison facilities. The court distinguished *Shoemaker v. Handel*,<sup>27</sup> a case which upheld random selection urine testing as well as daily breathalyzer tests for jockeys. The *McDonell* court balanced the equities in favor of the state's interest in ensuring that prison employees who have daily inmate contact would not be "inhibited by drugs or alcohol and are fully capable of performing their duties."<sup>28</sup>

In summary, exceptions to the warrant requirement have been upheld "where a legitimate governmental purpose makes the intrusion into privacy reasonable."<sup>29</sup>

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23. *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986).

24. In *Rushton v. Nebraska Public Power Dist.*, 653 F. Supp. 1510, 1524-25 (D. Neb. 1987), Judge Urbom found security guard employees and licensed operators could be urine tested on the grounds that employees working at the Cooper Nuclear Station were subject to a pervasive regulatory scheme. This scheme included searches for firearms, explosives and incendiary devices on entering the plant, random pat-downs of clothing and constant surveillance monitoring via television cameras.

25. *Policemen's Benevolent Ass'n of New Jersey v. Washington Township*, 672 F. Supp. 779, 786 (D.N.J. 1987) (police are not within the highly regulated activity exception); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 591 (N.D. Ohio 1987) (refusing to apply *Shoemaker* to police cadets); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 881 (E.D. Tenn. 1986) (fire fighters found to be outside the administrative search exception).

26. 809 F.2d 1302 (8th Cir. 1987).

27. 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986).

28. *McDonell*, 809 F.2d at 1308. Additionally, the court noted in a comparative light, that the state's interest in prison security was at least as strong as the horse racing industry's interest in integrity and public confidence. *Id.*

29. *Security & Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 203 (2d Cir. 1984).



## B. Fourth Amendment Applications To Drug Testing Of Public Employees

### 1. Is Urine Testing a Search Within the Meaning of the Fourth Amendment?

Courts have repeatedly found that the compelled production of urine from employees by governmental agents in testing for the presence of illegal drugs constitutes a search and seizure under the fourth amendment.<sup>30</sup> The United States Supreme Court has not yet decided whether the compelled taking of an employee's urine implicates the fourth amendment. The court did hold, however, in *Schmerber v. California*<sup>31</sup> that the involuntary administration of a blood test constitutes a search and seizure within the meaning of the fourth amendment. In light of this holding and the overwhelming number of lower and appellate court holdings relative to drug testing, it seems likely that when presented with the question, the Supreme Court will find compelled urine taking to be within the search and seizure language of the fourth amendment.<sup>32</sup>

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30. National Treasury Employees Ass'n v. Von Raab, 816 F.2d 170, 176 (5th Cir. 1987); *McDonell*, 809 F.2d at 1307; *Policemen's Benevolent Ass'n of New Jersey, Local 318*, 672 F. Supp. at 784; *Smith v. White*, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987); *Amalgamated Transit Union Local 1277 v. Sunline Transit Auth.*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano*, 661 F. Supp. at 584; *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986); *Louvoorn*, 647 F. Supp. at 879; *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); see also *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985); *Smith v. City of East Point*, 183 Ga. App. 659, 359 S.E.2d 692, 694 (Ga. Ct. App. 1987).

31. 384 U.S. 757, 767 (1966).

32. In addition to the fourth amendment claim, several cases have commented on an individual's privacy expectation in the act of urination and the degree of intrusion involved in testing in the presence of government agents. See *Taylor v. O'Grady*, 669 F. Supp. 1422, 1434-35 (N.D. 1987); *Feliciano*, 661 F. Supp. at 588; *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986); *City of Palm Bay*, 475 So. 2d at 1324. In *Capua*, Judge Sarokin also noted that drug testing has the effect of forcing an employee to "divulge private, personal medical information unrelated to the government's professed interest in discovering illegal drug abuse." *Capua*, 643 F. Supp. at 1515. Consequently, the employer may discover the employee is epileptic, diabetic or pregnant, or has some other medical condition, while checking for illegal drug use. The inability of the test to avoid discovery and later disclosure of non-work related and protected class-type information may provoke future lawsuits under state and federal civil rights statutes.

## 2. *When Does a Public Employee's Legitimate Expectation of Privacy Outweigh the Government's Asserted Interest With Respect to Drug Testing?*

Public sector unions and their plaintiff employees have argued that public employers must meet the probable cause standard and secure a warrant before a urine test may be performed.<sup>33</sup> The courts have held public employers may test employees without probable cause but require a reasonable suspicion threshold before an employee may be subject to urine testing.<sup>34</sup> Public sector unions have attacked the

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33. See *McDonell*, 809 F.2d at 1306-07; *Security and Law Enforcement Employees, Dist. Council 82*, 737 F.2d at 203 (noting that exceptions to a probable cause warrant "exist where a legitimate governmental purpose makes the intrusion into privacy reasonable"); *Policemen's Benevolent Ass'n of New Jersey, Local 318*, 672 F. Supp. at 785; *Amalgamated Transit Union, Local 1277*, 663 F. Supp. at 1567.

34. See *McDonell*, 809 F.2d at 1306-07 (allowing urinalysis testing of correctional officers only on the basis of reasonable suspicion); *Security and Law Enforcement Employees, Dist. Council 82*, 737 F.2d at 204; *Policemen's Benevolent Ass'n of New Jersey, Local 318*, 672 F. Supp. at 790 (prohibiting random urinalysis testing of police officers where no reasonable, individualized suspicion exists); *Taylor*, 669 F. Supp. at 1439 (requiring reasonable, individualized suspicion of drug abuse before compulsory urine testing of correctional employees may be performed); *Smith v. White*, 666 F. Supp. at 1089 (drug testing of nuclear power plant employees upheld where employer had specific information regarding drug use for employees who were tested); *Amalgamated Transit Union Local 1277*, 663 F. Supp. at 1567 (public employer may constitutionally require mandatory alcohol and drug testing of employees in jobs directly related to mass public transportation without a search warrant or a showing of probable cause); *Feliciano*, 661 F. Supp. at 589-92 (urinalysis testing of police academy cadets was an unreasonable search in absence of reasonable, individualized suspicion); *American Fed'n of Gov't Employees v. Weinberger*, 658 F. Supp. 726, 735 (S.D. Ga. 1986) (to pass constitutional muster, the duties of employees subjected to standardless testing must be shown to be more than remotely or conceivably related to national security or to pose a potential danger to persons); *Bostic*, 650 F. Supp. at 250 (police department may demand employee urine sample only on basis of reasonable suspicion that urinalysis will produce evidence of illegal drug use by specific employees); *Penny v. Kennedy*, 648 F. Supp. 815, 817 (E.D. Tenn. 1986) (in absence of reasonable suspicion, information concerning drug problems can be acquired by physical observation of police officers, citizen's complaints, tips from other law enforcement agencies and other means); *Lovvorn*, 647 F. Supp. at 882 (urine test unjustified where there are no reasonable grounds for suspecting that test will turn up evidence that a particular fire fighter is using illegal drugs); *Capua*, 643 F. Supp. at 1514-17 (mass urine testing program of fire fighters found to be unconstitutional search when not based on reasonable suspicion); *Allen*, 601 F. Supp. at 491 (city had a right to make warrantless searches of its employees to determine whether they were using or abusing drugs which would affect their ability to safely perform their work with hazardous materials); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008-09 (D.C. 1985) (urinalysis testing of police officers upheld where employer limited testing to employees suspected of drug abuse); *City of Palm Bay*, 475 So. 2d at 1325-26 (permanent injunction prohibiting employer from random testing of police officers and fire fight-

grounds for the employer's reasonable suspicion when it has been based on informant information. To date, no court has held that informant information is per se insufficient. Some hold expressly that reasonable suspicion may be derived from informant tips as long as the informant has a past record of supplying reliable information, or the employer has other evidence tending to corroborate the allegations against specific individuals.<sup>35</sup>

Generally, drug testing programs that have commenced as a result of broad allegations of drug use by unnamed employees have been struck down as unconstitutional. In *Bostic v. McCleendon*,<sup>36</sup> the court found that the urine testing of a court clerk, without any objective facts alleging that she had used drugs at or away from work was unconstitutional.<sup>37</sup> The court commented that, merely because a city employer suspected other officers of smoking marijuana, the employer's suspicions did not rise to the level of a reasonable suspicion, and conse-

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ers without reasonable suspicion); *Smith v. City of East Point*, 183 Ga. App. at —, 359 S.E.2d at 694 (discharge of fire fighter for positive urinalysis test unconstitutional where no reasonable suspicion that employee was using drugs); *Fraternal Order of Police, Newark Lodge 12 v. City of Newark*, 216 N.J. Super. 461, 473, 524 A.2d 430, 436 (N.J. Super. Ct. App. Div. 1987) (mandatory urinalysis testing of narcotics officers held unconstitutional where no reasonable suspicion of drug use among officers); *Patchogue-Medford Congress of Teachers v. Patchogue-Medford Union Free School Dist.*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 462, 510 N.E.2d 325, 331 (1987) (random urinalysis testing of probationary public school teachers prohibited where no reasonable suspicion); *Caruso v. Ward*, 131 A.D.2d 214, 520 N.Y.S.2d 551, 552 (N.Y. App. Div. 1987) (random drug testing of police officers prohibited where no reasonable suspicion of drug use); *King v. McMickens*, 120 A.D.2d 351, 353, 501 N.Y.S.2d 679, 681 (N.Y. App. Div. 1986), *aff'd sub nom.*, *Perez v. Ward*, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296 (1987) (dismissal of corrections officer for refusal to submit to drug test upheld where employer had reasonable suspicion based on informant's statements). In *Smith v. White*, 666 F. Supp. at 1089, the court rejected the union's argument that reasonable suspicion could not be present unless the government actually observed that the employee's job performance was influenced by drugs. Reasonable suspicion is present when there is "some articulable basis for suspecting that the employee is using illegal drugs. . . ." *Lovvorn*, 647 F. Supp. at 881. Likewise, "[r]easonable suspicion may be based on statements made by other employees and tips from informants." *Smith v. White*, 666 F. Supp. at 1090.

35. See *Allen*, 601 F. Supp. at 484 (water and electric system employees were tested on informant's evidence); *King*, 120 A.D.2d at 353, 501 N.Y.S.2d at 681 (testing of corrections officers upheld, based on informant's allegations of drug use by employees). Cf. *Security and Law Enforcement Employees, Dist. Council 82*, 737 F.2d at 206 (where the court found reasonable suspicion existed against several individuals based on inmate information plus corroboration, but not against an officer where the informant inmate had no history of providing reliable information).

36. 650 F. Supp. 245 (N.D. Ga. 1986).

37. *Id.* at 250-51.

quently violated the fourth amendment.<sup>38</sup> This result has been followed by numerous courts. In *Penny v. Kennedy*,<sup>39</sup> the court rejected the City of Chattanooga's attempt to test all police officers based on independent information that unnamed officers had used drugs.<sup>40</sup> In *Feliciano v. City of Cleveland*,<sup>41</sup> testing of police cadets en masse based on a tip that current unnamed employees were known to use narcotics was found unconstitutional.<sup>42</sup> In *Smith v. City of East Point*,<sup>43</sup> the police chief reacted to reports that unnamed officers were smoking marijuana by testing all employees with police power, including the Fire Captain.<sup>44</sup> The *Smith* court found that there was no reasonable suspicion for testing.<sup>45</sup> In *City of Palm Bay v. Bauman*,<sup>46</sup> two fire fighters self-reported their drug use<sup>47</sup> and, subsequently, the city decided to test all police and fire fighters.<sup>48</sup> The court found the testing to be unconstitutional.<sup>49</sup> In each of these cases, the courts held that broad, sweeping, dragnet-like approaches to drug testing violated the fourth amendment. Rumors of drug use, unreliable informant information, lack of investigation or information without specific names of employees in the absence of an extremely compelling case for testing, such as in a prison setting, cannot support a finding of reasonable suspicion.

Courts have not given public employers any broad right to randomly test "law enforcement" employees simply because they have enforcement obligations.<sup>50</sup> Illustrative of this propo-

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38. *See id.*

39. 648 F. Supp. 815 (E.D. Tenn. 1986).

40. *Id.* at 817.

41. 661 F. Supp. 578 (N.D. Ohio 1987).

42. *Id.* at 580, 592.

43. 183 Ga. App. 659, 359 S.E.2d 692 (1987).

44. *Id.* at —, 359 S.E.2d at 692-93.

45. *Id.* at —, 359 S.E.2d at 694-95.

46. 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

47. *Id.* at 1323.

48. *Id.*

49. *Id.* at 1326.

50. Governmental employers have frequently raised arguments that law enforcement employees must demonstrate drug-free conduct to support their enforcement of drug laws. The integrity of law enforcement argument was expressly rejected in *Capua*, 643 F. Supp. at 1519 (fire fighters can serve the public effectively even in the face of "unpopular public perception" derived from drug use). Although the integrity argument was proposed, it was not adopted as the *ratio decidendi* in *McDonell*, 809 F.2d at 1307-08. A similar argument that drug use is incompatible per se with federal governmental employment was advanced and was summarily rejected in *American*

sition is *American Federation of Government Employees v. Weinberger*.<sup>51</sup> Here the federal government's periodic drug testing of civilian police employees of the Department of the Army, described by the Government as holders of critical jobs, was held unconstitutional in the absence of individualized suspicion.<sup>52</sup> In *Louvorn v. City of Chattanooga*,<sup>53</sup> the court admitted that the employer had a compelling interest because of the hazardous work and the need to rely on the employee's awareness. The court still required, however, individualized suspicion to warrant drug testing.<sup>54</sup>

Likewise, in *Capua v. City of Plainfield*,<sup>55</sup> a mass round-up of fire and police employees for urine testing was held unconstitutional on fourth amendment and other grounds. Here, the city had no specific information as to individual employees using drugs.<sup>56</sup> It lacked even a general job-related basis for testing given that no employees were on notice of job deficiencies, no employees were under investigation for drug use on the job and no citizen complaints had been received concerning inadequacies in fire protection.<sup>57</sup> Judge Sarokin concluded that the City commenced drug testing of its public safety employees solely because the public-at-large was using illegal drugs.<sup>58</sup>

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*Fed'n of Gov't Employees*, 651 F. Supp. at 735-36. The argument was also rejected in the context of municipal employment in *Penny*, 648 F. Supp. at 817 (constitutional protection afforded police officers cannot be lowered merely because they are police). Although a public employee's expectation of privacy is substantial, it must be balanced against "the realities of the workplace." *O'Connor*, 107 S. Ct. at 1500.

51. 651 F. Supp. 726 (S.D. Ga. 1986).

52. *Id.* at 735-36.

53. 647 F. Supp. 875 (E.D. Tenn. 1986).

54. 647 F. Supp. at 881-82. The court in *Louvorn* was reacting to a drug testing program which was carried out in a cursory fashion, without written procedures or methods, without standards for initiating the searches and without protective mechanisms for ensuring privacy concerns. Some samples were observed, some were not; some fire fighters were patted down, some were not; various pass/fail points were used and later changed in the next round of testing; disciplinary measures as opposed to rehabilitation options were unclear; and the initial tests may not have been followed by confirmation tests. *Id.* at 877-78. The court, therefore, saw the public employer's program as arbitrary. *Id.* at 881. It is difficult to separate out these fundamental flaws in the city's drug testing program from the court's broader holding, but it seems clear the court found reasonable suspicion would be necessary for any testing of fire fighters. *See id.* at 883.

55. 643 F. Supp. 1507 (D.N.J. 1986).

56. *See id.* at 1515.

57. *Id.*

58. *Id.* at 1516. It is interesting to note that Judge Sarokin, like Judge Edgar in *Louvorn*, was highly critical of the drug testing program's lack of procedural guide-

The same result occurred in *Policemen's Benevolent Association of New Jersey, Local 318 v. Township of Washington*,<sup>59</sup> where an exuberant mayor followed President Reagan's televised call for drug testing and ordered annual testing of all municipal employees. The city had no known drug problem but viewed the testing as a preventive measure.<sup>60</sup> The court found the broad testing unconstitutional.<sup>61</sup> It noted that employing drug-use statistics drawn from mass society, as the basis to mass test employees, was impermissible.<sup>62</sup>

Random testing of bus drivers and maintenance employees, absent evidence of drug use by the employees but based solely on generic reports of fatalities related to employee drug-abuse at other bus companies, has also been held to be an unconstitutional search under the fourth amendment.<sup>63</sup> Similar random drug testing of probationary teachers, absent individualized suspicion or any identification of a drug problem, has been held violative of the fourth amendment under both New York state and federal constitutions.<sup>64</sup>

Finally in *Taylor v. O'Grady*,<sup>65</sup> the court rejected arguments that correctional guard work per se justifies random drug testing.<sup>66</sup> This case is interesting primarily for the evidentiary findings that permitted the court to side-step the persuasive holding in *McDonnell*, which covered a facially identical group of employees, correctional guards, being drug tested for facially identical reasons: prison security and interdiction of drug traf-

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lines and the absence of precautions to ensure confidentiality of results. Further, he distinguished the Third Circuit Court of Appeals' authorization of drug testing of jockeys in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986), on the ground that *Shoemaker* presented a drug testing scheme employing very careful procedural protections. *Id.* at 1520.

59. 672 F. Supp. 779 (D.N.J. 1987).

60. *Id.* at 781, 791.

61. *Id.* at 796.

62. *Id.* at 791.

63. *Amalgamated Transit Workers Union Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1562 (C.D. Cal. 1987). The court held that the public employer must have reasonable suspicion to test since it did not demonstrate an existing drug problem among drivers. The court expressly declined to decide if individualized suspicion is necessary in all cases involving drug testing of public transportation employees. *Id.* at 1568 n.4.

64. *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 331, 517 N.Y.S.2d 456, 462 (N.Y. 1987).

65. 669 F. Supp. 1422 (N.D. Ill. 1987).

66. *See id.* at 1439.

ficking between employees and inmates.<sup>67</sup> In *Taylor*, the Cook County Department of Corrections' (DOC) drug testing plan contained extensive procedural protections, limited drug testing to once yearly without notice, twice monthly for six months if the employee tested positive and was in treatment, or on reasonable suspicion and relied on treatment over discipline.<sup>68</sup> Relying on the observation in the United States District Court of Appeals for the District of Columbia's decision in *National Federation of Federal Employees v. Weinberger*<sup>69</sup> that factual questions need to be resolved by the trial courts in fourth amendment challenges to state action, the court noted that its legal judgments would hinge on findings of fact relative to the nature and scope of the drug testing program.<sup>70</sup> The court then went on to find that although 147 episodes of drug use in the DOC were alleged to have occurred over a six-year period, only two employees were convicted, leaving the balance of charges as hearsay.<sup>71</sup> Additionally, the court deduced from expert testimony that only three of 1,700 employees were likely to be chronic users of illegal drugs.<sup>72</sup> Although the court found DOC officers had trafficked drugs, the problem was held not to be serious.<sup>73</sup> Finally, the court made detailed findings of fact concerning the urine tests' inability to show impairment at the time of testing.<sup>74</sup> From these findings, the court came to the conclusion that the urinalysis drug tests were fatally flawed in that they were not reasonably related to the object of the search because they could not produce evidence of work-related drug abuse.<sup>75</sup> In a more recent case, the District of Columbia Circuit has also concluded that, although school bus attendants may be drug tested as part of a regular physical without probable cause, the tests themselves are unconstitutional because they cannot reveal whether the employee possessed, used or was under the influence of drugs on the job.<sup>76</sup>

Further evidence of judicial hostility to overly broad drug

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67. See *McDonell*, 809 F.2d at 1306.

68. *Taylor*, 669 F. Supp. at 1424.

69. 818 F.2d 935 (D.C. Cir. 1987).

70. See *Taylor*, 669 F. Supp. at 1424.

71. *Id.* at 1426.

72. *Id.* at 1427.

73. *Id.* at 1429.

74. See *id.* at 1430-31.

75. See *id.* at 1437-38.

76. *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C. Cir. 1987).

testing is apparent in the category-testing cases. Generally, these cases involve separating out a specific group of employees whose job responsibilities present unique problems, and testing those employees on the ground that their work necessitates drug-free, around-the-clock compliance. In *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*,<sup>77</sup> the court rejected as unconstitutional, random testing performed twice a year on narcotics bureau officers.<sup>78</sup> Evidence that specific citizen reports identified two bureau employees as illegal drug-users and evidence that five recruits had tested positive was insufficient to justify random testing.<sup>79</sup> The court held that drug use was not extensive in the narcotics bureau and that individualized suspicion was therefore required.<sup>80</sup>

In *Caruso v. Ward*,<sup>81</sup> the court held that random drug testing of Organized Crime Bureau officers is unconstitutional without reasonable suspicion.<sup>82</sup> In a strongly voiced dissent, Judge Rothenberger remarked that the officers' work environment with easy access to drugs and the danger of economic corruption justifies random testing.<sup>83</sup> He pointed out that between 1984 and 1986, thirty-nine Organized Crime Bureau members were charged with drug involvement, twenty-two of whom tested positive and an additional eleven of whom refused to be tested.<sup>84</sup>

Despite the abundance of case law barring random testing of public employees, a growing number of courts are permitting random testing. Random testing has been allowed where the type of employment entails a special degree of danger to others and where a showing of recent drug use among employees in the group to be tested is compelling. The leading case is *McDonell v. Hunter*,<sup>85</sup> which permits uniform and random testing of prison guards. In *McDonell*, the court first determined that the guards' expectations of privacy are diminished be-

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77. 216 N.J. Super. 461, 524 A.2d 430, 437 (1987).

78. *Id.*

79. *Id.*

80. *Id.*

81. 131 A.D.2d 214, 520 N.Y.S.2d 551 (N.Y. App. Div. 1987).

82. *Id.* at —, 520 N.Y.S.2d at 552. Interestingly, the union did not object to testing on initial assignment to the bureau or as part of an annual physical. *Id.* at —, 520 N.Y.S.2d at 553.

83. *Id.* at —, 520 N.Y.S.2d at 558 (Rothenberger, J., dissenting).

84. *Id.*

85. 809 F.2d 302 (8th Cir. 1987).



cause of their place of employment.<sup>86</sup> The court then found that the employer had a strong interest in ensuring that prison guards did not work under the influence of drugs or alcohol and were not bringing drugs into the prison for inmates.<sup>87</sup> The court viewed the use of drugs by those employees who regularly work with inmates as a real threat to the security of the prison which could only be lessened by uniform and random urine testing.<sup>88</sup>

The court also stated its belief that drug-using prison employees were likely to supply drugs to the inmates.<sup>89</sup> Finally, the majority held that reasonable suspicion is limited to evidence deduced from "specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs. . . or that the employee has used a controlled substance within the twenty-four hour period prior to the required test."<sup>90</sup> Whatever factual distinctions might exist in the extent of the drug problem facing Iowa prisons versus that facing the DOC employer in Cook County in *Taylor* are not easily discernable from reading the two cases. *McDonell* clearly upholds random drug testing of prison guards based on their work setting.

The two nuclear plant employee cases likewise authorize broad drug testing. *Smith v. White*<sup>91</sup> is a reasonable suspicion case based on a self-reporting security officer who named individuals involved in drug use and distribution, 58% of whom later tested positive for marijuana or cocaine use.<sup>92</sup> This case does not address the constitutionality of random drug testing in a nuclear plant context. The analysis in *Smith v. White* indicates, however, that the court balanced the state's interest against the employee privacy interest, holding the government's interest in a drug-free workforce to protect and operate a nuclear plant is "patently obvious."<sup>93</sup>

In *Rushton v. Nebraska Public Power District*,<sup>94</sup> the court author-

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86. *Id.* at 1306 (citing Security & Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d 187, 202 (2d Cir. 1984)).

87. *Id.* at 1307-08.

88. *Id.* at 1308.

89. *Id.*

90. *Id.*

91. 666 F. Supp. 1085 (E.D. Tenn. 1987).

92. *Id.* at 1086.

93. *Id.* at 1089.

94. 653 F. Supp. 1510 (D. Neb. 1987).

ized annual drug testing without reasonable suspicion. The court found that a diminished expectation of privacy among nuclear workers with unescorted plant access, combined with Nuclear Regulatory Commission allegations of drug use, created sufficient grounds to authorize annual drug testing.<sup>95</sup> The court accepted urine testing as the least restrictive alternative to satisfy the compelling government interest in the health and safety of the public and the employees.<sup>96</sup>

This emerging trend toward authorizing drug testing where a serious threat might arise to the safety of others is illustrated in *National Association of Air Traffic Specialists v. Dole*.<sup>97</sup> *Dole* involved federal air traffic specialists who unsuccessfully challenged a yearly drug-testing examination. This examination enabled the employees to retain their medical clearances to perform air safety-related duties within the Federal Aviation Administration. Evidence indicated that many lives would be jeopardized by drug use of such employees and that a recent problem of admitted drug use by companion air traffic controllers was relevant.<sup>98</sup>

In a subsequent case, *Mullholland v. Department of Army*,<sup>99</sup> the court again found random testing of employees in critical jobs at Davison Airfield to be permissible.<sup>100</sup> Tested employees were servicing the helicopter fleet used to transport White House personnel, Defense personnel and members of Congress.<sup>101</sup> The court found observation of employee work behavior to be an inadequate means of detecting drug use since it "provides little basis on which to assess their illegal drug-free reputation and reliability of applicants for sensitive positions."<sup>102</sup>

The court also stated that "[r]ecent cases particularly have demonstrated that employees in dangerous and/or highly visible occupations, which involve the safety, well-being, and in-

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95. *Id.* at 1524.

96. *See id.* at 1516.

97. *National Ass'n of Air Traffic Specialists v. Dole*, No. A87-073, slip. op. (D. Alaska 1987) (cited in *Policeman's Benevolent Ass'n of New Jersey, Local 318*, 672 F. Supp. at 791-92).

98. *Id.* Evidence was presented to the court that 45 air traffic controllers had entered drug rehabilitation in 1986 and that a serious problem existed in the field. *Id.*

99. 660 F. Supp. 1565 (E.D. Va. 1987).

100. *Id.* at 1570.

101. *Id.* at 1567.

102. *Id.* at 1569.

tegrity of the public, are and should be held to a higher standard of care than other less conspicuous non-safety related positions."<sup>103</sup> Likewise, in a second aviation and other transportation employees case, *American Federation of Government Employees v. Dole*,<sup>104</sup> the United States District Court for the District of Columbia rejected a facial challenge to the random testing of employees in sensitive positions, holding that the jobs designated for such testing were appropriate.<sup>105</sup>

The final case favoring a broad application of drug testing is a hybrid that probably fits closest into the events-testing subset, although it could arguably be placed under the category-testing section. In *National Treasury Employees Union v. Von Raab*,<sup>106</sup> the Fifth Circuit Court of Appeals vacated the district court's permanent injunction and held that drug tests for entry into identified, sensitive jobs involving interdiction of drugs, carrying of firearms or access to classified information in the Customs Service were constitutional.<sup>107</sup> The testing requirement was not applicable to current holders of the positions.<sup>108</sup> It was also not applicable after an employee obtained employment by passing the initial test.<sup>109</sup> Test takers had five days advance notice preceding the test.<sup>110</sup> No adverse actions resulted from failing the test or for withdrawing in advance of testing.<sup>111</sup> As its rationale for upholding the limited testing, the court noted that Customs Service employees who used drugs undermine the public's confidence in the Service's integrity.<sup>112</sup> The court also reasoned that, because of the high cost of drugs, employees are susceptible to blackmail and participation in criminal enterprise.<sup>113</sup> These same arguments were advanced unsuccessfully in the two category-testing cases decided by state courts: *Caruso v. Ward*<sup>114</sup> and *Fraternal Order of*

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103. *Id.* at 1570.

104. 670 F. Supp. 445 (D.D.C. 1987).

105. *Id.* at 448-49.

106. 816 F.2d 170 (5th Cir. 1987).

107. *See id.* at 182.

108. 816 F.2d at 173.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 179.

113. *Id.*

114. 131 A.D.2d 214, 520 N.Y.S.2d 551 (N.Y. App. Div. 1987).

*Police Newark Lodge 12 v. City of Newark*.<sup>115</sup> Both courts distinguished the Fifth Circuit's holding in *National Treasury Employees Union* on the grounds that the Customs Service's drug testing plan was triggered solely by employees volunteering for transfer, was a one-time only test and contained no penalties for failing the test or for withdrawing.<sup>116</sup> Other courts have also chosen not to follow *National Treasury Employees Union*.<sup>117</sup>

In the most recently decided case, *Railway Labor Executives Association v. Burnley*,<sup>118</sup> the Ninth Circuit Court of Appeals struck down federal rules requiring mandatory drug and alcohol testing of railroad workers after the occurrence of an accident.<sup>119</sup> The divided court noted that "[a]ccidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew."<sup>120</sup>

Judge Arthur Alarcon, in a vigorous dissent, noted "[a]s recent history attests, locomotives in the hands of drug or alcohol impaired employees are the substantial equivalents of time bombs endangering the lives of thousands."<sup>121</sup> While most correctly described as an events-testing rather than a random testing case, this result is clearly at odds with the *Shoemaker, Von Raab* and *McDonell* circuit court cases. This decision also indicates a lack of unanimity with regard to the authorizing of drug testing where the safety of many people is at stake.

Another difficult question to resolve in a fourth amendment context is the propriety of subjecting off-duty conduct to employer scrutiny. As noted earlier, a number of courts have expressed disapproval that drug testing spans on and off-duty activities and cannot prove present impairment on the job.<sup>122</sup> Other courts, however, have found a public employer may appropriately test for and act on drug-use information showing

115. 216 N.J. Super. 461, 524 A.2d 430 (N.J. Super. Ct. App. Div. 1987).

116. *Fraternal Order of Police, Newark Lodge 12*, 216 N.J. Super. at 472, 524 A.2d at 436; *Caruso*, 131 A.D.2d at —, 520 N.Y.S.2d at 553-54.

117. See *Feliciano*, 661 F. Supp. at 592 (*National Treasury Employees Union* involved sensitive positions while police cadets are not sensitive positions); *Taylor*, 669 F. Supp. at 1440 (the Cook County DOC fires employees for refusing to test).

118. 839 F.2d. 575, (9th Cir. 1988).

119. *Id.* at 592.

120. *Id.* at 587.

121. *Id.* at 596.

122. See *supra* notes 73-75 and accompanying text.

up in a work-related drug screen, even if the precise time of exposure is not established.<sup>123</sup> As the *Mullholland* court stated, even though a drug test cannot detect whether drugs were taken on or off-duty, off-duty use can affect employee job performance and the government may therefore deter and detect such use.<sup>124</sup> Such detection must be consistent with high-security occupations or ones with high risks of injury to the public.

### C. *Analysis Of Constitutional Grounds Outside The Fourth Amendment*

Public sector unions have attacked their employers' drug testing programs on a number of constitutional grounds in addition to the fourth amendment. With few exceptions, cases to date have been decided solely on fourth amendment grounds.

#### 1. *Substantive Due Process Challenges to Drug Testing*

*Capua v. City of Plainfield*<sup>125</sup> is the only case holding that a public employer's "mass round-up" drug testing was an unconstitutional infringement of employees' fourteenth amendment due process rights.<sup>126</sup> Judge Sarokin found the employer's plan illegal because it violated liberty and property reputational interests of the employees without affording them due process of law.<sup>127</sup> As the court grudgingly admitted in *American Federation of Government Employees v. Weinberger*,<sup>128</sup> "[o]nly recently has the technology of drug testing attained a level of accuracy that (arguably) could withstand a due process challenge."<sup>129</sup> *National Treasury Employees Union* expanded on

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123. *McDonell*, 809 F.2d at 1308-09 (permitting random testing of prison guards and reasonable suspicion testing running back 24 hours from the time of the test, implicating off-duty conduct); *Smith v. White* 666 F. Supp. at 1090 (permitting reasonable suspicion testing on tips which indicate that drug use took place outside of work); *Amalgamated Transit Union Local 1277*, 663 F. Supp. at 1572 (where the court rejected "any contention that a public transportation employee has a fundamental constitutional right to use illegal drugs off-duty"); *Bostic*, 650 F. Supp. at 250 (holding that the police department had a legitimate interest in ensuring that its officers did not use drugs on the job or use drugs off-duty in a manner which would affect their on-duty performance).

124. *Mullholland*, 660 F. Supp. at 1570.

125. 643 F. Supp. 1507 (D.N.J. 1986).

126. *Id.* at 1522.

127. *Id.* at 1520-21.

128. 651 F. Supp. 726 (S.D. Ga. 1986).

129. *American Fed'n of Gov't Employees*, 651 F. Supp. at 731.

this premise by noting that “[t]he drug-testing program is not so unreliable as to violate due process of law.”<sup>130</sup>

The Eleventh Circuit Court of Appeals in *Everett v. Napper*<sup>131</sup> rejected a substantive due process defense, deciding that an Atlanta fire fighter was correctly discharged for refusing to submit to urinalysis testing. The court held that requiring the employee to submit to the test did not violate his substantive due process rights.<sup>132</sup> The urine test requirement was rationally related to the interests of the Bureau of Fire Services in protecting the public safety and welfare by ensuring that its fire fighters are fit to perform their duties.<sup>133</sup>

## 2. Right to Privacy in Relation to Drug Testing

A more concerted attack on drug testing has been based on the proposition that such testing violates employees' constitutional right to privacy. The constitutional right to privacy exists as a penumbral right extrapolated from the United States Constitution,<sup>134</sup> or as an enumerated right found in several state constitutions.<sup>135</sup> Federal court cases to date have generally rejected the argument that the constitutional right to privacy outweighs the employer's interest in drug testing or urinalysis.<sup>136</sup> One California Superior Court, however, in

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130. *National Treasury Employees Union*, 816 F.2d at 181. *Bostic* contains the answer to why drug-testing challenges do not succeed on liberty grounds under the fourteenth amendment. In order to implicate the liberty interest, the employee must show both that he or she was stigmatized and that the charges were false. *Bostic*, 650 F. Supp. at 251-52 (citing *Blanton v. Giel Memorial Psychiatric Hosp.*, 758 F.2d 1540, 1544 (11th Cir. 1985)). As in *Bostic*, if the results are accurate, then the charges are true, defeating the fourteenth amendment claim.

131. 833 F.2d 1507 (11th Cir. 1987).

132. *Id.* at 1513.

133. *Id.*

134. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (privacy right broad enough to encompass woman's decision to terminate pregnancy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy specifically guaranteed within penumbra of Bill of Rights).

135. At least eight states have the right to privacy specifically enumerated in their state constitutions. See ARIZ. CONST., art. II, § 8; CAL. CONST., art. I, § 1; HAW. CONST., art. I, § 6; ILL. CONST., art. I, § 6, 12; LA. CONST., art. I, § 5; MONT. CONST., art. II, § 10; S.C. CONST., art. I, § 10; WASH. CONST., art. I, § 7.

136. *Shoemaker v. Handel*, 795 F.2d 1136, 1144 (3d Cir. 1986), cert. denied, 107 S. Ct. 577 (1986). (right of privacy in medical information is only relevant as to employees' concerns over confidentiality); *Smith v. White*, 666 F. Supp. 1085, 1090 (E.D. Tenn. 1987) (penumbral personal privacy rights do not outweigh the government's need for drug-free security in a nuclear plant); *Amalgamated Transit Union Local 1277 v. Sunline Transit Auth.*, 663 F. Supp. 1560, 1571-72 (C.D. Cal. 1987) (privacy

granting a temporary injunction, has found that governmental drug testing destroys workers' rights to privacy in violation of the California State Constitution.<sup>137</sup>

### 3. *Fifth Amendment Privilege Against Self-Incrimination*

A final area of constitutional challenge in regard to public employee drug testing is the fifth amendment's privilege against self-incrimination.<sup>138</sup> To date, the courts have considered the results of urinalysis testing as physical, not testimonial evidence.<sup>139</sup> As such, this non-testimonial evidence does not trigger the fifth amendment privilege.<sup>140</sup>

Other public employee drug-testing cases have argued first amendment, eighth amendment and ninth amendment claims, but none have achieved any serious consideration in court decisions.<sup>141</sup>

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interests advanced, characterized by the court as the right to use illegal drugs off-duty, do not rise to the level of an independent, fundamental right).

137. *Loder and John Doe 41 v. City of Glendale, Cal. Super. Ct., No. C616659* (Sept. 8, 1987), cited in 25 Gov't Empl. Rel. Rep. (BNA) 1265 (Sept. 14, 1987).

138. U.S. CONST. amend. V.

139. *National Treasury Employees Union*, 816 F.2d at 181 (citing *Fisher v. United States*, 425 U.S. 391, 408-09 (1976)) (privilege against self-incrimination applies to testimonial evidence); *Amalgamated Transit Union, Local 1277*, 663 F. Supp. at 1571 (drug testing does not violate compelled self-incrimination); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1527-28 (D. Neb. 1987) (noting that the United States Supreme Court in *Schmerber* held that a blood test result is not testimonial or communicative evidence envisioned by the fifth amendment).

140. In *United States v. Dionisio*, 410 U.S. 1 (1973), the Court dismissed fifth amendment privilege claims in relation to compelled production of voice exemplars, since they were used for identification purposes and not for testimonial or communicative content. *Id.* at 7. Similarly, in *Schmerber v. California*, 384 U.S. 757, 764 (1966), the Court noted in regard to fifth amendment self-incrimination in cases involving the use of results of blood tests that "[t]he distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony', but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (footnote omitted). This result has also been followed in compelled production of finger and palm prints, voice and handwriting exemplars in *Matter of Rosado*, 441 F. Supp. 1081, 1085 (1977).

141. The *Rushton* court gives a detailed analysis of the first amendment claim that mandatory referral to an employee assistance program on a positive drug or alcohol test, which views the conduct as an "illness or disease," burdens the principle and practice of religion by lowering the testee's esteem in the eyes of religious elders. The court found that the burden was overridden by the compelling public interest of the government in the safe operation of its nuclear plant. See *Rushton*, 653 F. Supp. at 1516-23.

### III. ANALYSIS

The trench warfare between public employers, public sector unions and public sector employees over mandatory drug-testing is not likely to end soon. In order to resolve the many constitutional ramifications of the drug-testing plans, parties will have to vigorously litigate the scope and content of such plans. In the first generation drug-testing cases, the federal district courts and state courts harmonized decisions in striking down ill-conceived, reactionary drug testing plans. Consequently, public employers revised their drug-testing programs to build in substantial safeguards.<sup>142</sup> Despite these protections, every drug-testing public employer faces a substantial risk of lawsuits in the adoption or implementation of a drug-testing program.<sup>143</sup>

Nonetheless, a number of principles have emerged and appear likely to become established as the law on drug testing of public employees. First, as noted earlier, urinalysis will most likely be deemed a fourth amendment type of search and seizure.<sup>144</sup> As employers move to more sophisticated procedures to ensure privacy in taking the sample, while maintaining the integrity of the sample through final chemical analysis, it seems reasonable to speculate that such testing will not be deemed so intrusive as to violate the fourth amendment.<sup>145</sup> *Mullholland* states this point directly: "In considering the availability of less intrusive measures, in this case the alternative

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142. For example, Minnesota's recent statute, Drug and Alcohol Testing in the Workplace, MINN. STAT. § 181.996 (Supp. 1987) provides that an employer's testing policy must be in writing and made available to applicants and employees. The statute also restricts testing to broadly identified situations, provides for confirmatory testing, retests of samples, laboratory and chain-of-custody regulation, first instance rehabilitation-before-discipline and other comprehensive procedural and substantive protections. *See generally id.*

143. The risk of lawsuit may be equal for public sector unions. The AFL-CIO has cautioned its public sector unions about the inherent danger in negotiating drug-testing provisions on behalf of their members. "Duty of Fair Representation" suits may succeed if the employer alleges it had reasonable cause, the union agrees and the court disagrees; employees tested may sue the employer and the union jointly for constitutional or civil rights violations or for state tort claims in defamation, invasion of privacy or negligence. *AFL-CIO on Drug and Alcohol Testing on the Job*, 25 Gov.'t Empl. Rel. Rptr. (BNA) 61:5061, 61:5068 (1987).

144. *See supra* notes 30-32 and accompanying text.

145. *See, e.g., McDonnell*, 809 F.2d at 1308. The court found that the only way to control drug use and trafficking is through uniform testing or by systematic random testing, as long as the employees who are randomly tested are not selected by a means which is arbitrary or discriminatory. *Id.*



information sources do not eradicate the need for urine testing."<sup>146</sup> Since the tests are highly accurate and necessary in limited work settings, the United States Supreme Court will likely disagree with the District of Columbia Circuit and the Ninth Circuit holdings that the tests are unconstitutional because they cannot measure on-duty use or possession.<sup>147</sup> Once the question of who may be constitutionally tested is resolved, the fact that the test reaches outside the workplace should not be an impediment to its constitutionality.

The Third, Fifth and Eighth Circuits have all found some degree of constitutional protection applicable to public employees and other employees covered by governmental testing requirements.<sup>148</sup> Yet each court has also upheld the constitutionality of a governmental drug-testing program.<sup>149</sup>

Absent individualized suspicion, these courts and other lower federal courts are authorizing limited random drug-testing only in situations where the work is performed in a highly dangerous setting, such as prisons, nuclear plants or aviation-related jobs. The law is less than clear as to whether this trend will extend random testing to all common carrier public employees having operating responsibilities affecting the public.<sup>150</sup> Testing in this manner protects the greater interest of the public to be free from threats of drug-impaired employees before the incident occurs.<sup>151</sup>

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146. 660 F. Supp. at 1569. Under the particular facts of *Mullholland*, the court stated that even if the Army could observe the employee's on-the-job performance while they were working in sensitive positions, this method would not be sufficient to determine whether the employees were drug-free. *Id.*

147. *Cf.* *Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575 (1988); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986).

148. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); *Shoemaker V. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986).

149. *Id.*

150. *See Railway Labor Executives Ass'n*, 839 F.2d at 592 (court struck down federal rules requiring mandatory drug and alcohol testing of railroad workers after an accident).

151. The court in *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987), received testimony on the possibility of running neurobehavioral tests to ascertain on-the-job impairment, but concluded that the method proposed was unduly cumbersome for detecting drug impairment at work. *Id.* at 1433. Although this same court found trained supervision to be the solution, observation in many employment settings is inadequate given the breadth of locations, lack of sufficient number of supervisors and the difficulty of detecting drug-related behavior soon enough to forestall injuries to persons and property. *Cf. id.* at 1438.

Courts are drifting away from holding police and fire employees to lower standards (initiating drug testing without suspicion) than are afforded to the general public. Likewise, in *Anable v. Ford*,<sup>152</sup> a federal district court firmly held that the use of drug testing on students was unnecessary and excessively intrusive, indicating some groups may never be tested because testing the group is highly offensive.<sup>153</sup> The setting and type of testing appear to have great weight in determining whether the fourth amendment balancing favors the government or the employee interests.

The more compelling the factual evidence is of an existing drug problem and the possible harm that may result to others, or if the positions involve intrinsically dangerous work, the greater the likelihood of survival of random testing. *McDonnell*,<sup>154</sup> *Mulholland*,<sup>155</sup> *Rushton*<sup>156</sup> and *National Association of Air Traffic Specialists*<sup>157</sup> each present evidence of these factors.

Although *National Treasury Employees Union* upheld random testing without individualized suspicion,<sup>158</sup> it should be viewed as an anomaly. The purely voluntary aspects and advance notice elements of the plan, as well as the opportunity to avoid even the most de minimis adverse consequences for failing or refusing to take the test, place the challenged plan in the category of form without substance. The lack of testing future or even current employees removes it from a true random testing posture. One wonders if the government did not simply take out all objectionable features of the plan for the sole purpose of passing constitutional muster. This action renders the plan relatively worthless in detecting drug use in sensitive security positions.

Incident or events testing has not been the focus of extensive litigation yet, except with regard to transfers and promotions. The results are mixed. Recently, the Ninth Circuit held that random tests based on accidents occurring are not consti-

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152. 653 F. Supp. 22, 44 (D. Ark. 1985).

153. *Id.*

154. See *McDonnell*, 809 F.2d at 1308.

155. *Mulholland*, 660 F. Supp. at 1507.

156. *Rushton*, 653 F. Supp. at 1524.

157. *National Association of Air Traffic Specialists*, No. A87-073 Slip. op (D. Alaska), cited in *Policemen's Benevolent Ass'n of New Jersey, Local 318*, 672 F. Supp. at 791-92.

158. 816 F.2d at 182.

tutional for railroad workers.<sup>159</sup> Whether or not this unusual holding will survive on appeal is unclear. Generic testing without individualized suspicion after firing a gun or after high-speed chases may not be worth the risk testing entails, given the fact that the conduct may create facts and inferences sufficient to justify a "for cause" test on reasonable suspicion grounds. Promotions and transfers testing have not survived legal challenges, with the exception of the watered down Customs Service program in *National Treasury Employees Union*.<sup>160</sup> Return from leave testing appears to be constitutionally acceptable, as does medical testing, where the results are not used to ensure a drug-free work environment but to verify fitness to perform work. At any rate, these tests are routine, acceptable and may be avoided by the employee, thereby reducing the degree of compulsion. Pre-employment testing has not yet undergone close constitutional scrutiny. Drug-treatment monitoring tests appear least likely to be at risk in a constitutional challenge.

Unpredictable federal court rulings may prompt public sector unions and employees to seek to avoid federal court by turning to state constitutional law. Both New York and New Jersey have expressly held that their state constitutions prohibit random drug testing.<sup>161</sup> The *Rushton* court, in exercising its pendent jurisdiction, held that the Nebraska Constitution was not violated by the random testing of nuclear plant employees.<sup>162</sup> As noted above, the California Superior Court, Appellate Division, has held in *Loder* that the public employer's drug testing program violated the California State Constitution on privacy grounds.<sup>163</sup> Employee rights relative to urine

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159. See *supra* notes 118-21 and accompanying text.

160. 816 F.2d at 182.

161. See *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 517 N.Y.S. 2d 856, 459, 70 N.Y.2d 57, 510 N.E.2d 325, 331 (N.Y. 1987) (random urinalysis testing of probationary public school teachers prohibited as there was no reasonable suspicion for testing); *Fraternal Order of Police, Newark Lodge No. 12*, 216 N.J. Super. 461, 477, 524 A.2d 430, 439 (N.J. Super. Ct. App. Div. 1987) (mandatory urinalysis of officers found unconstitutional where there was no reasonable suspicion of drug use); cf. *National Treasury Employees Union*, 816 F.2d at 182 (promotions and transfers testing survived legal challenges).

162. *Rushton*, 653 F. Supp. at 1529.

163. *Loder and John Doe 41 v. City of Glendale, Cal. Super. Ct., No. C616659* (Sept. 8, 1987), cited in 25 Gov't Empl. Rel. Rep. (BNA) 1265 (Sept. 14, 1987).

testing may be afforded greater protection under state constitutions.

### CONCLUSION

The future of random testing, based on these cases, is that it will be applicable only in narrowly defined circumstances. The category-testing cases thus far have been decided against public employers, signaling that narcotics and organized crime squad members are no less deserving of full constitutional protections against unreasonable searches than are citizens at large. It seems likely, however, that applying random testing to SWAT teams, bomb squads, police pilots and air crews would withstand close scrutiny on the basis of the high-security cases.

In summary, the drug-testing dilemma will remain unresolved until the Supreme Court gives direction in a broadly applicable holding announcing the constitutional threshold elements of public employer drug testing of public employees. The current case-by-case review of fourth amendment protections relative to employer searches, in the words of Justice Scalia, creates "a standard so devoid of content that it produces rather than eliminates uncertainty in this field."<sup>164</sup>

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164. O'Connor v. Ortega, 107 S. Ct. 1492, 1505 (1987) (Scalia, J., concurring).

