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Legal aspects of drug testing in North Carolina public schools

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LEGAL ASPECTS OF DRUG TESTING IN NORTH CAROLINA PUBLIC SCHOOLS

by

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Few problems in our nation today have received as much attention as the problem of drug abuse. Federal policies now link federal funds with the creation of drug-free workplace environments. Drug testing, in particular urinalysis screening, is one response of contemporary society to drug abuse. For public sector employers, including public school administrators, the implementation of drug testing involves important policy considerations. A constitutional tug of war exists, balancing a public school employee's constitutional rights to privacy and freedom from unreasonable searches with the school system's responsibility to maintain a safe and secure workplace. The resulting debate has led to legal challenges, with both the Fourth and Fourteenth Amendments subjected to inquiry in relation to the implementation of public sector drug testing.

The purpose of this study was to provide information for practicing school officials faced with the development and implementation of a urinalysis screening program. The questions answered by this study involved the issues of search and seizure in relation to the application of drug testing, different types of drug testing utilized by public school employers, procedural issues pertinent to drug testing policies, patterns and trends in judicial decisions, and

guidelines for administrators and school board members to use in policy development.

Based on the analysis of the data, the following conclusions were drawn:

1. No public school teacher may be subjected to mandatory drug testing without reasonable suspicion that an individual teacher is using drugs.
2. Transportation personnel in school systems are likely to be held to more stringent drug testing requirements due to governmental interest in insuring public safety.
3. Drug testing programs that fail to establish a detailed drug testing policy with substantive and procedural due process components may face legal challenge.
4. Legally defensible drug testing programs provide standards for a secured collection procedure, including a protected chain of custody, the use of a certified laboratory, and the confirmatory testing of all initial positives by an alternate procedure.
5. Confidentiality and privacy are critical components for drug-testing programs.
6. Mandatory pre-employment drug testing has been judicially condoned if part of a job application process.

7. Courts support drug-testing programs where disciplinary action includes rehabilitation.

This dissertation is

dedicated to

Caryl Blair Burns

whose steadfast encouragement

made completion a priority and reality

and

to my mother,

Leona Miller Blair,

whose quiet devotion smoothed out

all the rough times and the rough edges.

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of The Graduate School at The University of North Carolina at Greensboro.

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CHAPTER I

INTRODUCTION

Is random drug testing of teachers permissible? Does drug testing infringe upon the due process rights of teachers? Do school boards have the right to dismiss teachers based upon one positive drug test? The answers to these and other questions will be addressed in this study of the legal aspects of drug testing in North Carolina public schools.

Few problems in our nation today have received as much media attention and have created as much public debate as the problem of drug abuse. The use and abuse of alcohol and other drugs in our society is well documented. They sap the strength of our economy, both in workpower lost due to greater absenteeism, inefficiency, and accidents and in workpower redirected due to an increased need for law enforcement and rehabilitation services. If this is a war, as some have called the drug abuse issue, then American workplaces, including schools, increasingly serve as the front lines for the battle. The National Institute for Drug Abuse (NIDA) has suggested that drug abuse is "the most common health hazard in the American workplace."[1] Two-thirds

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[1]U.S. Department of Health and Human Services, National Institute on Drug Abuse, NIDA Report (Washington, D.C.): U.S. Department of Health and Human Services, 1986.

of those entering the workplace for the first time have used illegal drugs and forty-five percent have used them within the last year, according to NIDA statistics. Between ten and twenty-three percent of all workers are estimated to abuse illegal drugs on a regular basis on the job, while nearly twelve percent of the work force abuses alcohol, with "abuse" defined as use of illegal drugs three or more times a week or five or more drinks on five or more days.[2] Of particular importance to North Carolina, a recently completed study indicated that nearly 470,000 of the approximately 6.6 million residents abuse alcohol and drugs at a cost to the state of $4.3 billion dollars a year.[3] A Gallup poll conducted in 1989 reported that for the first time since the end of World War II, a majority of Americans considered a domestic problem--drug abuse--as the most critical problem facing the United States today.[4] Justice Anthony Kennedy, writing for the majority in the case National Treasury Employees v. Von Raab, indicated that "drug abuse is prevalent throughout society."[5] In Skinner v. Railway Labor

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[2]National Institute on Drug Abuse, citing 1992 statistics, telephone interview by author, 14 April 1993.

[3]"N.C. Pays High Price for Substance Abuse," The Charlotte Observer, 18 July 1993, 4C.

[4]M. McQueen and D. Shribman, "Battle Against Drugs is Chief Issue Facing Nation, Americans Say," New York Times, 20 September 1989, p. 1.

[5]National Treasury Employees Union v. Von Raab, 109 S. Ct., 1395 (1989).

Executives Association, Justice Kennedy further noted that there is "no reason to believe that American workplaces . . . are not affected by such a pervasive societal problem."[6]

Such statistics and commentary have pressured public sector employers to seek serious solutions to these problems. Many employers have responded by implementing drug testing programs. The emerging story of the workplace application of drug testing is complex and controversial. Testing has grown into a one billion dollar industry.[7] Initially used as a component of drug treatment programs and as a screening mechanism for inmates entering prison, drug screening for employment purposes began in the 1970s following military investigations that indicated soldiers in Vietnam were becoming addicted to heroin and other drugs. The Department of Defense utilized drug testing as a means of identifying drug abusers among returning Vietnam War veterans. All branches of the military were participating in mandatory urine testing for drugs by 1982. By 1985 American laboratories were processing between 15 and 20 million drug tests annually.[8]

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[6]Skinner v. Railway Labor Executives Association, 109 S. Ct., 1402 (1989).

[7]K. Hafner and S. Garland, "Testing for Drug use: Handle with Care," Business Week, 28 March 1988, 65.

[8]A. Kupfer, "Is Drug Testing Good or Bad?" Fortune, 19 December 1988, 133-134.

The federal government was among the first employers to extend drug testing into the public sector. President Ronald Reagan's Executive Order 12594 in 1986, as part of a national war on drugs, served to require a drug-free environment in federal workplaces. This order stated that "persons who use illegal drugs are not suitable for Federal employment."[9]

Drug testing was authorized for employees in "sensitive" positions along with those in "other positions involv-[ing] law enforcement, national security, the protection of life and property, public health or safety or other functions requiring a high degree of trust and confidence."[10] In Federal Personnel Manual (FPM) Letter 792-16 President Reagan provided a rationale for the extension of drug testing, stating

> as the nation's largest employer, the Federal government and its two million civilian employees must be in the forefront of our national effort to eliminate illegal drugs from the American workplace.[11]

By the following year, the amount of drug testing among all employers doubled.[12] The Drug-Free Workplace Act,

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[9]Drug-Free Federal Workplace Executive Order 12564, 15 September 1986, Federal Register at 32890.

[10]Ibid at 32892.

[11]Federal Personnel Manual (FPM) Letter 792-16, November 1986, p. 3.

[12]F. Lunzer, "But I've Never Used Drugs," Forbes, 13 July 1987, 133-134.

enacted by Congress in 1988, extended the reach of the federal mandates for drug-free workplaces to include all recipients of federal grants. Those receiving federal grants, including schools, were required to develop drug-free workplace policies, to communicate those policies to employees, to establish drug-free awareness programs, to impose sanctions and/or prescribed rehabilitation for individuals found in violation, and to notify the federal granting agency of any violations. These actions would serve as a part of a good faith effort in maintaining a drug-free environment. Excessive employee violations could result in a potential loss of federal funds.[13] This is the point at which many school systems began seriously considering drug testing as an option for employees. School systems, as recipients of federal grants, were not required to drug test employees, but with loss of federal grant money at stake, drug testing became an increasingly attractive option.

Former Attorney General Edwin Meese, who served from 1985-1988, made drug-testing of teachers a federal priority, asserting

> . . . governmental employers have a legitimate right to impose conditions that assure fitness for duty. . . . In the case of teachers, the transmission of values and ethics, by example, as well as by precept, is an important part of professional duty. Thus, freedom

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[13]102 Stat. 4305-08 Public Law No. 100-690 (16 November 1988), Federal Register at 4951-52.

> from drugs is very much a fitness-for-duty issue for them.[14]

He argues:

> . . . the Justice Department view[s] freedom from drugs as a valid condition of employment for school teachers. . . . The issue before us is that of education, example, and leadership. . . . They must show by precept and example, that leadership and chemical dependency simply don't mix.[15]

Although much of the debate concerning drug testing has centered around public sector employment, the private sector has also implemented testing programs. In 1983, ten percent of Fortune 500 companies sponsored drug screening programs, usually as part of pre-employment criteria. By 1986 one-fourth of the leading industrial companies and one-third of the Fortune 500 companies were conducting drug tests.[16] About half of all major corporations by 1988 were conducting some type of drug testing program,either for pre-employment or for certain categories of employees.[17]

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[14]Charles W. Hartman Memorial Lecture, delivered by Edwin Meese III, Attorney General of the United States, at the University of Mississippi, 19 March 1987, released by the Department of Justice (Washington, D.C.), 15.

[15]Ibid., 16-17.

[16]Gary Scholick, "Drugs in the Workplace: Legal Developments," CUPA Journal, Summer 1989, 50, citing Employment Testing (University Publications of America, 1987) at D:1.

[17]Helen Axel, Corporate Experiences with Drug Testing Programs (New York: Conference Board, 1990), 5.

Media attention to drug abuse and public opposition to the presence of drugs in the workplace have driven employers to implement comprehensive substance abuse policies and programs. Federal initiatives requiring drug testing in government agencies have also served to promote greater acceptance of drug testing in the workplace. Drug testing of applicants and employees is supported as a deterrent to drug use on the job and as a means to verify impairment. Drug testing also serves to address the issue of security, particularly associated with liability in the event of drug-related accidents and incidents. However, balancing this nation's desire to detect and regulate drug abuse in the workplace and American society's dedication to preserving individual civil liberties has resulted in a litany of legal challenges to workplace drug testing programs, especially those utilizing urine screening. So far, public sector employees have sought relief primarily based on Fourth Amendment constitutional issues, including whether drug testing qualifies as a "search and seizure" under the Fourth Amendment and whether random testing and mass suspicionless testing fall under the Fourth Amendment requirement of a warrant and probable cause. In addition, an individual's due process interests under the Fourteenth Amendment have also been addressed by the courts. With the convergence of more sophisticated testing procedures, more societal demands for

a drug-free work force, and more political pressures to satisfy federal mandates, school boards and administrators often must rely on the courts for direction and clarification in the application of drug testing programs.

Statement of the Problem

Drug testing poses a significant problem for school systems. Schools receive federal funds, and as recipients of those funds, must have comprehensive substance abuse policies in place or must risk loss of funding. In considering implementation of drug testing, school administrators and board members are guided by the Justice Department's philosophy of fitness-for-duty and by concerns for legal liability. Drug testing, while not required by the federal government to maintain funding, nonetheless offers the greatest protection from liability claims and is supported by the private sector.

On the other hand, drug testing is expensive and conflicts with many historical priorities of schools. In addition, school boards have received little help in determining what is best for their systems. Given the continuing debate concerning drug testing, school boards and administrators face numerous challenges in creating drug-free workplace policies, especially when those policies include a drug testing component. This study will provide guidelines for school board members and administrators who must grapple with this issue.

Purpose of the Study

The purpose of this study was (1) to determine from current literature the critical legal issues concerning the drug testing of public employees, including public school teachers; (2) to review and analyze drug testing policies currently used by school units in the state of North Carolina; (3) to review and analyze case law related to these currently-adopted policies; and (4) to provide guidelines for practicing school administrators who must draft and enforce the drug-free workplace policies. This study was developed in a factual manner based on the legal issues involved and did not attempt to address the moral or emotional issues inherent in drug testing.

Questions to be Answered

This study will answer the following questions:

1. What is revealed in current literature concerning drug testing as a search and seizure?
2. What is revealed in current literature concerning different applications of drug testing, including random drug testing, reasonable suspicion testing, and pre-employment testing?
3. What are the most common procedural issues related to application of drug testing?
4. Are there discernible patterns and trends that can be identified from an analysis of case law?

5. What legal and practical guidelines can be created as a result of this research to assist school administrators and school board members?

Methodology

The methodology used in this study was that of legal research as defined by Hudgins and Vacca.[18] Within this type of research, an analysis is conducted of judicial decisions from which legal principles are established. The study of case law concerning drug testing was supplemented with an analysis of the current North Carolina statutory law concerning workplace drug testing. In addition, each of the 121 public school units and the three federal school systems were contacted concerning the drug testing of school employees. Of the 115 respondents, thirty-two currently conduct drug testing as part of their drug-free workplace programs. The drug testing policies of these school units were reviewed and analyzed in relation to current case law.

Legal research starts with the framing of the problem as a legal issue: the legal aspects of drug testing public school employees in North Carolina. A bibliography of court decisions is built, with each as a legal issue: the legal aspects of drug testing public school employees in North Carolina. A bibligoraphy of court decisions is built,

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[18]H. C. Hudgins and Richard S. Vacca, Law and Education (Charlottesville, Va.: The Michie Company, 1985), 23-52.

with each decision subjected to an analysis around three major areas: the facts of the case, the decision and rationale, and the implications of the decision.

Primary sources for this study were state and federal court decisions. Secondary sources such as law reviews, education articles, business and management analyses, and books were also used to provide supplemental information. Included as resources were the Current Index to Journals in Education, Index to Legal Periodicals, Social Science Index, Current Law Index, and Resources in Education.

Legal cases focusing on drug testing of public sector employees were located utilizing the Westlaw computer search system at Wake Forest University Law Library. The actual cases were examined as reported in the National Reporter System, which includes decisions handed down by the following courts: the United States Supreme Court, the United States District Courts, the United States Courts of Appeals, and state appellate courts. Finally, legal cases were "shepardized" using Shepard's Citations, which provides a history of reported court decisions and how each case has been cited.

Limitations of the Study

This study was limited to an analysis of state and federal cases relating to urinalysis drug testing of public sector employees, including teachers, and to an examination

of the drug-free workplace policies of those school systems currently conducting drug testing of employees. Tobacco and alcohol abuse issues were not specifically addressed since the focus of most urinalysis drug testing relates to drugs that are classified and regulated as controlled substances. Case law concerning drug testing is recent, as are the policies from the school systems. This study was designed as an initial analysis of the literature and legal cases to examine the legal application of urinalysis drug testing in school systems in North Carolina.

Design of the Study

Chapter I includes an introduction, the statement of the problem, the purpose of the study, the questions to be answered, the methodology, the limitations of the study, the design of the study, and the definition of terms.

Chapter II examines current articles and reviews from educational, business, scientific, and legal resources to determine the actual procedures of drug testing, the application of drug testing in the workplace, and the limitations of drug testing, both legally and scientifically, as revealed through discussions in current literature.

Chapter III reviews the drug-free workplace policies from those school systems that currently conduct drug testing. Attention was given to determining which categories of employees were subjected to testing, the type of testing

conducted (pre-employment, random, reasonable suspicion), the various procedural components of the drug testing policies, and the assumption of cost for the drug testing procedures.

Chapter IV presents pertinent legal cases concerning the drug testing of public sector employees, including teachers. Most of these cases are district court or appellate court cases, as there have only been two Supreme Court decisions concerning drug testing so far.

Chapter V summarizes the findings of the research and provides guidelines for school administrators and school board members as they anticipate conducting drug tests of school employees. Also included in this chapter are recommendations for further study.

Definition of Terms

The following words and phrases are key terms which were utilized in this study. This list of definitions is divided into two parts--legal terms and terms concerning drug testing. The source for the definitions of the legal terms was Black's Law Dictionary.[19] The source for the definitions of the drug testing terms was Drug Testing: Protection from Society or a Violation of Civil Rights?[20]

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[19] Black's Law Dictionary, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990).

[20] Drug Testing: Protection for Society or a Violation of Civil Rights? (Lexington, Ky.: The Council of State Governments, 1987).

by the National Association of State Personnel Executives and the Council of State Governments.

Legal Terms

Certiorari--A writ issued by a superior court to an inferior court requiring that the inferior court produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. The Supreme Court of the United States commonly uses certiorari as a discretionary device to choose the cases it wishes to hear.

Compelling interest--An interest which the state is forced or obliged to protect.

Due process--A course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights.

Probable cause--A reasonable cause; having more evidence for than against. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction.

Reasonable suspicion--Such suspicion which is sufficient to induce an ordinarily prudent and cautious

individual under the circumstances to believe that criminal activity is at hand.

Search--Consists of looking for or seeking out that which is otherwise concealed from view; a search implies prying into hidden places for that which is concealed, hidden, or intentionally put out of the way.

Seizure--Act of taking possession of property for a violation of law or by virtue of an execution of a judgment.

Drug Testing Terms

Chain of custody--The record of individuals who handle the specimen.

Chromatography--A method used to separate drugs and metabolites.

Confirmation test--A test performed to verify a positive screening test result and based on a methodology different from the screening test.

Gas chromatography (GC)--A method for separating drugs and metabolites.

Immunoassay--A test using antibodies to detect drugs/metabolites.

Illegal drugs--Drugs including cocaine, marijuana, opiates, and phencyclidine (PCP) that are deemed illegal by federal law.

Metabolite--The product of metabolism.

Positive--Test result indicating a drug/metabolite is present.

Screening test--An initial drug test, utilizing urinalysis, designed to rapidly and reliably distinguish negative specimens from those that may be positive.

Summary

United States District Judge Avant Edenfield, in assessing the widespread application of drug testing, noted:

> The drug problem in this country is real and it is dangerous. But the methods used to eradicate it must be implemented within constitutional limits, not only because the employees to be tested for drugs have an expectation of privacy, but also because the creation of unfortunate precedent in this area, especially in light of the technological advances of recent years, could and would have a far-reaching impact upon the rights of all citizens in areas outside of the drug context.[21]

Today, the attention of the public and the media is still focused on the problems related to drug abuse. Reflecting this trend, employers have implemented drug testing programs. For public sector employers, including public school administrators, the application of drug testing involves crucial policy considerations concerning constitutional issues that have been addressed in recent court decisions. An understanding of these constitutional issues is critical if

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[21]U.S. District Judge Avant Edenfield, American Federation of Government Employees v. Weinberger, 651 F. Supp. 726 (S.D. Georgia 1986) at 21.

policies are to be legally permissible. Chapter II will present a review of the literature concerning drug testing, examining drug testing procedures, the application of drug testing in the workplace, and the legal and scientific limitations of drug testing.

CHAPTER II

REVIEW OF LITERATURE

Historical Overview

Drug testing is one response of contemporary society to what is currently defined as drug abuse. It is a response aimed at controlling and containing this problem. The history of addictive drugs has been marked by hopes for a simple solution to this problem. Over time there have been various societal responses to drug abuse, including prohibition, legal restraints, medical and psychological treatment, and punishment. Yet, in contrast to previous responses, drug testing represents the technological sophistication that makes it possible to detect the presence of drugs in biological specimens. Ironically, this technology for controlling drug abuse descended from the same techniques utilized in synthesizing new marketable drugs for use in this century.

Understanding the current wave of interest in drug testing requires insight into both its sociological and technological foundations. According to Deborah L. Ackerman in "A History of Drug Testing,"[1] drugs have been used in

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[1]Deborah L. Ackerman, "A History of Drug Testing," in Drug Testing: Issues and Options, ed. Robert H. Coombs and Louis J. West (New York: Oxford Press, 1991), 3.

every society throughout history in traditional ways--to cure sickness, to relieve pain, to enhance moods, and to improve physical performance. Every society has also experienced those whose nontraditional use of drugs deviated from the medical and social acceptance of the time. Such behavior, classified as "drug abuse," is culturally determined, with behaviors corresponding to appropriate use and inappropriate abuse varying considerably from culture to culture and even within the same culture over time.[2]

Prior to the nineteenth century, Ackerman notes, the substance with the greatest potential for access and abuse was alcohol. The introduction of highly potent distilled spirits between the sixteenth and eighteenth centuries initiated intensive religious and social responses to address the problems associated with alcohol addiction. Some religious and social reformers called for moderation; others called for total abstinence. The American Society for the Promotion of Temperance, founded in 1827, concentrated its efforts into alcohol's prohibition. By 1851, the state of Maine had enacted the first prohibition law in the United States.[3]

During the early 1800s, other substances, such as opium and morphine, were introduced medically to alleviate pain. Opium, used as an analgesic and hypnotic in Asia for almost

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[2]Ibid. [3]Ibid., 5.

as long as alcohol had been used here, also had an addictive history. As an unregulated additive to medicines and potions, opium soon became a drug of use and abuse by the general public.[4] Beverly Potter and Sebastian Orfali suggest in Drug Testing at Work: A Guide for Employers and Employees, that, by the latter part of the nineteenth century, one in 400 Americans was estimated to have used opiates regularly.[5] At the same time, morphine was also widely publicized as an analgesic. After the Civil War, a population of morphine-addicted veterans joined the dependent ranks.[6]

Early attempts to control opium and morphine, Ackerman explains, sought to move beyond the traditional religious and social responses of prohibition. The use of new drugs to break chemical dependency was promoted. Heroin was introduced in the late 1800s to alleviate opium withdrawal symptoms and cocaine was utilized as a cure for morphine addiction. Within a short period of time, heroin and cocaine addiction replaced opium and morphine addiction. Potter and Orfali note that pharmaceutical companies found many consumer uses for cocaine, as it became an ingredient in cigarettes, skin salves, nasal sprays, wine, and face powder.

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[4]Ibid., 5.

[5]Beverly Potter and Sebastian Orfali, Drug Testing at Work: A Guide for Employers and Employees (Berkeley, CA: Ronin Press, 1990), 2.

[6]Ackerman, 5.

Presidents Grant and McKinley, Thomas Edison, and Pope Leo XIII endorsed its use. Thus, it was no surprise that by 1900, an estimated 250,000 Americans were opium or cocaine addicted.[7]

With an expanding concept of drug abuse and an ever-lengthening list of drugs abused, Ackerman explains that the United States undertook a more comprehensive approach to control the drug problem, including the use of legal restraints and punishment. This was the first time many substances became "illegal" and "controlled," as laws were enacted that legally restricted the flow and distribution of drugs. The 1906 Pure Food and Drug Act required medicines containing habit-forming substances to carry warning labels. By 1909, opium imports were banned. The Harrison Act of 1914 established strict limits to narcotic sales and required, for the first time, record-keeping of drugs prescribed by physicians and dispensed by pharmacists. The temperance movement regained momentum by 1919, securing passage of the Eighteenth Amendment, prohibiting the sale and manufacture of alcohol. Prohibition ended in 1933 with the repeal of the Eighteenth Amendment, but not before marijuana, more available than alcohol or other controlled substances during Prohibition, became another source of widespread addiction. Reports that marijuana led to murder and insanity resulted

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[7]Potter and Orfali, 2.

in the enactment of the Marihuana [sic] Tax Act of 1937, legislation that levied taxes on users and proscribers of marijuana, with harsh penalties for nonpayment of those taxes.[8]

Control of drugs through legal restraints and taxes did not diminish the technological evolution in the manufacture of synthetic drugs. Science marched forward as medical chemistry actively isolated, purified, and prescribed new stimulants and hallucinogens, all with an unknown abuse potential. The development of barbitol in 1903 led to the synthesis of various barbiturates. By the 1940s, other psychoactive drugs such as LSD had been marketed. However, the same methods used in the creation of new drugs were now acknowledged to be useful in identifying and quantifying drugs in biological specimens.

Prior to the early 1900s, no technique existed for identifying drug users beyond actions individuals made to secure possession of drugs or actions resulting from individuals under the influence of drugs. Ackerman cites M. H. Haber in describing that urinalysis may, in fact, be "the oldest of all laboratory tests."[9] Hippocrates, Haber explains, first suggested that urine served as a blood

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[8]Ackerman, 6-7.

[9]Ackerman, 8, citing M. H. Haber, "Pisse Prophecy: A Brief History of Urinalysis," Clinics in Laboratory Medicine, 8 (1988), 415.

filter and was suitable for medical diagnosis. It was only after perfection of chemical and microscopic analyses of biologic specimens in the nineteenth century that urinalysis became an accepted medical procedure.[10] The use of various chromatographic methods to separate compounds and identify chemical components such as acids and bases was developed by 1904. Subsequent discoveries in the isolation of absorbents and solvents made the technique of chromatography more sensitive and powerful and the separation of substances more precise. Paper chromatography was well established by 1944, advancing the use of urinalysis as a means for detecting various diseases. Additional refinements led to methods whereby the unique abilities of substances to absorb and emit light could be utilized to detect specific drugs such as heroin, morphine, barbiturates, amphetamines and cocaine in biological specimens.[11]

The first true drug-screening program was introduced in the early 1920s, according to C. B. Pugh and J. L. Fink in "Testing for Drug Abuse: Analytical Methods," but it was based on analysis of blood samples, not on urinalysis. During Prohibition, blood samples were often collected from drivers charged with driving under the influence and were biochemically analyzed. By the early 1930s, noninvasive breath analyses for alcohol intoxication were substituted

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[10]Ibid., 415-418. [11]Ackerman, 7.

for blood tests.[12] It was not until the 1950s that the chromatographic techniques that made it possible to conduct mass screenings were perfected. Gas chromatography (GC) improved the separation methodology of paper chromatography so that almost all drugs could be subjected to analysis. When coupled with mass spectrometry (GC/MS) in the 1970s, drug screenings could detect and identify all drugs in biological sepcimens. The most recently developed methodologies are the immunoassays, in particular the enzyme-multiplied inhibition assay (EMIT) and the radioimmunoassay (RIA), both marketed as tests that are relatively portable and inexpensive for the screening of most drugs.[13] Thus, urinalysis became a standard operating procedure by the 1970s for identifying drugs. The use of mandatory drug testing in 1968 by the International Olympic Committee, the widespread utilization by the military, and the extension of drug screening into amateur athletics by the National Collegiate Athletic Association in 1986 broadened the application of drug testing and made it increasingly attractive to the American workplace.

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[12]C. B. Pugh and J. L. Fink, "Testing for Drug Use; Analytical Methods," American Journal of Hospital Pharmacy, 45 (1988), 1297-1300.

[13]Ackerman, 12-15.

The Debate Concerning Drug Testing

Many voices have entered the debate concerning drug testing and its application into the American workplace, including the voices of scientists, politicians, legal scholars, and business executives. Donald Klingner in Workplace Drug Abuse and AIDS: A Guide to Human Resource Management Policy and Practice summarizes the reasons for the current popularity of drug testing in the workplace, noting that it joins a long line of control measures. Previous control measures, including intensive efforts toward interdiction, mandatory drug sentences and penalties, and media campaigns such as "Just Say No," he suggests, have largely been ineffective and misdirected.[14]

Focusing on the workplace is, Klingner suggests, "one arena in which to address this issue as both necessary and reasonable." He further explains:

> Controlling workplace substance abuse is certainly defensible as one of the most rational societal policies for responding to substance abuse. Why? Our two best measures of a person's ability to function in society are whether they can maintain stable social relationships (family and friends) and hold a job. Inabilitiy to do these things means that there is an increased likelihood they will end up in jail or a psychiatric facility. Employees who have substance abuse problems already have much to lose by continued poor job performance . . . loss of a job will make it much harder to continue substance abuse without

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[14]Donald E. Klingner, Workplace Drug Abuse and AIDS: A Guide to Human Resource Management Policy and Practice (New York: Quorum Books, 1991), 6-7.

> running afoul of the criminal justice system . . . [and] will mean loss of status and self-respect.[15]

According to Nanette Rutka Everson in "Drug Testing: It's a Good Idea and It's Legal," drug testing is critical to maintaining an effective workforce, as she argues:

> . . . With one in six American workers using marijuana monthly and one in twenty American workers using cocaine monthly, it is difficult to imagine how American business can compete against an ever more disciplined foreign workforce. Those who receive goods and services provided by drug users will bear the aggravation of increased quality control errors as well as expose themselves to safety hazards associated with defective products.[16]

John Morgan in "Problems of Mass Urine Screening for Misused Drugs" more critically notes that drug testing is often initiated as a cost effective means for addressing substance abuse in the workplace, based on the premise that drug users behave ineffectually at work. Morgan questions such assumptions that would classify abusers and users together,[17] indicating that a positive test for drugs is not directly correlated to impaired human behavior. He suggests that the real purpose for drug testing in the

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[15]Ibid., 12.

[16]Nanette Rutka Everson, "Drug Testing: It's a Good Idea and It's Legal," in Drug Testing: Protection for Society or a Violation of Civil Rights? (Lexington, Ky.: National Association of Personnel Executives and the Council of State Governments, 1987), 71.

[17]John P. Morgan, "Problems of Mass Urine Screening for Misused Drugs," Journal of Psychoactive Drugs, 16(4) (1984), 305.

workplace is the identification of the deviant, rather than the dysfunctional, behavior, likening drug testing to polygraph testing, which can be used to uncover details about the moral behavior of individuals.[18]

Beverly Potter and Sebastian Orfali indicate that statistics often play a major role in the drug testing decision making. According to these authors, Rear Admiral Mulloy reported in 1983 that mandatory drug testing had led to a detectable decrease in drug abuse among enlisted Navy personnel. Positive test results dropped from 48 percent in 1980 to 21 percent in 1982. However, Potter and Orfali explain that this statistic is deceptive, as it masks the improvements made in laboratory procedures from 1980-1982 in addressing false positives and the fact that there was a marked increase in alcohol use for the same personnel.[19] Richard Dwyer echoes this manipulation of drug testing statistics in "The Employer's Need to Provide a Safe Working Environment," as he argues, "Mythological and emotionally-charged numbers are being used to shock complacent Americans into acting on our illegal drug problems."[20]

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[18]Ibid., 308. [19]Potter and Orfali, 29.

[20]Richard E. Dwyer, "The Employer's Need to Provide a Safe Working Environment: The Use and Abuse of Drug Testing," in Substance Abuse in the Workplace: Readings in Labor and Management Issues, ed. by Raymond L. Hoglar (Penn.: Department of Labor Studies and Industrial Relations, Pennsylvania State University, 1987), 59.

Other employers implement drug testing as a result of the cost claims associated with drug abuse. Stephen Crow and Sandra Hartman in "Drugs in the Workplace: Overstating the Problems and the Cures" suggest that the "price tagging" of drug problems in the workplace is often based on undocumented and overinflated estimates. Agencies charged with collecting drug abuse statistics are largely federal agencies, compelled consciously or unconsciously, they insist, to justify their existence and their reports by price tagging the drug problems they are trying to resolve. For example, Crow and Hartman note the AT&T study of two plants in their company, one that drug tested and one that did not. They found that workplace costs of illicit drug use were less than the costs associated with drug testing. Therefore, AT&T determined there was no economic justification for mandatory testing in their company.[21]

Cost was certainly a critical issue in the federal government's implementation of drug testing in 1986. Frank Thompson, Norma Riccucci, and Carolyn Ban in "Drug Testing in the Federal Workplace: An Instrumental and Symbolic Assessment" examined the federal drug testing program as it was implemented from 1986-1990. Cost benefit analysis would rarely warrant mandatory testing or random testing with low positive rates, for a small proportion of drug abusers in a

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[21]Stephen M. Crow and Sandra Hartman, "Drugs in the Workplace: Overstating the Problem and the Cures," Journal of Drug Issues, 22 (Fall, 1992), 925.

test pool implies a potentially low percentage testing positive and a high cost per test procedure. Federal planners originally estimated that there would be a five percent rate of positive results from those employees who were subjected to random testing. In actuality, as of 1991, the rate of positive results has been considerably lower than five percent, generally less than half a percent per agency for random testing. In cost, that has meant that the federal drug testing program has cost five times per positive result more than estimated, thus making it an enormous and costly program. In contrast, when agencies tested based on individualized suspicion, the rate turned out to be twenty-two percent positive, a much more effective cost-benefit ratio.[22] This concern for the cost-benefit dilemma and random drug testing is reiterated by Thomas Sexton and Ulrike Zilz in "On the Wisdom of Mandatory Drug Testing," as they suggest,

> The lower the proportion of users, the less desirable is mandatory testing. . . . Society should perform universal or random testing only if it has sufficient prior evidence that the proportion of substance abusers in the subpopulation is large enough.[23]

Michael Walsh and Jeanne Trumble contend that drug testing as an issue extends beyond cost-benefit analyses and

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[22]Frank J. Thompson, Norma M. Riccucci, and Carolyn Ban, "Drug Testing in the Federal Workplace: An Instrumental and Symbolic Assessment," Public Administrative Review, 51 (Nov./Dec. 1991), 518-519.

[23]Thomas R. Sexton and Ulrike Zilz, "On the Wisdom of Mandatory Drug Testing," Journal of Policy Analysts and Management, 7 (Spring 1988), 543.

statistics. In their article "The Politics of Drug Testing," they place drug testing within the context of the economic climate of the day. Aggressive pursuit of profits has resulted in powerful marketplace dynamics for drug testing. These authors outline the continuing scenario--attorneys oversee a never-ending spiral of cases and lawsuits; labor representatives oversee increased demand for their negotiating services; private consultants peddle their knowledge to policy makers; technological entrepreneurs develop more sophisticated testing equipment and procedures. With the drug testing field growing an estimated ten percent a year, Walsh and Trumble insist that profit motives are a significant driving force behind the drug testing phenomena.[24]

Aside from the larger issues concerning drug testing, Helen Axel in Corporate Experiences with Drug Testing Programs examines some of the reasons why individual corporate employers implement drug testing. She indicates that most employers cite recurrent drug problems in the workplace as their single most compelling reason for considering and implementing a drug testing program. Many employers believe that testing for drugs can assist in detecting drug use before addictive behavior affects performance at the

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[24]J. Michael Walsh and Jeanne G. Trumble, "The Politics of Drug Testing," in Drug Testing: Issues and Options, ed. by Robert H. Coombs and Louis Jolyon West (New York: Oxford University Press, 1991), 22-23.

worksite.[25] In particular, many employers suggest safety and legal liability considerations in the event of drug-related accidents affecting drug testing decisions. Employers report they are not immune to the resulting media attention when drugs are implicated in accidents. Further, Axel notes,

> In the view of many proponents, drug testing not only has the capacity for detecting incipient drug problems, but can act as a deterrent to others who may be tempted to experiment with drugs.[26]

Finally, she argues testing sends an important message to the community that drug users will not be tolerated or hired.[27]

Crow and Hartman assert that the clamoring for drug-testing is neither driven by profits nor fear of liability but is related to a neo-temperance movement aimed at fueling our fears of contemporary undesirables--those groups commonly associated with drugs such as inner city minority groups. Those most responsible for this neo-temperance movement are the media, who sensationalize drug-related stories, and politicians, who ignore other problems such as alcohol and tobacco for fear of offending their own powerful constituencies.[28]

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[25]Helen Axel, Corporate Experiences with Drug Testing Programs (New York: Conference Board, 1990), 17-18.

[26]Ibid. [27]Ibid. [28]Crow and Hartman, 927.

Thompson, Riccucci, and Ban also question the symbolic value of drug testing. Drug testing programs may prove divisive and part of status politics, serving as a vehicle for reaffirming those who are desirable and seeking out those who are "undesirable." In addition, these authors suggest that implementing mandatory testing for broad categories of federal employees where drug abuse has never been documented popularize the misguided notion that federal workers are abusers, sacrificing their integrity in order to secure public confidence.[29]

Dr. George P. Lundberg, former editor of the Journal of the American Medical Asociation, has described drug screening measures as "chemical McCarthyism," insisting

> Urine drug screening has been introduced as one method to create the drug-free workplace. Unfortunately, there are no standards . . . that support the notion that the benefits produced by this approach will exceed the costs in money or loss of personal liberty produced by this form of intimate body search. . . .[30]

Lundberg concedes that urine drug screening has improved greatly since its initial uses with athletes and military personnel, but he contends that drug screening still fails to pinpoint drug impairment. He argues that

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[29]Thompson, Riccucci, and Ban, 523.

[30]George D. Lundberg, "Mandatory Unindicated Drug Screening: Still Chemical McCarthyism," Journal of the American Medical Association, 256 (December 5, 1986),

the purpose of drug testing is primarily legal not medical, with the intent to punish not rehabilitate.[31]

Klingner underscores the limitation of drug testing, stating, "Even the strongest advocates will concede that it is an invasive and degrading procedure which is technologically imperfect," while citing a common challenge to those who would conduct urinalysis testing for illegal drugs, noting, "the drugs of choice for workplace substance abuse are alcohol and tobacco . . . those substances represent the greatest health and safety hazard to employees and employers."[32] Echoing Lundberg, Klingner indicates that drug tests only determine whether drugs are present, "not the level of concentration or the extent to which the presence of these drugs results in impaired job performance."[33]

Richard Dwyer, summarizing the ideas of many drug testing analysts, asserts the reasons for the continuing popularity of drug tests in spite of the criticism:

> 1) The results satisfy a powerful desire to know intimate and hidden details of human behavior; 2) media hype causes mass hysteria and these tests satisfy the American search for an immediate solution based on our belief that science can cure all of our ills; 3) there is a misguided notion that these tests provide answers that help to ensure a safe and secure workplace; 4) our government is making an attempt to shift the responsibility of controlling illegal drug trafficking from ineffective law enforcement agencies to the employer . . . a classic case of shifting the blame from the criminal to the victim; and 5) those in position of

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[31]Ibid., 3005. [32]Klingner, 55. [33]Ibid., 1.

> power are individuals over 40 years old. As a drug of preference remains alcohol, which is not only more pervasive in the workplace, but also more tolerated.[34]

No Longer a Question of If, But How to Drug Test

Once the decision to drug test is made, employers face choices in the method of implementation. Many employers, including the federal government, conduct random drug testing. Everson describes the necessity of random screening, stating:

> . . . The sad truth about drug impairment is that, by the time an employee begins to exhibit visible symptoms of obvious drug intoxication, they are generally already at the extreme end of drug dependency. . . . Given the difficulty of detecting illegal drug use, the problem that an employer must face is the fact that most drug effects are more subtle than crude intoxication. . . . The federal model embraces random testing because of the inability of supervisors to detect drug use in all but the very best egregious circumstances. Moreover, in those 'sensitive' positions subject to random testing, like law enforcement, illegal conduct is so inconsistent with a law enforcement mission, that illegal conduct is itself a disqualifier for employment.[35]

Beverly Potter suggests, however, that random testing programs have drawn the most criticism and have been the source of legal attacks on drug testing programs in general. People who have no history of drug use, she emphasizes, resent being tested with suspicion. People using "legitimate"-prescribed medications or over-the-counter drugs often must defend themselves, proving their innocence.[36]

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[34]Dwyer, 66. [35]Everson, 74. [36]Potter and Orfali, 28.

Lewis Maltby in "Why Drug Testing is a Bad Idea" notes that the fundamental limitation of drug testing is that it screens for the wrong things. Drug testing, he notes, reveals the presence of drug metabolites which may remain in the body for up to two months. As he argues, "Firing good, sober employees because of something they did last Saturday night does not increase safety."[37] He attributes the popularity of drug-testing to politics and the power of the media. He states:

> Despite the fact that workplace drug abuse is far less prevalent than alcohol abuse--which industry has survived for years--the media has portrayed it as an epidemic that is sweeping the country and will destroy our economy unless immediate emergency measures are taken. In this emotional climate, is it any wonder that a manager who is already beleaguered can be convinced by a good salesperson who promises an instant solution with a simple, inexpensive test?[38]

Potter and Orfali also describe the overarching reach of drug testing, suggesting,

> The concern that drug or alcohol testing may infringe on non-work activities merits consideration. The courts must counterbalance the interests of the employer and society against that of the employee being tested for drugs. Tests can identify drug use during an employee's off hours. An employer's interest in an employee's personal matters is not compelling unless an

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[37]Lewis Maltby, "Why Drug Testing is a Bad Idea," in Substance Abuse in the Workplace: Readings in the Labor-Management Issues, ed. by Raymond L. Hoglar (Penn.: Department of Labor Studies and Industrial Relations, Pennsylvania State University, 1987), 55.

[38]Ibid.

employee's use of drugs directly affects the workplace.[39]

Richard Dwyer emphasizes other critical limitations associated with the technology of drug testing. Companies that manufacture and market drug testing materials attest to the relatively high levels of accuracy for their products, with many companies claiming a 95 percent accuracy rate. Dwyer states, however, that most tests actually result in a false positive labeling one out of three times, resulting in a 67.8 percent accuracy level. In addition, confirmation tests are essential to verify positive screens, but he notes that in the real world, confirming tests are often not conducted. In addition to concerns with test inaccuracy, there are increased concerns with laboratory inaccuracies. There is often the risk of human error--in administering the test, in transfering the sample through the chain of custody, and in interpreting the results of the screen. Dwyer relates that the Center for Disease Control (CDC) rates laboratories with greater than 25 percent error rates as unacceptable. A 1985 CDC study of laboratories participating in drug tests evidenced error rates of 30 percent frequently.[40]

Another technical problem cited by Dwyer is the cross-reactivity of over-the-counter substances. Several EMIT

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[39]Potter and Orfali, 75. [40]Dwyer, 60-64.

tests have been reformulated due to the fact that they produce positive readings for marijuana use in reaction to the presence of ibuprofen. Positive tests, Dwyer argues, may result not only because of test error and/or human error, but also because a substance considered safe has been identified as an illegal substance. He urges caution, noting that drug tests neither identify intoxication, addiction, dysfunction, nor malfeasance, the very behaviors that cause an unsafe work environment.[41]

There have been numerous legal challenges to drug testing. Potter and Orfali note that in 1989 alone, over 40 lawsuits challenging drug testing were heard in federal courts.[42] Mark A. Rothstein in "Screening Workers for Drugs: A Legal and Ethical Framework" weighs the legal and ethical concerns related to the conducting of drug-screening programs. He notes that dealing with drug-abusing employees previously occurred after the fact--after an accident or crime.[43]

Preventing the consequences of drug-abusing employees before a problem arises is essential. Drug testing supports workplace efficiency, especially since some workers work alone and many may be impaired but not visibly intoxicated.

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[41]Dwyer, 63. [42]Potter and Orfali, 84.

[43]Mark A. Rothstein, "Screening Workers for Drugs: A Legal and Ethical Framework," in Substance Abuse in the Workplace; Readings in the Labor-Management Issues, ed. by Raymond L. Hoglar (Penn.: Department of Labor Studies and Industrial Relations, Pennsylvania State University, 1987), 119.

Rothstein presents several criteria for a legal and ethical drug screening program. First, the testing program should be concerned with identifying which employees will be subjected to the testing regimen. In particular, employees in "critical" or "safety specific" jobs may meet testing criteria, while those in noncritical or non-safety specific jobs may not be subject to the same rigorous testing standards. He explains that this is a compromise between those who support mandatory drug testing of all employees and those who oppose any drug screening.

In addition, accurate test procedures must be performed by trained professionals under laboratory conditions. New testing products have been marketed as cheap, convenient, and portable. Improper use of testing materials and misapplied procedures by inexperienced test administrators may lead to questionable results that will not withstand a courtroom challenge.

Finally, Rothstein emphasizes the need for confidentiality, since drug testing background information and test results serve as medical records. Data should be stored in a secure environment with access limited.[44]

According to David Evans in "Legal Issues in Alcohol and Drug Detection Programs," all drug tests must be administered as though the results will become part of a legal

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[44]Ibid., 120-124.

proceeding. He outlines a proper testing protocol that will withstand even a rigorous legal challenge, explaining:

1. Testing procedures must not unnecessarily embarrass or harass an employee.
2. Consent to test must not be obtained fraudulently, by misrepresentation, or by force.
3. Sample collection must be relatively error-free with the sample free from adulteration.
4. Persons conducting the test must be properly trained and/or certified.
5. Procedures must be appropriate, with equipment in proper order.
6. Tests must follow all state laws for sampling and analysis.
7. Test selection must be appropriate; if employees are selected randomly, the selection process must be fair.
8. Test subjects must be apprised before the test of the appropriate procedures and given an opportunity to discuss any physical condition which may interfere with the result.
9. The test environment should not affect the test.[45]

Gary Scholick in "Drugs in the Workplace: Legal Developments" details the constitutional dimensions of drug testing programs for public sector employees. Drug testing has been labeled a search and seizure under the Fourth Amendment. Following the precedents set by case law, drug testing has been traditionally prohibited except when the employee is in a highly regulated industry, in an industry with a significantly diminished expectation of privacy, or in a job in which public safety concerns are paramount. If

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[45]David G. Evans, "Legal Issues in Alcohol and Drug Detection Programs," in Drug Testing: Protection for Society or a Violation of Civil Rights (Lexington, Ky.: National Association of Personnel Executives and the Council of State Governments, 1987), 11.

an employee does not fit these exceptions, public sector employers must have reasonable suspicion for testing. Scholick notes that lower courts have been balancing the issues of reasonable suspicion testing and random testing on a case by case basis. In general, cases involving fire-fighters, police officers, and teachers have found that drug testing is permissible for reasonable suspicion. For transportation workers, horse racing participants, correctional officers, nuclear power plant employees, and air traffic controllers, random testing has been found permissible based on either public safety concerns, degree of industry regulation, or diminished expectation of privacy. Further, pre-employment drug testing for almost all categories has generally been upheld as constitutional.[46]

Scholick also addresses the debate surrounding the threshold levels for drug testing and their impact on employee dismissal. The threshold level is the cut-off point for reporting test results as positive. For example, an employee would not receive a positive report unless the threshold level for a specific substance is in excess of a specific number of nannograms per milliliter of urine. Scholick notes that most laboratories have developed their own standards for what constitutes a positive test result. If an individual tests above that standard, Scholick

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[46]Gary P. Scholick, "Drugs in the Workplace: Legal Developments," CUPA Journal (Summer, 1989), 53.

stresses, it does not necessarily indicate impairment. It is the employee's behavior which reveals whether the employee is impaired; the drug test merely tells why the person is impaired. Scholick suggests that the particular level of positive result may be affected by the physical condition of the individual tested, the amount of drugs injested, and the amount of liquid consumed by the individual. He advises that because of the lack of an established correlation between the amounts of substances in the urine and the levels of impairment, drug testing is best used to confirm a reasonable suspicion rather than proof in and of itself that the employee is under the influence.[47]

Attorney Stephen Allred, in "Constitutional Concerns in Drug Testing of Public Employees," discusses Jones v. McKenzie, a federal district court case in which the District of Columbia's requirement that each of its transportation employees be subjected to urinalysis was struck down, in part based on a flawed testing procedure. The court noted that manufacturer's instructions for the city-administrated tests directed test administrators to confirm positive results by an alternate method. The administrator of the city's test failed to confirm a positive test result. The court cited this failure in its decision to overturn the employee's dismissal. Following a strict

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[47]Ibid., 50-53.

testing protocol should be part of any drug testing program, Allred advises.[48]

Robert Decrease et al. discuss several court cases that have resulted from the implementation of drug testing, particularly cases concerning defamation of character. Defamation occurs, they note, when a false statement is communicated to a third party that "tends to harm the reputation of another so as to lower him in the estimation of the community or to deter the third person from dealing with him."[49] An employer may be accused of defamation whenever the employer provides information about an employee, especially when the information relates to the drug test results. These authors explain that defamation is the most frequently alleged claim in a suit involving drug testing. They cite two precedent-setting cases: O'Brien v. Papa Gino's of America and Houston Belt & Terminal Railway v. Wherry. In O'Brien v. Papa Gino's, the employer's statement that "employee was terminated for drug use" was found to be not completely true, in that the plaintiff/employee was actually discharged for failure to promote the son of one of his supervisors. In Houston Belt v. Wherry, the positive drug test results of a dismissed employee were publicly discussed in a labor union

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[48]Stephen Allred, "Constitutional Concerns in Drug Testing of Public Employees," School Law Bulletin (Winter, 1987), 20-23, 36.

[49]Robert P. Decrease, Mark Lifshitz, Adriana C. Magurra, and Joseph E. Tilson, Drug Testing in the Workplace (Chicago: ASCP Press, 1989), 28-29.

communication. Damages were awarded in both cases. Generally, these authors suggest, employers will not be liable for defamation if they have the duty to communicate information to those with a need to know, a standard frequently applied in the areas of disciplinary proceedings, in response to reference requests, in performance evaluations, and in response to public officials such as the police. This qualified privilege to communicate information, including drug test results, can be lost if "the employer knows the information is false, or recklessly disregards the falsity of information, or is guilty of excessive publication."[50]

Emerging case law continues to affect the application of drug testing by public sector employers. According to Stephen Allred in "Recent Developments on Drugs in the Workplace," two recent Supreme Court rulings upheld the constitutionality of different government-mandated drug testing programs under the Fourth Amendment "reasonableness" standard. In National Treasury Employees Union v. Von Raab, the Supreme Court reviewed the constitutionality of the United States Customs Service drug testing program. In this program, drug tests are required of all employees seeking promotion to positions related to drug interdiction of positions associated with classified materials. The Court ruled that mandatory testing of large categories of

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[50]Ibid.

employees was permissible in that the government had a compelling interest in seeing that those enforcing drug laws or those dealing with classified documents were drug-free. The Court felt that Customs Service workers held a diminished expectation of privacy by virtue of the special physical and ethical demands related to their jobs.[51] In a second case, Skinner v. Railway Labor Executives Association, the Court upheld the testing of railroad employees after major accidents or for those who violated safety rules. The Court said neither probable cause nor reasonable suspicion was required for drug testing to occur since the compelling interest of the government was to insure the safety of the public. The Court further noted the highly regulated nature of the transportation industry and that employees, therefore, would have a diminished expectation of privacy.[52]

Allred suggests that in both cases the Supreme Court determined that "special needs" existed, allowing the exception to the Fourth Amendment search based on reasonable suspicion. With Von Raab, mass testing of categories of employees is permitted when there exists a diminished expectation of privacy for those categories. In the Skinner case, employers of transportation workers, including school systems, may test certain transportation employees following

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[51]Stephen Allred, "Recent Developments on Drugs in the Workplace," School Law Bulletin (Summer, 1989), 1-6.

[52]Ibid.

accidents. However, for the majority of public sector employees, the requirement continues that "drug testing must be premised on individualized suspicion of drug use, based on evidence supporting the belief that an individual employee is using drugs."[53] Allred cautions, however, that additional cases may provide the Supreme Court opportunities to create other categories of exceptions to reasonable suspicion drug testing.

Summary

Unquestionably, the last two decades have been marked by an increased national awareness of the dangers of drug abuse and the significant costs this problem presents to our society. There has been a growing intolerance to the presence of illegal drugs in the workplace, and with the technological advances in detecting drugs in biological specimens, the workplace has become the newest battleground in the war on drugs. This emerging societal trend favoring drug testing is reflected in recent Supreme Court cases and other cases concerning employer policies permitting pre-employment, random, and reasonable suspicion testing. It will be up to the courts to continue to establish the parameters for workplace drug testing policies, balancing the constitutional rights of employees and the interests of employers in maintaining safe and efficient workplaces.

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[53] Ibid.

CHAPTER III

ANALYSIS OF DRUG-TESTING POLICIES

The Drug-Free Workplace Act, enacted on November 18, 1988, significantly altered the drug enforcement policies of every school system in North Carolina. This act applies to all recipients of federal contracts or grants valued at or above $25,000.[1] As part of the eligibility requirement for the federal contract or grant, each prospective recipient must certify that a drug-free workplace is maintained in those areas in which contract or grant work is performed. The final regulations, published in the Federal Register on August 16, 1990, directed that all local education agencies (LEAS) establish an operational Drug-Free Schools Prevention Program. At a minimum, each school unit was expected to:

> (1) Create a policy statement indicating that school employees have the right to a drug-free workplace; that the unlawful manufacture, distribution, possession, or abuse of a controlled substance is prohibited on the school premises or in any location as part of school activities; and, that specific actions will be taken against those who violate the policy.
> (2) Notify each employee that all provisions of the drug-free workplace policy are mandatory and that, as a condition of employment, each employee is required to inform the system within five days of any criminal

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[1]David S. Tatel, "The Drug-Free Workplace Act and Related Federal Antidrug Rules," Journal of Public Management (July 1989): 20.

> conviction for any violation of a drug statute occurring in the workplace;
> (3) Publish and distribute this policy to each employee, either by posting the policy on a bulletin board, publishing copies in the personnel manuals, or circulating individual copies to employees;
> (4) Contact the federal funding agency within ten days upon receiving information of an employee drug-statute conviction occurring in the workplace;
> (5) Impose, within thirty days of the employee's notice, either penalties or sanctions up to, and including, dismissal, or requirements that the employee complete a school system-approved rehabilitation/treatment program;
> (6) Provide a drug-free awareness program for all employees, focusing on the dangers of workplace drug abuse, the penalties the employee will receive for violations, and the availability of counseling, rehabilitation, and employee assistance programming;
> (7) Make a "good faith effort" to establish and maintain a drug-free workplace through the enforcement of the established regulations.[2]

Failure to follow this federal mandate could lead to the loss of federal funds. According to a memorandum from the North Carolina State Department of Public Instruction, school systems were to be in compliance by October 1, 1990.[3]

However, nothing in the Drug-Free Workplace Act, in the federal regulations, or in the Department of Public Instruction directive, requires or encourages the drug testing of public school employees. School systems that have included a substance abuse testing component had no procedural guidelines from the State Board of Education nor the State Department of Public Instruction towards the development of a

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[2]Ibid.

[3]Sammie Campbell Parrish, Memorandum--"Drug-Free Schools Prevention Program Certification"--October 5, 1990.

clear and comprehensive drug screening policy. School systems often had to turn to other public sector employers or to private industry for substance abuse testing models.

One source of information concerning procedural recommendations for substance abuse testing was the report of the Study Commission on the Uniform Regulation of Substance Abuse Testing, a report requested by the General Assembly of North Carolina and completed in 1989. Later enacted as the Workplace Drug Testing Regulation Act, this legislation placed conditions on several types of drug testing being utilized by private employers in the state and mandated specific standards for drug testing.[4] With this act, North Carolina joined five other states (Hawaii, Louisiana, Maryland, Nebraska, and Oregon) in statutorially restricting drug testing procedures of private employers.[5] According to this act, a private employer in North Carolina may require an employee to submit to reasonable suspicion drug testing and may require a random drug test of an employee if the employee serves in a high risk or safety position

> . . . such as requiring the operation of vehicles, machinery, equipment, or the handling of hazardous materials, the mishandling of which may place fellow

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[4] North Carolina General Assembly: An Act to Regulate Workplace Drug Testing, Session 1989, Articles 95-225 to 95-232.

[5] Mark A. DeBernardo and Benjamin W. Hahn, 1993 Guide to State Drug Testing Laws (Washington, D.C.: Institute for a Drug Free Workplace, 1993), 10.

> employees or the general public at risk of serious injury, or the nature of which would create a security risk in the workplace.[6]

Also, private employers may require job applicants to complete pre-employment screening if the applicant is given written notice, with a positive result serving as possible grounds for denying or limiting the employment of the applicant. Finally, private employers in North Carolina may require an employee, referred through an employer-approved counseling or rehabilitation program, to undergo follow-up drug testing as a part of the treatment program for a period of up to twelve months following the completion of the treatment program.[7]

More importantly, the North Carolina Drug Free Workplace Act established specific procedural requirements for drug testing, addressing the most current judicial precedents, with the warning that adverse action against an employee or job applicant based on a drug test result is prohibited unless all procedural conditions have been met. Those requirements for private employers include:

> (1) A detailed written policy for all test subjects, explaining the circumstances of the testing procedure including laboratory protocol, the types of drugs the

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[6] "An Act to Regulate Workplace Drug Testing," Article 95-225.

[7] "An Act to Regulate Workplace Drug Testing," Article 95-226.

testing will screen, the consequences resulting from a confirmed positive test, and other rights guaranteed to employees and applicants concerning substance abuse testing;
(2) The securing of the urine sample under reasonable and sanitary conditions, with a protected chain of custody maintained for the proper collecting, handling, labeling, receiving, and identifying of the sample;
(3) The use of laboratories approved by the North Carolina Department of Human Resources or laboratories certified by either the National Institute on Drug Abuse, the College of American Pathology, or the American Association of Clinical Chemistry, with all laboratories following a standard confirmation of an initial positive with a second test of the same sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted procedure;
(4) Providing applicants and employees a written copy of the test result within five working days of the employer's notice, along with an opportunity to explain or rebut a confirmed positive drug test result and an opportunity to retest, at the subject's expense, the original sample;
(5) Adhering to strict confidentiality in regards to the test result by limiting access to the employee or applicant, the supervisory personnel, employee assistance personnel, and to others on a need to know basis;
(6) Maintaining an employee assistance program or referral system for current employees, utilizing counseling, rehabilitation, or treatment at the employee's expense or as part of the benefit package;
(7) Allowing no dismissal based upon a positive drug test unless the positive result occurred during the employee's participation in drug treatment or unless the employee failed to complete the prescribed treatment or refused to participate in the prescribed treatment; however, an employee may be reassigned or suspended during the treatment period.[8]

The North Carolina statute notes finally that "Nothing in this Article shall be construed to place a duty on employers to conduct drug testing of their employees or job applicants."[9] Yet, if private employers choose to require

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[8]Ibid., Article 95-227. [9]Ibid., 95-229.

substance abuse screening in the workplace, the state statutorially regulates both the application of the testing and the procedures of the testing.

Drug Testing in North Carolina Schools

The seven statutory mandates previously described apply only to private sector employers in North Carolina. Public sector policies currently authorizing drug testing fall under the auspices of constitutional principles such as search and seizure limitations or due process guarantees. Nonetheless, an examination of private sector drug testing standards along with a review of current research indicates there are certain minimal components of an effective drug testing policy for public school systems. First, a detailed drug testing policy will provide clear information concerning all laboratory procedures, types of testing, and categories of employees required to be tested. Next, drug testing policies should guarantee, in writing and by practice, privacy in sample collection with a secure chain of custody. Third, the use of certified laboratories will ensure that all initial positives will be confirmed by an alternate method. Then, opportunities to rebut, explain, or retest after a confirmed positive result will address proper due process requirements. Finally, provision of treatment or rehabilitation assistance serves to reinforce a more comprehensive drug-free workplace program. All of these

components reflect the current case law precedents for public sector employees and strongly preserve constitutional rights and privileges.

In examining the application of drug testing in the school systems of North Carolina initially, all one hundred and twenty-one state systems and the three federal systems were contacted by letter (see Appendix A for the complete letter) to determine which systems currently require drug testing of job applicants and/or employees as part of their drug-free workplace programs. One hundred and fifteen units (95%) responded to the request. All one hundred and fifteen units reported they had a drug-free workplace program in place, with thirty-two units (28%) conducting some type of substance abuse testing as part of the program. Each of the thirty-two units was contacted in writing (see Appendix B for a copy of the second request) in order to secure a copy of the system's current drug testing policy for analysis. Of those thirty-two units, thirty-one (97%) systems (all systems except Camp Lejeune) provided copies of their policies for examination.

Table 1 indicates that twenty-six of the thirty-one systems (84%) require pre-employment drug testing. One-half of the systems that require pre-employment screening (13 systems or 50%) require it for all job applicants. Nine systems of the twenty-six (35%) require pre-employment

TABLE 1

MAJOR TYPES OF DRUG TESTING IN NORTH CAROLINA SCHOOL SYSTEMS

	Pre-Employment	Random	Reasonable Suspicion
Anson County		x(a)	
Brunswick County	x(d)(e)	x(d)(e)	x(d)(e)
Caldwell County	x	x(b)	x
Catawba County	x	x(b)	x
Chapel Hill/Carrboro	x(a)	x(a)	x(a)
Charlotte/Mecklenberg	x	x(c)	x
Cleveland County		x(a)	x
Clinton City Schools	x(a)	x(a)	x
Davidson County	x(c)	x(c)	x
Gaston County	x	x(b)	x
Halifax County	x	x(c)	x
Harnett County	x(d)	x(d)	x(d)
Hickory City Schools		x(d)	x
Iredell County	x(c)		x(c)
Johnston County	x(b)	x(b)	x(b)
Kings Mountain Schools	x(d)(f)	x(d)	x
Lee County	x(a)	x(a)	x(a)
Lexington City Schools	x	x(c)	x
Lincoln County	x(a)	x(a)	x
McDowell County	x(a)	x(a)	x(a)
New Bern/Craven Schools			x
New Hanover County	x(d)(e)	x	x
Pitt County	x		
Richmond County			x
Robeson County	x		x
Rowan/Salisbury Schools	x		
Thomasville City Schools	x	x(b)	x
Wake County	x(b)(g)		x
Warren County	x	x(a)	x
Wilson County	x	x(a)	x
Winston-Salem/Forsyth	x		x

Key to Abbreviations

(a) Bus drivers only
(b) Bus drivers and bus mechanics
(c) Bus driver, bus mechanics, and safety positions
(d) All operators of system vehicles
(e) Maintenance positions are also tested.
(f) Contractors for driver's education are tested.
(g) Heavy equipment operators are tested.

screening only of applicants for bus driving, bus mechanics, and others in safety positions, such as security guards. The remaining four units of the twenty-six (15%) require pre-employment testing of bus drivers and mechanics along with specified others, including maintenance workers and other system-owned vehicle operators (Brunswick County; New Hanover School System), independent driver education contractors (Kings Mountain Schools), and heavy equipment operators (Wake County).

In addition, of the thirty-one units reporting, almost all conduct some type of random drug testing, usually of specified categories of employees. Twenty-three of the thirty-one units (74%) utilize random testing, usually applying such testing to all transportation workers (bus drivers, mechanics) or designated vehicle operators (coaches or teachers who drive buses). In addition, five of the twenty-four systems that randomly test (21%) specify "randomness." Brunswick County and Kings Mountain School System both use a formula in determining random selection--one-twelfth of five percent. Brunswick County applies the formula yearly while Kings Mountain Schools apply the formula monthly. Anson County randomly selects by drawing social security numbers for those to be tested. Lincoln County and McDowell County randomly select ten percent for testing yearly. The remaining nineteen units (79%) did not indicate

any pre-established percentages, formulas, or measures for selecting employees for random testing. No system applied random testing to all the public school employees.

The majority of the school systems conducting drug tests in North Carolina utilize reasonable suspicion testing. Twenty-eight of the thirty-one systems (90%) report that reasonable suspicion testing is part of their drug-free workplace program, with twenty-one units (75%) applying reasonable suspicion testing to all school employees. The remaining seven units (25%) apply reasonable suspicion testing to specified categories of employees, including bus drivers, bus mechanics, maintenance workers, and other school vehicle operators.

As presented in Table 2, several school units require mandatory scheduled drug testing. These seven units (22%) specify the frequency, percentages, and/or categories of employees for which drug testing is mandatory. Warren County requires yearly drug screening of bus drivers, while Johnston County requires drug testing of both bus drivers and bus mechanics yearly. Lee County requires bus drivers to submit to testing every two years. Lincoln County and McDowell County conduct drug screenings of ten percent of their bus drivers or transportation workers yearly. Charlotte-Mecklenberg mandates that bus drivers, bus mechanics, and security officers participate in drug testing every

TABLE 2

OTHER TYPES OF DRUG TESTING IN NORTH CAROLINA SCHOOL SYSTEMS

	Scheduled	Post-Acc.	Follow-Up
Anson County			
Brunswick County			x(d)(e)
Caldwell County		x(h)	x
Catawba County		x	x
Chapel Hill/Carrboro			
Charlotte/Mecklenberg	x(c)(i)	x(j)	x
Cleveland County			
Clinton City Schools		x(k)	
Davidson County			
Gaston County			x
Halifax County			
Harnett County			x
Hickory City Schools		x	x
Iredell County			
Johnston County	x(a)(l)		
Kings Mountain Schools		x(j)	x
Lee County	x(a)(l)	x(k)	
Lexington City Schools			x
Lincoln County	x(a)(m)	x	x
McDowell County	x(a)(m)	x	
New Bern/Craven		x	
New Hanover County			
Pitt County			
Richmond County			
Robeson County			
Rowan/Salisbury Schools			
Thomasville City Schools			x
Wake County	x(b)(g)(l)		
Warren County	x(a)(l)	x(j)	
Wilson County			
Winston-Salem/Forsyth			

Keys to Abbreviations
Post-Acc.=Post Accident
(a) Bus drivers
(b) Bus drivers, bus mechanics
(c) Bus drivers, bus mechanics, safety positions
(d) All operators of system-owned vehicles
(e) Maintenance workers
(f) Contractors for driver's education
(g) Heavy equipment operators

TABLE 2 (continued)

(h) Personal injury and $400 in property damage
(i) Every two years
(j) Personal injury and $500 in property damage
(k) Personal injury and $4400 in property damage
(l) Yearly
(m) 10% yearly

two years. Wake County requires an annual drug test of bus drivers, bus mechanics, transportation workers, and heavy equipment operators.

An important type of drug screening for many units is the post-accident drug testing of any school employee driving a system-owned vehicle. Eleven of the thirty-one units (35%) require post-accident testing, usually within 24-32 hours of the accident. All eleven units conduct post-accident drug testing when accidents result in personal injury. In addition, most units indicate post-accident drug testing will be conducted when there has been significant property damage. Six units (55%) indicate the minimum property damage amounts that will result in post-accident testing. Caldwell County requires post-accident drug testing with at least $400 in property damage, while Kings Mountain Schools, Charlotte-Mecklenberg, and Warren County require at least $500 in property damage. Two systems, Clinton City Schools and Lee County, require significant property damage--a minimum of $4400--before requiring post-accident drug testing.

Finally, eleven of the thirty-one systems (35%) conduct follow-up testing as part of treatment programs for those who have tested positive previously. Generally, during the twelve months following treatment for substance abuse, an employee in any of these eleven units may be subject to

random follow-up testing as part of the continuing rehabilitation process. Participation in follow-up drug screening usually is a stipulation accompanying the return to active employment.

Close examination of the procedural elements of the drug testing policies of each of the thirty-one units reveals considerable similarity but also indicates dramatic differences, especially in regards to critical components of comprehensive drug-testing policies. Tables 3, 4, 5, and 6 summarize each system's written policy covering the drug testing of school employees. The factors examined included having a detailed written policy; an indication that certified laboratories will be used; provisions to confirm all initial positive results; assurances of procedures insuring privacy and a clear chain of custody for the sample; guarantees for confidentiality of test results; opportunities for rebutting or explaining positive results and for seeking additional testing of the sample; and information concerning rehabilitation options. These components reflect both the model established for private employers in North Carolina and the precedents established through recent court cases concerning public sector drug testing. In addition, the responsibility for the costs of individual drug test was analyzed, as these procedures are often expensive and may be a financial challenge to the average school employee.

Of the thirty-one units conducting drug testing, Table 3 indicates that twenty-six (84%) have a detailed written policy explaining the types of testing to be conducted and the basic steps for conducting the drug tests. However, only nine of the detailed policies (35%) provide specific information concerning the laboratory process, especially the use of a certified laboratory and a clearly documented description of the kinds of tests to be conducted on each sample. This contrasts significantly with the requirements for private employers in North Carolina, where a well-detailed written policy with complete information concerning testing procedures and certified laboratory analysis is the expectation, not the exception.

As to constitutional concerns for privacy, Table 4 shows that only eight of the thirty-one units (26%) specifically indicate any procedural accommodations in insuring privacy in sample collection and only nine of the thirty-one units (29%) stipulate that an established chain of custody will safeguard the sample from collection site to inspection site. Specific precedents from public sector cases have addressed the need for restrictions guaranteeing privacy for the drug-tested individual and guaranteeing security for the sample. In addition, the necessity for confirming an initial positive test by a second alternate test has been decided by the courts and has been demonstrated by the companies

TABLE 3

SELECTED DRUG TESTING POLICY COMPONENTS
OF NORTH CAROLINA SCHOOL SYSTEMS

	Detailed Written Policy	Lab Process	Confirming Test
Anson County			
Brunswick County	x	x	x
Caldwell County	x	x	x
Catawba County	x	x	x
Chapel Hill/Carrboro	x		
Charlotte-Mecklenberg			
Cleveland County	x		
Clinton City Schools	x		x
Davidson County			
Gaston County	x	x	x
Halifax County	x		
Harnett County	x	x	x
Hickory City Schools	x	x	
Iredell County	x		
Johnston County	x		
Kings Mountain Schools	x		
Lee County	x		x
Lexington City Schools	x	x	x
Lincoln County	x		
McDowell County	x		
New Bern/Craven	x		
New Hanover County	x		x
Pitt County	x		
Richmond County	x	x	x
Robeson County	x		
Rowan/Salisbury			
Thomasville City Schools			x
Wake County	x		
Warren County	x		
Wilson County	x		
Winston-Salem/Forsyth	x	x	x

TABLE 4

PRIVACY, CHAIN OF CUSTODY, AND CONFIDENTIALITY
DRUG TESTING POLICY COMPONENTS OF NORTH CAROLINA SCHOOLS

	Privacy	Chain of Custody	Confidentiality
Anson County			
Brunswick County	x	x	x
Caldwell County	x	x	x
Catawba County	x	x	x
Chapel Hill/Carrboro			x
Charlotte-Mecklenberg			x
Cleveland County			x
Clinton City Schools			x
Davidson County			
Gaston County	x	x	x
Halifax County			
Harnett County	x	x	x
Hickory City Schools		x	
Iredell County	x	x	x
Johnston County			x
Kings Mountain Schools			x
Lee County			x
Lexington City Schools	x		x
Lincoln County			x
McDowell County			x
New Bern/Craven			x
New Hanover County			x
Pitt County			x
Richmond County		x	x
Robeson County			x
Rowan/Salisbury			
Thomasville City Schools			x
Wake County			x
Warren County			
Wilson County			x
Winston-Salem/Forsyth	x	x	x

that manufacture drug-testing materials. Yet, according to Table 3, only twelve of the thirty-one policies (39%) specifically describe the use of a second confirming test for initial positive results.

Courts have also expressed concern for guaranteeing the due process of public sector employees in drug testing procedures. A majority of the school units utilizing drug testing specifically include opportunities for due process when employees receive confirmed positive results. As evidenced in Table 5, only twenty-one of the thirty-one school units (68%) indicate that employees will be given an opportunity to explain or rebut a positive drug test, usually by presenting proof of having taken prescribed medication or over-the-counter medication. Seven of the thirty-one units (23%) provide the option of seeking an independent laboratory analysis of the sample, usually at employee expense, for those with confirmed positive results. Eleven of the thirty-one units (35%) utilize a Medical Review Officer in helping employees who test positive understand the test results and the options for treatment and rehabilitation. Twenty of the thirty-one units (65%) identify rehabilitation and treatment services available to school employees, including twelve units (60%) that provide an Employee Assistance Program.

TABLE 5

EMPLOYEE OPTIONS, REHABILITATION, AND MRO
DRUG TESTING POLICY COMPONENTS OF NORTH CAROLINA SCHOOLS

	Rebuttal	Retest	Rehab.	MRO
Anson County				x
Brunswick County	x	x	x(a)	x
Caldwell County	x	x	x(a)	
Catawba County	x		x(a)	x
Chapel Hill/Carrboro				
Charlotte-Mecklenberg			x(a)	
Cleveland County	x		x(a)	
Clinton City Schools	x			x
Davidson County	x		x(a)	
Gaston County	x	x	x(a)	x
Halifax County	x	x		
Harnett County	x	x	x	x
Hickory City Schools			x(a)	x
Iredell County	x		x(a)	
Johnston County				
Kings Mountain Schools	x		x	
Lee County	x		x	x
Lexington City Schools	x		x(a)	x
Lincoln County	x		x	
McDowell County	x			
New Bern/Craven			x	
New Hanover County			x	
Pitt County	x			
Richmond County	x	x	x	x
Robeson County				x
Rowan/Salisbury				
Thomasville City Schools	x		x(a)	
Wake County	x			
Warren County				
Wilson County	x		x	
Winston-Salem/Forsyth	x	x	x(a)	

Key to Abbreviations

Rehab.=Rehabilitation options
MRO=Medical Review Officer
(a) Includes Employee Assistance Program referral

Another critical policy element often presented through court decisions is confidentiality. Public sector employers may be cited for not guaranteeing the confidentiality of drug test results. Table 4 shows that twenty-five of the thirty-one drug testing units (81%) specifically address confidentiality, describing how the drug testing information will be shared, usually on a "need to know" basis.

Finally, one issue that has not received the attention of the courts nor the attention of a regulatory agency has been the cost of drug testing. Individual drug tests, especially those with initial positive results requiring the more sophisticated confirmatory test, could be cost prohibitive to the average school employee. Table 6 revels that sixteen of the thirty-one policies (52%) specifically indicate which tests will be at the system's expense.

In addition, four of the systems that address the payment issue (25%) place conditions on those payments. Caldwell County indicates it will be responsible for all drug testing costs excepting pre-employment testing (which is at the applicant's expense) and follow-up random testing that accompanies a treatment program. Similarly, Harnett County pays for all the drug testing that is required except follow-up random testing, while Cleveland County pays for all testing except pre-employment testing. Pitt County pays for almost all drug tests, including the pre-employment tests

TABLE 6

COST AS A COMPONENT OF THE DRUG TESTING POLICIES OF NORTH CAROLINA SCHOOLS

	System Pays	Information Not Provided
Anson County		x
Brunswick County	x	
Caldwell County	x(b)	
Catawba County	x(a)	
Chapel Hill/Carrboro		x
Charlotte-Mecklenberg		x
Cleveland County	x	
Clinton City Schools	x	
Davidson County	x	
Gaston County	x	
Halifax County	x	
Harnett County	x(c)	
Hickory City Schools	x	
Iredell County		x
Johnston County		x
Kings Mountain Schools		x
Lee County	x	
Lexington City Schools		x
Lincoln County		x
McDowell County	x	
New Bern/Craven		x
New Hanover County	x	
Pitt County	x(d)	
Richmond County	x	
Robeson County	x	
Rowan/Salisbury		
Thomasville City Schools		x
Wake County		x
Warren County		x
Wilson County		x
Winston-Salem/Forsyth		x

Key to Abbreviations

(a) System does not pay for pre-employment testing.
(b) System does not pay for pre-employment testing or follow-up testing.
(c) System does not pay for follow-up testing.
(d) System only pays for bus driver testing.

for bus drivers. Payment for pre-employment testing for other positions in Pitt County is left to the individual applicants.

Summary

Thirty-two school systems in North Carolina currently conduct some type of drug testing as part of their drug-free workplace programs. The types of drug testing most frequently applied by these school systems are reasonable suspicion testing of employees, pre-employment testing of applicants, and random testing of specified categories of employees. The majority of school units have a detailed written drug testing policy which includes descriptions of the types of drug testing to be utilized and the specific employees covered by the policy. In addition, within these policies, most systems address the crucial issues of confidentiality, the right to rebuttal in cases of positive results, rehabilitation and treatment options, and the assumption of drug testing costs by the school system. A minority of school systems--Brunswick County, Gaston County, Harnett County, Caldwell County, Catawba County, Winston-Salem/Forsyth County, Lexington City Schools, and Richmond County--maintain a comprehensive written drug testing policy including information concerning laboratory processes, confirmatory testing of initial positives, privacy, chain of

custody, and retesting options. As Chapter IV will indicate, many of the elements critical to comprehensive drug testing policies and programs have led to litigation in both state and federal courts.

CHAPTER IV

LEGAL ASPECTS OF DRUG TESTING: IMPLICATIONS FOR PUBLIC SCHOOL EMPLOYERS AND PUBLIC SCHOOL POLICIES

The conflict between detecting drug use and verifying impairment on the one hand, and the recognition of the importance of preserving individual civil liberties on the other, has resulted in numerous legal challenges to drug testing programs. To date, most litigation has concerned the implementation of drug testing programs by federal, state, and local government employers and has primarily involved constitutional issues. There are three major constitutional restraints on public employers: freedom from unreasonable searches, right to privacy, and due process. Case law relating to the drug testing of public employees has addressed all of these issues. In addition, such drug testing issues as confidentiality and procedural integrity of the actual testing process have also been subjected to courtroom review.

Only two drug testing cases have been heard by the United States Supreme Court, which has meant a reliance on federal courts of appeals and district courts for the rulings that continue to shape drug testing as it is applied in the workplace. In addition, there have been no North Carolina drug testing case nor any Fourth Circuit drug

testing cases. Thus, public sector employers in North Carolina must look to other district and circuit courts for case law guidance.

The majority of these cases are public sector cases and were decided from 1985-1991, during the time when drug testing was extensively promoted by the federal government and was exhaustively popularized by the media. Two early private sector cases relating to issues critical to drug testing have also been included, in part due to the numerous citations made to these cases.

The facts of each case are outlined, along with the decision of the court. The framework for the discussion of the legal aspects of these cases will be the implications for public sector drug testing policies, in particular policies applicablea to public school employees. For the purpose of tracing the intricate judicial precedents for drug testing, the discussion of cases will first address the development of current legal responses to critical Fourth Amendment issues. Selected public sector cases that have served to shape the application of drug testing of public sector employees will be examined. Next, an extended analysis will focus on the litigation involving federal drug testing programs with its applicability to governmental policy-making concerning drug testing. In particular, the two Supreme Court rulings will be presented as companion

decisions, as these decisions pose potentially important implications for the constitutionality of drug testing many workers in other fields of employment. Finally, cases involving public school employees are examined together, since decisions in these cases have a direct impact on public school drug testing.

Drug Testing and the Fourth Amendment

Drug testing policy makers have found that, by far, one of the biggest obstacles in the path of drug testing is the United States Constitution. The Fourth Amendment of the Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[1]

The Fourth Amendment is applied to criminal, civil, and administrative investigations, but it has also become the major focus of drug testing litigation.

A search under Fourth Amendment purposes occurs when the government invades an individual's expectation of privacy that society considers reasonable. Although the issue of whether a urinalysis drug test constitutes a search

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[1] United States Constitution, Fourth Amendment.

continues to be addressed in courtroom debate, every federal court that has decided the issue has held that it is. In addition, a fundamental issue to be resolved in every case involving a search is the reasonableness of the search, since the Fourth Amendment forbids "unreasonable" searches, not "reasonable" searches. The critical determination of every public sector drug testing case hinges on whether urinalysis drug testing is reasonable. Courts tend to articulate the reasonableness by balancing the importance of the governmental interest in testing against the nature of the invasive procedure. Two early cases, Schmerber v. State of California[2] and Division 241 Amalgamated Transit Union v. Suscy,[3] have provided the foundation for these debates.

Schmerber v. State of California[4] considered the constitutionalitiy of taking bodily fluids without consent for evidence. The subject in this case, Amando Schmerber, was arrested for driving under the influence. His arrest occurred at a local hospital, while he was receiving treatment for injuries from an accident. Police officials directed the hospital to take a blood sample for testing from Schmerber, even though Schmerber refused to consent to

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[2]Schmerber v. State of California, 86 S.Ct. 1826 (1966).

[3]Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976).

[4]S.Ct. 1826 (1966).

the procedure and objected to the taking of the sample. Chemical analysis of the blood sample, later introduced in court as evidence, indicated a high level of intoxication. With this evidence, Schmerber was convicted in Los Angeles Municipal Court of driving under the influence.

Following his conviction, Schmerber brought suit, contending that the withdrawal of blood and the admission of chemical analysis of the blood as evidence violated his right not to be subjected to unreasonable search and seizure under the Fourth Amendment. The Appellate Department of the California Supreme Court rejected his argument and affirmed his conviction in municipal court. The case was appealed and the Supreme Court granted certiorari.

In speaking for the Supreme Court, Justice Brennan asserted that the forced withdrawal of blood did not violate the petitioner's right under the Fourth Amendment to be free of unreasonable searches and seizures. Establishing an often cited description of the Fourth Amendment in relation to the taking of bodily fluids, Justice Brennan stated:

> The Fourth Amendment's proper function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. . . . Because we are dealing with intrusion into the human body rather than with state interference with property relationships or private papers, we write on a clean slate. . . .[5]

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[5]Schmerber v. State of California at 1834.

In such cases, the court must establish if the taking of the bodily fluid, in this instance a blood sample, meets the Fourth Amendment standards of reasonableness. In the case of Schmerber, the court indicated there was probable cause in the arrest of the petitioner and, that even though a search warrant is normally required, the police officer acted to secure the evidence before it could be destroyed.

Justice Brennan explained:

> We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops. . . . There was no time to seek out a magistrate and secure a warrant. Given the special facts, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident.[6]

Thus, the United States Supreme Court ruled that the forced withdrawal of blood and the chemical analysis of that blood introduced as evidence in a drunk driving case was a search according to the Fourth Amendment and that it met the Fourth Amendment standards for reasonableness.

In a case heard by the Seventh Circuit Court of Appeals, a Chicago Transit Authority rule requiring bus drivers to submit to drug tests following accidents or when suspected of being under the influence was upheld. This rule was instituted after an increased number of accidents were found to be related to use of drugs and alcohol. In

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[6]Ibid., 1835-36.

Division 241 v. Suscy,[7] the union representing 5500 bus operators of the Chicago Transit Authority challenged the constitutionality of the standard. The District Court for the Northern District of Illinois upheld the Chicago Transit Authority's motion to dismiss the action by the union. The union appealed, arguing that the rules for drug testing were invalid under the Fourth Amendment. The Appeals Court upheld the dismissal, indicating that the test of constitutionality for invasion of a public employee's protected rights is derived from the nature of the rights involved. The Fourth Amendment, the Court explained, protects an individual's reasonable expectation of privacy from unreasonable intrusion by the state. The Court further noted:

> Whether the individual has a reasonable expectation of privacy and whether the intrusion is reasonable are determined by balancing the claims of the public against the interest of the individual. . . . In this case, the CTA had paramount interest in protecting the public by insuring that bus and train operators are fit for their jobs . . . and members of the plaintiff union have no reasonable expectation of privacy with regards to blood and urine tests.[8]

The implication for public school policy makers from these early cases is that the "taking" of urine has been likened to the involuntary taking of blood, which the

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[7]Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976).

[8]Ibid., 1267.

Supreme Court has labeled a search and seizure under the Fourth Amendment. Urinalysis drug testing has been ruled to be a search under Fourth Amendment purposes. Courts have held that not all searches are unconstitutional under the Fourth Amendment. Only unreasonable searches are prohibited. Courts will permit this kind of "search" based upon the circumstances by which the test was conducted. Courts will apply a balancing test in determining the reasonableness of drug testing, with reasonableness requiring a judicious balancing of the intrusiveness of the search for the individual's expectation of privacy against the government's compelling interest in conducting the search.

Urinalysis is Reasonable with Individualized Suspicion

In trying to apply this balancing test, lower court decisions have led to conflicting precedents. For example, in the case Allen v. City of Marietta[9] (Georgia), six former employees of the City of Marietta and the Marietta Board of Lights and Water sought in district court to overturn their dismissals following drug tests. The plaintiffs alleged that the urinalysis test was an unreasonable search and seizure under the Fourth Amendment.

According to facts of the case, Barry Allen and five other plaintiffs all had worked in the electrical division,

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[9]Allen v. City of marietta, 601 F. Supp. 482 (N.D. Georgia 1985).

usually around high voltage wires. The City Manager, through the use of an undercover employee, received specific reports of marijuana use by Allen and the other five employees while on the job. The City Manager linked these reports to a documented large number of accidents by these same employees occurring on the occasions of the reported drug use. After being confronted with the evidence, the six employees were given the option to be terminated immediately or to submit to urine tests. All six agreed to participate in the urinalysis screening. All tested positive for marijuana, at which point all were fired. The dismissed employees filed suit, alleging a search and seizure violation under the Fourth Amendment.

In examining the claims of the plaintiffs, the court suggested:

> While the court has some doubt whether requiring a person to provide a sample of his urine for analysis is the kind of 'search' contemplated by the framers of the Fourth Amendment, the court feels constrained by current law to hold that a urinalysis is a search within the meaning of that amendment. . . .[10]

Once the issue of search and seizure had been decided, the court analyzed the second fundamental component--whether the search was reasonable or unreasonable. In this case, the court argued that the Supreme Court had ruled warrantless

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[10]Ibid., 488.

searches to be unreasonable under the Fourth Amendment, aside from some permitted exceptions, with most exceptions related to immediate danger or to risks that evidence may be destroyed. In addition, this court indicated:

> One of the exceptions . . . is a class of cases involving searches of government employees. The cases are not unique, but all appear to involve a balancing of the individual's expectation of privacy against the government's right as an employer . . . to investigate one's conduct which is related to the employee's performance of his duties. . . .[11]

Urine tests, the court determined, were conducted in an employment context as part of an ongoing investigation into drug use. The City of Marietta had a statutory responsibility to make searches for the purpose of insuring that employees could perform their work safely. Finally, in ruling that a urine test under these circumstances was a reasonable search and not in violation of the Fourth Amendment, the court concluded:

> Government employees do not surrender their Fourth Amendment rights because they go to work for the government. They have as much of a right to be free from warrantless government searches as any other citizen. At the same time, however, the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties.[12]

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[11] Ibid., 489.

[12] Ibid., 491.

Similarly, in the Florida case, City of Palm Bay v. Bauman,[13] the District Court of Florida addressed random drug testing of police officers and fire fighters, and again the standard of reasonable suspicion was found appropriate under the Fourth Amendment. According to the facts of the case, the city of Palm Bay initiated a personnel policy requiring the random testing of all police officers and fire fighters. This policy was seen as necessary since fire fighters must be physically and mentally able to insure their safety and the safety of their fellow fire fighters and the public. Police officers, also, it was reasoned, must be physically and mentally able to use weapons, drive vehicles, and make judgments affecting life and death. In addition, police officers are sworn to enforce the law and must have credibility in following the laws in order to merit the public's confidence and respect. Known use of illegal substances would undermine both professions in their ability to perform their jobs effectively and efficiently. Finally, the city insisted that "public employees are legitimately subject to more regulation of their activities than the general populace."[14]

The policy was challenged in Circuit Court, at which time the court permanently enjoined the city from requiring

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[13]City of Palm Bay v. Bauman, 475 S. Rep. 2d 1322 (1985).

[14]Ibid., 1324.

random urine testing for the purpose of detecting the presence of controlled substances. Finding that the urine testing required by the city constituted an unreasonable search and seizure in violation of the Fourth Amendment, the Circuit Court commented on the lack of reasonable suspicion:

> . . . urine testing not performed as part of a physical examination required annually or at other specified career times by City personnel policy, and designed to determine the presence of controlled substances, may constitutionally be required only on the basis of probable cause, to wit: reasonable suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the police officer or fire fighter to have been on the job using, or after recently used, a controlled substance.[15]

The City appealed to the District Court of Florida. The District Court found the "probable cause" standard too severe a standard, noting, "We see no reason for imposing a stricter standard than that imposed by the federal courts."[16] The court held that urinalysis is a reasonable search and seizure when a basis existed for individualized suspicion, and that individualized suspicion, rather than probable cause, was the proper standard when applied to urine testing.

In addition, the District Court of Florida significantly modified the Circuit Court's order limiting the application of reasonable suspicion testing. The Circuit Court had established that the city could require an employee submit to drug testing after using a controlled substance on

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[15]Ibid., 1325. [16]Ibid., 1326.

the job or after recently using a controlled substance. The District Court found this to be unusually restrictive, concluding:

> The city has the right to adopt a policy which prohibits police officers and fire fighters from using controlled substances at any time while they are so employed, whether such use is on or off the job. The nature of the police officer's or fire fighter's duties involves so much potential danger to both the employee and to the general public as to give the city legitimate concern that these employees not be users of controlled substances.[17]

Thus, the city, as a public sector employer, could utilize drug testing in any case of reasonable suspicion and could prohibit police officers and fire fighters from using controlled substances at any time during employment with the city.

For school administrators who plan drug testing programs, these two cases provide the basic rights of employers to drug test. School system employers may have an obligation to protect the public from drug-related accidents that may occur. Drug testing is a legally accepted means of fulfilling this obligation when employees work in potentially dangerous situations. Also, public school employers may have the right to conduct drug testing of identified categories of employees in order to retain the public's trust and maintain behavioral or professional standards. Finally,

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[17]Ibid.

public school employers have the right to make reasonable rules regarding employees' use of drugs.

Urinalysis is Reasonable without Individualized Suspicion

Other courts have applied the same balancing test and have determined that urinalysis is a reasonable search and seizure even without individualized suspicion. Two important cases are often cited under this analysis, McDonnell v. Hunter,[18] and Shoemaker v. Handel.[19]

In McDonnell v. Hunter,[20] Alan McDonnell, a correctional officer at the Men's Reformatory in Anamosa, Iowa, sought court action challenging the constitutionality of the Iowa Department of Corrections' policy requiring correctional employees to submit to random urine testing.

According to the facts of the case, McDonnell signed, at the time of his employment, a consent to search, which was a standard form for correctional employees to sign. On January 17, 1984, McDonnell was notified by the prison supervisors that they had received information that he had been witnessed, off duty, in the company of individuals currently under surveillance for drug-related activities.

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[18] McDonnell v. Hunter, 612 F. Supp. 112 (D.C. Iowa 1985).

[19] Shoemaker v. Handel, 795 F.2d 1136 (3rd. Cir. 1986).

[20] 612 F. Supp. 112 (D.C. Iowa 1985).

The supervisors requested that McDonnell submit to urinalysis, to which he refused. Ten days later McDonnell was terminated. He was later reinstated at another institution, but only after the loss of ten days of pay. McDonnell brought suit against the Iowa Department of Corrections, challenging the constitutionality of the department policy subjecting employees to random drug testing. The Department of Corrections defended its policy, indicating the necessity for security at a correctional facility. In addition, the Department explained that correctional officers were not asked to submit to testing unless there was cause to believe there was a problem.

The District Court in Iowa, in assessing the case, reiterated that each individual has a reasonablae or legitimate expectation of privacy in regards to his body, and that governmental intrusion is a search. The court went on to suggest that the taking of a urine specimen is more of a "seizure" than a "search," arguing:

> Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person has the reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it availale to others to collect and analyze in order to discover the secret physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited

> to recent ingestion of alcohol or drugs. One clearly has as reasonable and legitimate expectation of privacy in such personal informaton contained in his body fluids. Therefore, governmental taking of a urine specimen is a seizure within the meaning of the Fourth Amendment.[21]

The District Court of Iowa then addressed the next fundamental issue--whether the seizure was reasonable and not in violation of the Fourth Amendment. The Iowa Department of Corrections insisted that taking urine samples was reasonable "because it was undesirable to have drug users employed at a correctional institution, even if they do not smuggle drugs to inmates."[22] But the Court suggested that the reach of drug tests often extended into areas beyond the employer's legitimate right to know, explaining:

> Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it--search and seizure can yield a wealth of information useful to the searchers. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a government employer's search of an employee a constitutionally reasonable one.[23]

The District Court of Iowa ruled against the Department of Corrections policy. The Court also set an exacting standard for the drug testing of public sector employees to be reasonable under the Fourth Amendment:

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[21]Ibid., 1127. [22]Ibid., 1130. [23]Ibid.

> . . . public sector employers are allowed to demand of employees urine specimens for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in the light of experience, that the employee is then under the influence of a controlled substance.[24]

The Iowa Department of Corrections appealed. The Eighth Circuit Court of Appeals reversed the lower court's ruling, finding that drug testing is a reasonable search, even when there is no basis for individualized suspicion, for prison employees who maintain regular contact with prisoners in medium and maximum security prisons. The court concluded that prison employees have a diminished expectation to privacy due to the requirements for prison security and that the government had a compelling interest in insuring that security. Further, noting the availability of options in maintaining that security, the court held that random urinalysis testing was the least intrusive method of investigating drug use.

In a case from the Third Circuit Court of Appeals, echoing the McDowell v. Hunter decision, warrantless drug testing of certain categories of employees was sanctioned as constitutional. That case, Shoemaker v. Handel,[25] was initially filed by five jockeys against the New Jersey Racing Commission and Hal Handel, the Executive Director of

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[24]Ibid., 1128.

[25]Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986).

the Commission. In charge of regulating the racing industry in New Jersey, the Commission serves a critical function, since the racing industry relies heavily on paramutual betting for which the state of New Jersey receives a portion of the revenues. Because of the relationship between public wagering and a state industry, the regulations have attempted to guarantee the integrity of racing and races. Thus, regulations have been in place for a number of years to conduct post-race testing of horses, and, if the test results are positive, a warrantless search of the stables is conducted.

Willie Shoemaker, Angel Cordero, and three other jockeys challenged new regulations that required all jockeys, trainers, grooms, and other officials, when instructed by the State Steward, to submit to breathalyzer tests following a day's racing. In addition, every official, jockey, trainer, and groom could also be subjected to urinalysis drug testing for controlled substances following a day's racing. The jockeys sought to restrain the enforcement of the new regulations on the grounds of unconstitutionality, but they were denied a preliminary injunction.

The District Court, in examining the implementation of the regulations, found that the breathalyzer tests were relatively painless and were conducted daily on jockeys and less frequently on grooms, trainers, and officials. The court also found that urine tests, under the direction of

the State Steward, were conducted randomly, with three to five names of participating jockeys drawn from an envelope. Those whose names were drawn submitted a sample after the last race of the day.

The jockeys argued that urinalysis was an inappropriate procedure in relation to professional activities. Many jockeys, the plaintiffs explained, lose weight quickly before racing, eliminating excess body fluids so as to lighten the load a horse has to carry. Thus, requiring a jockey to provide a sample after a race was difficult and time-consuming. The jockeys did not challenge the issue of testing; they simply argued that neither the mandatory daily breathalyzer test nor the random urine tests should be required without individualized reasonable suspicion. Mass suspicionless drug testing, it was asserted, violated Fourth Amendment rights. The New Jersey Racing Commission countered, insisting that such warrantless searches or seizures of persons employed in a highly regulated industry such as horse racing were reasonable under the Fourth Amendment, given the strong state interest in maintaining the conduct of the industry and the confidence of the public.

The District Court addressed two issues--whether there was a compelling governmental interest in conducting random searches of persons in highly regulated industries, and whether the extensive regulations of an industry diminished

the privacy expectations of the employees. The Court found that both issues were present in the New Jersey horse racing industry. Noting that New Jersey had a strong interest in insuring the integrity of the horse racing industry to assure public confidence, the Court asserted:

> Public confidence forms the foundation for the success of an industry based on wagering. Frequent alcohol and drug testing is an effective means of demonstrating that persons engaged in the horse racing industry are not subject to certain outside influences. It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing.[26]

Further, the Court indicated that there is a diminished expectation of privacy by the jockeys, stating:

> Substance abuse by jockeys, who are the most visible human participants in the sport, could affect public confidence in the integrity of that sport. While the state's interest in the appearance of integrity reaches all participatns, it is obviously greatest with respect to jockeys.[27]

The District Court concluded that since the random searches were lottery-based, with little or no discretion for the State Steward to select subjects for the drug tests, the random drug testing did not violate the Fourth Amendment. On appeal, the Third Circuit Court of Appeals affirmed the District Court's ruling.

For the public school administrator, these cases indicate that in industries where employees have a diminished

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[26]Ibid., 1142. [27]Ibid., 1144.

expectation of privacy or where extensive regulations are mandated, drug testing may fall under "administrative search" standards. That is, reasonable suspicion is not required for conducting the drug testing. However, in public sector workplaces that do not meet the "administrative search" criteria, drug testing will be legally permissible based on reasonable suspicion.

Urinalysis is Unreasonable without Individual Suspicion

Other courts have examined the application of drug testing to public sector employees and have determined that urinalysis drug testing constitutes an unreasonable search or seizure in the absence of individualized suspicion. Two public sector cases are frequently cited supporting this argument--Capua v. City of Plainfield,[28] and Lovvorn v. City of Chattanooga.[29]

Few cases have received as much attention as Capua v. City of Plainfield,[30] a District Court case from New Jersey. All fire fighters and fire officers were required to submit to a surprise urinalysis drug test on May 26, 1986. The Plainfield Fire Chief and the Plainfield Director of Public Affairs and Safety locked down the firehouse doors and

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[28]Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

[29]Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986).

[30]643 F. Supp. 1507 (D.N.J. 1986).

demanded that employees provide samples while under surveillance. This procedure was repeated on May 28 and on June 12, until all fire employees were tested. There had been no notice of the mass drug testing, no written departmental policy to cover the drug testing, nor any strategies or procedures developed for collecting, testing, and analyzing the samples. Personnel who tested positive on the initial screening were terminated immediately, without receiving copies of the results, without hearings, and without pay. Ben Capua and the other terminated fire fighters filed suit, seeking to have the current program of drug testing declared unconstitutional and to enjoin the City of Plainfield from conducting standardless, policy-less, department-wide drug testing in violation of the Fourth Amendment. While the case was considered, a temporary restraining order prohibited further drug testing. The dismissed fire fighters were also reinstated.

The District Court addressed numerous issues in the City of Plainfield's testing program, particularly procedural issues. The Court found the manner of sample collection highly intrusive, explaining,

> A urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing or humiliating experience.[31]

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[31] Ibid., 1514.

Lack of concern for privacy was also addressed by the District Court. With no warnings, no policy directives, nor any procedural guidelines, the court concluded, "Plaintiffs reasonable expectations of privacy fell subject to the unbridled discretion of their government employer, contrary to the very tenets of the Fourth Amendment. . . ."[32]

In addition, the Court also vigorously challenged the program's failure to provide confidentiality, stating:

> . . . Compulsory urinalysis forces plaintiffs to divulge private, personal medical information unrelated to the government's professional interest in discovering illegal drug use. . . . The danger of disclosure . . . ranges from embarrassment to improper use of such information in job assignments. . . . Plainfield had not established any procedural guidelines to govern the urine testing, and in particular, had not taken any precautions to vouchsafe confidentiality . . . [which] has subjected all Plainfield fire fighters to public suspicion and degradation.[33]

The City of Plainfield defended its actions, citing that government employees have a diminished expectation of privacy and that governments have a compelling interest in managing employees and in investigating potential misconduct.

The Court, however, indicated that the city's actions in conducting a mass round-up for drug testing was intrusive, considering there had been no documented incidence of fire-related accidents, no below-standard job performance evaluations among the 103 fire fighters, no complaints from

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[32]Ibid., 1515. [33]Ibid.

the community, and no specified circumstances of employee drug use or abuse. The Court's analysis focused particularly on the intrusiveness of the incident, explaining:

> The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. The City of Plainfield essentially presumed the guilt of each person tested. The burden wss shifted onto each fire fighter to submit to a highly intrusive urine test in order to vindicate his or her innocence . . . contrary to the . . . Constitution.[34]

Even though the city had argued that mere suspicion instead of reasonable suspicion should be the principle under which government employees could be drug tested, the Court insisted that the government's interest would not be significantly hindered by a reasonable suspicion standard. The Court held, therefore, that the City of Plainfield's program of mass drug testing was not reasonable and in violation of the fire fighters Fourth Amendment rights. District Judge Sarokin summarized the Court's attitude:

> . . . Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as if someone had been present and watching. It is George Orwell's 'Big Brother' Society come to life. . . . The harassment, coercion, and tactics utilized here, even if motivated by the best of intentions, should cause us all to recognize the realities of government excesses and the need for constant vigilance against

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[34]Ibid., 151.

> intrusions into constitutional rights by its agents. If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundmaental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.[35]

Another controversial case concerning the drug testing of fire fighters is Lovvorn v. City of Chattanooga.[36] The Commissioner of Fire and Police for the City of Chattanooga implemented a program of drug testing for all employees in response to reports that some employees were allegedly smoking marijuana on the job. Drug testing was informally discussed, but no official notice of the exact date for testing was made. Given only a few days' notice, all fire fighters were taken in groups to a local laboratory for mandatory blood and urine screenings. Hearing that some personnel might tamper with the sample collection, administrators frisked some fire fighters in the first groups for contaminants or containers of clean samples. In addition, all samples were collected under the direct supervision of administrative personnel. Urine samples were subjected to the EMIT testing process.

Throughout this incident, none of the procedures for collection, analysis of the samples, nor any of the

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[35]Ibid., 1511.

[36]Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986).

consequences and disciplinary sanctions were presented in a written policy. Urine samples that tested positive for trace amounts of controlled substances were submitted to a second manual EMIT screening. Fire fighters whose samples tested positive on two EMIT screenings were suspended, with their names released to the press. Later, after disciplinary hearings, ten employees were terminated, five resigned, and seventeen received probation. Following the disciplinary hearings, the samples were sent to a laboratory in North Carolina for confirmatory testing using an alternative process.

Again, after hearing rumors alleging switched samples in the first drug testing sweep, along with one fire fighter testing positive subsequent to completing rehabilitation, the Commissioner ordered another mandatory drug screening of all fire department employees. Roland M. Lovvorn and other fire fighters brought suit against the city, requesting that urine tests be enjoined, based on their unconstitutioality under the Fourth Amendment.

The District Court for the Eastern District of Tennessee acknowledged the compelling interest the City of Chattanooga had in maintaining a drug-free fire department staff, in that fire-fighting requires skills in decision-making and in reacting quickly to uncertain conditions, skills that can be adversely affected by drug use. However,

the Court recognized the challenge drug testing posed to individual employee rights, especially privacy rights. Privacy, the Court suggested, is determined by a two-pronged test--whether the individual expects privacy and whether society recognizes that expectation as reasonable. In examining the issue of individual privacy in this drug testing program, the Court reacted strongly to the sample collection process:

> The rationale here is that human dignity and privacy are adversely affected where, as under the Chattanooga testing procedure, an individual is forced to engage in a private bodily function in the presence of a government agent. . . . This Court concludes that most people, including fire fighters, have a certain degree of subjective expectation of privacy in the act of urination. . . .[37]

Specifically addressing the second prong of the issue, the District Court examined the interests of the city in relation to the individual expectation of privacy of the city's fire fighters. The Court noted:

> While Chattanooga fire fighters do not entirely surrender their Fourth Amendment rights when they become city employees, they nevertheless as employees, as opposed to the general citizenry, have a somewhat diminished expectation of privacy. While probable cause would not be required for the city to conduct urine tests, the balancing of the interests of the city and individual interests requires some quantum of individualized suspicion before the tests can be carried out. This quantum may be denoted as 'reasonable suspicion.'[38]

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[37]Ibid., 880. [38]Ibid.

Finding no evidence of deficient job performance in the department and no individualized suspicion, the Court ruled that the mandatory drug testing program as conducted by the City of Chattanooga violated the Fourth Amendment rights of the fire fighters. The Court enjoined the city from continuing any further testing under the current program.[39]

As suggested by these cases, courts have significant concerns for the procedural integrity of the drug testing process. Thus, for school administrators conducting a drug testing program, failure to establish a detailed policy with collection methods and standards clearly outlined and failure to follow accepted confirmatory procedures in testing initial positives may lead to swift legal censure. In addition, verifiable guarantees to confidentiality and privacy must be provided both within the drug testing policy as written and as practiced.

Drug Testing and the Fourteenth Amendment

One other area of constitutional challenge has been the application of the Fourteenth Amendment to drug testing procedures. The Fourteenth Amendment provides that

> [n]o state shall make or enforce any law which shall abridge the privilege or liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.[40]

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[39] Ibid.

[40] United States Constitution, Fourteenth Amendment.

While allowing numerous applications of drug testing, courts have been establishing an emerging set of parameters to guarantee the due process rights of public sector employees. Thus, public sector employers must address both procedural due process and substantive due process issues in any drug testing actions. Two cases where the courts evidenced a strong interest in procedural protections were Capua v. City of Plainfield and Lovvorn v. City of Chattanooga.

In Capua, the District Court of New Jersey found that the 103 fire fighters who were mandatorially tested had a recognized liberty and property interest in their individual reputations and in the integrity of their good names. Those who were dismissed based on positive results, the court insisted, were denied that liberty and property interest without due process of law. In addition, the court noted that the conducting of mass suspicionless testing under open surveillance without prior notice and without access to legal recourse violated not only the dignity of those tested but also all procedural safeguards. Finally, not allowing opportunities for fire fighters testing positive to have their samples retested further limited the fundamental doctrine of fairness and procedural due process, in violation of the Fourteenth Amendment. As the court explained:

> Defendants' actions impermissibly violated these liberty and property interests without due process of law . . . [and] precipitously exercised their unbridled discretion exhibiting a total lack of concern for the constitutional rights of their employees.[41]

Judge Sarokin further warned public sector employers utilizing drug testing,

> Assuming a program of drug testing is warranted, before it may be implemented, its existence must be made known, its methods clearly enunciated, and its procedural and confidentiality safeguards adequately provided.[42]

In Lovvorn v. City of Chattanooga, the Eastern District Court for Tennessee also criticized the lack of procedural integrity by the City of Chattanooga in conducting mandatory drug sweeps, stating:

> . . . No standards for frequency, purpose, or methods of conducting the tests have been established by Chattanooga's City Commission . . . some donations of urine samples were observed and some were not. Some fire fighters were 'patted down,' others were not. Various pass/fail standards were used. . . . It is unclear whether the EMIT tests are to be confirmed by GSMS tests. In short, the administration of these tests is subject to the sort of standardless discretion, which even if the administrative search exception did otherwise apply, would make it inapplicable in this case.[43]

Again, lacking a clear procedural framework, the City of Chattanooga's drug testing program was found to be in

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[41] 643 F. Supp. (D.N.J. 1986) at 1521. [42] Ibid., 1511.

[43] 647 F. Supp. (E.D. Tenn. 1986) at 881.

flagrant violation of the due process rights of the employees. These cases indicate for public sector employers, including public school administrators, the importance of giving notice of drug testing, establishing a clear chain of custody, and implementing strict procedural guidelines for addressing the due process rights of employees, both substantively during the actual conducting of the drug test, and procedurally, by providing opportunities for retesting and seeking legal counsel.

Federal Drug Testing Programs and Litigation

In its final report to President Reagan, the Commission on Organized Crime in March, 1986, made more than fifty recommendations, including one concerning drug testing of federal employees:

> The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocably a similar policy that any and all use of drugs is unacceptable.
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> Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program.[44]

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[44]President Reagan's Commission on Organized Crime, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime, Report to President Reagan and Attorney-General Edwin Meese (March, 1986).

President Reagan's Executive Order[45]--12564, issued also in 1986, mandated a drug-free federal workplace, in direct response to the recommendations from the Commission on Organized Crime. Federal task forces began the coordination of developing drug testing programs for the more than one hundred and fifty federal agencies. By 1987, Section 503, Title V, Public Law 100-71 created the administrative procedures for implementing drug testing in the federal workplace. The "Mandatory Guidelines for Federal Workplace Drug Testing Programs" were published in the Federal Register[46] on April 11, 1988, outlining in detail the actual implementation process for federal agencies and departments.

Drug testing plans for forty-two of the largest federal departments and agencies were certified by 1988. Immediately, federal employee unions challenged the implementation of testing programs in court.

The first legal challenge to the federal drug testing initiative was the National Treasury Employees Union suit against the U.S. Customs Service (National Treasury Employees Union v. Von Raab[47]). The Supreme Court announced in 1988 that it would hear two drug-testing cases: the case

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[45]Executive Order 12564, "The Drug-Free Federal Workplace," Federal Register (Sept. 15, 1986).

[46]"Mandatory Guidelines for Federal Workplace Drug Testing Programs," Federal Register (April 11, 1988).

[47]National Treasury Employees Union v. Von Raab, 109 S.Ct. 1384 (1989).

concerning the Customs Service (National Treasury Employees Union v. Von Raab[48]) and a case challenging the testing of railroad employees (Skinner v. Railway Labor Executives Association[49]). Numerous lawsuits representing employees for most federal departments and agencies were also filed, but the majority of case decisions concerning federal programs for drug testing were delayed until the Supreme Court rulings were complete. Decisions for the two drug testing cases were announced on the same day, March 21, 1989.

The focus of the debate in National Treasury Employees Union v. Von Raab[50] is the drug testing program of the United States Customs Service. A bureau of the Department of the Treasury, the Customs Service processes incoming people, cargo, carriers, and mail for the government. It also collects import revenues and enforces border checks. One critical responsibility is drug interdiction. Customs Service agents, in this capacity, often come into direct contact with drug traffickers and drug smugglers. The work environment and the potential threat involved requires that many customs agents carry weapons. In 1986 the Commission of Customs implemented a drug testing program, stressing:

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[48]Ibid.

[49]Skinner v. Railway Labor Executives Association, 109 S. Ct. 1402 (1989).

[50]109 S.Ct. 1384 (1989).

> Customs is largely drug-free, [but] unfortunately no segment of socitey is immune from the threat of illegal drug use . . . there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs. . . .[51]

The Customs Service testing program was applied as a condition of promotion to positions that were directly involved in drug interdiction or drug enforcement, for positions where carrying a weapon was required, and for positions that handled classified material.

Federal employees in the agency brought suit initially in the United States District Court for the Eastern District of Louisiana, alleging that the mandatory drug-testing program violated the Fourth Amendment. Judge Robert F. Collins ruled that mandatory testing of certain employee-applicants of the Customs Service in absence of individualized suspicion of drug use was unconstitutional under the Fourth Amendment. The District Court enjoined the Customs Service from requiring drug tests for any applicants.

On appeal, a divided United States Court of Appeals for the Fifth Circuit vacated the District Court's injunction. The Appellate Court considered it significant that the testing program was an aspect of a promotional requirement. More importantly, the Appeals Court concluded that the government had a strong interest in detecting drug use

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[51]Ibid., 1398.

among applicants for critical positions in the customs agency. Drug use by agents charged with enforcing drug laws could lead, the Court felt, to compromises in performance and to sacrifices in public confidence in the agency. In addition, agents addicted to controlled substances might be tempted to divert interdicted drugs for personal use. The Appeals Court summarized its attitude, stating:

> Considering the nature and responsibility of the jobs for which applicants are being considered at Customs, and the limited scope of the search, the exaction of consent as a condition of assignment to the new job is not unreasonable.[52]

Subsequently, the case was appealed to the United States Supreme Court.

The Supreme Court upheld the constitutionality of the drug testing program of the Customs Service. Justice Kennedy delivered the majority opinion, joined by four other members. The Court dispensed with the argument that a warrant was necessary prior to testing employees. Justice Kennedy noted that government agencies and departments could not function if warrants were required for the testing of all employees. In particular, seeking warrants "would serve only to divert valuable agency resources from the Service's primary mission."[53] Also, warrants would not serve to provide additional guarantees to personal privacy in testing,

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[52]Ibid., 1390. [53]Ibid., 1386.

as employees applying for transfer to these specified positions where drug testing was prerequisite knew that a drug test was required. There was no discretionary determination, the Court suggested, to search on the part of the agency and "there are simply no special facts for a neutral magistrate to evaluate."[54]

More importantly, the Court suggested the compelling government interest in drug testing outweighed any privacy interests of individual employees. Because the Customs Service represents "the first line of defense" in America's war on drugs, and because threats, violence, and bribery often accompany the war on drugs, "It is readily apparent that the government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."[55] Since drug interdiction often requires the use of weapons, agents who carry those weapons must be drug free in order to pose as minimal a safety risk to the public.

In addition, the Court, examining the lack of evidence of any drug use by Customs Service employees, did not find it necessary to create a nexus between drug use and drug testing. The Court explained:

> . . . [I]t is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of

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[54]Ibid. [55]Ibid.

> evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chicken.[56]

Thus, considering the implications of these governmental interests, the Court reasoned that Customs Service employees have a diminished expectation of privacy, stating,

> Unlike most private citizens or government employees in general, employees in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms.[57]

The Supreme Court upheld the Customs Service drug testing program as it applied to positions directly involved in carrying out drug interdiction and to those positions where weapons were required, thereby permitting Fourth Amendment searches without individualized suspicion. On remand, the Court sent back to the Court of Appeals the component of the Customs Service program that applied to the testing of employees in sensitive positions for further study.

Justice Marshall, joined by Justice Brennan, dissented with the majority, suggesting, ". . . the court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable. . . ."[58] Justice Scalia, joined

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[56] 816 F. 2d 179 (1989).

[57] 109 S. Ct. 1398 (1989). [58] Ibid.

by Justice Stevens in dissenting, warned of the gravity of decision:

> Today's decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others--automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards . . . that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.[59]

Skinner v. Railway Labor Executives Association,[60] a case concerning the drug testing of railroad employees following accidents, addressed the implementation of Federal Railway Administration regulations, in 1985, requiring blood and urine tests of employees following major train accidents or incidents when employees failed to follow established safety rules. These regulations resulted from a 1983 study identifying forty-five train accidents, thirty-four fatalities, sixty-six injuries, and twenty-eight million dollars in property damage, between 1975 and 1983, related to

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[59] Ibid., 1401-1402.

[60] Skinner v. Railway Labor Executives Association, 109 S. Ct. 1402 (1989).

alcohol and drug use by employees on the job. The Railway Labor Executives Association, a union representing the railroad employees, challenged the regulations requiring testing as a violation of the Fourth Amendment's prohibition of unreasonable searches. The suit was brought in the United States District Court for the Northern District of California and sought to enjoin the Federal Railway Administration's testing program. The District Court concluded that the regulations did not violate the Fourth Amendment. The Court noted that railroad employees have a recognizable expectation to the privacy of their bodies, but that this interest did not outweigh the "public and governmental interest in the promotion of . . . railway safety, safety for the employees and safety for the general public that is involved with the transportation."[61]

On appeal, a divided Court of Appeals for the Ninth Circuit reversed the District Court's ruling, indicating that a requirement of a particularized suspicion was necessary to a reasonable applying of drug testing under the Fourth Amendment. Such a requirement, the Appellate Court suggested, would ensure that drug tests, which often screen substances taken many days and weeks before testing, would be confined to detecting current employee impairment.

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[61]Ibid., 1420.

The Supreme Court granted certiorari to consider whether the regulations invalidated by the Ninth Circuit Court of Appeals violated the Fourth Amendment. In a decision written by Justice Kennedy, joined by six other members, the Federal Railway Association's drug testing program was upheld as constitutional.

The Court first had to establish a governmental relationship to the case, as the tests were implemented on private sector railroad employees by private employers. Only with a governmental link could the Fourth Amendment be debated as an issue in the case. The Court reasoned that since the testing was conducted at the mandate of the Federal Railway Administration, a federal agency, then the government participation was to a degree sufficient for consideration of the Fourth Amendment.

Echoing the findings of lower courts, the Supreme Court found that urine testing was a Fourth Amendment search, as "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable."[62] In addition, the Court found that no warrant was necessary and no individualized suspicion was required, explaining:

> . . . showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances,

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[62]Ibid., 1413.

> where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.[63]

The Court also argued that aside from the compelling government interest, railway employees had limited privacy interests, as the transportation industry is highly regulated due to the documented alcohol and drug abuse of employees. The Court explained this limited privacy:

> Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information. We conclude, therefore, that the testing procedures . . . pose only limited threats to the justifiable expectations of privacy of covered employees.[64]

More importantly, the Court insisted that the government had a strong interest in safety, safety that could be at risk in the hands of impaired transportation employees. The drug-testing requirement could have a deterrent effect, the Court reasoned, as employees may be less inclined to use drugs if testing will take place after an accident or safety violation. Thus, the Court found the Federal Railway

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[63]Ibid., 1417. [64]Ibid., 1419.

Association's drug-testing program constitutional under the Fourth Amendment.

Justice Marshall dissented, strongly asserting that "The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."[65] Justice Brennan, also in dissent, maintained, "The court today takes its largest step yet toward reading the probable cause requirement out of the Fourth Amendment."[66]

There are several broad implications from these cases concerning drug testing for school administrators. By ruling that drug testing was reasonable in each case, the Supreme Court indicated that the traditional Fourth Amendment requirements of probable cause, reasonable suspicion, or individualized suspicion may be of limited application in some drug testing programs. However, in both instances, the Court determined that "special circumstances" were present. The Court did not indicate that all public sector employees may be required to submit to drug testing nor did the Court encourage public sector employers to utilize intrusive mandatory drug testing searches. Where there is a compelling government interest, the Court suggested, then drug testing in the absence of probable cause, reasonable suspicion, or individualized suspicion, may be constitutionally permissible. In Von Raab, the compelling government interest was

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[65]Ibid., 1423. [66]Ibid.

in preserving the drug-free integrity of the Customs Service workers. The fact that these government employees have high profile jobs in drug interdiction resulted in a significantly diminished expectation of privacy for the individual worker. In Skinner v. Railway Labor Executives Association, compelling government interest in transportation safety significantly reduced the expectations of privacy for these workers, also. The Skinner case more directly affects public school drug testing programs, as school systems may require drug tests of identified employees involved in vehicle accidents. However, as suggested by this case, attention should be addressed to the evidence of drug use among the identified employee population and whether the positions selected for testing have a diminished expectation of privacy. More importantly, these two cases indicate that for the majority of school system employees, drug testing must be continued to be based on reasonable suspicion of drug use.

In addition, the Von Raab case provided an important framework for establishing a constitutionally permissible drug testing program. The Supreme Court upheld the following components:

- -The drug testing program was limited to identified categories of employees.
- -The drug testing program was justified by the roles performed by the employees and would maintain public confidence in those roles.

-The drug testing program was voluntary, applied to employees seeking promotion to the identified positions.

-The drug testing program was a reasonable condition for employment in those positions.

-The intrusiveness of sample collection was minimized and privacy was guaranteed.

-The purpose of the drug testing program was administrative not punitive.

-The sample collection was scheduled by appointment.

-Strict chain of custody procedures were utilized.

-Laboratory procedures utilized appropriate screening tests and confirmatory tests.

-Employees testing positive received no adverse consequences except denial of transfer.[67]

Creating a comparable set of criteria may not guarantee a legal defense for a drug testing program, but addressing these elements may signal to public school employees and courts that a fair and balanced approach has been utilized.

With the announcement of the Supreme Court rulings in the Von Raab and Skinner cases, other legal challenges by federal agencies and departments could be settled, and those that had been settled previously could be firmly implemented. One program that had been settled in the interim was the drug testing program of the Federal Aviation Administration with the case, National Association of Air Traffic Specialists v. Dole.[68] That program, which subjected specified

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[67]Ibid., 1386, 1394.

[68]National Association of Air Traffic Specialists v. Dole, No. A 87-073 (D. Alaska 1987).

categories of employees to mandatory drug testing, was challenged in District Court in Alaska as being in violation of the Fourth Amendment. The program had sought to require employees in sensitive jobs to submit to urinalysis drug testing as part of routine physical examinations. Several categories of employees were covered under the umbrella of "sensitive jobs," including air traffic controllers, pilots, and flight service specialists. In challenging the testing program, the union representing the air traffic employees contended that not all categories performed critical or sensitive work, particularly flight service specialists.

The District Court in Alaska ruled that drug testing as applied by this program was a search under the Fourth Amendment and that it was a reasonable search based on "public safety considerations outweigh[ing] the intrusion upon petitioners' legitimate expectation of privacy."[69] Drug testing employees was seen as reasonable considering the responsibilities these employees had in insuring the safety of the traveling public. More importantly, the District Court established several parameters for determining the sensitivity of positions in programs with a drug-testing context, including degree of public trust in the industry, significance of the position to the overall industry, the level and degree of supervision provided the positions, the

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[69]Ibid., 63.

risk factors involved, and the level of reliance by other employees on information provided concerning public safety issues.

The District Court denied the request for injunction against the drug testing program and upheld the program for testing air traffic employees, including flight service specialists, noting that "national interests in air safety and the public's perception of safety" more than balanced the legitimate individual expectations for privacy. In addition, the District Court, in denying injunction to the program, supported the Federal Aviation Administration's program elements, which included:

-Advance notice of the drug testing procedure,

-Rehabilitative focus of the program, with those testing positive reassigned to less-sensitive areas and entering an approved rehabilitation program,

-Application of drug testing within the context of an existing annual physical examination,

-Identified sensitive or critical nature of the employees' responsibilities,

-Verified procedures for chain of custody,

-Use of a pre-drug-testing evaluation for drug use which was examined only with confirmed positive tests, thereby assuring confidentiality,

-Opportunities provided for retesting the sample at individual request,

-Use of appropriate testing and confirming procedures, including gas chromatography/mass spectrometry,

-Use of the least intrusive means for collection.[70]

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[70]Ibid., 68.

The implication for public school administrators who are charged with creating drug testing policies is that a drug-testing program that includes these components will be effective, primarily because it can withstand legal challenges as evidenced by the District Court of Alaska's support for them.

Other cases challenging the implementation of drug testing programs in federal agencies and programs were addressed by courts, establishing additional parameters for public school employees covered by the drug testing requirements and the types of drug testing applied. With the case American Federation of Government Employees v. Cavazos,[71] employees of the Department of Education sought to eliminate two components of the Department's Drug-Free Workplace Plan. That plan included six types of drug testing, including random testing of employees in sensitive positions, reasonable suspicion testing, accident or unsafe practices testing, voluntary testing, follow-up rehabilitative testing, and applicant testing. Only the random testing and reasonable suspicion testing elements were the subject of the courtroom challenge. Four percent of the Department of Education workers were eligible for random testing--motor vehicle operators, personnel who were exposed to computer or

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[71]American Federation of Government Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989).

financial information, Presidential appointees, guards, employees who handled secret documents, and personnel in the Inspector General's Office. In contrast, all Department of Education personnel would be subject to reasonable suspicion testing.

The United States District Court in Washington held that all aspects of the Department of Education's drug testing program were constitutionally permissible except the random drug testing of computer data processors. That category of employee testing was ruled to be unreasonable search and seizure since those employees neither affected the safety of other employees or the public nor had access to sensitive information.

Similarly, in National Treasury Employees Union v. Yeutter,[72] employees of the Department of Agriculture challenged the constitutionality of the random testing, reasonable suspicion testing, and post-accident drug testing elements of the Department of Agriculture's Drug-Free Workplace Plan. According to the proposed plan, all of the employees of the Department of Agriculture's Food and Nutrition Service would be subjected to post-accident and reasonable suspicion testing. In addition, motor vehicle operators and employees in the Plant Protection and Quarantine Program, a division of the Department of Agriculture's Animal and

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[72]National Treasury Employees Union v. Yeutter, 733 F. Supp. 403 (D.D.C. 1990).

Plant Health Inspection Service, would have to submit to post-accident, reasonable suspicion, and random drug testing.

Unions representing the employee groups asked the United States District Court in Washington to make permanent a preliminary injunction against random testing and asked for a permanent injunction against post-accident testing. They further challenged the constitutionality of reasonable suspicion testing under the Fourth Amendment.

As with other federal cases concerning drug testing programs, the District Court examined particular employee categories covered by the different types of testing. The Court held that Plant Protection and Quarantine Officers and computer data specialists could not be required to submit to random drug testing since neither group dealt with sensitive information. However, the Court lifted the preliminary injunction against the random testing of motor vehicle operators, finding this component permissible in the interest of insuring public safety. Further, the Court held that the reasonable suspicion and post-accident drug testing provisions were acceptable under the Fourth Amendment.

Unions representing employees of the Health and Human Services Department challenged proposed drug testing with the case, American Federation of Government Employees v. Sullivan.[73] The proposed drug testing component of the

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[73]American Federation of Government Employees v. Sullivan, 744 F. Supp. 294 (D.D.C. 1990).

Department's Drug-Free Workplace Plan mandated the random drug testing of 8500 employees in forty-five different employment categories, with at least ten percent tested annually. Random drug testing was primarily applied to those positions holding top security clearances and motor vehicle operators. The Department's plan also required post-accident testing and reasonable suspicion testing.

As with previous cases dealing with federal drug testing programs, the Court examined categories of employees and types of testing to which those employees were to be submitted. The Court held that random testing of employees with top security clearances and motor vehicle operators was constitutional in the light of a compelling government interest in insuring the security of sensitive information and in protecting the traveling public. The Court, however, granted the unions a preliminary injunction against the plan's post-accident component, indicating that this component would not stand constitutional scrutiny. The Court questioned the validity of drug testing an employee involved in an accident (not necessarily a vehicular accident) in which there was as little as $1000 of property damage, especially when the employee was not in a safety-sensitive position, when there was no evidence the employee was at fault, or when the employee was not engaged in conduct that would necessarily diminish a legitimate expectation of privacy.

Most importantly, the Court ordered an injunction against the criteria utilized in assigning reasonable suspicion testing. These criteria were essentially the same reasonable suspicion indicators applied by most federal drug testing programs. The District Court, in this case, chose to examine the criteria closely.

According to the Health and Human Services drug testing plan, any of the five criteria could trigger a reasonable suspicion investigation, leading to a requirement of employee drug testing. These criteria included:

> (1) Observable phenomena, such as direct witness of drug use or possession and/or physical symptoms of being impaired or under the influence;
>
> (2) A pattern of abnormal behavior;
>
> (3) Arrest or conviction for a drug-related offense or the identification of an employee currently under criminal drug investigation;
>
> (4) Information from a credible or reliable source concerning drug use;
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> (5) Evidence that the employee tampered with a prior drug test.[74]

These were the same criteria specified by the Federal Personnel Manual following President Ronald Reagan's Executive Order guidelines.[75]

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[74]Ibid., 302-303.

[75]Federal Personnel Manual Letter 792-16 (November 1986), 3.

In evaluating the five reasonable suspicion criteria, the Court found the first four standards to be problematic. The first component, relating to direct observation of drug use, the Court challenged the extent of the direct observation into the off-duty environment, noting:

> . . . The proposed criteria are not limitd to observation of, or information regarding, on-the-job impairment. . . . Health and Human Services has not articulated any special circumstances with respect to employees in their department which would justify the use of criteria which apply to off-the-job drug usage. . . . It is unlikely that a generalized interest in securing the integrity of the workforce by policing their off-duty drug use could survive a Fourth Amendment challenge.[76]

The District Court, therefore, granted a preliminary injunction to the application of the first criteria for reasonable suspicion drug testing, particularly in its sweep of off-duty activities rather than on-the-job behaviors.

With respect to the second criterion, based entirely on a "pattern" of abnormal or erratic behavior, the Court noted the particular subjective nature of this application, suggesting:

> . . . for a supervisor to make such a determination, he or she would surely have to be trained to recognize the types of emotional behaviors that are the result of drug use. Yet, even with these precautions, it appears that there is likely to be a risk of error in evaluating who should be tested under this relatively subjective criteria.[77]

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[76]Ibid., 303. [77]Ibid., 304.

The Court further argued that the application of this standard to off-the-job activities could lead to errors, explaining:

> The fact that this standard has not been limited to behavior on the job will only aggravate this feeling, for not only can an employee be watched at home, but his activities and behavior at home can also be reviewed under this section regardless of its impact on his work.[78]

The Court ruled for a preliminary injunction against the applicaton of this criteria for reasonable suspicion drug testing, suggesting that "It is overbroad and not sufficiently related to the government's interest."[79] The District Court also questioned the logic of the third criteria permitting the reasonable suspicion testing of any employee arrested for a drug-related offense. The Court challenged the time frame permissible for such a criteria, indicating that a conviction for a drug offense at any previous time could place an employee in continual jeopardy. The Court concluded:

> . . . the criterion applies to any Health and Human Services employee who has ever been arrested or convicted for a drug-related crime. Consequently, an employee who was arrested for, or convicted of, possession of marijuana decades ago could suddenly be required to undergo testing. . . . There also appears to be no limit to the number of times the employee in this category could be tested. For example, if an employee with an arrest or conviction takes a urinalysis test next month and passes, he could, under the

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[78] Ibid. [79] Ibid.

> current criteria, be tested again and again, on the theory that once he had been involved in drugs, he is always a likely drug user.[80]

The District Court ruled that this standard served to continually punish an employee for past activity and was not specifically directed at detecting current drug use, and was, therefore, unreasonable under the Fourth Amendment.

The fourth criteria for reasonable suspicion, according to this plan, related to the use of information from a reliable or credible source. This standard was also rejected by the District Court. Ruling that this criteria neither indicated individualized suspicion nor use of drugs by the employee while on duty, the District Court held that this component was unreasonable under the Fourth Amendment.

The District Court rulings concerning the criteria applied in identifying employees for reasonable suspicion drug testing imply the significant care school administrators must use in creating standards for judging employee behavior. Criteria for reasonable suspicion testing for most employees must clearly relate to current on-the-job behaviors that impact on the employee's performance in the workplace and must be based on a particularized, reasonable suspicion.

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[80]Ibid., 304-305.

In an additional federal case, Harmon v. Thornburgh,[81] employees in the Department of Justice sought action in United States District Court, challenging the Department of Justice's drug testing plan. Under this plan, five categories of employees, all in identified sensitive positions, would be subjected to random drug testing, including employees with access to classified documents, attorneys and personnel who handled grand jury proceedings, Presidential appointees, employees who handled the prosecution of criminal cases, and employees who were assigned responsibility for the maintenance and storage of controlled substances. The United States District Court in Washington granted a preliminary injunction against the plan and later ruled the injunction permanent, citing the absence of any documented drug problem in the Department of Justice. The District Court concluded the Department's plan was unreasonable, suggesting "there is no nexus between fitness for duty, security, and integrity on the one hand, and compressing random urinalysis drug testing on the other, where no drug problems is believed to exist."[82] The Department of Justice appealed.

The United States Court of Appeals in Washington acted initially in response to a Department of Justice brief,

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[81]Harmon v. Thornburgh, 878 F.2d 484 (D.D.C. 1989).

[82]Ibid., 487.

which indicated that none of the plaintiffs were Presidential appointees nor employees responsible for maintaining and securing controlled substnces used in evidence. The brief argued that the plaintiffs lacked standing to represent all categories of employees scheduled for drug testing under the Department's plan. Subsequently, the Appeals Court modified the injunction order, restoring random testing for Presidential appointees and employees charged with maintaining and safeguarding controlled substances.

The case proceeded, with the focus on the challenge to the Department's plan to randomly test federal prosecutors, employees with access to grand jury proceedings, and employees with top security clearances. The Department of Justice defended its plan, noting that three governmental interests provided adequate justification for the plan--interest in maintaining the integrity of the work force, interests in securing public safety, and interest in the protection of sensitive information. The Appellate Court concluded that the government's interest in the integrity of the work force and public safety did not justify the random testing of prosecutors, employees with access to grand jury proceedings, or personnel with top security clearances. However, the government did have a compelling interest in protecting sensitive information, thereby justifying the random testing of those employees with top secret clearances. The Court moved

to modify the injunction so as to permit the random testing of that category of employee while retaining the injunction prohibiting the random testing of federal prosecutors and those handling grand jury materials.

This case indicates for school administrators that the issue of random drug testing--unscheduled mandatory testing of all or specified categories of employees--continues to raise the most critical concerns for drug testing programs. As suggested in Harmon, courts tend to address the legality of random testing by examining the particular circumstances of the assigned duties of the public sector employees. Rulings underscore the strong government interest in insuring public safety and in protecting sensitive or classified information. For public employers, including schools, with employees serving those positions, random drug testing may be constitutionally permissible. For other employees, the requirement remains that drug testing should be premised on reasonable suspicion.

Drug Testing and Public School Employees

Programs established for drug testing public school employees have also led to several court challenges. Of those, one case, Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free

Free School District,[83] directly addressed the mandatory drug testing of public school teachers.

According to the facts of the case, in 1983, the Patchogue-Medford School District completed a collective bargaining agreement with the Patchogue-Medford Congress of Teachers, the union representing the teachers of the district. That agreement stipulated that probationary teachers would be required to submit to a full physical examination during the first year of employment with the district and also during the third year as a condition for eligibility for tenure. In 1985, approximately twenty-five teachers were candidates for tenure and each was instructed to complete the physical examination requirement by May, 1985. Physical examinations were conducted by a school district-designated physician.

On May 3, 1985, each probationary teacher received notice that an additional test would be required, with the letter from the district office stating, "the district is requiring a urine sample for all employees eligible for tenure."[84] The system conceded that the sole purpose for adding urinalysis screening was to determine if any of the candidates were using drugs illegally. However, no

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[83]Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, 517 N.Y. Supp. 2d 456 (N.Y. Appeals, 1987).

[84]Ibid., 458.

resolution from the district's board of education mandated the additional testing and no policy statement existed covering this procedure. The teachers were informed that anyone refusing to participate would be denied tenure.

Prior to the scheduled urinalysis screening, the teachers' union initiated court action to prohibit the drug testing, claiming that it was unauthorized and that it constituted an unreasonable search and seizure in violation of the probationary teachers' constitutional rights. The union sought declaratory and injunctive relief from the requirement and obtained an interim stay of the testing proceedings. The school district responded that the drug testing was authorized by the 1982 collective bargaining agreement, did not constitute a search or seizure under the Fourth Amendment, and was reasonable for a tenure candidate.

The trial court ruled that the required urine test was not a prescribed part of the medical examination authorized by state statute and by the collective bargaining agreement. The court further held, following solid judicial precedent, that drug testing is a search and seizure and was constitutionally impermissible in the absence of reasonable suspicion. In addition, in examining the governmental interests expressed by the school district, District Court Judge Rubin asserted:

> In assessing the reasonableness of the teacher's expectation of privacy, we must contrast the nature of the teaching profession with other types of employment. We distinguish, at the outset, those businesses and industries which, because of the threat of criminal involvement, have historically been so pervasively regulated by the State that any person who enters into such a profession must be deemed to have consented to intense governmental scrutiny. In such pervasively regulated industries, . . . intrusive testing by a governmental agency may be permitted, even in the absence of any articulable individualized suspicion. Clearly, the profession of teaching is not in the same category . . . there [must] be some degree of suspicion before the dignity and privacy of a teacher may be compromised by forcing him or her to undergo a urine test.[85]

Judge Rubin concluded that ordering the drug testing of teachers was "an act of bureaucratic caprice."[86]

The school system appealed. Joined by the United States Attorney General as amicus curiae, the school system argued that compulsory urine testing did not violate the teachers' constitutional rights. Pointing out that the procedure is noninvasive to an individual's body and that all that is seized is an individual's waste product for which there is no expectation of privacy, the school district reasoned that the drug testing procedure was not a true search and seizure. However, the school district also contended, that if the procedure was a search and seizure, it was reasonable to require compulsory drug testing of

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[85]Patchogue-Medford Congress of Teachers, 505 N.Y. Supp. 2d 888 (1986) at 890.

[86]Ibid., 891.

teachers based on two governmental interests--public school teachers have a diminished expectation of privacy with respect to their fitness for duty, and that the State had a compelling interest in providing a drug-free environment for students in school.

The Appeals Court disagreed with the school district's arguments. It affirmed the lower court's decision prohibiting the application of drug testing to teachers in the Patchogue-Medford School District.

Another frequently cited case concerns the drug testing of school transportation workers. In Jones v. McKenzie,[87] the District of Columbia Public School System initiated a program of mandatory drug testing in 1984 for all employees of the transportation branch, including bus drivers, bus mechanics, and bus attendants. The program, to be a component of a required annual physical examination, was defended as necessary due to a significant increase in traffic accidents involving buses and an increase in transportation employee absenteeism. In addition, an investigation revealed the presence of syringes and bloody needles in the restrooms utilized by the transportation employees. According to the system's plan for testing, urine samples would be analyzed using the EMIT Cannabinold Urine Assay, manufactured by Syva Company. The EMIT test screens for THC,

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[87]Jones v. McKenzie, 625 F. Supp. 1500 (D.D.C. 1986).

a chemical metabolite associated with marijuana. The EMIT test indicates the presence of THC metabolites but does not reveal when the ingredient was absorbed or how it was ingested (by active smoking or passive inhalation in the presence of others smoking). In addition, the manufacturer's label stipulates:

> Any positive should be confirmed by an alternative method. Other methods in use for the detection of THC metabolites include radio-immunoassay and gas chromatography-mass spectrometry.[88]

The school system's testing directive reflected the necessity of following strict screening procedures, noting that "the confirmed finding of an illicit substance in the urine of an employee . . . shall be grounds for termination. . . ."[89]

Juanita Jones, the plaintiff in this case, served as a school bus attendant, assisting handicapped chilren on and off the bus. She also had to carry some impaired children and had to help maintain order while the bus was in transit. Jones worked 30-35 hours a week, received no leave or benefits, and was re-employed annually based on the availability of funds. Evaluations indicated she was an excellent employee.

Juanita Jones and twenty-five other transportation branch employees tested positive during the system's drug

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[88]Ibid., 1503. [89]Ibid.

screening. The system reported that samples testing positive were re-tested manually, using the same EMIT kits. The samples were not otherwise confirmed. Jones, after receiving notification of the positive result, voluntarily took two additional screenings, both of which resulted in negative readings for the presence of the THC metabolite.

Nonetheless, Jones was terminated without a hearing. She appealed her termination and requested a hearing to present evidence. The school system declined her request, permitting her only to supply a written statement in her behalf. Her appeal was ultimately rejected by the District of Columbia Superintendent of Schools.

Challenging her dismissal in court, Juanita Jones sought injunctive relief from drug testing and damages for violation of her rights under the Fourth Amendment and under District of Columbia statutes. She contended further that her termination without an adequate hearing occurred on the basis of one unconfirmed EMIT test, despite a manufacturer's warning and despite the directive of the superintendent. Jones also alleged a violation of substantive and procedural due process after being subjected to an unreasonable search and seizure.

The District Court held that her dismissal on the basis of an unconfirmed EMIT test was "arbitrary and capricious," violating the requirements of the superintendent and District

of Columbia statutes. The Court also concluded that her procedural due process rights under the Fourteenth Amendment were violated, insisting:

> In this case, plaintiff had no hearing before she was terminated and her post-discharge hearing was limited to a written submission. . . . This deprivation violated her constitutional right to procedural due process. . . .[90]

Finally, as to the issue of the unreasonableness of the search under the Fourth Amendment, the District Court made a distinction between bus drivers and bus attendants, suggesting:

> The ultimate question here is whether plaintiff, serving as a bus attendant assisting students, particularly handicapped ones in traveling by bus to and from schools had a reasonable expectation of privacy from a search by mandatory urine testing for drugs and whether such expectation is outweighed by public safety considerations. School bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to urine and blood tests . . . it does not follow that a school bus attendant like plaintiff should be exposed to such testing or that public safety considerations require testing of a school bus attendant.[91]

Thus, the District Court held that the mandatory drug testing violated Juanita Jones's rights under the Fourth Amendment in the absence of an individualized reasonable suspicion. In addition, the denial of a hearing concerning her dismissal

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[90] Ibid., 1507. [91] Ibid., 1580-1509.

and the failure to conduct appropriate confirmatory testing was held to be a violation of Jones's Fourteenth Amendment rights. The school system was ordered to reinstate Jones with back pay and seniority, was directed to purge her personnel file of any mention of the termination proceedings, was enjoined from terminating her in the future on the basis of an unconfirmed EMIT test, was required to provide full due process before any further termination actions, and was prohibited from administering any drug test to Jones without first establishing probable cause. The school system accepted all parts of the District Court's rulings except the prohibition of drug testing without probable cause. That issue was then appealed by the District of Columbia School System.

The Appeals Court in Washington, balancing the privacy interests of individuals subjected to drug testing with the governmental interests in safety for children, held that it was not unreasonable for the school system to require drug testing of its employees when an employee's duties involved direct contact with young children and affected their physical safety, when the testing was part of a routine employment-related physical examination, and when there existed a clear need for the testing based on the employer's legitimate safety concerns. Thus, the District Court's prohibition of testing except on the basis of probable cause was reversed.

In Jenkins v. Jones,[92] the Court of Appeals in Washington, D.C., re-examined on remand the drug testing plan of the District of Columbia Schools in relation to the rulings in National Treasury Employees Union v. Von Raab[93] and Skinner v. Railway Labor Executives Association.[94] The Court held that school officials could legally require drug testing of bus drivers in order to insure children's safety. The Court determined:

> . . . the main point is that, on the present record, the drug testing program by the School System 'is not an undue infringement on the justifiable expectations of privacy of covered employees,' and therefore, 'the Government's compelling interests outweigh privacy concerns.'95

Thus, with the concern for the welfare of the children taking precedence over the individual bus driver's rights to privacy, drug testing would be constitutionally permissible.

Several other cases have emerged, also challenging the drug testing of transportation employees, particularly bus drivers. In the case, Independent School District No. 1 of

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[92]Jenkins v. Jones, 878 F.2d 1476 (U.S. 1989).

[93]National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

[94]Skinner v. Railway Labor Executives Association, S. Ct. 1402 (1989).

[95]Jenkins v. Jones, 878 F.2d 1477 (U.S. 1989).

Tulsa County, Oklahoma v. Logan,[96] the Tulsa Public Schools had adopted a policy in April, 1986, requiring all employees in safety-sensitive positions, such as bus drivers, to take drug screening tests as part of an annual physical examination. Positive results on the drug screen would lead to dismissal. Jerry Logan and three others, who had been employed for several years as bus drivers, tested positive and were discharged. Logan and the other dismissed drivers applied for unemployment benefits. The Board of Review allowed them to file claims for unemployment compensation, concluding that there had been no evidence of potentially unsafe behavior on the part of any of the drivers and that there had been no evidence of impairment, such as bizarre behavior or loss of productivity.

In District Court, the school district sought to overturn the Board of Review's assessment. The District Court held that "termination from employment resulted from misconduct"[97] and that the dismissed bus drivers were ineligible for unemployment compensation from the Board of Review. Logan and the other drivers appealed the reversal, alleging that the taking of urine samples without cause or suspicion violated the Fourth Amendment. They also argued that the system had no evidence supporting misconduct.

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[96]Independent School District No. 1 of Tulsa County, Oklahoma v. Logan, 787 P. Rep. 2d 636 (1989).

[97]Ibid., 638.

The Court of Appeals held that the school district's policy of requiring school bus drivers to take a drug-screening test as part of an annual physical examination did not violate the Fourth Amendment since the school district had a compelling safety interest in insuring that drivers could perform effectively. The Court also ruled that drug testing was a reasonable means of detecting and deterring drug use. However, the Appeals Court concluded that a positive result on a drug screen, by itself, was not sufficient evidence of misconduct so as to disqualify an individual from receiving unemployment benefits. Thus, the Appeals Court reversed the District Court's ruling and reinstated the Board of Review's award of unemployment compensation to Logan and the other drivers.

In another case concerning the testing of bus drivers, Armington v. School District of Philadelphia,[98] a bus driver was discharged for refusing to submit to a urinalysis drug test. According to the facts of the case, Charles Armington was driving his route on February 5, 1988, running approximately fifteen minutes late. A bus attendant was on board the bus for the entire trip. During the trip, Armington was confronted by an angry parent who complained about the late arrival. Later that morning, a parent, who identified herself as Ms. Thompson, contacted the

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[98]Armington v. School District of Philadelphia, 767 F. Supp. 661 (E.D. Pa. 1991).

Transportation Services Department of the school district, alleging that the driver of her son's bus (Armington) was late that day, that he could not stand up when confronted, and that the bus smelled of marijuana. A transportation supervisor decided, on the basis of the complaint, that Armington should be tested for drug use.

Armington was met by a supervisor and taken to Health Services for drug testing. The supervisor witnessed no impairment nor smelled marijuana on the bus. Armington expressed reluctance to be tested, indicating that he would test positive for alcohol because of his attendance at a party the previous evening. Subsequently, Armington refused to take the drug test. He was immediately suspended by the supervisor.

At a suspension hearing, Armington was charged with insubordination for refusing to take the drug test and was recommended for dismissal. Armington, unaware that he could appeal directly to the Philadelphia Board of Education and to the Court of Common Pleas, resigned, believing he would lose his retirement benefit if he were fired.

Armington challenged the actions of the school district in court. The District Court for the Eastern District of Pennsylvania held that a constitutional requirement to compulsory urinalysis is reasonable suspicion that the individual to be tested is under the influence of drugs. The Court reasoned that information received from the parent

was sufficient to indicate reasonable suspicion, and therefore, the school district had reasonable cause to order the bus driver to submit to drug testing. Concluding that the plaintiff's refusal to be tested did not diminish the reasons for believing he may have been under the influence of marijuana, the District Court upheld Armington's dismissal.

Summary of Implications for Schools

The controversy surrounding drug testing holds significant implications for public school administrators. Drug testing policies that require school officials to screen teachers and other school employees place issues of personal freedom in conflict with child safety concerns and public expectations of school employees as role models. Federal and state court decisions concerning school employees have found that drug testing is a search and seizure under the Fourth Amendment. The Fourth Amendment does not prohibit all searches and seizures, only those that are unreasonable. Reasonableness is most often determined by a judicious balancing of compelling government interests against an individual's expectation of privacy.

Courts have also indicated that there can be no mandatory drug testing of public school teachers without reasonable suspicion that an individual teacher is using drugs. However, in light of several cases concerning public sector transportation employees and school bus drivers, it

appears school system transportation personnel will be treated differently in terms of both drug testing and court action in regards to drug testing. Drug testing has also been ruled as reasonable for job applicants.

Public school administrators, so far, have not conducted drug testing programs that qualify for the "administrative search" exception, since this exception is applied in industries that are heavily regulated or in positions where the employee has a diminished expectation of privacy. In addition, even though the Supreme Court has held that drug testing programs utilizing mandatory drug testing will be constitutionally permissible under limited circumstances, mandatory drug testing of all school employees is currently not legally permissible.

Finally, court reaction to the lack of procedural integrity in the District of Columbia School System's treatment of an employee (Jones v. McKenzie), along with the omission of due process hearings, suggest that schools conducting drug tests must confirm all initial positive results by an alternate test and must provide adequate opportunities for substantive and procedural due process for the tested employees. Public school administrators who fail to address due process issues in their respective drug testing policies may find their drug testing programs will not withstand a constitutional challenge. Chapter V will provide some

practical guidelines for public school administrators for implementing a drug testing program.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS FOR FURTHER STUDY

Summary

A glance at any recent newspaper reveals that public schools have entered a more professionally and legally challenging era. Along with the three R's, schools now must deal on a daily basis with the three S's--sexual harassment, school violence, and substance abuse. For the last decade, substance abuse has commanded the most attention of educational policy makers and legal scholars. As previously noted, with statistics reminding us that approximately 470,000 of North Carolina's nearly 6.6 million residents abuse alcohol and drugs at a cost to the state of $4.3 billion dollars a year, both private and public sector employers, including public school employers, have evidenced a growing intolerance for the presence of drugs in the workplace. The implementation of workplace drug testing programs is one response to the substance abuse problem. Currently, thirty-two of the one hundred and twenty-four school systems in North Carolina conduct some type of substance abuse testing as part of their drug-free workplace programs.

However, the implementation of workplace drug testing involves important policy considerations, particularly for

public employers. A constitutional tug of war exists, balancing a public sector employee's constitutional rights to privacy and freedom from unreasonable searches with the public sector employer's responsibility to maintain a safe and secured workplace. The resulting debate issuing from the collision of the rights of public sector employees and the rights of public sector employers has led to legal remedies, with both the Fourth and Fourteenth Amendments subjected to inquiry in relation to the implementation of drug testing. Courts have examined closely a public employer's reasons for the implementation of drug testing, the types of drug testing utilized for designated categories of employees, and the substantive and procedural due process provisions of drug testing policies as written and as practiced. As policies emerge and as cases are heard, viable parameters for drug testing continue to be weighed, acknowledged, accepted, and rejected. This requires policy makers such as school administrtors and school board representatives to be vigilant in understanding not only the governmental mandates for controlling drugs in the workplace but also the legal restraints on drug-free workplace programs instituted to address those mandates.

Answers to the Research Questions

This study attempted to answer five questions. The following answers are the result of a careful review of the

current literature on drug testing by public sector employers, the examination of drug testing policies from thirty-one school systems in North Carolina that conduct drug testing, and the investigation of pertinent case law.

Question one: What is revealed in current literature concerning drug testing as a search and seizure? Many authors and legal scholars address the issue of urinalysis drug screening as a search and seizure, infringing both the physical privacy of a bodily function and the personal privacy of individual behavior. Drug testing protocol requires collecting a secured urine sample often in tamper-proof surroundings and frequently in the presence of a witness who listens or watches, thereby subjecting those who are tested to a physically invasive and degrading search. In addition, drug testing can allow for screens for personal conditions, such as diabetes, not necessarily pertinent to employment; drug screens may also reveal the presence of drug metabolites for up to two months, sacrificing both medical and social privacy. The Supreme Court has ruled that the blood sampling of a defendant for use in court in determining blood alcohol content may be classified as a search under the Fourth Amendment. Following this rationale, lower courts have found that public sector employers who conduct urinalysis drug testing of employees are carrying out a search and seizure within the context of the Fourth

Amendment. This line of reasoning was later affirmed by the Supreme Court in two landmark cases--National Treasury Employees Union v. Von Raab and Skinner v. Railway Labor Executives' Association. The courts have not found searches, as such, to be unconstitutional. Searches that are unreasonable have not been judicially supported by the courts.

Question two: What is revealed in current literature concerning different applications of drug testing, including random drug testing, reasonable suspicion testing, and pre-employment testing? Whether a public employer's decision to implement drug testing will be considered "reasonable" appears to relate to the nature of the employment of the designated workers to be tested. Some categories of public sector employees have less of an expectation of privacy than others. Courts have ruled that employees whose work does not significantly pose a risk to themselves or to the public may be tested only if an employer has "reasonable suspicion" of drug use on the job. That is, there must be reasonable evidence for believing that a particular employee is probably using drugs. Drug testing is constitutionally permitted for reasonable suspicion. Public school employees fall under this application of case law.

On the other hand, for public employees engaged in hazardous or sensitive work or employed in a highly regulated industry, courts have applied a less stringent standard

for constitutionally defensible drug testing than reasonable suspicion. Courts have balanced the responsibilities and interests of the public employer's need to know of employee drug use with the privacy interests of the employees tested. In supporting the drug testing programs for railroad employees following accidents and of the United States Customs Service agents involved in drug interdiction, the Supreme Court signaled that the traditional Fourth Amendment requirements of probable cause and reasonable suspicion may be of limited application in some drug testing programs where evidence of drug use among the identified employee population and where positions of diminished expectations of privacy may trigger constitutionally defensible programs of blanket suspicionless drug testing.

Random drug testing, while not as widely implemented as reasonable suspicion testing, has, according to most authors, drawn the most criticism and has been the subject of most litigation. Constitutionally legal random testing varies according to the parameters of an individual's occupation. Court decisions have upheld random testing in heavily regulated industries, such as horse racing; in industries where employees experience a severely diminished expectation of privacy due to the nature of the work, such as in correctional facilities; and in employment situations where an employee's actions are critical to public safety,

such as transportation employees. For occupations that fail to meet these conditions, courts have ruled against random drug testing. In North Carolina school systems, bus drivers and bus mechanics are most frequently required to submit to random drug testing, based on legal precedent.

Although courts closely scrutinize random testing programs and blanket drug testing, they seem less inclined to accord job applicants protection from mandatory drug testing. Pre-employment drug testing has been found to be the most common type of drug testing among employers. Federal courts have approved an employer's right to conduct pre-employment drug screening as part of an application process. Some authors speculate that job applicants are less likely to challenge drug testing out of fear of being eliminated from consideration for employment. Others suggest that there is less of an expectation of privacy for a job applicant than for an employee with a property interest in a currently held position.

For the thirty-two school systems in North Carolina that conduct drug testing, reasonable suspicion testing, pre-employment drug testing, and random testing of designated categories of employees are the most frequently utilized types of drug tests.

Question three: What are the most common procedural issues related to the application of drug testing? While allowing numerous applications of drug testing, courts have

been establishing an emerging set of criteria to guarantee due process rights for employees subjected to drug testing. Public sector employers must address both procedural due process and substantive due process issues when conducting clearly defensible drug testing. Courts have supported the necessity of creating clearly estblished policies guiding the implementation of drug testing, of giving notice of drug testing, of establishing a clear chain of custody, and of implementing strict procedures for maintaining confidentiality in the actual collection and in the testing protocol. In addition, courts have ruled that public employers, including schools, must confirm all initial positive results by an alternate test prior to termination and must provide opportunities for employees to present evidence challenging positive test results.

Thirty-two school systems in North Carolina conduct some type of drug testing as part of their drug-free workplace programs. The majority of these schools have detailed written policies that address the critical components of confidentiality, termination hearings, and confirmatory testing of positive screenings. A small number of systems address all the substantive and procedural issues supported by case law.

Question four: Are there discernible patterns and trends that can be identified from an analysis of case law? Current case law has moved beyond an analysis of Fourth

and Fourteenth Amendment issues to an emerging demarcation of critical elements necessary for constitutionally defensible drug testing programs. The Supreme Court, in upholding the constitutionality of a United States Customs Service drug testing program, indicated acceptble expectations for a workplace drug testing program, including:

1. The drug testing program should be limited in scope to identified categories of employees to be tested and to the degree of intrusiveness of the testing procedure.
2. The drug testing program should be justified by the role of the jobs and the public confidence placed in those jobs.
3. The program should provide for adherence to privacy in collection procedures.
4. Whenever possible, the drug testing should be voluntary and/or applied to limited groups of employees.
5. The drug testing requirement should be a reasonable condition for employment, with the program's purpose administrative and not punitive.
6. Appropriate laboratory procedures should be utilized, with confirmatory testing and a strict chain of custody.

7. Publishing the drug testing policy and procedures and educating employees concerning the application of the program are critical, both in terms of good employee relations and for the implementation of a legally defensible drug testing policy.

In addition, other courts have examined the criteria used for reasonable suspicion testing and have found that policy makers should utilize criteria that clearly relate to current on-the-job behaviors that impact on the employee's performance in the workplace.

Question five: What legal and practical guidelines can be created as a result of this research to assist school administrators and school board members? The guidelines which have been developed during the course of this study will be presented later in this chapter.

Conclusions

An examination of recent case law decisions concerning the implementation of workplace drug testing and of drug testing programs indicates that courts have been inconsistent in definitively establishing what types of drug testing are appropriate, which employees should be subjected to drug testing, and what components are critical to constitutionally defensible drug testing programs. Thus, even when drug testing issues or programs appear to be similar to those already decided by the courts, a different set of

circumstances may result in an entirely different decision. Consequently, drawing specific conclusions from legal research is risky. However, based on a careful analysis of current case law, the following general conclusions concerning the legal aspects of drug testing policies as they are applied to public school employees can be made:

1. Courts have ruled that there can be no mandatory drug testing of public school teachers without reasonable suspicion that an individual teacher is using drugs. However, school system transportation personnel are likely to be held to more stringent drug testing requirements in light of a compelling government interest in insuring public safety.
2. Courts are swift in their legal censure of drug testing programs that fail to establish a detailed drug testing policy with substantive and procedural due process components clearly outlined.
3. Legally defensible drug testing programs must provide standards for a secured collection procedure, including a protected chain of custody for the samaple, the use of a certified laboratory, and the confirmatory testing of all initial positives by an alternate scientifically accepted procedure.

4. Guarantees to confidentiality and privacy must be maintained both during and subsequent to the collection and analysis of each sample.
5. Pre-employment drug testing has been judicially condoned when the testing is part of a job application process.

Drug Testing Guidelines for School Officials

The following guidelines will be of help to school officials in the development of drug testing policies. Although these guidelines do not guarantee a legally defensible drug testing policy, they will assist the practicing school administrator or school board member toward that purpose. It has been said that effective leadership, not drug testing, is the way to address substance abuse problems in the workplace. However, the following policy guidelines should serve to protect the rights of school employees to privacy and the interests of school employers:

1. The policy should clearly identify under what circumstances drug testing will be required and what categories of employees will be affected.
2. The focus of the policy should reflect the effect of the substance abuse to the employee's job performance.
3. The policy should outline procedures that guarantee substantive and procedural due process.

Attention should be given to insuring privacy in sample collection processes, to establishing a clear chain of custody for the laboratory analysis of the sample, and to maintaining confidentiality in test results and in subsequent disciplinary or rehabilitative action.

4. Any disciplinary action to be taken should be indicated, with opportunities provided for hearings for explanatory evidence and for appropriate challenges to positive test results.
5. All laboratory analysis should be conducted by a certified laboratory using the most reliable procedures available. Initial positives should automatically be subjected to confirmatory testing by an alternate method.
6. Rehabilitation in the form of Employee Assistance Programs or other counseling assistance opportunities should be provided or made available. Courts tend to support drug testing programs where disciplinary action includes rehabilitative options and not just punitive responses.
7. An aggressive effort should be made to publish the policy in such a way that every employee has access to information concerning every provision of the policy. In addition, employees should be educated

thoroughly about the drug testing policy and the procedures necessary for implementation.

Recommendations for Further Study

Several court decisions concerning drug testing have addressed the issue of testing public school students for drug use. One school system in North Carolina currently conducts drug testing of student athletes and another system has explored the use of a voluntary drug testing program. Therefore, this area deserves further investigation.

Other school systems across the country have also included drug testing policies as part of their drug free workplace programs. A state by state analysis of drug testing policies implemented by school systems would provide comparative data on policy components for drug testing school employees nationwide.

Finally, additional study may be warranted concerning the application of drug testing of faculty and employees of colleges and universities, as these school sites have also implemented drug testing of specific categories of employees.

BIBLIOGRAPHY

A. Legal Aids

Black's Law Dictionary. 6th ed. St. Paul, Minn.: West Publishing Company, 1990.

Current Law Index. Foster City, Cal.: Information Access Company.

National Reporter System. St. Paul, Minn.: West Publishing Company.

The Atlantic Reporter.
The Federal Reporter.
The Federal Supplement.
The New York Supplement.
The Northeastern Reporter.
The Pacific Reporter.
The Southeastern Reporter.
The Southern Reporter.
The Southwestern Reporter.
The Supreme Court Reporter.

Shepard's Citations. Colorado Springs, Col.; Shepard's Citations, Inc.

West's Education Law Digest. St. Paul, Minn.: West Publishing Company.

B. Periodicals and Journals

Allred,Stephen. "Constitutional Concerns in Drug Testing of Public Employees." School Law Bulletin (Winter, 1987), 20-23, 36.

_____. "Recent Developments on Drugs in the Workplace." School Law Bulletin (Summer, 1989), 1-6.

Anderson, Charlotte C., and Charles Williams. "Supreme Court Docket: Drug Testing and the Fourth Amendment." Social Education 53, no. 4 (Apr./May 1989): 229-232, 250.

Betts, K. C. "Fourth Amendment--Suspicionless Urinalysis Testing: A Constitutionally 'Reasonable' Weapon in the Nation's War on Drugs?" Journal of Criminal Law and Criminology 80 (Winter 1990): 1018-1051.

Biskupic, J. "Court Ruling May Give Impetus to Drug Testing Measures." Congressional Quarterly Weekly 47 (March 25, 1989): 650-652.

Caste, Nicholas J. "Drug Testing and Productivity." Journal of Business Ethics 11 (April 1992): 301-306.

Chineson, J. "Mandatory Drug Testing: An Invasion of Privacy?" Trial 22 (Summer 1986): 91.

Crow, Stephen M., and Sandra Hartman. "Drugs in the Workplace: Overstating the Problem and the Cures." Journal of Drug Issues 22 (Fall 1992): 925-943.

Davidson, Dan. "Employee Testing: An Ethical Perspective." Journal of Business Ethics 7 (March 1988): 211-217.

Faber, D. A. "Drug Testing Cases (Supreme Court Decisions)." Trial 25 (June 1989): 14-18.

Felman, James, and Christopher J. Petrini. "Drug Testing and Public Employees: Toward a Rational Application of the Fourth Amendment." Law and Contemporary Problems 51, No. 1 (1988): 253-297.

Glantz, L. H. "A Nation of Suspects: Drug Testing and the Fourth Amendment." American Journal of Public Health 79 (October 1989): 1427-1431.

Hafner, K., and S. Garland. "Testing for Drug Use: Handle With Care." Business Week, 28 March 1988, 65.

Horton, Thomas R. "Drugs in the Workplace." PM (September 1987): 2-4.

Jascourt, Hugh. "Drug Testing of Public Employees: An Introduction." Journal of Law and Education 17 (Fall 1988); 699-701.

Kupfer, A. "Is Drug Testing Good or Bad?" Fortune, 13 July 1987, 133-134.

Lehman, W. K., and D. D. Simpson. "Employee Substnce Abuse and On-the-Job Behaviors." Journal of Applied Psychology 77 (June 1992): 309-321.

Lundberg, George P. "Mandatory Unindicated Drug Screening: Still Chemical McCarthyism." Journal of the American Medical Association 256 (5 December 1986): 3003-3008.

Lunzer, F. "But I've Never Used Drugs." Forbes, 13 July 1987, 133-134.

Mallory, H. P. "Fourth Amendment--The 'Reasonableness of Suspicionless Drug Testing of Railroad Employees: Skinner v. Railway Labor Executives Association." Journal of Criminal Law and Criminology 80 (Winter 1990): 1052-1085.

Meier, K. J. "The Politics of Drug Abuse; Laws, Implementation, and Consequences." Western Political Quarterly 45 (March 1992): 41-69.

Morgan, John P. "Problems of Mass Drug Screening for Misused Drugs." Journal of Psychoactive Drugs 16 (1984): 305-316.

Normand, J. "An Evaluation of Pre-Employment Drug Testing." Journal of Applied Psychology 75 (December 1990): 629-639.

O'Keefe, A. M. "The Case Against Drug Testing." Psychology Today 21 (June 1987): 34-38.

Pugh, C. B., and J. L. Fink. "Testing for Drug Use: Analytical Methods." American Journal of Hospital Pharmacy 45 (1988): 1297-1300.

Scholick, Gary. "Drugs in the Workplace: Legal Developments." CUPA Journal (Sumemr 1989): 50-62.

Sendor, Benjamin. "If You Think Mass Drug Tests Are Dandy for Teachers and Students, Think Again." American School Board Journal (April 1987): 24-27.

Sexton, Thomas R., and Ulrike Zilz. "On the Wisdom of Mandatory Drug Testing." Journal of Policy Analysis and Management 7 (Spring 1988): 543-548.

Tallman, William G. "Guidelines for Drafting a Drug Screening Policy." PM (September 1987): 8-10.

Tatel, David S. "The Drug-Free Workplace Act and Related Federal Antidrug Rules." Journal of Public Management (July 1989): 20-24.

Thompson, Frank J., Norma M. Riccucci, and Carolyn Ban. "Drug Testing in the Federal Workplace: An Instrumental and Symbolic Assessment." Public Administration Review 51 (November/December 1991): 518-533.

Zirkel, Perry A., and Ivan B. Gluckman. "Drug Testing in Public Schools." NASSP Bulletin 71, No. 497 (March 1989): 138-141.

C. Newspaper Articles

McQueen, M., and D. Shribman. "Battle Against Drugs is Chief Issue Facing Nation, Americans Say," New York Times, 20 September 1989, 1.

"N.C. Pays High Price for Substance Abuse," The Charlotte Observer, 18 July 1993, 4C.

D. Books

Axel, Helen. Corporate Experiences With Drug Testing Programs. New York: Conference Board, 1990.

Bach, Julie S., ed. Drug Abuse: Opposing Viewpoints. St. Paul, Minn.: Greenhaven Press, 1988.

Bozeman, William C. Drug Testing in Schools: Implications for Policy. Alexandria, Va.: National School Board Association, Education Policies Service, 1987.

Coombs, Robert H., and Louis J. West, eds. Drug Testing: Issues and Options. New York: Oxford Press, 1991.

DeBernardo, Mark A., and Benjamin W. Hahn. 1993 Guide to State Drug Testing Laws. Washington, D.C.: Institute for a Drug Free Workplace, 1993.

Decrease, Robert P., Mark Lifshitz, Adriana C. Magurra, and Joseph E. Tilson. Drug Testing in the Workplace. Chicago: ASCP Press, 1989.

Drug Testing: Protection for Society or a Violation of Civil Rights? Lexington, Ky.: The Council of State Governments, 1987.

Hawkes, Richard L., and C. Nora Chiang, eds. Urine Testing for Drugs of Abuse. Rockville, Md.: NIDA Research Monograph, 1986.

Hoglar, Raymond L., ed. Substance Abuse in the Workplace: Readings in Labor and Management Issues. Penn.: Dept. of Labor Studies and Industrial Relations, Penn. State Univ., 1987.

Huggins, H. C., and Richard S. Vacca. Law and Education. Charlottesville, Va.: The Michie Co., 1985.

Klingner, Ronald E. Workplace Drug Abuse and AIDS: A Guide to Human Resources Management Policy and Practice. New York: Quorum Books, 1991.

Lewis, John F. Drug/Alcohol Abuse in the Schools: A Practical Policy Guide for Administrators and Teachers on How to Combat Drugs/Alcohol. Topeka, kansas: National Organization on Legal Problems of Education, 1987.

Potter, Beverly, and Sebastian Orfall. Drug Testing at Work: A Guide for Employees and Employers. Berkeley, Calif.: Ronin Press, 1990.

E. Federal and State Reports and Laws

"The Drug-Free Federal Workplace," Executive Order 12564, 15 September 1986, Federal Register.

Federal Personnel Manual (FPM) Letter 792-16, November 1986.

"Mandatory Guidelines for Federal Workplace Drug Testing Programs," 11 April 1988, Federal Register.

Meese, Edwin, III. Charles W. Hartman Memorial Lecture, delivered by Attorney-General Edwin Meese, University of Mississippi, 19 March 1987, published by the Department of Justice, Washington, D.C.

NIDA Report. Washington, D.C.: U.S. Deparatment of Health and Human Services, National Institute on Drug Abuse, 1986.

North Carolina General Assembly: An Act to Regulate Drug Testing, Session 1989, Articles 95-225--95-232.

102 Stat. 4305-08 Public Law No. 100-690, 16 November 1988, Federal Register.

Oversight Hearing on Drug Testing in the Work Force. Hearing before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, One Hundredth Congress, Second Session, 1988.

President Reagan's Commission on Organized Crime. America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime. Report to President Ronald Reagan and to Attorney-General Edwin Meese, March 1986.

United States Constitution, Fourth Amendment.

United States Constitution, Fourteenth Amendment.

F. Unpublished Sources

Parrish, Sammie Campbell. Memorandum, "Drug-Free Schools Prevention Programs Certification," 5 October 1990.

G. Legal Cases

Allen v. City of Marietta,601 F. Supp. 482 (1985).

American Federation of Government Employees v. Cavazos, 721 F. Supp. 1361 (1989).

American Federation of Government Employees v. Sullivan, 744 F. Supp. 294 (1990).

American Federation of Government Employees v. Weinberger, 651 F. Supp. 726 (S.D. Georgia).

Arkle v. Independent School District Number One of Tulsa County, 784 P.2d 91 (1989).

Armington v. School District of Philadelphia, 767 F. Supp. (1991).

Capua v. City of Plainfield, 643 F. Supp. 1507 (1986).

City of Palm Bay v. Bauman, 475 S. Rep. 2d 1322 (1985).

Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (1976).

Everett v. Napper, 833 F.2d 1507 (1987).

Feliciano v. City of Cleveland, 661 F. Supp. 578 (1987).

Harmon v. Thornburgh,878 F.2d 484 (1989).

Independent School District No. 1 of Tulsa County, Oklahoma v. Logan, 787 P. Rep. 2d 636 (1989).

Jenkins v. Jones, 878 F.2d 1476 (1989).

Jones v. McKenzie, 625 F. Supp. 1500 (1986).

Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (1986).

McDonnell v. Hunter, 612 F. Supp. 112 (1985).

National Association of Air Traffic Specialists v. Dole, No. A. 87-073 (1987).

National Federation of Federal Employees v. Weinberger, 818 F.2d 935 (1987).

National Treasury Employees Union v. Hallett, 776 F. Supp. 680 (1991).

National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

National Treasury Employees Union v. Yeutter, 733 F. Supp. 403 (1990).

Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, 505 N.Y. Supp. 2d 888; 517 N.Y. Supp. 2d 456 (1986, 1987).

Shoemaker v. Handel, 795 F.2d (1986).

Skinner v. Railway Labor Executives Association, 109 S. Ct. 1402 (1989).

H. North Carolina Schools Drug Testing Policies

Anson County
Brunswick County
Caldwell County
Catawba County
Chapel Hill/Carrboro Schools
Charlotte-Mecklenberg Schools
Cleveland County
Clinton City Schools
Davidson County
Gaston County
Halifax County
Harnett County
Hickory City Schools
Iredell County

Johnston County
Kings Mountain Schools
Lee County
Lexington City Schools
Lincoln County
McDowell County
New Bern/Craven
New Hanover County
Pitt County
Richmond County
Robeson County
Rowan/Salisbury Schools
Thomasville City Schools
Wake County
Warren County
Wilson County
Winston-Salem/Forsyth Schools

APPENDIX A

LETTER TO SUPERINTENDENTS

Phyllis K. Blair
1635 Dudley Shoals Road
Granite Falls, NC 28630

(Superintendent)
North Carolina School System

Dear _____:

A problem of continuing concern to schools and school systems is the use and abuse of drugs by school employees. Many school systems nationwide, in an effort to address the need for maintaining a drug-free workplace environment, have developed policies that utilize some form of drug testing of school employees as one means of dealing with this problem. Here in North Carolina, a number of school systems currently have established policies for the drug testing of employees, and others are beginning to look towards the development of such a policy. Because of the emerging nature of this policy development, many schools have often used federal government policies or other privately-developed policies as guides. No one central policy framework has emerged in this state that units may rely upon for direction.

I am currently a doctoral student at The University of North Carolina at Greensboro and the issue of drug testing as it applies to local school policy development is a part of my doctoral research. Under the direction of Dr. Joseph E. Bryson, I will be examining the parameters of policy development in relation to current and emerging case law. I will also be analyzing locally-developed school system policies for drug testing of school employees in this state. I hope to share this information with school systems, enabling units to see their own policies in relation to those of others statewide and to provide a policy framework for school systems anticipating the development of a drug-testing policy. To complete this policy analysis, I need to examine your school system's policy for drug testing. If your system is in the process of developing such a policy, a draft will be usable. I also appreciate any suggestions, concerns, or advice, since this is an issue that may ultimately affect all of us as public school employees. I have enclosed a self-addressed stamped envelope for your convenience.

Thank you in advance for your help and attention to my interest in this matter. I will be happy to share the results of my research with you in the future.

Sincerely,

Phyllis K. Blair

APPENDIX B

FOLLOW-UP LETTER TO SUPERINTENDENTS

Phyllis K. Blair
1635 Dudley Shoals Road
Granite Falls, NC 28630

(Superintendent)
North Carolina Schools

Dear _____:

The response to my initial request for information concerning schools and drug testing has been phenomenal. I have received copies of policies and drafts of policies, all of which will serve not only as a resource for my doctoral research but will serve as a resource for the state, as no one agency, as yet, knows the status of all the individual units in regards to the drug testing of school employees in North Carolina. I would like to thank all of the superintendents who have responded so graciously to my request. However, I still would like to get a one hundred percent response from those units indicating that drug testing is a component of their drug-free workplace policy in order to best describe the situation in North Carolina. If your unit has not forwarded a copy of the existing drug testing policy as it applies to school employees, I would like to again request such a copy.

Thank you in advance for your help and attention to my interest in this matter. I will be happy to share the results of my research with you in the future.

Sincerely,

Phyllis K. Blair