THE CONSTITUTIONAL IMPLICATIONS OF EMPLOYEE URINE TESTING

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Whether employers may resort to compulsory urine testing to detect workplace-related drug use is one of the most hotly debated legal issues of the 1980's. Testing advocates stress the myriad problems that drug-impaired workers cause, including safety risks and faulty products, and they emphasize the effectiveness of this technique in identifying such employees. (1) Opponents grant the need for a drug-free work setting but argue that urine testing is an excessively unreliable and intrusive means of obtaining one.

Until recently, litigation involving the legality of employee drug testing was sporadic. In the last few years, however, the number of testing programs has mushroomed,(2) and this has produced a spate of legal attacks. Although some cases have involved tests given by private employers,(3) most have arisen in the public sector and have implicated the federal Constitution.(4) These cases have involved claims that mandatory testing violates the Fourth Amendment prohibition against unreasonable searches and seizures, the Fifth Amendment privilege against forced self-incrimination, the guarantees of due process of law and equal protection of the law set forth in the Fourteenth Amendment, and the constitutional right of privacy.

These claims are the focus of this article. The article will discuss which employers are subject to the Constitution. It will then furnish an overview of existing standards for resolving constitutional attacks on urinalysis programs. Because several drug testing cases have worked their way to the federal appeals courts, and because the standards prescribed at this level will prevail until the Supreme Court speaks to this topic,(5) the article will concentrate on these cases.(6)

I. SCOPE OF THE CONSTITUTION

If an employee urinalysis program is attacked on constitutional grounds, the threshold question is whether the employer who implemented it is subject to constitutional commands. The first eight amendments to the Constitution, known as the Bill of Rights, apply to the federal government.(7) The Fourteenth Amendment due process clause "incorporates" these amendments and applies them to state and local governments.(8) Constitutional claims, therefore, may be asserted against federal employers; state employers, such as state universities, and administrative agencies; and local governments, including cities, counties, and school districts.

Courts have also held that some private actors are engaged in state action within the meaning of the Fourteenth Amendment. State action may be found if a government assists a private party in abridging a constitutional right.(9) Private actors may engage in state action if they exercise powers traditionally reserved to the government.(10) The extent of governmental involvement in private conduct may so obscure the line between the private party and the government that the conduct is deemed state action.(11) Finally, state control of private acts may make the acts the state's responsibility.(12)

Any of these theories may cause a private employer with a urine testing program to be subjected to constitutional constraints. Employers who become so enmeshed with a government that the latter controls their employees, for example, might be considered part of the government. If employees perform their tasks on government property and under government supervision, their employer could be deemed a state actor. One appeals court has even held that the Constitution is triggered by drug tests conducted by a private employer pursuant to federal regulatory authority.(13) It must be stressed, however,

that it is increasingly less likely that the state action concept will be applied to private employers. Far from expanding or even preserving this concept, the Supreme Court has recently narrowed it; it has held, for example, that the governmental function theory applies only if the private actor displaces the government.(14) This trend will almost assuredly continue. Absent obvious and substantial links with a governmental entity, therefore, private employers should have little to fear in terms of constitutional rights claims.

II. EMPLOYEE URINE TESTING AND THE CONSTITUTION

A. The Fourth Amendment

By far the most frequently litigated issue raised by urine testing concerns its status under the Fourth Amendment to the Constitution, which provides:

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

Whether a governmental investigation was a "search" is the threshold issue in an analysis involving this amendment. If the answer is yes, it must then be decided whether the investigation required a warrant and was reasonable.

To date, seven federal appeals court cases have dealt with the search and seizure implications of workplace drug testing: Division 241 Amalgamated Transit Authority v. Suscy,(15) Shoemaker v. Handel,(16) McDonell v. Hunter,-(17) National Treasury Employees Union v. Von Raab,(18) Jones v. McKenzie,(19) Everett v. Napper,(20) and Railway Labor Executives' Association v. Burnley.(21) The rationales and conclusions of these cases are consistent in many respects but quite divergent in others.

The cases uniformly agree that whether a urinalysis involves a "search" depends on whether it invaded a privacy expectation that society regards as reasonable.(22) Comparing compulsory urinalysis to an unconsented government taking of blood, which entails a search,(23) and noting that because such testing intrudes on privacy and dignity, allows the discovery of personal medical facts unrelated to drug use, and permits observation of non-working activities of employees, the cases also agree that, at least when given on a mass or random basis to detect drugs rather than as part of a routine, employment-related physical examination, a urinalysis invades legitimate privacy expectations and thus involves a search.(24) Observing that even administrative inspections not designed to produce evidence for a criminal investigation or prosecution have been held to involve searches, the cases further agree that the fact that urine test results will be used only in making employment decisions and not for law enforcement purposes does not make the Fourth Amendment inapplicable.(25)

As for the reasonableness of this type of search, the cases agree that the exigencies of drug testing require prompt action that obviates the need for a search warrant.(26) Moreover, because employees cannot, as an employment condition, be required to consent to an illegal test, an unconstitutional test will not be redeemed by the fact that the subject supposedly "consented" to it, although advance consent may lessen the privacy expectation of the person tested.(27) Finally, the reasonableness of a test will be determined by balancing the need for it against the resulting intrusion on employee privacy. Courts will consider the extent to which the employer had a legitimate business need to test the employee, given the nature of the work involved and the risk that would be posed by drug impairment; whether there was prior evidence of an existing drug problem; and similar factors. They will then decide if the testing process was reasonably related in scope to the circumstances which justified the test. Whether those giving the test may exercise discretion in choosing subjects to be tested or in interpreting results, the reliability of the test and testing conditions, the intrusiveness of the process, and the extent to which employee privacy expectations have been reduced, e.g., by the nature of the job and /or by advance notice of the test, are among the factors that will affect the outcome of the reasonableness inquiry.(28)

The cases are widely split on the issue of whether tests may be given on a mass or random basis or only if there is reason to suspect

drug impairment in the person(s) to be tested. Under traditional Fourth Amendment standards, warrantless searches may be conducted only if there is "probable cause" to believe that evidence of illegal activity will be found in the place to be inspected, coupled with exigent circumstances making it impractical to secure a warrant.(29) As noted, courts agree that drug testing involves the exigencies needed to dispense with the warrant requirement, and they also agree that the stringent probable cause standard is inappropriate in this context; they disagree, however, over whether any other level of particularized suspicion, e.g., "reasonable suspicion," should be a prerequisite to a drug test.

At one end of the spectrum, the Shoemaker court allowed New Jersey to test horse racing jockeys without reason to suspect anyone of being on drugs. Stressing the need to preserve public confidence in racing, in which wagering is heavy and corruption is a threat; the fact that New Jersey had since 1939 heavily regulated the industry; and the fact that the jockeys' expectations of privacy had been reduced by their knowledge of this regulation and of the testing rule, the court invoked the exception to the warrant requirement which permits random administrative inspections in heavily-regulated industries if the regulatory scheme adequately protects privacy and limits the discretion of those conducting the test.(30) Emphasizing the nature of the duties of Customs Service employees, who work with drugs and drug smuggling,Von Raab used the same approach in upholding a Customs policy requiring testing of people applying for certain jobs. The court noted that the plan had been adopted solely for administrative purposes, and it said that "to ensure compliance with a regulatory scheme applicable to highly regulated industries, the government may undertake inspections of the premises occupied by those industries without a warrant and without any degree of individualized suspicion. The exception occurs when warrantless searches are necessary to accomplishment of the regulatory scheme and when the very existence of the regulatory program diminishes the reasonable expectations of privacy of those involved in the industry."(31)

McDonell held that individualized suspicion is not needed if employees in sensitive areas -- prison guards, in that case -- are tested uniformly, e.g., in routine physical examinations, or by systematic random selection, but that other tests require a reasonable suspicion, based on objective facts and reasonable inferences drawn from them, that the employee is on drugs or has used them within 24 hours.(32) Suscy did not resolve this issue, although it seems to have upheld the policy in question partly because it included what amounted to an individualized suspicion requirement.(33) Jones upheld testing without any suspicion, but only in the context of employment-related physical examinations taken by school transportation employees who dealt with handicapped students and would, therefore, clearly pose a safety risk if on drugs.(34) Finally, Burnley, which struck down Federal Railroad Administration rules mandating drug testing of railway workers involved in certain incidents, suggests that reasonable suspicion is required even in industries which affect public safety.(35) It must be noted that the Burnley court expressly rejected the Shoemaker holding that the "pervasively regulated industry" exception to the warrant requirement authorizes mass or random searches of people.(36)

Though there is much to commend the view that urine tests may legally be conducted only if there is reasonable suspicion of drug impairment, it is submitted that the Supreme Court will not agree. The Court has held that the Fourth Amendment "imposes no irreducible requirement of [individualized] suspicion,"(37) and its recent decisions reflect a trend toward dispensing with this requirement when a search implicates diminished privacy interests and is conducted under a policy with safeguards that protect those interests from unbridled administrative discretion.(38) It is submitted that the Court will rule that a urinalysis is a search, albeit one less intrusive than other searches, e.g., strip or body cavity inspections. It will then likely say that the nature of a job can diminish privacy expectations, especially if a policy gives advance notice that drug screening may occur; that there is a significant public and business need to curtail drug use, especially in industries that affect public safety; and that urinalysis thus implicates reduced privacy expectations. The Court will then likely apply the "administrative inspection" or the "pervasively regulated industry" rationale -- or at least leave the door open for these approaches to be applied in proper cases -- and hold that no warrant is required to conduct a urine test and that there is no need for reasonable suspicion of drug

use if the safeguards in a testing plan minimize the degree to which tests intrude on already-diminished privacy expectations and limit the discretion of the person giving them.

B. The Fifth Amendment

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." It has been argued that to use in legal proceedings evidence of drug use obtained through urinalyses forces employees to give up this privilege. Courts, however, have uniformly rejected this claim. For example, relying on Schmerber v. California, which refused this argument with respect to a forcibly obtained blood sample used in a DWI case, Von Raab held that the privilege protects only testimonial evidence, and that urine reveals physical characteristics but not any knowledge the donor has.(39) Von Raab, however, did leave the door open for a claim that a policy requiring employees to fill out forms indicating certain personal facts, e.g., medications being taken, might violate the Fifth Amendment.(40)

C. The Fourteenth Amendment

The Fourteenth Amendment requires states to provide due process of law before depriving people of life, liberty, or property. Procedural due process requires that deprivations of these interests be preceded by notice of the infraction and an appropriate hearing.(41) Substantive due process prohibits arbitrary deprivations.(42) Employees fired or otherwise disciplined for testing positive in a urinalysis, therefore, may have a cognizable due process claim if they have a property or liberty interest at stake.

The cases say little about the due process implications of drug testing. Applicable standards, however, can be gleaned from other sources, especially Cleveland Board of Education v. Loudermill,(43) which applied the due process clause to the firing of an Ohio civil service employee, with no hearing, for lying on his job application. This case says that whether an employee has a property interest in employment depends on his contract. If the contract creates an expectation of continued employment, due process rights attach; absent a need for summary removal from the workplace, an employee with a property interest is entitled to a pre-removal hearing.(44) Where there is need for such removal, moreover, the employee may only be suspended with pay; suspensions without pay trigger due process requirements.(45) The case also says that employers may develop procedures for dismissal cases, but that they may not unilaterally decide what procedures satisfy constitutional requirements.(46) Finally, a test may give rise to a substantive due process claim. A dismissal based on one unconfirmed positive result may raise this claim, as may the unreliability of a test or testing conditions. In Von Raab, for example, the court rejected a due process challenge to the Customs Service plan, but only because of the circumstances: "While the initial screening test may have too high a rate of falsepositive results for the presence of drugs, the union does not dispute the evidence that the follow-up test, GC/MS, is almost always accurate, assuming proper storage, handling, and measurement techniques. Customs also employs elaborate chain-of-custody procedures to minimize the possibility of falsely positive readings. "(47) Jones and Burnley also expressed grave concerns about the unreliability of urine tests. (48)

The Fourteenth Amendment also says that no state shall "deny to any person within its jurisdiction the equal protection of the law." This means that governments may not differentiate without valid reason among people similarly situated. Whether this standard is offended is determined by applying the strict scrutiny, rational basis, or substantial interest test.(49) None of the appeals court decisions has held that one of these tests must be applied in the urinalysis context, but they indicate that the rational basis test is proper. In Shoemaker v. Handel, for example, the court rejected the claim that the racing commission rule denied the jockeys equal protection because it required them, but not other track employees, to submit to tests. The court held that the "governing equal protection principle" is that in trying to solve its problems, the state "may rationally take one step at a time." (50) Requiring jockeys to be tested was justified, as they were the most visible participants in a sport in which there was a great interest in the appearance of integrity.(51) This suggests that, although the best prospect for a successful equal protection challenge would exist if an employer applied a policy only to some employees or only in some instances, even this kind of attack might be given short shrift.

D. The Constitutional Right of Privacy

Drug testing cases have also invoked the constitutional right of privacy recognized in Griswold v. Connecticut.(52) This right has two aspects: an interest in autonomy, e.g., in regulating one's body and in being free from government intrusions in decisions regarding one's life, and a right not to have to disclose certain personal facts.(53) The appellate cases have said little about the privacy implications of mandatory urine testing, though Von Raab noted that "even areas sheltered by [privacy] rights are limited by countervailing state interests."(54) Cases such as Schmerber v. California and Rochin v. California,(55) however, indicate that minor bodily intrusions will be tolerated under certain conditions and that a balancing approach which considers the nature of and need for the test, the reliability of the test and test conditions, and whether other less intrusive options were available will be used to decide privacy claims. Random tests given to detect drug use stand a better chance of violating privacy rights than tests accompanying physical examinations or based on reasonable suspicion.

As for disclosural privacy, this right is limited, and whether employers who divulge test results or insist that employees reveal personal information, e.g., medicine being taken, violate this right depends on whether the interest in disclosure outweighs the resulting intrusion. In Shoemaker, for example, the court found that the testing rule did not violate disclosural privacy rights because it had been amended to provide that the jockeys' test results would not be disclosed, even to law enforcement authorities.(56) The court stated that although courts have recognized privacy rights in medical data, "governmental concerns may support the access to such information where the information is protected from unauthorized disclosure."(57) Because the commission's concern for racing integrity justified its access to urinalysis information, the jockeys' privacy concern was limited to preserving confidentiality, and the rule did this. "If the commission ceased to comply with the rule," said the court, "the jockeys may return to court with a new lawsuit."(58)

III. SUMMARY

It can be seen from this excursion through the law of drug testing that courts have generally provided a sympathetic audience to employers wanting to conduct tests. Public sector urine testing triggers the Constitution, and must therefore be "reasonable" under the circumstances, even if results will be used only for employment purposes. If an employer can show that the nature of the work involved justifies efforts to detect impaired employees, and if tests are conducted under a policy narrowly tailored to minimize the intrusion on employee privacy and to limit the discretion of the person giving the tests, the tests will likely be upheld, even without reason to suspect particular workers of being on drugs. Notice of a test may lessen employee privacy expectations, but neither notice nor employee consent will validate an unconstitutional test. Finally, precautions must be taken to insure the reliability of tests and the testing process, as mistakes in these areas provide a major source of legal headaches for employers.

Notes

1. Several tests are available. The most popular is the enzyme multiplied immunoassay (EMIT). It costs about $10 per test, comes in field kits, and can be given by non-technical personnel. Another is the gas chromatography/mass spectrometer (GC/MS). It is the most reliable but also the most expensive test, costing about $100 per sample, and it requires a laboratory setting with special machinery and personnel. See American Mgmt. Assn., Drug Abuse: The Workplace Issues, (D. Bohl, ed. 1987).
2. Public employees tested for drugs include police, firefighters, transportation workers, military personnel, and teachers. See Morgan, Problems of Mass Urine Screening for Misused Drugs, 16 J. Psych. Drugs 305 (1984). In private industry, almost half of the Fortune 500 companies test for drugs. See Drug Abuse: The Workplace Issues, supra note 1; Chapman, The Ruckus over Medical Testing, Fortune, Aug. 19, 1986, at 57.
3. E.g., Luck v. S. Pac. Transp. Co., 84-3-230 (Cal. Super. Ct., S.F. Cty. 1987).
4. Parties concerned about narrow readings of the federal Constitution by the Supreme Court are increasingly relying on state constitutions in legal attacks, and urinalyses may be challenged on this basis. E.g., Hunter, Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California? 4 Loy. L.A.L. Rev. 1451 (1986). In this article, however, all references to the Constitution signify the United States Constitution.
5. The Court has granted a writ of certiorari in National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), cert. granted 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988), but a decision should not be forthcoming until sometime in 1988.
6. For a review of some state and lower federal court urine testing cases, see Joseph, Fourth Amendment Implications of Public Sector Work Place Drug Testing, 11 Nova L. Rev. 605 (1987); Bible, Employee Urine Testing and the Fourth Amendment, 38 Lab. L.J. 611 (1987).

7. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
8. Tribe, American Constitutional Law $11-2 (1978). In relevent part, the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
9. E.g., Shelley v. Kramer, 334 U.S. 1 (1948) (state court cannot enforce privately negotiated racially restrictive covenant). For a discussion of state action, see Tribe, supra note 8, $18-1.
10. This is the "governmental function" theory. E.g., Evans v. Newton, 382 U.S. 296 (1966) (alternate basis for subjecting private park to Fourteenth Amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (private company town owners held to be state actors because they performed public function).
11. The "entanglement theory" holds that close contacts between the state and the private actor make the private acts indistinguishable from those of the state. No test has been developed to decide what level of involvement is needed to attribute private acts to the state. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961) (private restaurant leasing space in state parking lot held to be involved in state action).
12. The "state control" theory is similar to the entanglement theory in that in both instances courts look closely to the facts of the case to determine if the involvement in control is substantial enough to attribute the private acts to the state. E.g., Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) (state control theory used to find National Collegiate Athletic Association subject to Fourteenth Amendment).
13. Railway Labor Executives Ass'n. v. Burnley, No. 85-2891 (9th Cir. Feb. 11, 1988).
14. Flagg Bros. v. Brooks, 436 U.S. 149 (1978).
15. 538 F.2d 1264 (7th Cir. 1976).
16. 619 F. Supp. 1089 (D.N.J. 1985), aff'd, 795 F.2d 1136 (3rd Cir. 1986).
17. 612 F. Supp. 1122 (E.D. La. 1986), aff'd as modified, 809 F.2d 1302 (8th Cir. 1987).
18. 643 F.Supp. 380 (E.D. La. 1986),vacated, 816 F.2d 170 (5th Cir. 1987), cert. granted, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988).
19. 628 F. Supp. 1500 (D.D.C. 1986), rev'd and vacated in part, 833 F.2d 335 (D.C. Cir. 1987).
20. 632 F. Supp. 1481 (N.D. Ga. 1986), aff'd in part & rev'd in part, 833 F.2d 1507 (11th Cir. 1987).
21. No. 85-2891, (9th Cir. Feb. 11, 1988).
22. E.g., Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987), quoting United States v. Jacobsen, 466 U.S. 109 (1984).
23. Schmerber v. California, 384 U.S. 757, 769-70 (1966).
24. E.g., McDonell v. Hunter, 612 F. Supp. 1122, 1130 n. 6 (S.D. Iowa 1985), aff'd as modified, 809 F.2d 1302 (8th Cir. 1987) (drawing this distinction).
25. E.g., Shoemaker v. Handel, 619 F. Supp. 1089, 1097 (D.N.J. 1985), aff'd, 795 F.2d 1136 (3rd Cir. 1986), relying on Camara v. Municipal Court, 387 U.S. 523 (1967).
26. E.g., Railway Labor Executives' Ass'n. v. Burnley, No. 85-2891, slip op. at 21 (9th Cir. Feb. 11, 1988).
27. E.g., McDonell v. Hunter, 809 F.2d 1302, 1310 (8th Cir. 1987).
28. E.g., Railway Labor Executives' Ass'n. v. Burnley, No. 85-2891, slip op. at 39-42 (9th Cir. Feb. 11, 1988); Everett v. Napper, 833 F.2d 1507, 1511 (11th Cir. 1987); McDonell v. Hunter, 809 F.2d 1302, 1307-08 (8th Cir. 1987). Urine tests cannot measure current intoxication or degree of impairment; rather, they can discover only drug metabolites, which may remain in the body for days or weeks after drug ingestion. In addition, chain-of-command problems may make a specimen unreliable. See generally Dubowski, Drug-Use Testing: Scientific Perspectives, 11 Nova L. Rev. 415 (1987).
29. The general view is that warrantless searches are per se unreasonable, subject only to a few specifically delineated and well-recognized exceptions." Katz v. United States 389 U.S. 347, 357 (1967). The traditional probable cause test is whether "the facts and circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief" that a criminal offense had occurred and that the evidence would be found in the suspected place. Carroll v. United States, 267 U.S. 132, 162 (1925).
30. 795 F.2d 1136, 1142-43 (3rd. Cir. 1986).
31. 816 F.2d 170, 176-80 (5th Cir. 1987).
32. 809 F.2d 1302, 1308-09 (8th Cir. 1987).
33. 538 F.2d 1264, 1267 (7th Cir. 1976).
34. 833 F.2d 335, 337-40 (D.C. Cir. 1987).
35. No. 85-2891, slip op. at 39-41 (9th Cir. Feb. 11, 1988).
36. Id. at 29.
37. E.g., Delaware v. Prouse, 440 U.S. 648, 654-55 (1979).
38. E.g., O'Connor v. Ortega, ___ U.S. ___, 107 S. Ct. 1492 (1987) (approving searches of employee office desks without individual suspicion); New Jersey v. T.L.O. 469 U.S. 325 (1985) (approving searches of public school students).
39. 816 F.2d 170, 181 (5th Cir. 1987).
40. Id. The court noted that the union had not urged the Fifth Amendment claim on appeal, and said that "[o]ur decision not to strike the pre-test forms on fifth amendment grounds does not intimate any opinion about whether a particular employee may invoke the privilege against self-incrimination and refuse to fill out the forms."
41. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
42. Rochin v. California, 342 U.S. 165 (1952).
43. 107 S. Ct. 1487 (1985).
44. Id. at 1495.
45. Everett v. Napper, 833 F.2d 1507, 1512 (11th Cir. 1987).
46. Cleveland Bd. of Educ. v. Loudermill, 107 S. Ct. 1487, 1493 (1985).
47. 816 F.2d 170, 181 (5th Cir. 1987).
48. Jones v. McKenzie, 833 F.2d 335, 339 (D.C. Cir. 1987) ("[T]he School System has conceded that the EMIT test is not a valid measure of whether the subject is in possession of, is using, or is under the influence of illicit drugs at the time of the test"); Railway Labor Executives' Ass'n. v. Burnley, No. 85-2891, slip op. at 40 (9th Cir. Feb. 11, 1988) ("Blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the tests because the tests cannot measure current drug intoxication or degree of impairment").
49. The strict scrutiny test applies if the law affects a "suspect classification," such as race, or a "fundamental interest," such as the

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