

Fourth Amendment's Constraints Upon Drug Testing of Public Entity Job Applicants and Employees

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Michael J. Roper, Esquire
Joseph D. Tessitore, Esquire
Bell & Roper, P.A.
2707 E. Jefferson Street
Orlando, Florida 32803
(407) 897-5150

mroper@bellroperlaw.com
jtessitore@bellroperlaw.com

Issues To Be Addressed

1. When is it lawful to test job applicants for drugs? *Voss v. City of Key West*, 2014 WL 1883588 (S.D. Fla. May 9, 2014)
2. What is a “safety-sensitive” position?
3. When is it lawful to conduct post-accident drug testing of employees?

Public vs. Private Employer

Different standards for public versus private employer with regard to drug testing of employees.

- Private employer still has broad discretion to test both employees and job applicants randomly, without suspicion, and as it sees fit to operate the business.
- Drug testing by public employer is constrained by Fourth Amendment to U.S. Constitution.

Fourth Amendment

- “Search & Seizure”

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.

Fourth Amendment (cont'd)

- Fourth Amendment only allows the government to engage in “reasonable” searches of citizens.
- Unreasonable searches violate the privacy rights of citizens and hence are prohibited by the Fourth Amendment.
- In most cases, a search is deemed reasonable only when it is accomplished pursuant to a judicial warrant, issued upon probable cause.

Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602 (1989)

Fourth Amendment (cont'd)

- Government mandated drug testing (of any kind) is a “search” within the meaning of the Fourth Amendment.

Schmerber v. California, 384 U.S. 757 (1966);
Lebron v. Secretary, Florida Dept. of Children and Families,
710 F.3d 1202 (11th Cir. 2013)

- It is well established that drug testing which utilizes urinalysis is a “search” that falls within the scope of Fourth Amendment.

Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602 (1989)

Fourth Amendment (cont'd)

- The courts have recognized that the probable cause standard is “... unsuited to determining the reasonableness of administrative searches ...” by the government.

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)

- Therefore, in order to be deemed reasonable under the Fourth Amendment in the context of governmental drug testing of its employees, a search must ordinarily be based upon “individualized suspicion of wrong-doing.”

Vernonia School District v. Acton, 515 U.S. 646 (1995)

Chandler v. Miller, 520 U.S. 305 (1997)

Fourth Amendment (cont'd)

- Further, the Supreme Court has also upheld as “reasonable” searches conducted without individualized suspicion in certain very limited and exceptional circumstances.

Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602 (1989)

Chandler v. Miller, 520 U.S. 305 (1997)

New Jersey v. T.L.O., 469 U.S. 325 (1985)

- Government has the burden of showing that there are “special needs” which are “substantial,” which warrant dispensing with the requirement for individualized suspicion.

Fourth Amendment (cont'd)

- The Supreme Court has found standard employment drug and alcohol testing regimen to be “relatively noninvasive.”

Chandler v. Miller, 520 U.S. 305 (1997)

- If government can demonstrate that there is
 - (a) “special need; or
 - (b) “important governmental interest,”

which is furthered by the minimal intrusion, then it will not be required to show “individualized suspicion” in order to justify testing.

Fourth Amendment (cont'd)

In the context of employee drug testing, the Supreme Court has recognized only two concerns that present such “exceptional circumstances” which are sufficiently “substantial” to warrant an exemption to the Fourth Amendment’s warrant and probable cause requirement:

- (a) the specific risk to public safety by employees engaged in high-risk, safety-sensitive tasks;
- (b) protection of children entrusted to the public school system’s care and tutelage.

Chandler v. Miller, 520 U.S. 305 (1997)

Random Testing of Safety-Sensitive Employees

Supreme Court has approved suspicion-less drug tests of employees in certain “safety-sensitive” positions.

- Rationale is that there are “surpassing safety interests” which justify or mandate random testing program for certain classes of employees;
- It is not limited to individual safety, bodily injury, property damage;
- Can encompass a threat to public health or environment.

Random Testing of Safety-Sensitive Employees (cont'd)

- Because they are in a position where they could cause great injury or damage before any signs of impairment become noticeable to supervisors.
- Test the courts apply is a job category-by-category balancing of “the individual’s” privacy expectations against the Government’s interests.”
- no bright line to establish if position is truly “safety-sensitive.”

Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)

Drug Testing of Job Applicants

Voss

Voss v. City of Key West, 24 F.Supp. 3d 1219 (S.D. Fla. 2014)

Facts: City of Key West had policy which required (1) post-offer testing for all job applicants; (2) reasonable suspicion testing; (3) random testing for safety-sensitive employees.

Plaintiff (a lawyer) submitted application for position as Solid Waste Coordinator. Signed form agreeing to take drug test and acknowledging that refusal or failure, would disqualify her from consideration.

Drug Testing of Job Applicants

VOSS (cont'd)

City took position that pre-employment testing was justified because:

1. City had a responsibility for the safe, effective and efficient delivery of public services.
2. That drug use in workplace may result in or contribute to accidents and injury of employees and public, make employees less productive, promote absenteeism, etc.

Drug Testing of Job Applicants

VOSS (cont'd)

Solid waste coordinator position was a safety-sensitive position because:

- a. Had to supervise transfer station when manager was on leave;
- b. Make environmental education presentations to children.

Drug Testing of Job Applicants

VOSS (cont'd)

Court held:

- (a) that the City's interest in safe and effective delivery of services was "symbolic" only. No indication of concrete danger; no evidence of serious problem of drug abuse amongst applicants for employment with the City.
- (b) position of Coordinator was not "safety-sensitive"
 - solid waste coordinator not actively involved in safety-related duties – primarily administrative;

Drug Testing of Job Applicants

VOSS (cont'd)

- no evidence of prior on-the-job accidents caused by impairment or intoxication;
 - City did not subject solid waste coordinator to same random drug tests as other “public safety” positions.
- (c) no legal basis to distinguish between a job applicant and an existing employee with respect to Fourth Amendment protection.

Drug Testing of Job Applicants

VOSS (cont'd)

Conclusion:

Only lawful for public employer to conduct post-offer drug tests on applicants for “safety-sensitive” positions.

“Voss II” - Damages

City argued Plaintiff was not entitled to money damages since she was never actually an employee and, therefore, entitled to injunctive relief only.

Court found that Plaintiff was entitled to an award of back pay, due to City’s imposition of unconstitutional pre-employment condition.

Defendant has burden of proving that Plaintiff failed to mitigate her damages by not obtaining substantially equivalent employment.

Voss v. City of Key West, 24 F. Supp. 3d 1228 (S.D. Fla. 2014)

Question: What Is A Safety-Sensitive Position?

Start with definition of “Mandatory-testing position:”

“Mandatory-testing position” means, with respect to a public employer, a job assignment that requires the employee to carry a firearm, work closely with an employee who carries a firearm, perform life-threatening procedures, work with heavy or dangerous machinery, work as a safety inspector, work with children, work with detainees in the correctional system, work with confidential information or documents pertaining to criminal investigations, work with controlled substances, or a job assignment that requires an employee security background check, pursuant to s. 110.1127, or a job assignment in which a momentary lapse in attention could result in injury or death to another person (emphasis added).

§440.102(1)(o), *Florida Statutes*

Question: What Is A Safety-Sensitive Position? (cont'd)

Supplemented by definition of “Special-risk position:”

“Special-risk position” means, with respect to a public employer, a position that is required to be filled by a person who is certified under Chapter 633 or Chapter 943.

§440.102(1)(p), *Florida Statutes*

Chapter 633-Firefighters/Fire Marshall
Chapter 943-Law Enforcement

Question: What Is A Safety-Sensitive Position? (cont'd)

- Courts have recognized as “safety-sensitive” the following public services: law enforcement, firefighters, operation of large vehicles and heavy equipment, public transportation, planes, boats, corrections officers, working with children, railroad and dock workers, healthcare workers.

Employee Who Operates Motor Vehicle For Work

Employee that drives a city-issued vehicle for work – either while on the job or a take-home vehicle.

- Momentary lapse in attention could result in injury or death?? - certainly could encompass operating a car, but: Courts have generally held that the mere fact that an employee operates a city issued vehicle does not make the position safety-sensitive.

Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007)

Employee Who Operates Motor Vehicle For Work (cont'd)

The safety risks involved with the motor vehicle operators carrying out their duties are no greater than the normal risks associated with vehicle use by the general public.

Therefore, requirement to operate a city vehicle as part of job duties, does not, in and of itself, make the position “safety-sensitive.”

Barrett v. Claycomb, 976 F.Supp 2d 1104 (W.D.Mo. 2013)

To Determine If Position Is Safety-Sensitive, Courts Will Look At

- (1) Specific actual duties of job – not just because it is listed on job description as “safety-sensitive.” Problematic if try to designate everyone in agency as “safety-sensitive.”
- (2) Employer’s/industry’s track record with respect to:
 - (a) pattern of on-the-job intoxication;
 - (b) history of accidents attached to drug use;
 - (c) If there is a historical record – more likely to agree that job is safety-sensitive.

To Determine Safety-Sensitive, Courts Will Look At (cont'd)

- (3) If position is not traditionally considered safety-sensitive, expect heightened scrutiny from courts.
- (4) If job duties change, then the position could change designation with respect to whether it is “safety-sensitive.”

Post-Accident

Post-accident drug testing also falls within the ambit of the Fourth Amendment.

- Certain licensure and federal/state regulations will govern the testing of certain categories of employee, i.e.,
 - (1) commercial motor vehicle operated on a public road in commerce (CDL),
 - (2) Federal Railroad Administration, etc.

Post-Accident (cont'd)

The following chart may be used to help determine if a mandatory DOT test needs to be performed: 48 CFR Part 382.303 – Commercial Motor Vehicles.

Type of Accident Involved	Citation Issued to the CMV Driver	Test Must Be Performed By Employer
i. Human Fatality	Yes	Yes
	No	Yes
ii. Bodily injury with immediate medical treatment away from the scene	Yes	Yes
	No	No
iii. Disabling damage to any motor vehicle requiring tow away	Yes	Yes
	No	No

1. Alcohol test required if citation received within 8 hours of incident;
2. Controlled substance test required if citation received within 32 hours of incident

Post Accident Testing for Non-Regulated Employees

- This discussion focuses on employees who are not governed by those regulations;
- No clear direction from Courts;
- No clear precedent in the 11th Circuit;
- Consensus of decisions;
- If you have a policy that requires post-accident testing without regard to fault and/or the nature and extent of injury caused, then policy could be found to be unlawful.

Post Accident Testing for Non-Regulated Employees (cont'd)

Place some reasonable parameters on extent of injury or damage necessary to trigger testing requirements, i.e.,

- (1) fatality or personal injury requiring immediate medical treatment (hospitalization) or results in at least one lost workday;
- (2) property damage in excess of certain dollar amount - (\$5,000?).

Cases

Plane v. United States, 750 F.Supp. 1358 (W.D. Mich. 1990)

- Policy which required testing for employee involved” in accident, was too broad – not limited to persons who caused or contributed to accident.

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

- Policy which required testing for employee that caused accident resulting in fatality, or hospitalization, or property damage in excess of \$10,000 was upheld.

Cases (cont'd)

American Federation of Gov. Emp. v. Sullivan, 744 F.Supp. 294 (1990)

- Policy which required testing regardless of fault, for accident resulting in as little as \$1,000 property damage, was too broad and, therefore, unlawful.
- Amount of property damage not sufficient to justify testing.

Connelly v. Newman, 753 F.Supp. 293(N.D. Cal. 1990)

- Policy which allowed post-accident testing where property damage was in excess of \$1,000, was too broad.

Post Accident Summary

1. If you have reasonable suspicion, can test any employee post-accident, regardless of fault, amount of damage, injury, etc.
2. If employee is in a “safety-sensitive” position, can be tested post-accident regardless of fault, damage, injury.
3. If (1.) or (2.) above not present, then should only test on at-fault employee, when there is resulting significant bodily injury or property damage.

Consent

1. Drug testing policy is not lawful just because employee/applicant has “consented” to submit to testing as a condition of employment.
2. If consent is not freely and voluntarily given, it amounts to an “unconstitutional condition” and, therefore, not lawful.
3. Consent given under threat of losing job or being disqualified for employment has been deemed to be not freely or voluntarily given.

Lebron v. Secretary, Florida Dept. of Children and Families,
710 F.3d 1202 (11th Cir. 2013)

Conclusion/Recommendations

1. Review pre-employment drug testing policies for job applicants: limit to testing only for safety-sensitive positions.
2. Review definitions of “safety-sensitive” for compliance with statute/case law.
3. Review post-accident drug testing policies for compliance with principles discussed.

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