

# Employment Law Update: Drug Testing Employees, Applicants

By Vanessa Gonzalez

Under the 14th Amendment incorporation doctrine, local government employers cannot violate rights guaranteed to their employees under the U.S. Bill of Rights. Drug testing, specifically urine sample testing, implicates privacy issues and constitutes a search.<sup>1</sup> The Fourth Amendment protects citizens from illegal searches. The basic question courts review is whether a search is reasonable.<sup>2</sup> In the criminal context, the standard is probable cause. In administrative searches, where the government seeks to prevent the development of hazardous conditions, the standard is individualized suspicion of wrongdoing.<sup>3</sup> While individualized suspicion is the normal requirement, there are exceptions to the rule sometimes warranted by “special needs.”<sup>4</sup> When the government alleges there are special needs for a drug test search, “courts must undertake a context-specific inquiry, examining closely the competing privacy expectations versus the government’s special needs.”<sup>5</sup>

The first U.S. Supreme Court cases to address suspicionless drug testing were the *Skinner* and *Von Rabb* cases in 1989. In *Skinner*, the Federal Railroad Administration required suspicionless drug testing of workers involved in railroad accidents. The Court balanced the special characteristics of the railroad industry, where on-the-job intoxication was a significant problem, and the serious risks to public safety. The Court determined that covered employees’ expectations of privacy were diminished by reason of their participation in an industry that is heavily regulated to ensure safety.<sup>6</sup> The principle we draw from *Skinner* is that government “employees engaged in safety-sensitive tasks,” particularly those involved with the operation of heavy machinery or means of mass transit, may be subject to suspicionless drug testing.<sup>7</sup>

In *Von Raab*, the Supreme Court identified several other job categories that a suspicionless drug testing policy may cover. At issue in *Von Raab* was the U.S. Customs Service’s required urinalysis testing for three job categories: (1) those directly involved in drug interdiction, (2) those who carry firearms, and (3) those who handle classified material.<sup>8</sup> The Court began by identifying the government’s special needs with regard to the first two categories.<sup>9</sup> Customs employees responsible for drug interdiction were “exposed to the criminal element and to the controlled substances it sought to smuggle into the country.” The Customs Service was concerned not only about employees’ “physical safety,” but also the risk of bribery or corruption.<sup>10</sup> Thus, the Supreme Court found that “the Government had a compelling interest in ensuring that front-line interdiction personnel were physically fit, and had unimpeachable integrity and judgment.”<sup>11</sup> Similar logic applied to those who carried firearms. “Employees who may use deadly force to plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.”<sup>12</sup>

As for the privacy interests implicated by the search, the Supreme Court began by noting that “certain forms of public employment may diminish privacy expectations even with respect to such personal searches.”<sup>13</sup> The Court explained that “unlike most private citizens or government

employees in general, employees involved 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.”<sup>14</sup> The Court continued, “Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness,” and thus their privacy could not “outweigh the Government’s compelling interests in safety and in the integrity of our borders.” *Id.*

As for employees who handle classified information, the Court noted that the protection of “truly sensitive information” is “compelling,”<sup>15</sup> however, the Court questioned the Customs Service’s designation of several classes of employees, including baggage clerks and messengers, as belonging to this category.<sup>16</sup> The Court remanded for the lower courts to determine more precisely which employees truly dealt with sensitive information.<sup>17</sup>

After *Skinner* and *Von Raab*, the Courts of Appeals found several other categories of safety-sensitive positions following the logic in *Skinner*, including those involving planes, trains, buses and boats.<sup>18</sup> There are also federal regulations requiring drug testing for any employee who holds a commercial driver’s license.<sup>19</sup> Safety-sensitive positions similar to *Von Raab* include police officers,<sup>20</sup> correctional officers who interact with parolees or inmates in a prison,<sup>21</sup> and firefighters.<sup>22</sup>

The Supreme Court reaffirmed its position on the issue in *Chandler v. Miller* in 1997.<sup>23</sup> In that case, the Court considered a Georgia statute requiring drug testing of candidates for public office. The Court found no indication of a concrete danger demanding departure from the Fourth Amendment’s main rule, which requires individualized suspicion.<sup>24</sup> Unlike the railroad employees in *Skinner* or the law enforcement officers in *Von Raab*, the Georgia officials typically did not perform high-risk, safety-sensitive tasks.<sup>25</sup> Georgia’s testing program was not well crafted to detect drug use since the candidates themselves scheduled the drug test and could easily evade a positive result.<sup>26</sup> The Supreme Court declared the statute a violation of the Fourth Amendment right to be free from illegal searches.

Therefore, the standard for drug testing of government employees without an individualized suspicion is clearly set. The government employer must show the position is a safety-sensitive position. However, the questions continue to arise whether applicants for employment or post-job-offer applicants for employment can be required to take a drug test or if employees or applicants can consent to the drug test and thereby waive their rights to be free from illegal searches. These questions have not been answered by the Supreme Court. While some lower courts have shown latitude for testing of applicants, including those who have been offered a job contingent on passing a drug test, many, if not most, courts find these drug tests constitutional only if the employees are applying for safety-sensitive positions.<sup>27</sup>

In 2008, the Ninth Circuit addressed the question of a job offer conditioned on the passing of a drug test. The Court held that a city’s policy of drug testing as a condition of a job offer was unconstitutional as applied to a candidate for a library page position. The case was *Lanier v.*

City of Woodburn. Lanier applied to be a page at the city's public library. The city gave Lanier a conditional offer of employment subject to successful completion of a background check and pre-employment drug and alcohol screening. Lanier refused to take the drug test, and the city rescinded its job offer. The court of appeals held the policy was not unconstitutional on its face because it could be used for safety-sensitive positions. However, as applied to the library page position, the policy was unconstitutional. The Court stated the city failed to show the job involved work that may pose a great danger to the public, such as the operation of railway cars, the armed interdiction of illegal drugs, or work involving matters of national security. The work of a library page was not comparable to the work of safety-sensitive positions.<sup>28</sup>

On April 21, 2014, the Supreme Court refused to hear Florida Gov. Rick Scott's appeal of the Eleventh Circuit's finding that his executive order requiring random drug tests for all state workers and applicants was unconstitutional. The Eleventh Circuit found the policy unconstitutional because it was overbroad and not limited to safety-sensitive positions. The Supreme Court's refusal to hear the appeal means the ruling of the Eleventh Circuit stands.<sup>29</sup>

One of the arguments made by Scott was that the state employees had consented to drug testing because they could choose to quit their jobs instead. The Court stated, "We do not agree that employees' submission to drug testing, on pain of termination, constitutes consent under governing Supreme Court case law."<sup>30</sup> The Court continued, "Employees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress or coercion."<sup>31</sup> The Court went on to state that consent has already been adequately incorporated into the special-needs balancing test, which requires the courts to evaluate whether an employee's choice of profession necessarily diminishes her expectation of privacy. In *Skinner*, the Supreme Court weighed the railroad employees' choice to work in an industry that is regulated pervasively to ensure safety as a factor in favor of drug testing. In *Von Raab*, the Supreme Court explained that employees' choice of certain forms of public employment may diminish privacy expectations even with respect to personal searches.<sup>32</sup>

The Eleventh Circuit rejected a similar argument that welfare recipients had consented to suspicionless drug testing when the state required testing as a precondition to the receipt of their benefits. In that case, the Court stated, "A welfare recipient's mandatory consent was of no constitutional significance because it was a submission to authority rather than an understanding and intentional waiver of a constitutional right."<sup>33</sup> Surrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever it is, is not the type of consent that automatically renders a search reasonable as a matter of law."<sup>34</sup>

The Eight Circuit has also rejected the idea that employees who sign consent forms have no legitimate expectation of privacy. The Court stated, "If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment."<sup>35</sup>

In Texas, we live in the jurisdiction of the Fifth Circuit. The Fifth Circuit has addressed the issue of suspicionless drug testing as well. A Louisiana school board implemented a policy that

required random suspicionless drug testing for all school employees in safety-sensitive positions. On a custodian's second appeal, the Fifth Circuit found the custodian's job was a safety-sensitive position because there was evidence the custodian handled poisonous solvents and lawn mowers, which could be hazardous to young children.<sup>36</sup>

In a different school district case the same year, the Fifth Circuit reviewed a district policy which required drug testing of employees injured in the course of employment. The Court found that "testing here does not respond to any identified problem of drug use by teachers or their teachers' aid or clerical workers."<sup>37</sup> The policy did not clarify that only those who were thought to be at fault for an accident would be tested. Furthermore, the Court found that the district's drug testing really addressed a general interest in a drug-free school environment and found such a concern does not constitute a "special need."<sup>38</sup> The Court held that the district could not require teachers, teachers' aids, or clerical workers to submit urine specimens for testing in post-injury screenings absent an adequate individualized suspicion of wrongful drug use.<sup>39</sup>

The Fifth Circuit has found medical residents to be in safety-sensitive positions, and a lower court within the Fifth Circuit has found a scrub tech for a surgery room to be a safety-sensitive position.<sup>40</sup> A city worker who drove his crew around in a city owned pickup truck was also found to be in a safety-sensitive position.<sup>41</sup> The truck driver's drug test stemmed from a fault-based accident.<sup>42</sup> Finally, in a school district case, a court rejected a policy calling for drug testing of all sixth graders with parental consent, finding the District failed to show any special needs to do so.<sup>43</sup>

The law is clear for current employees. Drug testing is only constitutional if it is conducted due to an individualized suspicion or for safety-sensitive positions. With regard to applicants for employment or job offers conditioned on passing a drug test, the Supreme Court has not ruled on the issue. However, in light of the case law reviewed above, the conservative approach and the best way to avoid a legal challenge is to only require drug tests as part of a conditional job offer for safety-sensitive positions. In addition, there is no guarantee a consent to conduct the drug test will make it constitutional. Depending on the facts and circumstances of consent, even drug tests involving non-safety-sensitive positions can be subject to constitutional challenge.

Texas counties should have a clear policy on drug testing that includes a list of which positions are safety-sensitive positions and under what individualized suspicions an employee may be drug tested. The policy should indicate that the least intrusive means of drug testing be used and specify the consequences of a positive result. In addition, the policy should be reviewed or created by an attorney. H

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*Footnotes:*

1. *Chandler v. Miller*, 520 U.S. 305, 313. 117 S. Ct. 1295 (1997).

2. *Id.* at 313.
3. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667-68, 109 S. Ct. 1384 (1989); *Chandler v. Miller*, 520 U.S. at 313, 117 S. Ct. 1295.
4. *Chandler* at 313. (quoting, *Skinner*, 489 U.S. at 619, 109 S. Ct. 1402).
5. *Id.* at 314, 117 S. Ct. 1295.
6. *Id.* at 627, 109 S. Ct. 1402.
7. *Id.* at 620, 109 S. Ct. 1402,
8. 489 U.S. at 660-61, 109 S. Ct. 1384.
9. *Id.* at 668, 109 S. Ct. 1384.
10. *See id.* at 669, 109 S. Ct. 1384
11. *Id.* at 670, 109 S. Ct. 1384
12. *Id.* (internal quotation marks omitted).
13. *Id.* at 671, 109 S. Ct. 1384.
14. *Id.* at 672, 109 S. Ct. 1384.
15. *Id.* at 677, 109 S. Ct. 1384,
16. *See id.* at 678, 109 S. Ct. 1384.
17. *See id.*
18. *See, e.g., Bluestein v. Skinner*, 908 F.2d 451, 457 (9th Cir. 1990); *Nat'l Fed'n of Fed. Emps. v. Cheney*, 884 F.2d 603, 610-11 (D.C.Cir.1989).
19. *The Federal Omnibus Transportation Employee Testing Act of 1991*.
20. *See Carroll v. City of Westminster*, 233 F.3d 208, 213 (4th Cir.2000).
21. *See Int'l Union v. Winters*, 385 F.3d 1003, 1013 (6th Cir.2004).
22. *See Hatley v. Dep't of the Navy*, 164 F.3d 602, 604 (Fed.Cir.1998).
23. *See Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295 (1997).
24. *Id.* at 318-19, 117 S. Ct. 1295.
25. *Id.* at 321-22, 117 S. Ct. 1295.
26. *Id.* at 319-20, 117 S. Ct. 1295.
27. *Georgia Association of Educators v. Harris. Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N. D. Ga. 1990) (Court struck down across the board testing for all applicants for state jobs); *Burka v. New York City Transit Auth.* 739 F. Supp. 814 (S. D. N. Y. 1990) (Court rejected testing of applicants for non-sensitive jobs).
28. *Lanier v. City of Woodburn*, 518 F. 3d 1147 (2008).
29. *American Federation of State, County and Municipal Employees Council 79 v. Rick Scott*, 717 F. 3d 851 (2013) cert. denied
30. *Id.* at 874 citing *Lebron v. Sec'y. Fla. Dep't of Children & Families*, 710 F. 3d 1202, 1214-15(11th Cir. 2013).
31. *Id.* citing *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986); cf. *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967).
32. *Id.* at 874 citing *Skinner* 489 U.S. at 627, 109 S. Ct. 1402 and *Von Raab*, 489 U.S. at 671, 109 S. Ct. 1384.
33. *Lebron v. Sec'y. Fla. Dep't of Children & Families*, 710 F. 3d 1202 (11th Cir. 2013).
34. *American Federation of State, County and Municipal Employees Council 79 v. Rick Scott*, 717 F. 3d 851 (2013) cert. denied
35. *McDonnell v. Hunter*, 809 F. 2d 1302, 1310 (8th Cir. 1987).

36. *Aubry v. School Bd. of Lafayette Parish*, 148 F. 3d 559 (5th Cir. 1998).
37. *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 856 (5th Cir. 1998).
38. *Id.* at 856,857.
39. *Id.* at 857,
40. *Kemp v. Claiborne County Hosp.*, 763 F. Supp. 1362 (S.D. Miss. 1991).
41. *Bryant v. City of Monroe and Don Hopkins*, 2013 WL 5924731 (W.D.La.)
42. *Id.*
43. *Tannahill ex. rel. Tannahill v. Lockney Ind. School Dist.*, 133 F. Supp.2d 919 (N.D. Tex. 2001).