AN ANALYSIS OF FIREFIGHTER DRUG TESTING UNDER THE FOURTH AMENDMENT,

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As illegal drug use has become a nationwide problem, public employers, such as fire departments, are testing employees for illegal drug use. While fire departments want drug-free employees, they must recognize the legal obstacles that limit their power to test for illegal drugs. The Fourth Amendment to the United States Constitution protects the privacy of individuals against arbitrary and unreasonable intrusions by the government. As such, fire departments must only test employees for drug use in compliance with the Fourth Amendment.

Not only must fire departments appreciate the constitutional obstacles involved with drug testing, but they also must deal with state laws[1], collective bargaining agreements and the inevitable human resource problems that will arise from drug testing. Many state constitutions provide more privacy protections than the federal constitution.[2] Fire departments can violate collective bargaining agreements if drug policies are not carefully drafted and if the actual drug tests deviate from the policies. Finally, fire departments need to recognize that some employees may resent being forced to undergo drug testing. While an argument can be made that drug testing is for the safety of the department as a whole, individual employees may be upset if they personally do not use drugs and yet are forced to undergo what they might consider to be intrusive bodily tests. As such, fire departments should respect the integrity of each of their employees so that a few bad apples do not spoil an entire bushel.

This article examines relevant United States Supreme Court decisions dealing with public employee drug testing. Next, the article examines lower federal and state court decisions that have specifically addressed firefighter drug testing. While addressing the constitutional privacy issues that will arise, the article specifically addresses five different types of drug testing: reasonable suspicion, pre-employment, post-accident, return-to-duty, and random drug testing.

1. United States Supreme Court Precedent

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons ... against unreasonable searches and seizures."[3] Ordinarily, the Constitution requires the government to obtain a warrant supported by probable cause to search a person. However, when the government has a special need for a search, such as protecting public safety, a court will uphold the search if it is found "reasonable" after balancing the physical intrusion against the governmental interest at stake. As such, courts examine three factors when judging the constitutionality of employee drug tests: (1) the nature of the privacy interest upon which the search intrudes; (2) the extent to which the search intrudes on the employee's privacy; and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means employed by the government for meeting that concern.[4]

Recently, the United States Supreme Court has decided four cases which address governmental drug testing. While the cases do not specifically address drug testing of firefighters, they do provide useful guidance for fire departments that want to draft drug testing policies.

The Supreme Court has recognized the need to test safety-sensitive employees for drug use. In Skinner v. Railway Labor Executives' Ass'n,[5] the Court held that the Department of Transportation (DOT) regulations mandating drug screening of railroad employees after an accident were reasonable and therefore did not violate the Fourth Amendment because the safe operation of a railroad is an important government interest.[6] The Court recognized that a urinalysis test raises privacy concerns, but that railway employees, "by reason of their participation in an industry that is regulated pervasively to ensure safety," had a diminished expectation of privacy.[7]

Similarly, in National Treasury Employees Union v. Von Raab,[8] the Supreme Court held that Customs employees seeking promotions or transfers to positions involving drug interdiction or the use of a firearm could be compelled to submit to random drug testing. The Court found that the agency had an "almost unique mission," as it was the first obstacle against the smuggling of illicit drugs into the United States. Therefore, the government had a compelling interest in assuring that employees in positions that involve large amounts of illegal narcotics and interaction with criminals would not themselves be drug users.[9]

Although not involving drug testing of public employees, in Vernonia Sch. Dist. 47J v. Acton,[10] the Court held that a public school district's student athlete drug policy did not violate a student's federal or state constitutional right to be free from unreasonable searches. The Court noted in its decision that "students within the school environment have a lesser expectation of privacy than members of the population generally."[11] The Court also pointed out the importance of deterring drug use among children and the risk of injury a student athlete poses to him or herself and others.[12]

The Supreme Court has, however, refused to allow drug testing if the government fails to show a "special need" to test. In Chandler v. Miller,[13] the Court struck down a Georgia statute that required candidates for elected office to be drug tested within thirty days prior to qualifying for nomination or election. The Court found that Georgia failed to show a "special need" that was substantial enough to override a candidate’s privacy interest.[14]

Although the United States Supreme Court has not ruled on whether firefighters are "safety-sensitive employees," lower courts have assumed they are because they protect the public safety and are involved in dangerous and skilled activities.[15] Where a single misperformed duty could have irremediable and disastrous consequences, such as where an employee could not rectify a mistake or other government employees would have no opportunity to intervene before harm occurs, then a position is more likely safety sensitive.

While many courts will consider firefighters as safety-sensitive employees,[16] it is important for fire departments to recognize that not all of their employees may be tested for drug use at all times. As such, a department policy requiring that every employee undergo drug testing may be found unconstitutional.[17] For example, the governmental interest in testing a firefighter would be greater than its interest in testing a clerical employee. As such, fire departments must be careful to limit the scope of a drug testing policy.

Many fire departments require that firefighters be trained as paramedics or emergency medical technicians (EMT). Reviewing courts will likely find that paramedics and EMTs are safety sensitive employees because they perform skilled and life saving functions. Paramedics and EMTs must recognize vital signs that will determine necessary treatments. In addition, they must be able to perform intubation, perform CPR, read cardiac rhythm strips and remember which drugs or electrical shocks should be applied as part of a treatment. In Piroglu v. Coleman[18] a paramedic trainee alleged that a random urine drug

test violated the Fourth Amendment. The court recognized that the testing of EMTs falls within the special needs exception to the Fourth Amendment. Random drug testing "ensures that individuals charged with protecting the public health and safety are not under the influence of drugs." EMTs "are called upon to assess an emergency patient's symptoms, to administer cardiopulmonary resuscitation and to transport the emergency patient to a health care facility. Given the nature of his duties, an EMT under the influence of drugs poses a real and substantial risk to public health and safety."[19]

2. Circumstances Under which Drug Testing Occurs

Courts treat drug testing differently based on the circumstances under which a test is administered. As such, this article separately addresses the following types of drug tests which are commonly used by public employers: reasonable suspicion, pre-employment, post-accident, return-to-duty, and random drug testing.

There are a number of private companies that offer drug testing services. If a private company is used, it must respect and follow a fire department's drug testing policies. While it is beyond the scope of this article to examine the procedural requirements for the drug tests, it is important to recognize that courts have, and will, invalidate tests based on the manner in which the tests are administered.[20]

A Reasonable Suspicion

If properly administered, fire departments may constitutionally use reasonable suspicion drug testing for firefighters. Fire departments have successfully relied on the reasonable suspicion standard to test firefighters for drug use because insufficient performance by a firefighter is "threatening [to] the safety of the community."[21] It is important that fire departments both adopt proper guidelines to find reasonable suspicion and also that they follow those guidelines.

A reasonable suspicion search should be "under circumstances exhibiting individualized suspicion of on-the-job impairment and with evidence of substantial reliability."[22] Courts have articulated the following factors to provide a basis for reasonable suspicion testing:

(1) observable phenomena, such as direct observation of an employee engaged in drug-related activity or exhibiting the physical symptoms of being under the influence of a drug;

(2) a pattern of abnormal conduct or erratic behavior;

(3) an arrest or conviction for a drug- related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use or trafficking;

(4) information provided either by reliable or credible sources or independently corroborated;

(5) sudden change in work performance including unexplained or excessive absenteeism, tardiness or workplace negligence; or

(6) evidence that the employee has tampered with a drug test.[23]

In Saavedra v. City of Albuquerque[24] a firefighter was terminated after marijuana presence was found in his urine. He challenged, on Fourth Amendment grounds, the City's claim of a finding of reasonable suspicion to support the drug test. The court disagreed with the firefighter and found that the following facts constituted a reasonable suspicion: the firefighter referred himself to the city's employee health center for an evaluation, he had warned his supervisors that he might become violent if provoked, and he had lost his temper while in uniform and had engaged in a public altercation with his girlfriend.

As a practical matter, it is important that fire departments make findings of a reasonable supervisor prior to testing. A department's drug policy should contain forms that must be filled out prior to testing. The forms should have spaces that require the appropriate supervisor to make, and articulate, specific findings. If possible, articulate multiple grounds for suspicion. It is also important that the supervisors who observe the signs of drug use are trained to recognize such signs.

B. Pre-Employment

Offers of employment are frequently contingent on an applicant passing a drug test. Pre-employment drug testing involves a lower expectation of privacy and therefore courts are somewhat liberal in upholding such tests.[25] When an applicant applies for a job that requires drug testing, they voluntarily choose to enter into a profession that is regulated and where testing is required.[26] Courts recognize that applicants are not compelled to seek a job and if they find drug testing offensive, they need only refrain from applying for that particular job. As such, courts have held that those who voluntarily choose to accept a job that requires drug testing do not encounter the same level of intrusion on privacy.[27]

Pre-employment drug tests have been upheld for firefighters. In Brown v. Winkle[28], a federal district court in Ohio refused to enjoin a fire department's drug testing program. Borrowing from Von Raab, the court held that there could be no doubt that the work of firefighters "depends uniquely on their judgment and dexterity."[29] The court stated that "there is an element of teamwork in firefighting" and that "if one member of the crew is not completely alert and capable, mentally and physically, the lives of the other members are in jeopardy."[30]

Firefighter applicants should be warned, immediately upon applying, that they will be required to undergo drug tests. A description of the drug test should also be provided. The mandatory pre-employment drug testing should also be included in the fire department's drug testing policy handbook.

C. Post-Accident Drug Testing

Fire departments may test firefighters for drug use after an accident. Skinner held that post-accident procedures are intended to provide valuable information that can help to pinpoint the cause of an accident, and to deter drug use "[b]y ensuring that employees . . . know that they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty."[31] The important governmental interests served by post-accident testing regulations would be seriously hindered if supervisors were forced to gather specific facts amounting to an individualized suspicion of impairment before testing a particular employee.[32] In Skinner, the Supreme Court held that post-accident

drug testing was reasonable because the invasion of privacy was minimal and often involved employees who worked in sensitive positions.[33]

Precedent has established that firefighters are safety-sensitive employees.[34] As such, courts will likely uphold post-accident drug testing by fire departments. Fire departments should include language in their drug-testing policies which requires post-accident drug testing of all firefighters that are causally connected to an accident.

D. Return-to-Duty Drug Testing

Return-to-duty drug testing usually occurs when an employee has either tested positive in the past or has admitted to drug use. Essentially, the employer gives the employee a second chance. As such, there are very few cases which address return-to-duty testing.[35]

Fire departments may constitutionally employ return-to-duty testing of firefighters. To an extent, return-to-duty testing is similar to pre-employment testing. If an employee does not want to be tested, he or she need not return to duty. Additionally, an employee has a lower expectation of privacy because they know they will be retested and because they have usually been tested in the past. If fire departments decide to allow previous drug users to return to duty, they should be careful to draft drug-testing policies that require return-to-duty drug testing. Such a requirement should also be explained, in writing, upon imposing discipline that allows a firefighter to return to duty.

E. Random Drug Testing

A public employer can only impose a random drug-testing program on its employees, absent individualized or reasonable suspicion, if the employee works in a safety sensitive position. Since firefighters are safety-sensitive employees,[36] they may be subjected to random drug testing.[37] For instance, in Penny v. Kennedy,[38] the court relied on Von Raab and Skinner to conclude that there is a compelling interests to make sure that firefighters are free from drug impairments and therefore held a urinalysis without any suspicion of use is permissible. Likewise, in Wilcher v. City of Wilmington,[39] a fire department began randomly testing firefighters and the firefighters claimed a Fourth Amendment violation. The court disagreed with the firefighters and upheld the testing under the Fourth Amendment.

3. Departments Must Follow Proper Testing Procedures

It is also important to be careful that the integrity of the testing process is respected because sloppy testing procedures may invalidate a drug test. For instance, in Johnson v. City of Plainfield[40] a federal district court in New Jersey held that a firefighter properly stated constitution violations where all firefighters and fire officers were ordered to submit to a surprise urinalysis test. The urinalysis tests were done under the surveillance and supervision of testing agents. Firefighters that could not urinate on demand were insulted. Finally, the court pointed out that urine samples were given to members of the opposite sex and the station doors were all locked. As such, the court found that the procedures used were improper. [41]

If properly performed and administered, most courts will uphold a fire department's testing of firefighters for drug use. It is important to remember that each department's situation is different and that this article is not a substitute for the advise of legal counsel.

Table of Cases Cited

Capua v. Plainfield, 643 F. Supp. 1507 (D.C. N.J. 1986)

Lovvorn v. Chattanooga, 846 F.2d 1539 (6th Cir. 1988)

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[1]For instance, 49 CFR §382.103(d)(3) permits a State, at its discretion, to exempt firefighters from federal drug and alcohol testing requirements under certain circumstances. The Illinois Administrative Code specifically provides that its definition of a commercial motor vehicle does not include "firefighting equipment owner or operated by or for a governmental entity." 92 Ill. Adm. Code 1030.81.

[2]Public employees are able to challenge testing procedures under both federal and state constitutions. See Hillard v. Bagnola, 698 N.E.2d 170 (1st Dist. 1998)(police officer challenged drug test that detected cocaine under the Illinois Constitution and the Federal Constitution); and Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998)(finding that firefighter drug-testing method was reasonable under Fourth Amendment did not preclude finding that it was an invasion of privacy under state law).

[3]U.S. Const. Amend. IV.

[4]Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[5]489 U.S. 602 (1989).

[6]The Supreme Court reversed the Ninth Circuit Court of Appeals which held that the post-accident testing as applied to the railroad employees violated the Fourth Amendment because the tests had no requirement for individualized suspicion. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 375 (9th Cir. 1988) rev'd Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[7]Id. at 627.

[8]489 U.S. 656 (1989).

[9]Id. at 668-670.

[10]515 U.S. 646 (1995).

[11]Id. at 656-57.

[12]Id. at 661-62

[13]520 U.S. 305 (1997).

[14]520 U.S. at 318.

[15]Saavedra v. City of Albuquerque, 73 F.3d 1525 (10th Cir. 1996)(in upholding a drug test, the court recognized that a firefighter is a safety sensitive position); Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998)(Since the dangers "associated with firefighting are well known, we have no trouble concluding that firefighters enjoy a diminished expectation of privacy"); Doe v Honolulu, 816 P.2d 306 (Haw. App. Ct. 1991)("Whenever fire fighters are called to emergencies, they are placed in life- threatening situations or situations that threaten the safety of themselves, their fellow fire fighters and members of the public. The fire fighter's inability to exercise good judgment and/or react quickly because he/she is impaired by drug use could lead to disasterous [sic] results").

[16]Supra note 15.

[17] See Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110, 1118 (N.D. Ga. 1990) (Georgia law requiring all applicants for state employment to submit to and pass a drug test is unconstitutional).

[18]25 F.3d 1098 (D.C.C.A., 1994)

[19]Id. at 1102-03.

[20]Reames v. Department of Public Works, 707 A.2d 1377 (Sup. Ct. N.J. 1998)(court invalidated a test where an employee was unable to provide a sample at a random drug test, was not given the opportunity to drink liquids, had a police officer watch the urination, there was no medically certified person on the premises to collect the samples and federal guidelines were disregarded); and Capua v. Plainfield 643 F.Supp. 1507 (D.C. N.J. 1986)(mass drug testing of firefighters violates the Fourth Amendment where the fire chief locked all the doors to the fire station, awakened the firefighters and told them that they would each be required to submit a urine sample while under the surveillance and supervision of a testing agent because of the high degree of bodily intrusion involved).

[21]Everett v. Naper, 833 F.2d 1507 (11th Cir. 1987)(order that firefighter submit to urinalysis did not violate the Fourth Amendment); accord Saavedra v. Albuquerque, 73 F.3d 1525 (10th Cir. 1996).

[22]Bangert v. Hodel, 705 F. Supp. 643, 650 (D.D.C. 1989).

[23]Id. See also American Fed'n of Gov't Employees v. Sullivan, 744 F. Supp. 294 (D.D.C. 1990); American Fed'n of Gov't Employees v. Martin, 969 F.2d 788 (9th Cir. 1992) (stating that the criteria for reasonable suspicion from the Department of Labor, Drug-Free Workplace Plan § 10A provides similar factors); Benavidez v. City of Albuquerque, 101 F.3d 620, 624 (10th Cir. 1996) (rejecting the contention that "such testing must be based only on direct observation and/or physical evidence that the employee's ability to perform his job is under the influence of a drug" because "information which would lead a reasonable person to suspect non-safety-sensitive employees . . . of on-the-job drug use, possession or impairment" is sufficient).

[24]73 F.3d 1525 (10th Cir. 1996).

[25]International Bhd. of Teamsters v. Dep't of Transp., 932 F.2d 1292 (9th Cir. 1991) (applicants have a reduced expectation of privacy).

[26]Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991) (applicant's knowledge of what will be required, and when, affects the strength of his or her interest).

[27]Willner, 928 F.2d at 1190.

[28]715 F.Supp. 195 (N.D.Ohio 1989).

[29]Id. at 197.

[30]Id. at 197. Accord Doe v. Honolulu, 816 P.2d 306 (Haw.App.Ct. 1991)(Suspicionless drug testing of urine at time of firefighters' annual physical examination did not violate Fourth Amendment).

[31]489 U.S. 602.

[32]Id. at 633-34.

[33]489 U.S. at 608-10.

[34]Supra, note 15.

[35]Note, The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing. 28 N. M. L. REV. 451 (Summer 1998)(There are few cases dealing with return to duty testing and such employees have a lower expectation of privacy because they often have already tested positive for drug use in the past).

[36]Supra, note 15.

[37]See generally Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989)(the government interest in testing without individualized suspicion is compelling); Transport Workers Union of Philadelphia Local 234 v. SEPTA, 884 F.2d 709, 712 (3d Cir. 1989) (random drug testing program can be constitutionally justified notwithstanding its lack of basis in individualized suspicion); Taylor v. O'Grady, 888 F.2d 1189, 1194 (7th Cir. 1989) (government does not need to demonstrate any suspicion at all, individualized or otherwise, to justify a drug-testing program compelling certain government employees to urinalysis).

[38]915 F.2d 1065 (6th Cir. 1990).

[39]139 F.3d 366 (3d Cir. 1998).

[40]731 F.Supp. 689 (D.N.J. 1990).

[41]Accord Reames v. Department of Public Works, City of Paterson, 707 A.2d 1377 (Sup. Ct. N.J. 1998)(court invalidated a test where an employee was unable to provide a sample at a random drug test, was not given the opportunity to drink liquids, had a police officer watch the urination, there was no medically certified person on the premises to collect the samples and federal guidelines were disregarded); and Capua v. Plainfield, 643 F. Supp. 1507 (D.C. N.J. 1986)(in a pre-Van Raab and Skinner case, the court held a regulation requiring mass drug testing of firefighters violates the Fourth Amendment where the fire chief locked all the doors to the fire station, awakened the firefighters and told them that they would each be required to submit a urine sample while under the surveillance and

supervision of a testing agent because of the high degree of bodily intrusion); Lovvorn v. Chattanooga, 846 F.2d 1539 (6th Cir. 1988)(pre-Van Raab and Skinner case holding that a mandatory urinalysis testing of firefighters, on department-wide basis, without reasonable cause or suspicion to believe that firefighters tested used controlled substances, violates the Fourth Amendment because where there are no standards for the frequency, purpose, or methods of conducting the tests and it was unclear what the standards and the disciplinary penalties were to be and there was no evidence of an increased incidence of drug abuse in the fire department).