Drug and Alcohol Testing of Municipal Employees

by C. Christine Fillmore



How far may employers go to guarantee a drug-free and alcohol-free workplace? The answer, which may come as an unwelcome surprise to many local government officials, depends upon whether the employer is a private organization or a governmental entity, who is being tested, and how the tests are performed.

"Drug-Free" Workplaces

Many people are familiar with the federal Drug-Free Workplace Act of 1988.[1] This law requires all organizations, contracting directly with the federal government in the amount of $100,000 or more, and all organizations receiving federal grants in any amount, to maintain a drug-free workplace. In carrying this out, employers are required to publish and give a policy statement to all employees, informing them that the unlawful possession or use of a controlled substance is prohibited in the workplace, and specifying the actions that will be taken against employees who violate the policy. Employers must also establish a drug-free awareness program to educate employees about the dangers of drug abuse in the workplace, the policy of maintaining a drug-free workplace, any available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed on employees who violated the policies. However, while penalties or participation in a rehabilitation program must be imposed upon an employee convicted of a criminal drug offense in the workplace, this law neither requires nor authorizes random drug-testing of employees.

Public Employers

Most employers would agree that maintaining a workplace free of drug and alcohol abuse is a worthy goal, and many would also agree that random or widespread drug and alcohol testing would be a useful tool in this endeavor. States and municipalities may have an even stronger desire to do this than some private businesses, given the fact that their employees conduct the public's business. Such employees need to exercise judgment and integrity: they discharge many public functions, such as law enforcement, firefighting, and teaching, and the public needs to have confidence and trust in them. Who wouldn't want to uphold these standards in the governmental workplace?

The idea makes a lot of sense, and has been implemented in some fairly high-profile ways across the country. The State of Georgia passed a law in 1990 requiring all candidates for certain state-elected positions to certify that they had passed a drug test within the 30 days before they filed to run for office.[2] The Governor of Florida signed an executive order on March, 22, 2011, requiring random drug-testing for all current State employees and applicants for State jobs.[3]

However, in 1997, the United States Supreme Court struck down the Georgia law in *Chandler v. Miller*.[4] Beginning on the day it was signed, Florida Executive Order 11-58 was deemed illegal and unenforceable by the Florida American Civil Liberties Union (ACLU) and many legal scholars.[5] In May 2011, the ACLU of Florida filed a lawsuit to block implementation of the drug-testing program on behalf of the American Federation of State, County and Municipal Employees (AFSCME) Council 79, which represents 50,000 state employees, and an additional 200,000 county and municipal employees, in Florida.[6] Florida's Governor suspended the program two weeks later for all but Corrections Department employees, pending the outcome of the case.

The problem? A little document called the United States Constitution.

Searches and Seizures

The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."[7] This guarantees the privacy, dignity, and security of people against certain arbitrary and invasive acts of the government, even when the government acts as an employer.[8] Unlike private employers, which are not subject to this limitation, municipalities and other public employers must be concerned about the Fourth Amendment because, as political subdivisions of the state, municipalities are "state actors" under the Constitution.

At its core, the Amendment protects a person's reasonable expectation of privacy and security against unreasonable searches and seizures. Not all searches and seizures are considered unconstitutional, only those that are "unreasonable."[9] In the ordinary criminal context, this means that the government must have a warrant before either searching or seizing. When there is no warrant, the government must have probable cause, meaning there is some individualized suspicion of illegal activity by that person, requiring expedient action instead of waiting to obtain a warrant. The determination of whether a search or seizure is unconstitutional depends upon all of the facts and circumstances involved. A court will balance the intrusion upon the individual's privacy interest against the degree to which the search or seizure is needed to promote a legitimate governmental interest.[10]

The U.S. Supreme Court has solidly decided that drug and alcohol testing are forms of "searches" under the Fourth Amendment.[11] This means that a municipality may only test its employees for drug and alcohol use in a way that is not "unreasonable" pursuant to the Fourth Amendment. The constitutional prohibition against random, suspicionless testing applies to new applicants and new hires, as well as current employees.[12]

However, although there are significant limitations on what a municipality may do, there are still certain categories of employees and specific situations for which drug and alcohol testing is acceptable and will not violate the Constitution. The key is that the testing program must adhere closely to the guidelines established by the courts, it must be narrowly tailored to protect the public's safety needs, and must be properly designed and administered. While the seminal cases establishing the limits of drug and alcohol testing of government employees were decided in 1989, the recent attempt to test all state employees in Florida illustrates that it may be time for a refresher course in the basics.

The U.S. Supreme Court has solidly decided that drug and alcohol testing are forms of "searches" under the Fourth Amendment. This means that a municipality may only test its employees for drug and alcohol use in a way that is not "unreasonable."

What *Can* Municipalities Do?

Court decisions from around the country do not reflect a universal agreement on which categories of employees may be tested, but some general conclusions may be drawn.

Commercial Driver's License (CDL) Testing. Under the federal Omnibus Transportation Employee Testing Act of 1991,[13] people who operate commercial motor vehicles (namely, those with a total gross vehicle weight of 26,001 pounds or more, or which carry 16 or more people including the driver, or which are used to transport hazardous materials) are required to have a commercial driver's license. Federal regulations not only prohibit the operation of any commercial motor vehicle while using drugs or alcohol, but also require employers, including municipalities, to perform drug and alcohol testing of these employees in certain situations. The purpose of such testing is "to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles."[14]

Testing is required in the following situations: (a) the first time a driver reports to work for the employer, (b) optional pre-employment testing after a conditional offer of employment is made, if all prospective employees are tested in exactly the same manner, (c) post-accident testing, (d) testing upon a reasonable suspicion of drug and/or alcohol use (based on specific, contemporaneous, articulable observations of the person's appearance, behavior, speech or body odors), and (e) return-to-duty testing after a violation.[15]

In addition, CDL drivers are required to submit to random testing for drug and alcohol use.[16] The regulations provide detailed instructions for the selection of employees for testing, the frequency of testing, and the manner in which tests are to be conducted. Great emphasis is placed on fairness, accuracy, and protection of the privacy rights of the person being tested.

There is also an option for states to exempt certain drivers from the testing requirements and the CDL licensing requirements.[17] For example, the State of New Hampshire has chosen to exempt fire service personnel who drive emergency vehicles assigned

continued on page 12



C. Christine Fillmore has been a staff attorney with the New Hampshire Local Government Center (LGC) in Concord, NH since 2005, advising and training local government officials in member municipalities, and writing for LGC handbooks and *Town and City* Magazine. Her prior legal experience includes seven years with the Concord, NH law firm of Rath, Young and Pignatelli in environmental law, commercial transactions and land use. Christine got her B.A. (*cum laude*) from Tufts University and her J.D. (*magna cum laude*) from Boston College Law School.

Drug and Alcohol Testing *continued from page 11*

or registered to a department or fire service organization in pursuit of fire service purposes.[18] This means that the random testing otherwise applicable to CDL drivers does not apply to New Hampshire firefighters who operate emergency or fire service vehicles. New York has followed a similar path, exempting police, fire, and ambulance drivers operating official vehicles during an emergency operation, or in the performance of official duties, or during activities related to executing emergency governmental functions.[19] To find if your state has exempted these or other categories of drivers, check the commercial driver licensing section of your state laws or the agency rules. The exemption is often found in the definition of "commercial motor vehicle."

Reasonable Suspicion Testing. Under the Fourth Amendment, even a search which may be performed without a warrant must be based, in most cases, on probable cause to believe that the person to be searched has violated the law.[20] In this context, a governmental employer must have some individualized suspicion that drug or alcohol use is taking place. While there is no single national standard for what constitutes "reasonable suspicion" in this situation, it may be said to exist, generally speaking, when an employer has specific, objective facts, and reasonable inferences drawn from those facts, that suggest an employee is using drugs, or is under the influence of alcohol or drugs, while on the job. These facts might include things like a direct observation of drug or alcohol use, apparent intoxication, abnormal or erratic behavior, and reports from reliable and credible sources that drug or alcohol use is happening on the job.

Random Testing. It should be clear at this point that governmental employers may not ordinarily test their employees for drug or alcohol use without a specific reason for doing so. Federal courts have struck down purely random testing programs. One city which tried to implement a testing program for all employees argued that it had good reasons for testing all job applicants: drug abuse had an adverse impact on job performance, and children had to be protected from those who used drugs or who could influence children to use them. While sympathetic to the city's concern, the U.S. Court of Appeals for the Ninth Circuit still ruled that the testing program was unconstitutional.[21]

While the desire to maintain a drug-free and alcohol-free workplace is understandable, it is not enough to override the Fourth Amendment's constitutional guarantee of freedom from unreasonable searches.

However, the U.S. Supreme Court has recognized that the traditional "probable cause" standard is not very useful when applied to routine administrative functions, especially where the government seeks to prevent the development of hazardous conditions *before* they occur, or to detect violations that are unlikely to generate articulable grounds for searching any particular place or person.[22] As a result, employees who serve in "safety-sensitive positions" may, in certain situations, be required to undergo random drug and alcohol testing. A variety of courts have recognized that, while such employees have a privacy right that will be invaded by such tests, the government has a stronger interest in protecting the safety of the public, which justifies the use of random testing. Employees who participate in an occupation that is regulated heavily to ensure safety, or which is fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences, are deemed to have a reduced expectation of privacy with respect to drug and alcohol testing.[23]

As the Supreme Court explained in *Nat'l Treasury Employees Union v. Von Raab* (discussing the rules for U.S. Customs officials and employees):

> 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. 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 ... The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.[24]

It bears noting, however, that the *Von Raab* decision was not unanimous. Justice Scalia wrote a vigorous dissent (in which he was joined by Justice Stevens and, by reference, Justices Marshall and Brennan), distinguishing this case from others where the Court found random searches to be reasonable on the basis that there was no history or evidence presented that drug use among Customs officials was an issue. "[N]either frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use,"[25] pointed out the dissent, adding that,

> ...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, opera-

continued on page 13

> tors of other potentially dangerous equipment, construction workers, [and] school crossing guards.[26]

This approach continues to be the view of some conservative constitutional scholars. Although today's climate of heightened border security would likely result in a similar decision, insofar as border officials are concerned, to that made two decades ago by the *Von Raab* Court, it would be interesting to see what today's Court would do with a different set of facts—for example, a challenge to a program to randomly drug-test dispatch officers (who do not carry firearms but who convey critical information in emergencies) or ambulance drivers (who transport the injured at a time of maximum vulnerability).

Nonetheless, it is clear that the current law permits municipalities to perform random testing of employees who serve in safety-sensitive positions. Employees who may fall into this category include police officers and others required to carry firearms or involved with drug crimes; emergency medical technicians; firefighters; transit employees; and bus drivers.[27] All of these categories involve employees who carry weapons, are required to make split-second decisions that may have significant safety repercussions, or who use equipment that can turn deadly if misused.

However, testing of these employees must still be reasonable and narrowly tailored to respect the individual's dignity, while providing an effective deterrent to drug and alcohol use. This means that the employees must be given meaningful advance notice of the testing program, and information about which drugs are the subject of testing and how the testing will work, to reduce to a minimum any "unsettling show of authority."[28]

The individual's privacy must also be respected, to the extent that this is reasonable. For example, an employee required to provide a urine sample should be permitted to produce the sample behind a partition or in a bathroom stall with a same-gender monitor within listening distance.[29] The guidelines for federal CDL drug-testing include protections of employee privacy,[30] and may be a useful model for employers to follow when implementing their own testing program

Conclusion

While the desire to maintain a drug-free and alcohol-free workplace is understandable, it is not enough to override the Fourth Amendment's constitutional guarantee of freedom from unreasonable searches. As state actors, municipalities may only test their employees for drug or alcohol use in a manner that complies with this guarantee. The boundaries of acceptable testing are not always clear. Well-meaning municipal officials may want to institute testing programs without a clear understanding of the constitutional limitations. It is up to us, as municipal attorneys, to educate and assist our clients regarding the impact of drug and alcohol testing of local employees on those employees' Fourth Amendment rights.

Notes

1. 41 U.S.C. § 701 *et. seq.* (2011).
2. Ga. Code Ann. § 21-2-140 (1990).
3. Fla. Exec. Order No. 11-58 (Mar. 22, 2011).
4. 520 U.S. 305 (1997).
5. *See e.g.*, Press Release, ACLUFL, *ACLU of Florida Responds To Gov. Scott's Executive Order Mandating Drug Testing of State Employees* (Mar. 23, 2011).
6. Press Release, ACLUFL, *ACLU and State Workers' Union File Suit in Federal Court to Block Governor's Order Requiring Drug Testing of State Employees* (June 01, 2011) at http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=3929. The Press Release includes a link to the ACLU's complaint.
7. U.S. Const. amend. IV.
8. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).
9. *Skinner*, 489 U.S. at 619.
10. Samson v. California, 547 U.S. 843, 848 (2006).
11. *See*, *e.g.*, *Skinner*, 489 U.S. 602 (1989) (blood and urine testing for drug and alcohol use); *Von Raab*, 489 U.S. 656 (1989) (urine testing for drug use); Schmerber v. California, 384 U.S. 757 (1966) (blood testing for alcohol); California v. 617 Trombetta, 467 U.S. 479 (1984) (breathalyzer tests).
12. Baron v. City of Hollywood, 93 F. Supp. 2d 1337 (S.D. Fla. 2000) (City's desire to foster public integrity was an insufficient rationale for drug-testing of all job applicants).
13. 49 U.S.C. § 31301 *et seq.* (2012).
14. 49 C.F.R. § 382.101 (2012).
15. 49 C.F.R. Part 382, Subpart C (2012).
16. 49 C.F.R. § 382.503(a) (2012).
17. 49 C.F.R. § 103(d); 49 C.F.R. § 383.3(d) (2012).
18. N.H. Admin. Rule Saf-C § 1801.02(a)(1) (2011).
19. N.Y. Veh. & Traf. Law § 501-a (4)(b) (2011).
20. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989).
21. Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008).
22. *Von Raab*, 489 U.S. at 668.
23. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 630 (1989); *Von Raab*, 489 U.S. at 668; Keaveney v. Town of Brookline, 937 F.Supp. 975, 987 (D. Mass. 1996).
24. 489 U.S. at 672, 679.
25. *Id.* at 681.
26. *Id.* at 685.
27. *See*, *e.g.*, *Skinner*, 489 U.S. 602 (railway workers); *Von Raab*, 489 U.S. 656 (customs service officials who carry firearms and/or handle drug interdiction); Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990) (firefighters and police officers); O'Connor v. Police Comm'r of Boston, 557 N.E.2d 1146 (Mass. 1990) (police officer trainees); Keaveney v. Town of Brookline, 937 F. Supp. 975 (D. Mass. 1990) (town employees driving commercial vehicles); Piroglu v. Coleman, 25 F.3d 1098 (D.C. Cir. 1994) (emergency medical technicians).
28. Delaware v. Prouse, 440 U.S. 648, 657 (1979) (quoted in *Von Raab*, 489 U.S. at 672); Smith County Educ. Ass'n v. Smith County Bd. of Educ., Docket No. 08-0076 (M.D. Tenn. Feb. 14, 2011).
29. *Von Raab*, 489 U.S. at 661.
30. 49 C.F.R. Part 40 (2012) (incorporated by reference into CDL testing program by 49 C.F.R. § 382.105) (2012). ML