# CURRENT DEVELOPMENTS IN THE LAW

## A Survey of Federal Cases Involving the Constitutionality of Suspicionless Drug Testing

This section presents a broad selection of cases recently decided in the federal court system, but is not intended to be a comprehensive collection.

*Knox County Education Association v Knox County Board of Education,* Nos. 97-5405, 97-5408, 1998 WL 663336 (6th Cir. Sept. 29, 1998). THE SIXTH CIRCUIT HELD THAT SUSPICIONLESS AND SUSPICION BASED DRUG TESTING OF TEACHERS DOES NOT VIOLATE THE FOURTH AMENDMENT'S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

### I. INTRODUCTION

The Plaintiff, Knox County Education Association representing professional employees in the Knox County Education Association ("KCEA"), challenged the Defendant Knox County Board of Education's ("Board") drug and alcohol testing procedures as violative of the Fourth Amendment's prohibition against unreasonable search and seizures.[1]

The Court of Appeals for the Sixth Circuit held that suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to, "safety sensitive" positions within the Knox County School system including teaching positions is constitutional, as public interests outweigh the privacy interests of the teacher.[2] The court also found that the suspicion-based testing is constitutional since it comports with the reasonableness requirement of the Fourth Amendment.[3] However, the court was unable to conclude whether the Board's alcohol testing of all school employees was unconstitutional.[4]

### II. BACKGROUND

The Knox County School system is comprised of eighty-eight schools and employs thirty-two hundred teachers.[5] Teachers' duties consist of teaching, instructing, and supervising students. The system also employs non-teaching professionals trained to address the student's physical and psychological needs. Detecting drug use and the possession of weapons are among the teachers'

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[1] *See* Knox County Educ. Ass'n v. Knox County Bd. of Educ., Nos. 97-5405, 97-5408, 1998 WL 663336 (6th Cir. Sept. 29, 1998).

[2] *See id.* at *25.

[3] *See id.*

[4] *See id.* at *26.

[5] *See id.* at *2.

responsibilities.[6] The record contains no evidence of pronounced drug/alcohol abuse, or evidence that a teacher's inattentiveness or negligence ever contributed to or was related in any way to security incidents.[7] In prior litigation over the 1989 Board's Drug Testing Policy,[8] the district court held that only "safety sensitive" employees should be subject to pre-employment testing.[9] The court also held that testing as defined by the Board's 1989 policy violated the privacy interests of the professional employee applicant.[10]

In 1994, the Board adopted the "Drug Free Workplace Substance Abuse Policy"[11] which divided the tested employees into two groups: those who may be subject to suspicionless testing, that is applicants for "safety-sensitive" positions, and all employees who may be subject to suspicion-based testing.[12] An applicant refusing to complete any part of the drug testing procedure was no longer a valid candidate for employment.[13] In the case of a positive result, confirmed by a second test, an offer of employment was to be revoked.[14] Similar standards applied to teachers transferring or seeking promotion.[15] The Policy also provided for drug and/or alcohol screening based on "reasonable suspicion" and instigated by the School System Director of Personnel, the person authorized to act in that person's absence, or the Medical Review Officer ("MRO").[16]

The drug and alcohol abuse testing procedures designated the MRO as responsible for reviewing and interpreting the results of tests,[17] and expected him/her to follow the Medical Review Officer's Manual published by the Department of Health and Human Services.[18] The urine testing was done according to the Department of Transportation ("DOT") Workplace Testing Programs.[19] With respect to alcohol testing procedures, the policy designated the Knox County Sheriff's Department as responsible for administration of the breath analysis test, and set the level to be considered positive at .02.[20] In contrast to the DOT. procedures, the Policy provided few guidelines regarding the administration of the

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[6] *See id.*

[7] *See id.* at *3.

[8] *See id.*

[9] *See id.* The "safety sensitive" positions subject to pre-employment testing included those of principals, assistant principals, teachers, traveling teachers, teacher aids, and school secretaries.

[10] *See id.*

[11] *See id.* at *4 (citing the Federal Anti-Drug Act, 41 U.S.C. § 702, which requires federal grant receipents to establish a drug-free workplace).

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.* at *5.

[16] *See id.*

[17] *See id.* at *6.

[18] *See id.*

[19] *See id.*

[20] *See id.* at *7.

test.[21] The Policy also described reasonable suspicion testing and recognized information regarding the individual's drug testing results as confidential, released upon a "written consent" of the individual, and maintained in a confidential manner.[22]

The plaintiffs challenged defendant's drug and alcohol testing procedures that established two levels of testing: 1) suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to "safety sensitive" positions within KCEA, and 2) "reasonable suspicion" drug and/or alcohol testing of all school employees.[23] KCEA challenged both provisions as violative of the Fourth Amendment's prohibition against unreasonable searches and seizures.[24] The district court denied defendant's motions for summary judgment and found that the Board's drug testing policy violated the Fourth Amendment to the extent that it permitted suspicionless testing, and in the manner by which it permitted alcohol testing upon reasonable suspicion.[25] The district court enjoined the Board from further implementation and enforcement of those sections of the Policy, and found the remainder of the policy facially valid.[26]

The district court balanced the individual's privacy expectations against the governmental interests to determine "whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[27] The district court rejected the argument that the teachers had a "diminished expectation of privacy" and concluded that the balance tilted heavily in favor of individual privacy interests. Thus, the district court held that the suspicionless testing program violated the Fourth Amendment.[28]

The district court held that the reasonable suspicion testing was constitutional, as it "adequately protected the government's interests in removing drug impaired employees from their jobs without invading their reasonable expectation of privacy."[29] However, the reasonable suspicion alcohol testing program was constitutionally flawed, as it did not protect the privacy interests of tested employees and, due to its low threshold, raised a possibility that an individual may test positive simply as a result of legal, off-duty consumption of alcohol.[30]

Both parties appealed the decision to the Court of Appeals for the Sixth Circuit.

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[21] *See id.*

[22] *See id.*

[23] *See id.* at *8.

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *Id.* (quoting Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989)).

[28] *See id.*

[29] *See id.*.

[30] *See id.*

## III. ANALYSIS

### A. *Constitutionality of a Drug Testing Regime*

The Supreme Court stated that the Fourth Amendment protects individuals from searches and seizures,[31] but only those that are unreasonable.[32] The reasonableness of a search depends on the circumstances of seizure itself, as well as on the nature of the search or seizure.[33] Drug testing utilizing urinalysis is a search within the ambit of the Fourth Amendment.[34] The court subsequently gave examples of recent Supreme Court cases in the area of drug testing.[35]

### B. *Suspicionless Testing*

In *Chandler,*[36] the Court held that while a valid search must be based on "individualized suspicion of wrongdoing,"[37] suspicionless testing, not accompanied by individualized suspicion, can also comport with the Fourth Amendment. To see whether the search comports with the Fourth Amendment, the courts must balance the government's (or public) interest in testing against the individual's privacy interest.[38]

#### 1. Public Interest in Testing

With regard to the government's interest in testing, the Supreme Court has traditionally focused on two factors: 1) whether the targeted group exhibits a pronounced drug problem; and if not, whether the group occupies a unique position making the existence of drug problem unnecessary to justify testing; and 2) the magnitude of harm that could result from the use of illicit drugs on the job.[39] Typically, with the existence of a pronounced drug problem within the group targeted for suspicionless testing, a drug testing regime has a higher likelihood

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[31] *See id.* (citing Schmerber v. California, 384 U.S. 757 (1966)).

[32] *See id.* (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)).

[33] *See id.* (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

[34] *See id.* at 10 (citing *Skinner,* 489 U.S. at 617).

[35] *See id.* (citing Chandler v. Miller, 520 U.S. 305 (1997) (upholding constitutionality of a statute requiring drug testing of candidates for high office in Georgia); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding random drug testing of students involved in school athletic programs); *Skinner,* 489 U.S. 602 (upholding suspicionless drug testing on railroad employees); *Von Raab,* 489 U.S. 656 (upholding the United States Customs Service's drug testing, where the government had a "compelling interest" in ensuring integrity and judgment not impaired by drugs).

[36] 520 U.S. 305.

[37] Knox County Educ. Ass'n, 1998 WL 663336 at *10 (citing *Chandler,* 117 S. Ct. at 1301).

[38] *See id.* at *13.

[39] *See id.*

of being deemed constitutional.[40] Although this case did not show any evidence of drug or alcohol abuse among the teachers, the Board relied on *Von Raab's* holding in which the Court upheld suspicionless drug testing in the absence of a drug problem among the Custom Service agents.[41] This court discussed *Van Raab's* unique context and held that the nature of the work and positions of school teachers and administrators must also be seen as unique.[42] The unique character of teachers' calling, coupled with *in loco parentis* obligations imposed upon them, justified a suspicionless regime of drug testing even in the absence of a track record of a pronounced drug problem.[43]

The second factor considered by the court was the magnitude of harm that could result from the use of illicit drugs on the job.[44] In this case, the Board argued that teachers occupy safety-sensitive positions and the school district had a legitimate interest in safeguarding the health and welfare of its students by ensuring that individuals in those positions were not under the influence of drugs or alcohol.[45] This court rejected the Board's argument that the issue of whether teachers are safety-sensitive employees is precluded by the doctrine of res judicata. Although the issue was decided in the KCEA I case, the court determination of which employees occupied safety-sensitive positions was not essential to the disposition of the case, therefore the doctrine of res judicata did not preclude relitigation of the case.[46] The court then proceeded to make its own determination whether teachers occupy safety-sensitive positions, emphasizing the need to show a "clear, direct nexus. . .between the nature of the employee's duty and the nature of the feared violation."[47]

In considering whether "the position of school teacher may not fit neatly into the prototypical 'safety-sensitive' position," the court argued a broader application where teachers are responsible for the safety of young children. It cited the need for constant attention and supervision in situations where children could cause harm to themselves or to others.[48] There is an equal interest in requiring that teachers and other school officials be drug free at the high school level, where teachers must observe and report drug use and assaults among students.[49]

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[40] *See id.* (discussing Skinner's increase in drug use among the train operators that warranted the testing, whereas Chandler's lack of demonstrated drug problem mitigated against the testing).

[41] *See id.* at *14 (citing *Von Raab*, 489 U.S. 656).

[42] *See id.*

[43] *See id.* at *15.

[44] *See id.*

[45] *See id.*

[46] *See id.* (citing Anthan v. Prof'l Air Traffic Controllers Org., 672 F.2d 706, 710 (8th Cir. 1982)).

[47] *See id.* at *18 (citing Georgia Ass'n of Educ. v. Harris, 749 F. Supp. 1110, 1115 (N.D. Cir. 1989)).

[48] *See id.*

[49] *See id.* (citing TCA § 49-6-4301(a)).

The court found that local school districts have a strong interest in requiring that teachers remain drug-free, and the apparent lack of specific instances in which a student was harmed by a teacher's impaired condition was not dispositive of the issue of a "safety-sensitive" position.[50] The court also stressed that the critical function of supervising students, another aspect of a "safety sensitive" position, would be compromised and undermined if the teachers or administrators operated under the influence of drugs.[51]

2. Privacy Interest of Employees

Because "teachers' legitimate expectations of privacy are diminished by their participation in a heavily regulated industry and by the nature of their jobs," the court determined that the public interest in suspicionless testing outweighs the employee's privacy rights.[52] In citing the Supreme Court precedents assessing the privacy interests of employees, the court focused on two central factors: "(1) the intrusiveness of the drug testing scheme; and (2) the degree to which the industry in question is regulated."[53]

While noting that drug testing through urinalysis does indeed implicate an employee's privacy interests on several levels,[54] and may amount to a Fourth Amendment violation if unreasonable,[55] the court emphasized that on the whole it is fairly circumscribed and unintrusive. The testing is done only once, prior to receiving the position requiring it, and the testing procedures include extensive reviews of positive results by an MRO to determine if there is any alternative medical explanation.[56] There are, moreover, extensive safeguards in place to ensure privacy during the actual taking of the urine sample and confidentiality of the drug testing results.[57]

In answering the plaintiff's contention that drug testing procedures violate the Fourth Amendment by testing for eleven drugs not included in the DOT procedures and which can be found in common medicines, the court points out that the Department of Human Services advises against using the DOT urine sample to test for more than the five drugs that fall under the DOT guidelines.[58] While admitting concern over the shortcomings of the test and lack of uniform standards for testing for the additional drugs,[59] policy protects against false positives by entrusting the MRO with the task of reviewing the employee's medical history and conducting an interview to determine if the positive result was caused

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[50] *See id.*

[51] *See id.* at *19.

[52] *Id.*

[53] *Id.*

[54] *See id.* (citing *Skinner,* 489 U.S. at 616-17).

[55] *See id.* (citing *Skinner,* 489 U.S. at 618).

[56] *See id.*

[57] *See id.* at *20.

[58] *See id.* at *21.

[59] *See id.* (citing 49 C.F.R. Part 40).

by legally prescribed medication.[60] Thus, the shortcomings of the testing procedure are insufficient to render the test unconstitutional.

Because, as the Board contends, the employees subjected to the drug testing are participating in a highly regulated industry, their expectation of privacy is accordingly diminished.[61] The court opined that the district court's ruling erred in determining that to be heavily regulated, the regulations in question had to relate exclusively to safety. Citing relevant Supreme Court precedents in *Skinner*[62] and in *Veronia*,[63] the court argued that the focus of the regulations at issue may be far broader than just those related to safety. In the case of *Skinner*, these include regulations related to facilities, equipment, operations, and employees, while in the case of *Veronia* they include maintaining a minimum grade point average and complying with "rules of conduct, dress, training hours and related matters" for athletes participating in school sports.[64]

There are a multitude of regulations concerning the Tennessee public schools, including those related to the implementation of drug abuse education, school safety and security, discipline, drug use among students, the search of students' lockers for drugs and weapons, and requiring teachers and principals to report student offenses.[65] Regulations also pertain to the duties, responsibilities, certification, qualification, and licensing requirements of teachers and principals. Thus, as the court found, teachers participate in a heavily regulated profession or industry, and as such their expectation of privacy might be diminished.[66]

> On balance, the public interest in attempting to ensure that school teachers perform their jobs unimpaired is evident, considering their unique in loco parentis obligations and their immense influence over students. These public interests clearly outweigh the privacy interests of the teacher not to be tested because the drug-testing regime adopted by Knox County is circumscribed, narrowly-tailored, and not overly intrusive, either in its monitoring procedures or in its disclosure requirements. This is particularly so because it is a one-time test, with advance notice and with no random testing component, and because the school system in which the employees work is heavily regulated, particularly as to drug usage.[67]

The court therefore reversed the district court's finding that this portion of the statute was unconstitutional.

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[60] *See id.*

[61] *See id.* at *22.

[62] 489 U.S. at 627.

[63] 515 U.S. at 657.

[64] *Knox County Educ. Assoc.*, 1998 WL 66336 at **22-23.

[65] *See id.* at *23.

[66] *See id.* at *24.

[67] *Id.* at *25.

C. *Suspicion-Based Testing*

The court also found suspicion-based testing to be constitutional under the Fourth Amendment.[68]

1. Drug Testing

School officials may test an employee if the Director of Personnel "reasonably suspects" that his/her on-the-job performance may have been affected by illegal drugs or alcohol, according to certain enumerated circumstances such as observed use, possession or sale of illegal drugs, apparent physical state of impairment of motor functions, violations of criminal drug law statutes involving the use of illegal drugs, alcohol or prescription drugs and so forth.[69] These requirements sufficiently limit the discretion of school officials in administering suspicion-based tests to comport with the reasonableness requirement of the Fourth Amendment.[70] The court therefore affirmed the district court's ruling on this aspect of the suspicion-based testing program.[71]

2. Alcohol Testing

The district court found that the school's alcohol testing procedures violated the Fourth Amendment for three reasons: 1) the initial breathalyzer test was to be carried out by law enforcement personnel, giving them immediate access to the results; 2) the policy did not require compliance with the DOT procedural rules regarding ensuring the accuracy of results; and 3) the alcohol content required for a positive result was so low (.02) that it could turn a positive result based solely on legal, off duty ingestion of alcohol.[72]

The court recognized that serious privacy concerns were implicated by the policy, which gave law enforcement authorities broad access to the testing results.[73] However, because the record indicated that the defendant no longer conducted its alcohol testing through the sheriff's office, but through its own personnel, the court concluded that the privacy issue was, as a practical matter, non-existent.[74]

On the second issue, the court held that even though the policy lacked detailed safeguards necessary to ensure accuracy of the breathalyzer machine normally afforded by the DOT procedures, this aspect of the test was not defective enough to engender constitutional concerns.[75] The court supported this conclusion by referring to specific procedures and safeguards within the policy that

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[68] *See id.*

[69] *See id.* (citing "Drug-Free Workplace Substance Abuse Policy," (JA 1011)).

[70] *See id.*

[71] *See id.*

[72] *See id.* at *26.

[73] *See id.*

[74] *See id.*

[75] *See id.* at *27.

worked to assure the accuracy and fairness of the results.[76]

The court was unable to make a determination as to the constitutionality of the third aspect of the test involving the alcohol level sufficient to produce a positive result.[77] For a search to be reasonable, it has to be "reasonably related in scope to the circumstances which justified the interference in the first place."[78] Based on the record before it, the court could not determine why an impairment as low as .02 is significant, and how it was related to the purpose of testing.[79] In case there was no such nexus, the court stated, this portion of the Policy was unconstitutional.[80] However, based on the record before it, the court could not make such conclusion. Therefore, the court reversed and remanded the issue of whether this portion of the test is constitutional to the district court, to determine whether the 0.02 level is reasonably related to the purpose of the testing.[81]

## IV. CONCLUSION

The Sixth Circuit Court of Appeals reversed the district court's ruling as to the suspicionless testing portion of the Policy. The court found that suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to "safety sensitive" positions within the Knox County School system, including teaching positions, is constitutional, because the public interest outweighs the privacy interests of the teacher. The court affirmed the district court's ruling as to the suspicion-based portion of the Policy and found it constitutional since it comports with the reasonableness requirement of the Fourth Amendment. However, the court was unable to conclude whether the Board's alcohol testing of all school employees was unconstitutional. The court reversed and remanded this issue to the district court for proceedings not inconsistent with its opinion.

*Monika D. Cornell*

*Willis v. Anderson Comm. Sch. Corp.*, No. 98-1227. 1998 WL 569114 (7th Cir. Sept. 9, 1998). THE SEVENTH CIRCUIT HELD THAT THE SCHOOL CORPORATION'S SUSPICIONLESS DRUG TESTING OF A STUDENT WHO ENGAGED IN FIGHTING IS NOT JUSTIFIED BY SPECIAL NEEDS AND THUS IS AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

## I. INTRODUCTION

The plaintiff, a high school freshman, sued the Anderson Community School Corporation ("Corporation") for requiring a drug and alcohol test after sus-

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[76] *See id.* (citing 49 C.F.R. Part 40 §§ 40.23, 40.25.).

[77] *See id.*

[78] *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1988)).

[79] *See id.*

[80] *See id.*

[81] *See id.*

pending him for engaging in a fight.[1] The defendant justified its search requirement on two grounds. First, the Corporation claimed that it had a reasonable suspicion that the plaintiff was a substance abuser.[2] Second, even if the Corporation conducted a suspicionless search, the Corporation argued that its search was constitutional because its special needs outweighed the plaintiff's privacy interests.[3] The Seventh Circuit Court of Appeals held that the Corporation's evidence of statistical data and professional literature showing a "causal nexus" between fighting and illegal substance abuse failed to create a conclusive presumption of reasonable suspicion that the plaintiff used drugs.[4] In addition, the court held that the Corporation's suspicionless search was not reasonable because the Corporation failed to demonstrate a special need, beyond the normal need for law enforcement, that justified departing from a traditional, suspicion-based approach.[5]

## II. BACKGROUND

The plaintiff was suspended for fighting with a fellow student.[6] After the fight, the school's Dean of Students met with the plaintiff.[7] The Dean concluded that the plaintiff's behavior did not provide enough reasonable suspicion to order a drug test.[8]

Pursuant to its policy, however, the Corporation notified the plaintiff that he still had to take a drug test when he returned from his suspension.[9] When the plaintiff refused to provide a urine sample for the test,[10] the Corporation suspended the plaintiff again.[11] The Corporation then informed the plaintiff that if he did not take the drug test, he would be seen as admitting to unlawful drug use. [12]Plaintiff filed suit, claiming that the Corporation's policy violated the Fourth and Fourteenth Amendments of the United States Constitution.[13] The district court denied the plaintiff's motion for a preliminary injunction and then entered a judgment on the merits in favor of the Corporation.[14] The Seventh Circuit Court of Appeals reversed.[15]

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[1] *See* Willis v. Anderson Comm. Sch. Corp., No. 98-1227, 1998 WL 569114, (7th Cir, Sept. 6, 1998)

[2] *See id.* at *2.

[3] *See id.* at *5.

[4] *See id.* at *3.

[5] *See id.* at *8.

[6] *See id.* at *1.

[7] *See id.* at *2.

[8] *See id.*

[9] *See id.* at *1.

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.* at *1.

[15] *See id.*

## III. ANALYSIS

### A. *Reasonable Suspicion of Drug Use*

School officials do not need probable cause to justify searches against students.[16] Officials can conduct a valid search if the search is justified at its inception and if a student's conduct creates a reasonable suspicion that a particular law has been violated.[17] The court ruled that the plaintiff's fighting did not provide the Corporation sufficient reasonable suspicion to order a drug test.[18] First, the court judged that the Corporation's data based on drug tests administered in its high schools did not conclusively show that substance abuse and fighting were correlated.[19] Second, the Corporation's professional literature failed to prove that one fight was sufficient evidence of substance abuse.[20] Overall, the Corporation did not have a basis to reasonably suspect a student for substance abuse because of a suspension for fighting.[21]

### B. *Special Needs*

The government can constitutionally conduct suspicionless searches if the government has special needs beyond the need to conduct law enforcement.[22] To determine if a search falls into this category, courts undertake a context-specific inquiry that examines the competing public and private interests.[23] To provide guidance to its inquiry, the court relied on *Veronia School District v. Acton*,[24] where the Supreme Court upheld suspicionless, random drug testing for school athletes. The *Veronia* court used a balancing test that determined the athletes' privacy rights were weak compared to the school's interest in having drug-free participants in their after-school program.[25]

Following *Veronia*, the Seventh Circuit first determined when the government's need for a suspicionless search outweighs the plaintiff's privacy interests.[26] The court noted that a suspicionless search was practical for the government. In addition, the court stated that students have a lesser expectation of privacy than members of the general public.[27]

The Seventh Circuit, however, distinguished the plaintiff's case from *Veronia* in two ways. First, members of the general student population, such as the plain-

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[16] *See id.* at *2.
[17] *See id.*
[18] *See id.* at *3.
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *See id.* at 4.
[23] *See id.*
[24] 515 U.S. 646 (1995).
[25] *See Willis*, 1998 WL 569114 at *4.
[26] *See id.* at *5.
[27] *See id.* at *5 (quoting *Veronia*, 515 U.S. at 657).

tiff, have a greater expectation of privacy than the athletes in *Veronia*.[28] For example, compared to a student from the general population, the athletes in *Veronia* knew that they had certain obligations, such as drug testing, that they had to permit in exchange for the privilege of participating in their favored activities.[29] Second, the Corporation's policy did not allow students much leeway to avoid testing by controlling their behavior.[30] Thus, the Corporation's policy of testing the plaintiff, who in the heat of passion engaged in fighting, "cannot be analogized to the sort of measured conduct or degree of control discussed in *Veronia*."[31] The court next addressed the Corporation's need to conduct the test. It judged that the Corporation's drug problem was as severe as the Supreme Court found in *Veronia*.[32] Nevertheless, the Court concluded that the Corporation's purpose for its testing policy, deterring students' substance abuse, was not a sufficient justification for its suspicionless search.[33] In addition, the court rejected the school's policy because it came too close to blanket testing and overly departed from the Fourth Amendment's requirement of individualized suspicion.[34]

Moreover, the Corporation's use of suspicionless searches on students who engaged in fighting violated state law.[35] Indiana requires that a child meet with a school principal or a similar official before he is suspended.[36] This state law suggests that the individualized suspicion standard is workable in school disciplinary actions.[37] In fighting cases, school officials would likely have little difficulty of making a finding of reasonable suspicion that would permit testing.[38] Thus, the Corporation's imposition of a suspicionless search seemed to be based on only demonstrative or symbolic purposes.[39] In contrast, the Supreme Court has permitted suspicionless searches in cases only where suspicion-based searches were impracticable.[40] The court concluded that the Corporation did not sufficiently justify why its student searches could not be conducted under the more suitable suspicion-based approach.[41]

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[28] *See id.*

[29] *See id.*

[30] *See id.*

[31] *Id.*

[32] *See id.* at *7.

[33] *See id.* at *6-7.

[34] *See id.* at *7.

[35] *See id.* at *8.

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.* at *9.

## IV. CONCLUSION

The Seventh Circuit Court of Appeals held that the Corporation's evidence of statistical data and professional literature showing a "causal nexus" between fighting and illegal substance abuse fails to create a conclusive presumption of reasonable suspicion that the plaintiff used drugs.[42] In addition, the court held that the Corporation's suspicionless search was not reasonable because the Corporation failed to demonstrate a special need beyond a normal need for law enforcement that justified departing from a traditional, suspicion-based approach.[43] The Seventh Circuit's ruling bridles school discretion to order drug testing. Future litigation will explore the uncertain contexts where school authorities have sufficient justification to demand suspicionless searches against their students.

*Rebecca Claire Fischer*

*Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998). THE COURT OF APPEALS FOR THE FIFTH CIRCUIT HELD THAT A SCHOOL BOARD'S NEED TO CONDUCT SUSPICIONLESS SEARCHES PURSUANT TO ITS DRUG TESTING POLICY OUTWEIGHED THE PRIVACY INTERESTS OF SAFETY SENSITIVE EMPLOYEES IN AN ELEMENTARY SCHOOL.

## I. INTRODUCTION

The plaintiff, Larry Aubrey, a custodian employed by defendant Lafayette Parish School Board in an elementary school, sought injunctive relief and damages because he was subjected to a urinalysis which he contended violated his Fourth Amendment rights and provisions of the Louisiana Drug Testing Act.[1] Where a Fourth Amendment intrusion, such as drug testing, serves a special government need beyond that of law enforcement, a balancing test is required in which the government's interest is weighed against the employee's privacy interest.[2] The Fifth Circuit Court of Appeals held that the School Board's need to conduct suspicionless searches pursuant to their drug testing policy outweighed the privacy interest of the employees in an elementary school who regularly interacted with students, used hazardous substances, operated potentially dangerous equipment, or otherwise posed any threat or danger to the students.[3]

## II. BACKGROUND

The Lafayette Parish School Board adopted an Employment Drug Testing Policy in December 1992.[4] Every year, as part of the drug policy, the Board sub-

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[42] *See id.* at *3.

[43] *See id.* at *8.

[1] Aubrey v. Sch. Bd. of Lafayette Parish, 149 F.3d 559, 561 (5th Cir. 1998).

[2] *See id.* at 562.

[3] *See id.* at 565.

[4] *See id.* at 561. The first clause of the policy's statement of purposes provides: The children of Louisiana are the greatest natural resource this state provides and

mitted a list of "safety sensitive" employees for random selection and drug testing.[5] Because Aubrey's duties entailed using various chemicals for cleaning, securing the school premises at the end of the day, and being in constant contact with the students, Aubrey was considered a safety sensitive employee.[6] Aubrey learned about the drug testing policy at an in-service training for the custodial staff in August 1993.[7] On September 28, 1994, the Board requested that Aubrey and fourteen other employees submit to urinalysis screenings.[8] Aubrey's test indicated the presence of tetrahydrocannabinol, the active chemical in marijuana.[9] Instead of terminating Aubrey, the Board required that he attend a substance abuse program.[10]

Aubrey denied that he used marijuana and sought an injunction barring the Board from firing him, or requiring that he continue to attend the substance abuse program.[11] Aubrey claimed that being subjected to the urinalysis violated his Fourth Amendment[12] rights, which protected him from arbitrary or suspicionless searches, and provisions of the Louisiana Drug Testing Act,[13] which required that the screening laboratory collect split samples.

The district court granted the Board's motion for summary judgment.[14] Aubrey appealed and the Fifth Circuit reversed and remanded the case, concluding that the record did not contain enough evidence upon which to balance the government's need to protect children against the intrusion of Aubrey's Fourth Amendment rights.[15] The Board resubmitted its motion for summary judgment and filed additional evidence addressing the court's concerns.[16] The district court again granted defendant's motion and the Fifth Circuit Court of Appeals affirmed.[17]

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their continued safety and heal is of serious importance to state and local education agencies. Therefore, the Lafayette Parish School Board has a compelling interest and commitment to eliminate illegal and unauthorized drug use (including the unauthorized use of alcohol), drug users, drug activities, and drug effects from all of its workplaces.

*Id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] U.S. CONST. amend. IV.

[13] LA. REV. STAT. ANN. S. 49:1001, ET SEQ. (WEST SUPP. 1997).

[14] *See Aubrey*, 148 F.3d at 561.

[15] *See id.*

[16] *See id.*

[17] *See id.*

## III. ANALYSIS

### A. *Plaintiff's Fourth Amendment Claim*

The Fourth Amendment guarantees a person privacy, dignity, and security against arbitrary searches and seizures by officers of the government including searches conducted by the government while acting as an employer.[18] A program that compels a government employee to submit a urinalysis is a search within the meaning of the Fourth Amendment because such a test invades reasonable expectations of privacy.[19] Where the Fourth Amendment intrusion serves a special governmental need beyond that of law enforcement, a balancing test is required.[20] The interest of the government must be weighed against the privacy interest of the employee.[21] The analysis of the privacy interest should include the employee's desire to be free from mandatory testing as well as the intrusiveness of the particular program at issue.[22] Special needs may outweigh the privacy interests of individuals in some situations.[23]

In applying the balancing test, the Fifth Circuit first evaluated the Board's interest in administering a urinalysis to its safety sensitive employees.[24] The Board contended that its drug policy was intended to maintain the safe and efficient operation of its school, ensure the safety of the children, and decrease the potential spread of drug use among its students.[25] As Aubrey's duties made him a safety sensitive employee, the Board's failure to use extreme caution in the selection and supervision of such employees could place the children at risk.[26] Furthermore, the Board asserted that it had a compelling interest to eliminate illegal drug users from the school.[27] Although the Board did not produce any evidence

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[18] *See id.* at 562 (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-18 (1989); Camara v. Mun. Ct. of San Francisco, 387 U.S. 523 (1967)).

[19] *See id.* (citing Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 665-66 (1989); *Skinner*, 489 U.S. at 616-17).

[20] *See id.* (citing *Skinner*, 489 U.S. at 619).

[21] *See id.*

[22] *See id.* (citing Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); *Skinner* 489 U.S. at 619).

[23] *See id.* (citing Chandler v. Miller, 520 U.S. 305 (1997) (finding that the Fourth Amendment was violated by a Georgia statute requiring candidates for state offices to certify that they had tested negative in a drug urinalysis); *Acton*, 515 U.S. 646 (finding that it was constitutional for a school district to administer drug tests to student athletes); *Skinner*, 489 U.S. 602 (finding that the government's interest in regulating the conduct of railroad employees is greater than an individual's interest in privacy); *Von Raab*, 489 U.S. 656 (finding that the U.S. Customs Service is allowed to give drug tests to employees applying for promotions to positions involving interdiction of illegal drugs and requiring the carrying of firearms)).

[24] *See id.* at 563.

[25] *See id.*

[26] *See id.*

[27] *See id.*

that demonstrated a problem of drug use in its schools, the court found that "neither our workplaces nor our elementary schools are immune from the drug scourge causing such problems in our land."[28] The court found that the Board's drug policy was designed to prevent drug users from obtaining safety sensitive positions and to aid in detecting employees in those positions who use drugs so that it could be treated as a prerequisite to keeping their jobs.[29] The court determined that these interests were "substantial indeed."[30]

The court then weighed the Board's interests against the intrusion and interference with individual liberty that resulted from Aubrey's drug test.[31] The court noted that an employee's expectation of privacy must be asserted in the context of the employment relation.[32] First, the court pointed out that Aubrey had notice that his position was designated as safety sensitive and that he would be subjected to random testing.[33] The court emphasized that Aubrey's custodian position was considered sensitive because he handled potentially dangerous machinery and hazardous substances in an environment with a large number of children and that Aubrey should reasonably have expected an inquiry into his "fitness and probity"[34] to operate and use such material in a school setting.[35] The court also pointed out that Aubrey's position had a possible impact on the physical safety of the students and that the presence of someone using illegal drugs increased the likelihood that the children would have a way of obtaining drugs.[36] Second, the court concluded that the intrusiveness of the search was minimal because Aubrey produced the sample in private, was not required to disclose any personal medical information, and the urinalysis was not used to determine the presence of anything other than the absence of drugs.[37] Finally, even though Aubrey tested positive for marijuana, the Board did not dismiss him, but required that he participate in a substance abuse program.[38]

The court concluded that the Board's special need to implement its drug testing policy outweighed the interest of the employees in the school who interact regularly with students, use hazardous substances, operate potentially dangerous equipment or otherwise pose any threat or danger to the students.[39] The court emphasized that the school system was a guardian for the children entrusted to its care and that it was responsible not only for protecting the children from their own actions, but also for deterring potentially dangerous actions of adults,

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[28] *Id.*

[29] *See id.*

[30] *Id.*

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *Id.* (quoting *Von Raab*, 489 U.S. at 672).

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] *See id.*

[39] *See id.* at 565.

including school employees, who may have interaction with and influence upon them.[40]

B. *Plaintiff's Louisiana Drug Testing Act Claim*

Aubrey also contended that the drug testing procedure established by the Board was deficient.[41] He alleged that the Board violated the Louisiana Drug Testing Act because the screening laboratory failed to collect split samples.[42] The court stated that the requirement only applies to "screening laboratories"and that the laboratory that performed the testing in this case was not considered a screening laboratory within the meaning of the statute.[43] In addition, an employer may, but is not required, to collect split samples.[44] The court concluded that Aubrey's assertions were meritless.[45]

C. *Dissent*

Judge Dennis disagreed with the majority's conclusion that the School Board showed that this case fell within the special needs category recently recognized by the Supreme Court, under which state officials without reasonable individualized suspicion of wrongdoing may require a person to submit to a urinalysis drug test.[46] Judge Dennis distinguished this case from those the Supreme Court placed within the special needs category.[47] He emphasized that those decisions clearly require state officials to have an individualized reasonable suspicion that illegal drug use evidence is contained in a person's urine before ordering him to submit to a urinalysis drug test.[48] The cases in which the Supreme Court has created an exception that allows an intrusion without reasonable individualized suspicion are very different from the situation in the present case.[49] In the cases where the Court found the special needs exception applied, the nature of the intrusion was much less severe, the magnitude of the governmental need for the search was far greater, and/or it was impracticable or impossible to respond to the governmental need with an individualized suspicion requirement.[50]

Judge Dennis also found that the school board in the present case had not established that there was any demonstrated need for the suspicionless drug testing

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[40] *See id* at 564-65.

[41] *See id.* at 565.

[42] *See id.* A split sample is defined as a "urine specimen from one individual that is separated into two specimen containers." (citing LA. REV. STAT. § 49:1001(20) (West Supp. 1997).

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See id.* at 566.

[48] *See id.* at 565.

[49] *See id.* at 566.

[50] *See id.*

of janitors and other school workers.[51] In *Skinner, Von Raab,* and *Veronia,* which the dissent relied upon to distinguish this case, the urinalysis tests were administered as part of well defined programs established by governmentally promulgated regulations based on documented needs and not upon the "pure ipse dixit of local government officials."[52] In addition, in this case there was no demonstration that public safety was genuinely in jeopardy or that there was a critical and immediate need to suppress the Fourth Amendment's normal requirement of individualized suspicion.[53] The School Board had not established a documented link between drug abuse by janitors and other school workers and any school accident or exposure of children to drugs.[54] Furthermore, the record did not reflect that school janitors participate in an industry that is regulated pervasively to ensure safety.[55] Finally, Judge Dennis pointed out that this case involved a free adult janitorial worker employed "in the mundane job of maintaining school buildings and grounds."[56]

In addition, Judge Dennis found the majority's decision to conflict with previous Fifth Circuit opinions in which the court held unconstitutional similar programs for the suspicionless urinalysis testing of school board employees.[57]

## IV. CONCLUSION

The Fifth Circuit Court of Appeals held that the School Board's need to conduct suspicionless searches pursuant to their drug testing policy outweighed the privacy interest of the employees in an elementary school who regularly interacted with students, used hazardous substances, operated potentially dangerous equipment, or otherwise posed any threat or danger to the students. This case broadens the "special needs" category recently recognized by the Supreme Court, under which State officials may conduct suscipionless drug tests. This case also indicates that the Fifth Circuit will extend the "special needs" category to any school employee who may have interaction with and influence upon students.

*Shera Gittleman*

*19 Solid Waste Department Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998). THE TENTH CIRCUIT COURT OF APPEALS FOUND THAT THE CITY OF ALBUQUERQUE'S SUSPICIONLESS DRUG TESTING POLICY CONSTITUTED AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT BECAUSE THE PROGRAM WAS NOT WARRANTED BY A SPECIAL NEED.

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[51] *See id.* at 570.

[52] *Id.*

[53] *Id.*

[54] *See id.*

[55] *See id.*

[56] *Id.*

[57] *See id.* The dissent referred to United Teachers v. Orleans and Jefferson Parish Sch. Bds. 142 F.d. 854 (5th Cir. 1998).

## I. INTRODUCTION

The plaintiffs, nineteen Solid Waste Department mechanics whose primary job responsibility is to repair large, diesel City trash trucks, challenged the constitutionality of Albuquerque, New Mexico's suspicionless drug testing policy.[1] The plaintiffs brought suit against the City of Albuquerque ("City") contending that the policy infringed on their Fourth Amendment rights to be free from unreasonable searches and seizures.[2] Any time a urinalysis test is imposed upon government employees for the purpose of detecting illegal drug use, the test is a search subject to the Fourth Amendment, and must be reasonable.[3] The Tenth Circuit Court of Appeals affirmed the District Court for the District of New Mexico's judgment and held that the City's suspicionless drug testing program constituted an unreasonable search and seizure in violation of the Fourth Amendment because the City failed to demonstrate a special governmental need for the program.[4]

## II. BACKGROUND

Pursuant to the City's policy, employees with jobs requiring a commercial driver's license ("CDL") had to undergo substance abuse tests before they could obtain or renew CDLs.[5] The plaintiffs perform repair work on City trash trucks and are not authorized to drive City vehicles on streets or highways, but the City nonetheless listed the plaintiffs' job categories as one for which a CDLs are required.[6] The plaintiffs claimed that the City's drug testing scheme violated their Fourth Amendment rights to be free from unreasonable searches and seizures by requiring them to submit to and pass suspicionless drug tests.[7] The City defended the policy on grounds of public safety and concerns for employee health.[8] Both the plaintiffs and the City moved for summary judgment.[9]

The District Court for the District of New Mexico granted summary judgment in favor of the plaintiffs, struck down the City's policy, and awarded the plaintiffs $2,700 in damages after conducting a Supreme Court balancing analysis and determining that the City's reasons for implementing the drug testing policy were not "compelling" enough.[10] The City subsequently repealed its policy, but

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[1] *See* 19 Solid Waste Dep't Mechanics v. City of Albuquerque, 156 F.3d 1068, 1070 (10th Cir. 1998).

[2] *See id.*

[3] *See id.* at 1072.

[4] *See id.* at 1074.

[5] *See id.* at 1071. The policy also stated that employees had to pass drug tests before obtaining permits to operate City vehicles and equipment that require CDLs.

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.* "[W]hile the city has valid public interests in establishing a drug enforcement program, those interests do not outweigh the interference with individual liberty that

appealed the district court's damage award by challenging the merits of the district court's decision.[11]

## III. ANALYSIS

### A. *Preliminary Matters of Mootness and Standard for Summary Judgment*

The court began its analysis by first rejecting the plaintiffs' assertion that because the City repealed the drug testing policy subsequent to the district court's judgment, the case should be dismissed as moot.[12] The court reasoned that the City's appeal of the damage award and any possible attorney's fees by challenging the merits of the district court's decision "save[d this case] . . . from the bar of mootness."[13]

The court then noted that it would review the district court's summary judgment de novo and stated the standard for summary judgment by which it would review the record.[14]

### B. *Fourth Amendment Analysis*

#### 1. Balancing of Interests

As an initial matter, the court discussed the balancing test for determining whether a government employer's drug testing requirement constitutes an unreasonable search and seizure.[15] The court stated that ordinarily, in order for a drug testing policy to pass constitutional muster, it must be reasonable, based on individualized suspicion.[16] The court looked to Supreme Court precedent and stated that in determining the reasonableness of a drug testing scheme even in the absence of individualized suspicion, the court must balance the character and nature of the asserted privacy intrusion against the government's proffered interests put forth as a justification for the drug testing policy.[17]

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results from requiring this particular class of employees—nondriving, solid waste mechanics—to undergo warrantless drug tests." 19 Solid Waste Dep't Mechanics v. City of Albuquerque, CIV No. 93-1385, slip op. at 11 (D.N.M. Oct. 11, 1994).

[11] *See id.*

[12] *Id.*

[13] *Id.* (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8 (1978)).

[14] *See id.* "The moving party is entitled to summary judgment '[w]here the record taken as a whole could not lead a rational trier of fact to find to find for the non-moving party.' " Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[15] *See id.* at 1072.

[16] *See id.*

[17] *See id.* (citing Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (finding drug testing of high school student athletes constitutional); Skinner v. Railway Labor Executives' Ass'n 489 U.S. 602 (1989) (finding federal regulations that require drug testing of railroad employees involved in train accidents or who violate particular safety rules constitutional); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (finding

2. Threshold "Special Need" Inquiry

The court then discussed *Chandler v. Miller*,[18] the most recent Supreme Court case dealing with the constitutionality of drug testing, and concluded that even prior to the balancing of interests, the court must determine as a threshold matter whether the government's drug testing policy was warranted by a special need.[19] If the government successfully demonstrates a special need for its drug testing program, the court may then proceed to balance the competing interests.[20] If the government is unable to demonstrate that its program is warranted by a special need, however, the court ends its inquiry there and strikes down the drug testing program as unconstitutional.[21]

The court stated that according to *Chandler*, there is a two-prong inquiry to determine whether a suspicionless drug testing policy is warranted by a special need.[22] First, the court must determine whether the government's concerns in adopting the drug testing scheme were "real."[23] If the government adopted the drug testing scheme in response to a documented drug abuse problem or because drug abuse among the target group posed a serious danger to the public, the government's concerns were "real."[24] Second, the court must determine whether the government's drug testing scheme effectively addressed the goals of detection and deterrence.[25] The court noted that the cases where the government satisfied the second prong involved drug testing schemes that were unpredictably administered, "significantly increasing the deterrent effect."[26]

In applying the two-prong special need inquiry to the City of Albuquerque's suspicionless drug testing policy, the court found that while the government had "real" concerns satisfying the first prong, the drug testing scheme failed to meet the related goals of detection and deterrence.[27] Inquiring into the first prong, the court distinguished this case from *Chandler*, in which the Supreme Court rejected Georgia's asserted concerns for adopting a drug testing requirement for candidates running for state offices.[28] The court noted that although the City of-

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drug testing of Customs Service employees applying for positions involving interdiction of illegal drugs or requiring them to carry firearms constitutional)).

[18] 117 S. Ct. 1295 (1997).

[19] *See* 19 Solid Waste Mechanics, 156 F.3d. at 1072 (citing Chandler v. Miller, 117 S. Ct. 1295 (1997)).

[20] *See id.*

[21] *See id.*

[22] *See id.* at 1072-73.

[23] *See id.* at 1073 (citing *Chandler*, 117 S. Ct. at 1301-04).

[24] *See id.* Evidence of a drug abuse problem "would shore up an assertion of special need for a suspicionless general search program [by helping] to clarify—and to substantiate—the precise hazards posed by such use." Chandler, 117 S. Ct. at 1303.

[25] *See id.*

[26] *Id.* (quoting *Skinner*, 489 U.S. at 630).

[27] *See id.* at 1074.

[28] *See id.* at 1072, 1074 (citing *Chandler*, 117 S. Ct. at 1298). In *Chandler*, Georgia justified its drug testing policy on the grounds that "the use of illegal drugs draws into

fered no evidence of a drug abuse problem among the mechanics nor any evidence that drug use by the plaintiffs resulted in accidents involving the City's trash trucks, the City had a significant interest in ensuring safety not only on the streets where the plaintiffs' repaired trucks are released, but within the repair shops as well.[29] As for the next step in the special need inquiry, the court found that the City's drug testing program failed the second prong because it was not well-designed to address drug use in the workplace.[30] First, the court stated that because the City administered drug tests in predictable intervals, the mechanics would know in advance when they would have to produce a urine sample and detoxify their systems accordingly in enough time to pass the test.[31] Next, given the fact that renewal of a CDL occurs only once every four years, the court determined that the City failed to demonstrate the efficacy of such infrequent testing on the detection and deterrence of drug use. The court concluded that because the City administered the drug tests infrequently and in predictable intervals, the scheme did not effectively detect and deter drug use in the workplace thereby failing the second prong of the special need inquiry.[32]

### C. *Concurrence*

Circuit Judge Briscoe agreed with the court's determination that the City's drug testing program violated the plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures because the City failed to demonstrate a special need for the program.[33] Judge Briscoe disagreed, however, with the court's determination that the City's proffered concerns for adopting the suspicionless drug testing policy were "real."[34] Judge Briscoe focused on "the nature and immediacy of the governmental concern at issue"[35] to find that the City's concerns for public safety and maintaining employee health were not "real" and did not "rise to the level of a real and immediate interest that could justify suspicionless drug testing."[36] First, Judge Briscoe noted that the lack of any reasonable individualized suspicion documented by evidence of drug use to justify the City's adoption of a random drug testing policy.[37] Second, Judge Briscoe stated that while a government employer may adopt a drug testing scheme in the absence of individualized suspicion when the employer has a special interest, here

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question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." *Id.*

[29] *See id.* at 1074.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.* at 1075.

[34] *See id.*

[35] *Id.* (citing *Acton*, 515 U.S. at 660).

[36] *Id.*

[37] *See id.*

the City had no such special interest.[38] Finally, Judge Briscoe noted that the City's proffered reasons for adopting the drug testing policy were "hypothetical" and agreed with the district court's conclusion that the policy as applied to the plaintiffs was merely for "administrative convenience."[39]

## IV. CONCLUSION

The Tenth Circuit Court of Appeals held that the City of Albuquerque's random drug testing of plaintiffs, trash truck mechanics who were not authorized to drive city vehicles on streets and highways, constituted an unreasonable search and seizure in violation of the Fourth Amendment because the program was not warranted by a special need. The court found it unnecessary to balance the interests of the plaintiffs against those of the state because the City failed the threshold requirement of demonstrating a special need for its drug testing policy. The court found that while the City had a significant interest in protecting the public from unsafe trucks on the streets and maintaining employee health and safety in the workplace, the drug testing policy failed to effectively address drug use in the workplace because the City administered the tests in predictable intervals and only once every four years upon renewal of CDLs. Therefore, according to the Tenth Circuit's interpretation of "special need" for purposes of determining the constitutionality of drug testing schemes, government employers will mainly have to worry about satisfying the second prong of the special need showing because in most cases, concerns for health and safety will likely be sufficient to satisfy the first prong, which merely means that government employers will have to be more rigorous in administering drug tests and in a manner not predictable to their employees so as to satisfy the second prong of the special need showing.

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[38] *See id.* at 1075-76 (citing *Von Raab*, 489 U.S. at 670). In *Von Raab*, despite the absence of individualized suspicion, the Supreme Court found that "the Government ha[d] a compelling interest in ensuring that front-line [illegal drug] interdiction personnel [we]re physically fit, and ha[d] impeachable integrity and judgment" sufficient to overcome the usual requirement of demonstrating a problem of drug use. *Id.*

[39] *Id.* at 1076.