STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 14-52

Drug-Free-Workplace Programs

QUESTIONS

1. Do the drug-free-workplace programs established by Tenn. Code Ann. §§ 50-9-101 to -114 violate either the Tennessee Constitution or the United States Constitution?

2. If the purpose of a drug test under the drug-free-workplace programs is to disclose whether an employee is under the influence of drugs or alcohol at work, is an employee unfairly punished for past drug use based on a positive drug-test result if the employee is not presently under the influence of drugs or alcohol or does not satisfy the criteria for reasonable-suspicion drug testing under Tenn. Code Ann. § 50-9-103(15)?

3. Because a number of other states have legalized the possession and use of marijuana, does the drug testing of a Tennessee employee for marijuana use violate the employee's right to freedom of movement or travel guaranteed by the Privileges and Immunities Clause of the United States Constitution?

OPINIONS

1. No. The statutes establishing drug-free-workplace programs expressly restrict drug testing to constitutional limits.

2. The express purpose of the program is to promote a drug-free workplace, enhance productivity, and discourage drug and alcohol abuse. Whether the programs unfairly punish certain employees is a question of policy to be determined by the General Assembly.

3. No.

ANALYSIS

1. Drug-free-workplace programs established under Tenn. Code Ann. §§ 50-9-101 to -114 permit employers to establish a drug-free workplace by following certain drug-testing requirements. Employers are not required to take part in the programs. *See* Tenn. Code Ann. § 50-9-101(b) ("*If* an employer implements a drug-

free workplace program . . . .") (emphasis added); Tenn. Code Ann. § 50-9-103(5) ("'Covered employer' means a person or entity that . . . maintains a drug-free workplace . . . . This chapter shall have no effect on employers who do not meet this definition[.]"). But employers that choose to participate are rewarded with certain benefits, including discounts for workers' compensation premiums, a shifted burden in workers' compensation disputes, and the ability to deny workers' compensation medical and indemnity benefits. Tenn. Code Ann. § 50-9-104(a)(1)-(3). Employers who do not follow the terms of the program forfeit these benefits. Tenn. Code Ann. § 50-9-104(a).

The act establishing drug-free-workplace programs allows drug testing only "[t]o the extent permitted by law." Tenn. Code Ann. § 50-9-106(a). The state and federal constitutions, of course, are the supreme law of their respective jurisdictions. *See Peay v. Nolan*, 7 S.W.2d 815, 816 (Tenn. 1928); *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The above limitation, then, expressly restricts the required drug testing under the programs to the confines of the constitutions; any violation of either constitution would also violate the act establishing the programs. Accordingly, the programs do not permit or require employers to conduct unconstitutional drug tests.

2. The purpose of the drug-free-workplace programs is expressly stated as follows:

> It is the intent of the general assembly to promote drug-free workplaces in order that employers in this state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace and reach their desired levels of success without experiencing the costs, delays and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees. It is further the intent of the general assembly that drug and alcohol abuse be discouraged and that employees who choose to engage in drug or alcohol abuse face the risk of unemployment and the forfeiture of workers' compensation benefits.

Tenn. Code Ann. § 50-9-101(a). Whether the programs impose unfair punishment is a question for the General Assembly in the exercise of its prerogative to "declare the policy of the State touching the general welfare." *Smith v. Gore*, 728 S.W.2d 738, 751 (Tenn. 1987); *see Hodge v. Craig*, 382 S.W.3d 325, 337 (Tenn. 2012).

3. The Privileges and Immunities Clause of the United States Constitution states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The primary purpose of the Clause is to place visitors to a state on the same footing with citizens of the state. *Paul v. Virginia*, 75 U.S. 168, 180 (1868), *overruled on other grounds by United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944);

see also Saenz v. Roe, 526 U.S. 489, 502 (1999) (noting that the Clause bars "discrimination against citizens of other States").

The Clause does not require that visitors receive more rights than citizens, regardless of the law of the visitor's home state: "Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States." *Paul*, 75 U.S. at 180; *see also Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978) (holding that a visitor is not entitled to invoke the law of his home state as a corollary to his constitutional right to travel).

The drug-free-workplace programs do not discriminate against noncitizens. Rather, citizens and visitors alike are subject to testing if they are employed or applying for employment in a drug-free workplace. *See, e.g.*, Tenn. Code Ann. §§ 50-9-104(a), 50-9-106(a). Therefore, the Privileges and Immunities Clause does not require Tennessee to conform its drug-testing policy to the policies of states that have decriminalized or legalized marijuana.

The Privileges and Immunities Clause may also protect "the right of a citizen of one State to enter and to leave another State." *Saenz*, 526 U.S. at 500, 501 n.13; *see also Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (noting that courts have attributed the source of this component to various constitutional provisions). But this component pertains only to actions that "directly impair the exercise of the right to free interstate movement." *Saenz*, 526 U.S. at 501; *see, e.g., United States v. Guest*, 383 U.S. 745, 756 (1966) (holding that the right to travel included the right to use highways and other instrumentalities of interstate commerce to travel from one state to another); *Edwards v. California*, 314 U.S. 160 177 (1941) (striking down a state law that prohibited the transport of indigent persons into the state); *Crandall v. Nevada*, 73 U.S. 35, 39-49 (1867) (invalidating a Nevada tax on every person leaving the state by common carrier). Tennessee's drug-free-workplace programs do not impair movement across borders as the laws in *Guest, Edwards*, and *Crandall* did.

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