

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 31, 2017

Opinion No. 17-23

Constitutionality of Random Drug Testing of County Employees and Elected Officials

Question

May a county constitutionally implement a random drug testing policy for all county employees and elected officials who are covered by the county's medical insurance plan as a means to reduce insurance premiums and to promote confidence with the public?

Opinion

No. A blanket random drug testing policy for all county employees and elected officials would violate the Fourth Amendment of the United States Constitution, as well as section 7 of article I of the Tennessee Constitution.

ANALYSIS

The Fourth Amendment of the United States Constitution safeguards the privacy of individuals against arbitrary and unwarranted governmental intrusions by providing 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.”¹ By its terms, the Fourth Amendment proscribes unreasonable searches and seizures by governmental officials. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *United States v. Sharpe*, 470 U.S. 675, 682 (1985). While this proscription typically applies in a criminal context, it also applies when the government is acting as an employer. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). See *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) (“It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”).

The United States Supreme Court, on several occasions, has found that government-compelled drug and alcohol testing is a “search” under the Fourth Amendment. See *Board of Education of Independent School Dist. 92 v. Earls*, 536 U.S. 822, 828 (2002); *Chandler v. Miller*, 520 U.S. 305, 313 (1997); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Von Raab*, 489 U.S. at 665. See, e.g., *Skinner*, 489 U.S. at 616-17 (determining that blood, urine, and

¹ The Fourth Amendment applies to the States through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Similarly, article I, section 7 of the Tennessee Constitution guarantees “[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.” This provision is “identical in intent and purpose with the Fourth Amendment.” *State v. Scarborough*, 201 S.W.3d 607, 622 (Tenn. 2006); *Sneed v. State*, 221 Tenn. 6, 13, 423 S.W.2d 857, 860 (1968).

breath tests were all “searches”). Consequently, to pass constitutional muster, the compelled testing of government employees for drugs and alcohol must be reasonable under the Fourth Amendment. *See Earls*, 536 U.S. at 828; *Chandler*, 520 U.S. at 313; *Skinner*, 489 U.S. at 617; *Von Raab*, 489 U.S. at 665.

Whether a particular search is reasonable is determined by “balancing the nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests.” *Earls*, 536 U.S. at 829; *Skinner*, 489 U.S. at 619 (same). As a general rule, to be reasonable a search must be justified by a warrant or some individualized suspicion. *See Earls*, 536 U.S. at 828; *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665-66. However, neither a warrant nor a suspicion is an indispensable component in every circumstance. “Where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Von Raab*, 489 U.S. at 665 (citing *Skinner*, 489 U.S. at 619-620).

The Supreme Court has recognized that this “special needs” exception may apply in the context of safety and administrative regulations “where the ‘Government seeks to prevent the development of hazardous conditions.’” *Earls*, 536 U.S. at 828 (quoting *Von Raab*, 489 U.S. at 667-68). For instance, when an important governmental interest would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. *See Skinner*, 489 U.S. at 624. Hence, application of the “special needs” exception is fact-driven. When special needs are alleged in justification of a Fourth Amendment intrusion, “courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.” *Chandler*, 520 U.S. at 314. Accordingly, if the government shows a special need, courts then must determine whether the privacy interests implicated by the search are minimal and whether an important governmental interest furthered by the search would be placed in jeopardy by a requirement of individualized suspicion of illegal drug use as opposed to a random search. *See id.* As discussed below, this “context-specific inquiry” has led courts to uphold suspicionless drug testing only when “the proffered special need for drug testing [is] substantial – important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” *See Chandler*, 520 U.S. at 318.

The Supreme Court has decided five compelled-drug testing cases in recent years.² In each case, it engaged in the context-specific inquiry, closely examined the particular facts, and balanced the specific, competing interest involved.

² Two cases address compulsory drug testing of children in public school settings. *See Earls*, 536 U.S. at 837-38 (upholding suspicionless drug testing of students involved in competitive extracurricular activities) and *Vernonia*, 515 U.S. at 665-66 (upholding suspicionless drug testing of students participating in interscholastic athletics). These cases provide less guidance for the question posed because “Fourth Amendment rights … are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.” *Earls*, 536 U.S. at 829-30 (quoting *Vernonia*, 515 U.S. at 656). As the Court explained, “[a] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” *Id.* at 830. Accordingly, the Court cautioned against the assumption that suspicionless drug testing would readily pass constitutional muster in other contexts. *Vernonia*, 515 U.S. at 665.

In *Skinner*, the Court considered the government’s interest in testing railroad employees for drugs and alcohol after a serious accident without a showing of individualized suspicion that drugs were involved. *Skinner*, 489 U.S. at 609-11. The Court began its analysis by noting that the “problem of alcohol use on American railroads is as old as the industry itself,” and that alcohol was the probable cause or a contributing factor in at least 21 significant train accidents occurring between 1972 and 1983, resulting in 25 fatalities, 61 non-fatal injuries, and millions of dollars in property damage. *Id.* at 607. Against this backdrop, the Court evaluated the Federal Railroad Administration’s regulations which mandated post-accident toxicological testing for all employees involved in an accident. *Id.* at 608-11.

The Court determined that the government’s interest in testing was compelling because the “[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” *Id.* at 628. The Court also considered the deterrent effect of post-accident testing as opposed to scheduled testing:

By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

Id. at 630 (internal citation omitted). In other words, testing without a showing of a particularized suspicion was essential to the realization of a deterrent effect: the employee’s inability to avoid detection simply by staying drug-free at a prescribed test significantly enhanced the deterrent effect. See *Chandler*, 520 U.S. at 316 (discussing deterrent effect in *Von Raab*).

Finally, the Court found that the avoidance of calamities outweighed the employees’ privacy interests, which were “diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.” *Skinner*, 489 U.S. at 627.

In *Von Raab*, which was decided the same day as *Skinner*, the Court upheld the United States Customs Service’s drug testing program that made urine drug tests a condition of promotion or transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm. See *Von Raab*, 489 U.S. at 660-61. Unlike *Skinner*, the Service’s drug-testing regime was not prompted by a pronounced drug problem, but by its stature as the “Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population.” *Id.* at 668.

The Court found that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment. *Id.* at 670. The Court further cautioned against the possibility of grievous consequences associated with having drug-using agents:

This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

Id.

Similarly, the Court found that public interest demanded effective measures to prevent the promotion of drug users to positions that require the employee to carry a firearm, even if the employee was not engaged in the interdiction of drugs. *Id.* “[T]he public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.” *Id.* at 671.

The “unique mission” of the Service was another factor contributing to the Government’s compelling interest in ensuring that these employees do not use drugs:

Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. Indeed, the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service’s policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.

Id. at 674.

Finally, the Court found that employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. *Id.* at 672.

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.

Id.

In *Chandler*, the Court examined Georgia’s statutory requirement that candidates for state office pass a drug test. *Chandler*, 520 U.S. at 309. Balancing the candidates’ privacy expectations against the State’s interest in drug testing them, the Court held the statute unconstitutional because the suspicionless testing did not meet the Fourth Amendment’s “special needs” exception to overcome the need for an individualized suspicion of wrongdoing. The Court observed the lack of a demonstrated problem of drug abuse among state officeholders. *Id.* at 319. While the Court stated that such a problem is not necessary in all cases, it would “shore up an assertion of special need.” *Id.* The Court found that the testing responded to no “concrete danger,” was supported by no evidence of a particular problem, and targeted a group not involved in “high-risk, safety-sensitive tasks.” *Id.* at 319, 321-22. The Court concluded:

What is left, after close review of Georgia’s scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. . . . The need revealed, in short, is symbolic, not ‘special,’ as that term draws meaning from our case law.

Id. at 321-22. Consequently, the Court held that the requirement did not fit within the “closely guarded category” of constitutionally permissible suspicionless searches. *Id.* at 309.

As these cases demonstrate, when “special needs” are alleged in justification of a particular drug testing policy, a court is to conduct a “context-specific inquiry” to balance the government’s interest in testing against the individual’s privacy interest. See *Chandler*, 520 U.S. at 314. In examining the government’s interest, the court is to consider whether the government’s policy addresses a pervasive drug problem. See *Earls*, 536 U.S. at 835; *Von Raab*, 489 U.S. at 673-74. While not necessary, a demonstrated problem “shore[s] up an assertion of special need.” See *Chandler*, 520 U.S. at 319. Specifically, the court is to consider the nature and immediacy of the government concerns and the efficacy of the policy in meeting them by assessing whether the government’s interest in testing will accomplish that interest. See *Earls*, 536 U.S. at 834; *Vernonia*, 515 U.S. at 660. As demonstrated above, this assessment requires the court to examine the nature and extent of the employee’s duties. See *Skinner*, 489 U.S. at 634; *Von Raab*, 489 U.S. at 674.

In evaluating the individual’s privacy interest, a court is to consider the nature of the privacy interest compromised by the drug-testing policy. See *Vernonia*, 515 U.S. at 654. For instance, the nature of an employee’s work and the safety concerns associated with it can diminish the employee’s expectation of privacy. See *Von Raab*, 489 U.S. at 672; *Skinner*, 489 U.S. at 628. Similarly, adults who choose to participate in closely regulated industries have a limited expectation of privacy. See *Vernonia*, 515 U.S. at 657; *Von Rabb*, 489 U.S. at 672. The employee’s privacy interest also includes consideration of the “character of the intrusion” imposed by the drug testing policy. See *Vernonia*, 515 U.S. at 658. The character of the intrusion relates to the method by which the test is performed. See *Chandler*, 520 U.S. at 318; *Skinner*, 489 U.S. at 626. This aspect of the employee’s privacy interest can also include consideration of the confidentiality of the individual’s drug testing records. For instance, the court may consider whether the records are kept separate from other personnel files, who has access to the files, and whether the files are turned over to law enforcement authorities or have detrimental job consequences. See *Earls*, 536 U.S. at 833; *Vernonia*, 515 U.S. 658 and n. 2.

In sum, whether a drug-testing policy is constitutional is a fact-based determination. It is necessary to consider the position held by the employee or official and balance the government's interest in testing against the individual's privacy interests. Consequently, a blanket county random drug testing policy for all county and elected officials would not pass constitutional muster, especially in light of the stated purpose of the policy to reduce insurance premiums and promote confidence with the public. *See Chandler*, 520 U.S. at 319, 321-22 (finding unconstitutional "symbolic" drug-testing policy that responded to no "concrete danger").

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

LAURA T. KIDWELL
Senior Counsel

Requested by:

The Honorable Curtis Halford
State Representative
108 War Memorial Building
Nashville, Tennessee 37243