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APPLYING THE FOURTH AMENDMENT TO
RANDOM DRUG TESTING OF POLICE
OFFICERS:
*POLICEMEN'S BENEVOLENT
ASSOCIATION OF
NEW JERSEY v. TOWNSHIP OF WASHINGTON,*
850 F.2d 133 (3d Cir. 1988)

The fourth amendment¹ protects individuals from unreasonable governmental searches and seizures.² Recently, public employees have used the fourth amendment to challenge random drug testing implemented by their employers,³ alleging that such testing constitutes an unreasonable search.⁴ In *Policemen's Benevolent Association of New*

1. The fourth amendment provides that "[t]he right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. The fourth amendment protection against unreasonable searches and seizures applies to the states through the due process clause of the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

2. The fourth amendment protects people and not simply places against unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347, 351-53 (1967) (government's electronically listening to and recording petitioner's phone conversation constituted a search and seizure under the fourth amendment). *See Mapp v. Ohio*, 367 U.S. 643, 645, 660 (1961) (government could not present evidence at trial of Mapp's possession of obscene materials because government conducted an unlawful search); *see also Wolf*, 338 U.S. at 27 (fourth amendment protection against arbitrary intrusion by the state is basic to a free society).

3. For a discussion of the application of the fourth amendment to drug testing of public employees, see generally Note, *Mandatory Drug Testing of Public Sector Employees: Constitutional Implications*, 65 U. DET. L. REV. 315 (1988); Ayers, *Constitutional Issues Implicated by Public Employee Drug Testing*, 14 WM. MITCHELL L. REV. 337 (1988).

4. Note, *supra* note 3, at 316. Public employers requiring random drug testing programs include fire and police departments, municipal utility companies, and school boards. *See, e.g., Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (fire fighters); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (police officers); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (municipal utility company employees); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), *aff'd*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (teachers).

Jersey v. Township of Washington,⁵ the Third Circuit held that random drug testing of city police officers was constitutional under the fourth amendment even though the city lacked individualized, reasonable suspicion of drug use.⁶

In *Policemen's Benevolent Association*, the Mayor of the Township of Washington, in response to a Presidential Executive Order⁷ calling for a drug-free workplace,⁸ implemented a mandatory drug testing program for all municipal employees.⁹ The Policemen's Benevolent Asso-

5. 850 F.2d 133 (3d. Cir. 1988).

6. *Id.* at 134. In *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988), the court noted that there must be "some quantum of individualized suspicion before [urine] tests can be carried out. This quantum may be denoted as 'reasonable suspicion.'" 647 F. Supp. at 880. Reasonable suspicion requires some articulable basis for suspecting the particular employee. *Id.* at 881. See *City of Palm Bay*, 475 So. 2d at 1326 (to justify an intrusion based on reasonable suspicion, officials must find specific objective facts and draw rational inferences from the facts in light of their experience); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987) (a search is reasonable under the fourth amendment if, at its inception, reasonable grounds exist to suspect work-related drug use, and the means adopted relate to the objective of the search and are not excessively intrusive).

7. Exec. Order No. 12,564, 3 C.F.R. 224 (1987) (codified at 5 U.S.C. § 7307 (1988)).

8. 850 F.2d at 134. The presidential executive order calling for a drug-free workplace provides in part:

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace. . .

Section 1. Drug-Free Workplace

- (a) Federal employees are required to refrain from the use of illegal drugs.
- (b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
- (c) Persons who use illegal drugs are not suitable for Federal employment.

Section 3. Drug Testing Programs

- (a) The head of each Executive agency shall established a program test for the use of illegal drugs by employees in sensitive positions . . .
- (c) [T]he head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:
 - (1) When there is a reasonable suspicion that any employee uses illegal drugs;
 - (2) In an examination authorized by the agency regarding an accident or unsafe practice. . . .
- (d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Exec. Order No. 12,564, 3 C.F.R. 224 (1987) (codified at 5 U.S.C. § 7307 (1988)).

9. 850 F.2d at 134.

ciation of New Jersey filed suit on behalf of the police officers of the Township,¹⁰ alleging that the drug testing plan was unconstitutional under the fourth amendment.¹¹ The Association specifically challenged those aspects of the plan¹² calling for random testing of police officers.¹³ The United States District Court for the District of New Jersey granted the Association's request for summary judgment.¹⁴ On appeal, the Third Circuit reversed, holding that random drug testing of police officers did not constitute an unreasonable search and seizure.¹⁵

10. *Policemen's Benevolent Ass'n of New Jersey v. Township of Washington*, 672 F. Supp. 779 (D.N.J. 1986), *rev'd.*, 850 F.2d 133 (3d Cir. 1988). The Policemen's Benevolent Association and the Association's president, Edmund Giordano, sued the Township, the Mayor, and the Township Council. *Id.* at 780. While still in the district court, the Association agreed to dismiss the Township Council as a defendant. *Id.* at 781.

11. 672 F. Supp. at 780. The Association also moved temporarily to restrain the Township from implementing the plan. *Id.* The district court granted the motion and ordered the Township to show why the court should not grant a preliminary injunction. *Id.*

12. The district court lifted the restraining order on October 8, 1986, when the Township indicated that it would not test current employees until it had formalized a drug testing plan. *Id.* at 781. The Township indicated that it would formulate program guidelines and submit them for judicial review. Consequently, the court denied the Association's request for a preliminary injunction and dissolved the temporary restraints. *Id.*

The Township submitted a revised drug testing plan that established policies and procedures for testing and controlling unauthorized drug use among Township personnel. *Id.* The procedures listed two methods for the detection of illegal drug use: (1) testing individual employees based on reasonable suspicion; and (2) testing employees based on a universal random urinalysis procedure. The plan further required annual physical examinations including a urinalysis drug test for all municipal employees. *Id.* The Township gave its employees sixty-days notice prior to implementing the program. *Id.* at 782. The plan permitted employees to urinate privately unless the employer reasonably suspected that an employee might tamper with this sample. *Id.* After actual testing, anonymous sampling containers protected employee privacy. *Id.* Finally, the Township could utilize final test results only for disciplinary and not criminal purposes. *Id.*

13. The Association challenged the constitutionality of three provisions of the revised plan: random testing of police officers; mass testing of the entire police force; and testing as part of pretextual physical examinations which are not bona-fide medical examinations given in the ordinary course of business and as a matter of the Township's policy for its police officers. *Policemen's Benevolent Ass'n*, 850 F.2d at 135.

14. 672 F. Supp. at 796. The district court held the drug testing plan unconstitutional under the fourth amendment as an unreasonable search and seizure. *Id.* The court enjoined the Township from requiring police officers to submit urine samples for drug testing unless individualized, reasonable suspicion existed that a particular officer used illegal drugs. *Id.*

15. 850 F.2d at 141-42.

The fourth amendment protects an individual's reasonable expectation of privacy.¹⁶ A court will consider a search reasonable if, viewed objectively, it is justifiable under the circumstances.¹⁷ In the employment context, this privacy interest is weighed against the employer's discretion to enforce reasonable conditions of employment.¹⁸

The Supreme Court only recently addressed mandatory drug testing of public employees.¹⁹ However, more than twenty years ago, in *Schmerber v. California*,²⁰ the Supreme Court held that an involuntary blood test²¹ constituted a search within the meaning of the fourth amendment.²² The Court reasoned that an individual has a reasonable expectation of privacy in the personal information blood contains.²³

16. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). *See also* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (the fourth amendment protects actual expectations of privacy that society recognizes as reasonable).

17. *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

18. *See* *Bratcher v. United States*, 149 F.2d 742, 745-46 (4th Cir.), *cert. denied*, 325 U.S. 885 (1945) (physical examination of military inductee, resulting in discovery of drug use, was not an unlawful search and seizure even though the government used results in criminal prosecution); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (warrantless search of postal employee's locker for stolen mail did not violate fourth amendment).

19. *See* *National Treasury Employees Union v. Von Raab*, No. 86-1879 (March 21, 1989) (LEXIS, Genfed Library, U.S. file). The Supreme Court held the customs service's mandatory drug testing of employees applying for positions directly involving interdiction of illegal drugs was reasonable despite the absence of reasonable, individualized suspicion. Although the Court affirmed the constitutionality of the *Von Raab* drug testing program, the *Von Raab* facts involved employees seeking sensitive positions in drug enforcement. Hence, the Court's decision seems to have limited application regarding the constitutionality of public employee drug testing. *See infra* notes 57-64 and accompanying text for additional discussion of *Von Raab*.

20. 384 U.S. 757 (1966).

21. In *Schmerber* petitioner was hospitalized following an automobile accident. After smelling alcohol on petitioner's breath, a police officer arrested petitioner and charged him with driving while intoxicated. At the hospital, the officer directed a physician to conduct a blood test over petitioner's objection. *Id.* at 758-59.

22. *Id.* at 767. Petitioner argued that the involuntary blood extraction constituted an unreasonable search and seizure in violation of the fourth amendment. *Id.* at 759. The court relied on the amendment's guarantee of the individual's right to be secure in his or her person in determining that an involuntary blood test was a search under the fourth amendment. *Id.* at 767. The court held, however, that the blood alcohol test was a reasonable search and seizure.

23. *Id.* at 767-70. Since evidence of blood-alcohol content could determine one's guilt or innocence to a charge of driving while intoxicated, the court believed that the fourth amendment privacy interest required probable cause in order to conduct the test. *Id.* at 770-71. The *Schmerber* court found the police officer's search to be reasonable

By analogy to *Schmerber*, many courts have held that urinalysis²⁴ constitutes a search under the fourth amendment.²⁵ In *McDonnell v. Hunter*,²⁶ the Eighth Circuit compared urine testing to an involuntary blood test.²⁷ The court conceded that, unlike blood testing, the "seizure" of urine does not require bodily intrusion.²⁸ Nevertheless, the court noted, a person normally discharges urine with a reasonable expectation of privacy²⁹ and has an interest in safeguarding personal information contained therein.³⁰ Hence, the *McDonnell* court held that because urinalysis intrudes upon the right of individuals to be secure in their "persons,"³¹ such testing is a search and seizure under the

because the officer had probable cause to suspect petitioner's intoxication, and the test administered was safe. *Id.* at 771-72. See also *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) ("Each individual has a reasonable expectation of privacy in the personal 'information' bodily fluids contain.").

24. Urinalysis is the most common drug testing method. Other methods include blood testing and polygraph tests. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 46 (1985). The EMIT (Enzyme Multiplied Immunoassay Technique) is the most common test used for initial screening of urine samples. Experts estimate the EMIT test to be 97% to 99% accurate with errors attributed mainly to sample mix-ups and misreadings. *Id.* at 48. The gas chromatography/mass spectrometry (GCMS) test, which is reportedly 100% accurate, is commonly used to confirm positive EMIT tests. Ager, *Ready, Set . . . Will You Go?*, Det. Free Press, Nov. 30, 1986, at 14-15.

25. See, e.g., *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), *aff'd in part*, No. 86-1879 (March 21, 1989) (LEXIS, Genfed Library, U.S. file) (search of U.S. Customs Service employees); *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987), (search of correctional officers); *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985), and *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986) (police officers); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986), and *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988) (city fire fighters); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (horse jockeys).

26. 809 F.2d 1302 (8th Cir. 1987). *McDonnell* addressed the constitutionality of urine testing for correctional institution employees.

27. *Id.* at 1307 (citing *Capua*, 643 F. Supp. at 1513). Medical labs analyze both urine and blood to determine physiological facts. *Id.* See also *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984) (urinalysis requires the same level of scrutiny as blood testing).

28. *McDonnell*, 809 F.2d at 1307.

29. *Id.*

30. *Id.* The Supreme Court recognized an individual's right to privacy in medical information in *Whalen v. Roe*, 429 U.S. 589, 600 (1977).

31. U.S. CONST. amend. IV. See *supra* note 1.

fourth amendment.³²

Although courts generally extend fourth amendment protection to urinalysis,³³ courts differ as to the constitutionality of programs that test public employees without reasonable, individualized suspicion of drug use.³⁴ Most courts have ruled that such programs violate the fourth amendment.³⁵ In *Capua v. City of Plainfield*,³⁶ the United States District Court for the District of New Jersey adopted the reasonable suspicion standard to determine the constitutionality of random drug testing of city fire fighters.³⁷ In *Capua*, the fire commissioner ordered fire fighters to submit to an unannounced urinalysis test.³⁸ The test lacked written guidelines and formal procedures for collecting,

32. *McDonnell*, 809 F.2d at 1307.

33. Courts generally agree that urinalysis is a search within the meaning of the fourth amendment. *See supra* notes 25-32 and accompanying text (presenting the case history which developed this consensus).

34. *Compare Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (upholding mandatory urinalysis without reasonable suspicion for municipal employees who worked around high voltage wires) *with Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986), *aff'd.*, 846 F.2d 1539 (6th Cir. 1988) (reasonable suspicion required to conduct mandatory urine testing); *see supra* note 6 (discussing the requirement of reasonable, individualized suspicion).

35. *See, e.g., Bostic v. McClendon*, 650 F. Supp. 245, 250 (N.D. Ga. 1986) (police department allowed urine testing only on basis of reasonable suspicion); *Lovvorn*, 647 F. Supp. at 879-83 (random drug testing of fire fighters and police officers violates the fourth amendment); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1517-20 (D.N.J. 1986) (surprise testing of fire fighters is an unreasonable search in violation of the fourth amendment); *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1325-26 (Fla. Dist. Ct. App. 1985) (police officers not required to supply urine samples in the absence of reasonable suspicion supported by the circumstances); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 591-92 (N.D. Ohio 1987) (urinalysis testing of police academy cadets is an unreasonable search in the absence of reasonable, individualized suspicion); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008-09 (D.C. App. 1985) (urinalysis testing of police officers held reasonable where employer limited testing to employees suspected of drug use); *but see Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (random urine testing and daily breathalyzer tests for jockeys held constitutional); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1523-25 (D. Neb. 1987) (random urine testing for security guards and licensed operators at a nuclear power plant held constitutional).

36. 643 F. Supp. 1507 (1986).

37. *Id.* at 1517-20.

38. *Id.* at 1511. At 7:00 a.m. the Fire Chief and Director of Public Affairs and Safety entered the fire station, locked the doors, and awakened all fire fighters present on the premises. *Id.* The department required each employee to submit a urine sample while under the surveillance and supervision of bonded testing agents employed by the city. *Id.*

testing, and utilizing the test information.³⁹ In evaluating the reasonableness of the search, the *Capua* court employed a balancing test⁴⁰ that weighed the city's need for the search against the intrusiveness of the test to fire fighters.⁴¹ The court concluded that the test's intrusiveness outweighed the city's interest in eradicating drug use.⁴² The court found that a "reasonable suspicion" standard was necessary to protect individuals against arbitrary governmental searches.⁴³ The *Capua* court held that, absent reasonable suspicion, the random drug testing program constituted an unreasonable search and seizure proscribed by the fourth amendment.⁴⁴

Several courts have developed an exception to *Capua's* reasonable suspicion standard where searches are made pursuant to administrative inspection schemes in closely regulated industries.⁴⁵ In *Shoemaker v.*

39. *Id.* at 1511-12.

40. *See* *Camara v. Municipal Court*, 387 U.S. 523 (1967). Courts determine whether a search is reasonable under the fourth amendment by balancing the government's need to search against the individual's right to privacy. *Id.* at 536-37. Courts have consistently adopted this balancing test. *Capua* applied a balancing test to random drug testing.

41. 643 F. Supp. at 1517-19.

42. *Id.* at 1520. The *Capua* court noted that the act of urination has traditionally been a private function, and that a urine test conducted under close surveillance by a government representative, no matter how professionally or courteously handled, tends to be a very embarrassing and humiliating experience. *Id.* at 1514.

Examining the city's interest in eradicating drug use, the court noted that the city provided no specific proof that any individual fire fighter used drugs. *Id.* at 1516. Furthermore, the city did not show an increase in fire-related accidents or complaints of inadequate fire protection. *Id.*

43. *Id.* at 1517.

44. *Id.* at 1522. Adopting the holding in *Schmerber v. California*, 384 U.S. 757 (1966), the *Capua* court first found that the governmental taking of a urine specimen was a search and seizure under the fourth amendment. 643 F. Supp. at 1513. The *Capua* court then applied a balancing test. *Id.* *See supra* notes 20-32 and accompanying text (discussing the *Schmerber* decision).

45. *See* *Shoemaker v. Handel*, 795 F.2d 1136, 1142-43 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (random urine testing for jockeys in the heavily regulated horse-racing industry held constitutional); *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1524-25 (D. Neb. 1987) (warrantless searches, including urine testing, of employees who had unescorted access to protected areas of state nuclear power plant held constitutional where public employer was subject to a comprehensive regulatory scheme); *McDonnell v. Hunter*, 809 F.2d 1302, 1308-09 (8th Cir. 1987) (random urinalysis of a state prison employee who had regular contact with prisoners housed in medium to maximum security prisons held reasonable).

Prior to *Shoemaker* and *Rushton*, courts permitted warrantless searches of premises that were subject to administrative inspections. *See, e.g.,* *Donovan v. Dewey*, 452 U.S.

Handel,⁴⁶ the Third Circuit applied the administrative search exception to warrantless breath and urine testing of jockeys⁴⁷ participating in the heavily regulated⁴⁸ New Jersey horse-racing industry.⁴⁹ The court examined the justifications for the administrative search exception.⁵⁰ First, the *Shoemaker* court noted the strong state interest in conducting drug testing. Because New Jersey derived substantial revenue from horse racing,⁵¹ the state had a legitimate interest in maintaining public confidence in the industry.⁵² Secondly, pervasive regulation in the industry⁵³ diminished the jockey's expectations of privacy.⁵⁴ Having determined that the drug testing was within the administrative search exception, the *Shoemaker* court noted that the state's adminis-

594, 602-05 (1981) (underground mines); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (firearms dealer); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (liquor industry).

The *Shoemaker* and *Rushton* courts considered whether the administrative search exception reached warrantless testing of persons involved in highly regulated activity. See *infra* notes 48-54 and accompanying text (discussing the exception applied to persons).

46. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

47. The New Jersey Racing Commission adopted regulations governing horse racing. One regulation permitted the State Racing Steward to direct jockeys to undergo breathalyzer tests. 795 F.2d at 1138. Another regulation subjected jockeys to a random urine test. *Id.* The jockeys in *Shoemaker* argued that without individualized suspicion of drug use, random urinalysis and warrantless production of breath sample violated the fourth amendment. *Id.* at 1141.

48. *Id.* The New Jersey Horse Racing Commission has broad rulemaking authority. N.J. STAT. ANN. § 5:5-22 (West 1988). The Commission has the authority to prescribe conditions for the issuance and revocation of licenses. N.J. STAT. ANN. § 5:5-33 (West 1988).

All licensees are aware that the industry is subject to intense state regulation. *Shoemaker*, 795 F.2d at 1141. The regulation in question, N.J. ADMIN. CODE tit. 13, § 70-14A.11 (1985), requires jockeys to submit to random daily blood-alcohol testing and urinalysis. *Id.* at 1139-40.

49. 795 F.2d at 1142.

50. *Id.*

51. N.J. STAT. ANN. §§ 5:5-64, -64.1 (West 1988).

52. 795 F.2d at 1138. The court ruled that New Jersey has a strong interest in assuring the public of the integrity of persons engaged in the horse-racing industry and that drug testing effectively demonstrates that such persons are not influenced by drugs and alcohol. *Id.* at 1142.

53. See *supra* note 48 (discussing the Horse Racing Commission's broad rulemaking authority).

54. 795 F.2d at 1142. By accepting a state license and entering a highly regulated industry, jockeys were aware that the Racing Commission would exercise its authority to administer urine tests. *Id.*

tration of the searches had to be reasonable.⁵⁵ The court found the urine testing of jockeys reasonable because a strict administrative scheme protected jockeys from standardless invasions of privacy.⁵⁶

In *National Treasury Employees Union v. Von Raab*,⁵⁷ the Fifth Circuit held constitutional a drug testing policy imposed by the United States Customs Service as a condition to promotion to sensitive positions within the agency. Although the Customs Service was not highly regulated,⁵⁸ the *Von Raab* court drew an analogy to cases applying the administrative search exception.⁵⁹ The court reasoned that the government had a substantial interest in ensuring the effectiveness of employees who occupied sensitive positions in drug enforcement.⁶⁰ In considering the employees' privacy interests, the *Von Raab* court noted

55. *Id.* at 1143.

56. *Id.* An envelope holds the names of all jockeys participating in a given race. A representative draws the names of three to five jockeys for testing. *Id.* at 1140. If a jockey's name is drawn more than three times over seven days, the steward disregards the choice and draws another name. *Id.* The selected jockeys provide urine samples following their last race. The jockeys also fill out forms certifying the use of prescription or nonprescription drugs. *Id.* Finally, the Racing Commission sends the anonymous urine samples to a lab for testing. *Id.* Test results remain confidential and may only be used in an administrative or judicial hearing. *Id.* See N.J. ADMIN. CODE tit. 13, § 70-14A.11(e) (1985).

57. 816 F.2d 170 (5th Cir. 1987), *aff'd in part*, No. 86-1879 (March 21, 1989) (LEXIS, Genfed Library, U.S. file). Pursuant to a directive by the Commissioner of the United States Customs Service, the Service implemented a urinalysis drug testing program for applicants selected for three kinds of jobs deemed sensitive: those that directly involve the interdiction of illicit drugs, require handling a firearm, or involve access to classified information. *Id.* at 173. At first the Service only tested applicants for initial employment. After two months, however, the Service extended the program to current employees who sought transfers to sensitive positions. *Id.*

58. *Id.* at 179-80.

59. *Id.* The court stated:

The exception occurs when warrantless searches are necessary to accomplishment of the regulatory scheme and when the very existence of the federal regulatory program diminishes the reasonable expectations of privacy of those involved in the industry. While this case does not involve a highly regulated private industry, it calls for the same kind of balance between the need for each search and the invasion of the individual's expectation of privacy.

Id.

60. The United States Customs Service viewed the prohibition of narcotics smuggling as its top priority. 816 F.2d at 173. The court found that the government had a strong interest in employing individuals for key positions in drug enforcement who were not drug users themselves. *Id.* An employee's use of the illegal drugs he was hired to interdict would compromise the employee's ability to prohibit drug smuggling. *Id.* at 178. Furthermore, the employee's drug habit would undermine public confidence in the integrity of the Customs Service. *Id.*

that individuals seeking employment in drug interdiction know that the government may inquire into their personal use of drugs.⁶¹ Hence, Customs Service personnel had a diminished expectation of privacy.⁶² The court found the government's administration of the search reasonable within the meaning of the fourth amendment because the Service tested only those employees who were seeking to transfer to sensitive positions.⁶³ The reasonableness of the testing program was also evidenced by the custom service's use of the most accurate drug tests available.⁶⁴

In *Lovvorn v. City of Chattanooga*,⁶⁵ Chattanooga fire fighters chal-

61. *Id.* at 180.

62. *Id.* The court noted that in order to assure integrity and competence, the government could subject its employees to searches or other restraints on their liberties that would be impermissible without the employment relationship. *Id.* at 178. Since the program drug-tested employees seeking sensitive positions in drug interception, the court believed that "the tolerance usually extended for private activities does not extend to [these employees] if investigation discloses their use of drugs." *Id.* at 180.

63. *Id.* at 177. The Service mandated drug testing only for those individuals who voluntarily sought transfer to a more sensitive position. *Id.* These employees knew of the urinalysis requirement in advance. *Id.* at 178. An employee could forego drug screening, with no penalty except loss of the transfer sought, by withdrawing his application before the urine test. *Id.*

In the drug screening process, the employee entered a restroom stall and produced the urine sample privately. *Id.* at 174. An observer remained in the restroom to collect the sample, but did not visually observe the act of urination. *Id.* The *Von Raab* testing procedures ensured greater privacy than those conducted in *Capua*. *Id.* at 177. *See supra* notes 38-39 and accompanying text (discussing the *Capua* drug screening process).

64. 816 F.2d at 177. Because test results were either positive or negative, there was no room for official discretion in test interpretation. *Id.* The Customs Service used the EMIT test for initial screening and the GCMS test to confirm positive samples. *Id.* at 174. *See supra* note 24 (discussing these tests).

On March 21, 1989 the Supreme Court affirmed the Fifth Circuit's decision that the drug testing was reasonable under the fourth amendment. *National Treasury Employees Union v. Von Raab*, No. 86-1879 (March 21, 1989) (LEXIS, Genfed Library, U.S. file). Agreeing with the Fifth Circuit, the Court believed that the government's interest outweighed the privacy interests of employees seeking promotion to sensitive positions. The Court stated that the government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and possessed of unimpeachable integrity and judgment. The employees, however, have a diminished expectation of privacy by virtue of their special positions. Finally, the Court noted that employee privacy is adequately protected since the program narrowly and specifically defines the circumstances justifying testing, employees know that they must be tested, and employees are aware of the service's testing procedures. Even with the Supreme Court's affirmance of the drug testing program, the Court's 5-4 result suggests that the issue of public employee drug testing remains significant.

65. 647 F. Supp. 875 (E.D. Tenn. 1986), *aff'd*, 846 F.2d 1539 (6th Cir. 1988).

lenged the constitutionality of the city's random drug testing program.⁶⁶ The Chattanooga Fire Commissioner had instituted a mass urinalysis program⁶⁷ without establishing written and standardized testing procedures.⁶⁸ Initially, the court found that urinalysis constituted a search and seizure under the fourth amendment.⁶⁹ Next, the court balanced the city's need for testing against the fire fighters' privacy interests.⁷⁰ The court conceded that the city's need to search for drug use was compelling, since drugs could impair a fire fighter's ability to perform inherently hazardous activity.⁷¹ The court also conceded that fire fighters, as city employees, are not entitled to the same expectation of privacy as the general public.⁷² The court concluded, however, that fire fighters have, to a certain degree, an expectation of privacy in the act of urination.⁷³ Like *Capua*, the court held that the

66. *Id.* at 881.

67. *Id.* at 877. In early 1984, the city discovered "civilian" employees of the police or fire department smoking marijuana. In early 1985, the Chattanooga Fire Commissioner decided to administer mandatory urine tests to all members of the fire department. *Id.* The Commissioner lacked any objective indication that drugs affected any individual fire fighter or the department as a whole. *Id.* at 878. The Commissioner notified all fire fighters that they must report to an independent laboratory for blood and urine testing. The fire fighters gave urine samples while under the direct observation of an assistant fire chief. *Id.* at 877. The Commissioner suspended several fire fighters who tested positive and released their names to the press. *Id.* at 878. As a result of rumors that some fire fighters had switched urine samples, the Commissioner retested the entire fire department in the summer of 1986. *Id.* This proposed 1986 testing formed the basis of the lawsuit. *Id.* at 879.

68. *Id.* at 877. The program lacked written testing methods, standards for analyzing urine specimens, and procedures for implementing discipline and releasing test results. *Id.*

69. *Id.* at 879. As in *Shoemaker*, the court compared the urine test to the blood test at issue in *Schmerber*. *Id.* See *supra* notes 20-32 and accompanying text (discussing application of the *Schmerber* search and seizure analysis to drug testing).

70. See *supra* note 40 and accompanying text.

71. *Lovvorn*, 647 F. Supp. at 879. Expert testimony confirmed that marijuana could detrimentally affect perception, decision-making time, short-term memory, and motor skills. *Id.*

72. *Id.* at 880. See also *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987), *aff'd in part*, No. 86-1879 (March 21, 1989) (LEXIS, Genfed Library, U.S. file) (within limits, government employees face searches or restraints on their liberty that would be impermissible without the public employment relationship); *but cf.* *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (employees do not surrender their fourth amendment rights simply because they work for the government).

73. *Lovvorn*, 647 F. Supp. at 880. According to the court, the degree of intrusion engendered by a urine test varied among individuals. *Id.* Some may not mind urine

city must show a reasonable, individualized suspicion of drug use before the city could conduct a urine test.⁷⁴

The city also argued that the administrative search exception established in *Shoemaker* should apply in this case.⁷⁵ The *Lovvorn* court rejected this request by distinguishing *Shoemaker*.⁷⁶ The *Lovvorn* court reasoned that, unlike the jockeys in *Shoemaker*, the Chattanooga fire fighters were not employed in a highly regulated industry.⁷⁷ Moreover, because Chattanooga's drug testing plan lacked clearly defined standards, it lacked the procedural safeguards present in *Shoemaker*.⁷⁸

In *Policemen's Benevolent Association of New Jersey v. Township of Washington*,⁷⁹ the Third Circuit held that the *Shoemaker* court's administrative search exception applied to the Township's drug testing of its police officers.⁸⁰ Initially, the court noted that the Township's testing procedures were similar to those upheld in *Shoemaker*.⁸¹ The

testing while others may take great offense. Thus, the *Lovvorn* court believed that the Chattanooga testing procedure interfered to some degree with the fire fighters' subjective expectation of privacy. *Id.*

74. *Id.* at 881. See *supra* notes 42-43 and accompanying text (discussing the *Capua* court's holding that reasonable suspicion is required for random drug testing of city fire fighters).

Chattanooga had no less intrusive means of conducting effective testing. Thus, the court found the direct observation of urination constitutional. *Id.* at 880 n.5. As a prerequisite to drug testing, however, the court still required a finding of reasonable suspicion that a fire fighter used illegal drugs. *Id.* at 881-82. *But cf.* *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514-15 (D.N.J. 1986) ("direct" observation of urination is unconstitutional).

75. *Lovvorn*, 647 F. Supp. at 881. In *Shoemaker*, the Third Circuit applied the administrative search exception because the state strictly regulated horse racing. See *supra* notes 48-56 and accompanying text.

76. *Id.* at 881.

77. *Id.* By rejecting the administrative search exception, the court implied that the fire department was not highly regulated. As further implication that the fire department lacked intense regulation, the *Lovvorn* court rejected the City's request to characterize the fire department as a "paramilitary organization." *Id.* at 882.

78. *Id.* at 881. The court stated that administrative search exception cases relied on clearly defined testing standards to protect individual privacy expectations. *Id.* See *supra* note 56 and accompanying text (discussing the procedural safeguards in *Shoemaker*). The *Lovvorn* court reasoned that even if the administrative search exception did otherwise apply, Chattanooga's lack of clearly defined standards in its testing program rendered the exception inapplicable. *Id.*

79. 850 F.2d 133 (3d Cir. 1988).

80. *Id.* at 135-36. See *supra* notes 45-56 and accompanying text (discussing the *Shoemaker* rationale).

81. 850 F.2d at 136. The court noted that the plan's provision for random selection for urinalysis resembled the plan upheld in *Shoemaker*. *Id.* As further similarity, the

court then reviewed the constitutional requirements which must be met to validate a warrantless administrative search,⁸² emphasizing that *Shoemaker* controlled only if the Township's police department constituted a highly regulated industry.⁸³

To determine whether *Shoemaker* controlled, the Third Circuit first addressed the state's interest in testing police officers for illegal drugs. The court believed that the Township had a strong public interest in maintaining a drug free police force.⁸⁴ The court noted that the state's need for public confidence in law enforcement officials was significantly greater than the state's need to preserve confidence in the integrity of the horse-racing industry.⁸⁵ Next, the Third Circuit considered the justifiable privacy expectations of the officers. The detailed regulations governing the police force⁸⁶ convinced the court that police officers faced more stringent regulations than jockeys.⁸⁷ Thus, the pervasive regulation of the industry diminished the police officers' expectations of privacy. Finding *Shoemaker* applicable, the Third Circuit held that the Township's drug testing program for police officers was constitutional under the fourth amendment.⁸⁸

The Third Circuit's decision in *Policemen's Benevolent Association* further complicates the issue of what standards courts should use to determine the constitutionality of governmental drug testing of public employees. The court narrowed the range of constitutional drug tests

universal annual urinalysis for police officers was the equivalent of the daily breathalyzer test for jockeys. *Id.* See *supra* note 12 and accompanying text (discussing the Township's drug testing guidelines); see *supra* note 56 and accompanying text (discussing the *Shoemaker* drug testing guidelines).

82. 850 F.2d at 136. The court stated that the dispositive questions were (1) whether the state had a strong interest in preventing drug use among police officers; and (2) whether the pervasive regulation of the police industry reduced justifiable privacy expectations of the officers. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 141. The court explained that Washington Township police officers are called upon for duty at all times and are endowed with the power to use lawful force to arrest and detain. *Id.* The court concluded that the need for public confidence in and respect for public officials who have the power to use lawful force was significantly greater than the state's need to ensure integrity of the horse-racing industry. *Id.*

86. *Id.* at 137-41. The court listed the regulations governing the police force.

87. *Id.* at 141. The regulations included a myriad of topics: standards of conduct, duty responsibilities, manner of dress, carrying equipment off duty, alcoholic beverages, drugs, and personal appearance. *Id.*

88. *Id.* The Third Circuit noted that while some courts have both followed and distinguished *Shoemaker*, *id.* at 141 n.3, it was "not free . . . to disregard it." *Id.* at 141.

by recognizing that the government's interest in testing must be compelling in order to outweigh the employees' privacy expectations.⁸⁹ However, the court's determination that city police departments are a highly regulated industry signifies an expansion of the administrative search exception established in *Shoemaker*.⁹⁰ It is unclear whether courts will apply the administrative search exception to other police departments whose regulations differ from those in *Policemen's Benevolent Association*.

The Third Circuit also failed to conduct an effective analysis of the privacy expectations of the officers.⁹¹ Instead, the court summarily concluded that police officers were heavily regulated without clearly demonstrating the pervasiveness of the regulation sufficient to warrant application of the administrative search exception.⁹² While police officers may have a diminished expectation of privacy due to the public nature of their work,⁹³ the Third Circuit's decision subjects many innocent police officers to random urine testing when less intrusive means to detect drug use exist. For instance, the Township could directly observe police officers for suspected drug use or monitor public complaints about police performance.

The *Policemen's Benevolent Association* decision exemplifies the continuing constitutional dilemma surrounding mandatory drug testing of public employees. Prior holdings have emphasized the need for individualized, reasonable suspicion and detailed procedural guidelines to

89. In *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part*, No. 86-1879 (March 21, 1989) (LEXIS, Genfed Library, U.S. file), the court found that because employees were involved in drug interdiction, the Customs Service's interest in testing its employees for drugs was compelling. *Id.* at 173. In *Von Raab v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986), the court held that the city's interest in conducting random drug testing of fire fighters did not outweigh the fire fighters' privacy expectations, especially because the city lacked individualized suspicion of drug use. *Id.* at 1516.

90. The *Shoemaker* court applied the exception to horse jockeys heavily regulated by the New Jersey Racing Commission. By drawing an analogy to a regulated industry, the *Von Raab* court applied the exception only to employees seeking transfer to sensitive positions in the Customs Service. See *supra* notes 48-66 and accompanying text.

91. The court devoted a majority of its opinion to listing the regulations governing Township police officers. The court ended its inquiry upon determining that the Township had a significant need to instill public confidence in law enforcement officials and never addressed the privacy expectations of the police officers.

92. Without going into any analysis, the court stated that the regulations speak for themselves and are evidence that the police force is highly regulated. *Id.* at 141.

93. Courts have reached different conclusions as to whether public employment diminishes an individual's privacy interest. See *supra* note 72 and accompanying text.

protect the constitutional rights of public employees who are subjected to mandatory drug testing. The *Policemen's Benevolent Association* approach forces police officers to undergo urine testing even if the government fails to show reasonable, individualized suspicion of drug use. The Supreme Court has begun to articulate a constitutional⁹⁴ standard for examining random urine testing of government employees. However, the *Policemen's Benevolent Association* decision suggests that the war on drug testing will continue.

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94. See *supra* note 64 (discussing the *Von Raab* decision). Since the *Von Raab* decision limits mandatory drug testing to employees in sensitive positions and represents the Supreme Court's first encounter with public employee drug testing, it remains to be seen if the decision provides proper guidance for the constitutionality of mandatory drug testing programs.

