Urban Law Annual; Journal of Urban and Contemporary Law

Volume 33

January 1988

Random Urinalysis and the Fourth Amendment: Can They Coexist?

Russell Buhite

Follow this and additional works at: https://openscholarship.wustl.edu/law_urbanlaw

Part of the Law Commons

Recommended Citation
Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol33/iss1/12

This Recent Development is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Urban Law Annual; Journal of Urban and Contemporary Law by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.
To eradicate the widespread use of drugs in the workplace,1 many government entities2 have followed private employers3 by instituting drug testing programs. Government has a valid interest in ensuring a drug-free work force, particularly when impaired employees endanger public safety.4 Yet the intrusive nature of mandatory urinalysis5 of

1. Bensinger, Drugs in the Workplace: A Commentary, 3 Behavioral Sciences and the Law 441 (Autumn 1985). An estimated twenty-two million Americans use marijuana, four million people abuse cocaine, and ten million abuse prescription drugs. Id. National surveys estimate that drug abusers will have three to four times more accidents on the job compared with drug-free employees. Id. at 442. According to the National Triangle Research Institute survey of 1982 documents, due to alcohol and drug abuse employers lose 100 billion dollars every year in the form of reduced productivity and expenses from treatment, law enforcement, accidents, and health care. Id.


4. Commentators have focused on the employer's interest in guaranteeing job safety and security in the face of an increasing number of on-the-job accidents. See Lacayo, Putting Them All To the Test, Time, Oct. 21, 1985, at 61; see also Press, First the Lie
public employees implicates the Constitution's fourth amendment prohibition against "unreasonable searches and seizures." 6

Recently, several federal courts examined the constitutionality of mandatory mass urinalysis of public sector employees. 7 This Recent Development will survey the courts' attempts to establish standards for permissible drug testing and will examine the application of current fourth amendment analysis.

I. URINALYSIS DEFINED

The EMIT (Enzyme Multiplied Immunoassay Technique) system 8 is the most prevalent test currently used to detect employee drug use. 9


5. See infra, notes 24, 125, 147, 153 and accompanying text.

6. The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched.


8. The EMIT test consists of antibodies that attach themselves to drugs or drug metabolites (products resulting from drug breakdown in the body) in an individual's urine sample. Syva, a Syntex Co., Frequently Asked Questions About Syva and Drug Abuse Testing 3 (March 1983).

9. Note, Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitu-
Technicians typically administer EMIT as a preliminary drug text. Designed merely to indicate the presence of drug metabolites in a person’s body at a detectable level, EMIT is incapable of measuring the drug’s concentration in the body, or indicating when the subject took the drug. Although the EMIT System detects the presence of most drugs as long as three days after ingestion, marijuana can leave traces of tetrahydrocannabinol (THC) in the body for two to three weeks. Other drugs such as amphetamines and secobarbital may pass through the body so quickly as to escape detection altogether. Further, EMIT fails to correlate the presence of drug metabolites to the level of intoxication. Due to shortcomings of the EMIT System, most employers do not rely on this preliminary test to make employment decisions.

19 LOYOLA L.A. LAW REV. 1451, 1455 (June 1986). Non-technical personnel may administer the portable EMIT test and determine results in a matter of minutes. See supra, note 9. The possibility of improper testing may arise when non-technical personnel implement it. Note, supra at 1459-60.

11. After the drug is in the body, the liver converts it into chemical elements called “metabolites.” See supra, note 9, at 2.
12. The “detectable level” varies with factors such as body weight, stress, menstrual cycle, diet, and mood, which all affect the excretion rate. Id. at 3.

13. See supra, note 12. Thus, a person passively or actively exposed to marijuana smoke off the job site may test positive under EMIT long after intoxication. False positives from passive inhalation have been reported. See Zeese, Marijuana Urinalysis Tests, 1 DRUG L. REP. 25 (1983). Experts indicate that marijuana intoxication occurs within twenty to thirty minutes after smoking and lasts about two hours. See supra, note 8.

14. See supra, note 9, at 2.
15. THC, tetrahydrocannabinol, is the psychoactive component of marijuana. See supra, note 8.

16. See supra, note 9, at 2.
17. See supra, note 9, at 4.

18. It is impossible to correlate intoxication to the amount of metabolites excreted because individual physical and psychological factors affect the rate of excretion in urine. See supra, note 12. Thus, a person passively or actively exposed to marijuana smoke off the job site may test positive under EMIT long after intoxication. False positives from passive inhalation have been reported. See supra, note 8.
Typically, employers administer a confirmation urinalysis test before taking further action. The United States Government considers the GC/MS (Gas-Chromotography/Mass Spectrometry) test to be the most reliable method of confirmation and drug identification. If a urine sample indicates the presence of a drug, supervisory technicians separate the particular drug metabolites from the individual’s urine. Since the GC/MS test and other confirmation stage procedures involve analysis of chemical compounds in urine, technicians can accidently uncover physical disorders such as epilepsy and diabetes, thereby heightening the privacy invasion.

II. FOURTH AMENDMENT’S PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The fourth amendment requires searches and seizures to be “reasonable.” Reasonableness in a particular case depends on the context of the search. Generally, a “reasonable” fourth amendment search requires both a warrant and probable cause. A court may, however, consider a search valid in the absence of the elements. The Supreme Court has been unable to precisely define the reasonableness of a search. Instead, courts must use a case by case approach, balancing the degree of intrusion on personal rights against the need for the par-
ticular search. 31

Traditionally, courts determine a search’s intrusiveness by examining the individual’s expectation of privacy. 32 In fourth amendment cases, courts examine whether the person has an objectively reasonable 33 subjective expectation of privacy. 34

Courts exempt agency searches of participants in pervasively regulated industries 35 from the warrant requirement. 36 This “administra-


To determine the reasonableness of a search, courts measure the degree of intrusion against the individual’s expectation of privacy. Courts generally consider inspections of personal items the least intrusive. Searches that breach the integrity of the body create the greatest privacy invasion. Schmerber v. California, 384 U.S. 757, 770 (1966). Schmerber involved a policeman’s detection of alcohol on the defendant’s breath. After arresting the defendant, the officer directed a physician to obtain a sample of the suspect’s blood over the latter’s objections. Id. Since the search in Schmerber involved an intrusion beyond the body’s surface, the Court held that reasonableness depended upon whether the officer clearly believed that he would find the incriminating evidence. Id. at 769-70.


33. Katz v. United States, 389 U.S. 347, 367. For example, it would be unreasonable for an individual to claim privacy for remarks spoken openly in public. Id. The Court in Katz, however, held that an individual has a constitutionally reasonable expectation of privacy in his conversations from a telephone booth. Id. at 359.

The Supreme Court and other federal courts recognize a right to privacy in medical information. See, e.g., Whalen v. Roe, 429 U.S. 589, 600 (1977) (New York statute requiring those taking certain prescription drugs to report to State Health Department held sufficiently circumscribed to protect legitimate privacy interests). When the government advances a need to acquire medical information to develop treatment programs or control public health threats, courts are more willing to uphold reporting requirements. United States v. Westinghouse Electric Corp., 638 F.2d 570, 578 (3d Cir. 1980).


34. Katz, 389 U.S. at 361 (1967) (Harlan, J., concurring) (although individuals expect privacy in their home, statements, actions, or things people expose to the “plain view” of others indicate intent to waive protection).

"administrative search" exception contains two conditions precedent to its application. First, the state must articulate a compelling interest in conducting the unannounced search. Examples of such interests include preservation of public health and safety and protection of industry employees from inherent occupational hazards. Second, the search must involve an industry accustomed to pervasive regulation. Such extensive regulation reduces an individual's legitimate expectation of privacy. In the context of an administrative search of a highly regulated industry, courts imply consent from participation in the enterprise.

Even in the context of an administrative search, the Supreme Court applied a reasonableness standard to protect an individual's privacy when government officials possess unlimited discretion to impose a search. In Marshall v. Barlow's, Inc. the Supreme Court held that the Occupational Safety and Health Act's (OSHA) administrative inspection provisions insufficiently restricted the scope and frequency of

36. See Donovan v. Dewey, 452 U.S. 594, 602-605 (1981). In Donovan, the Court deferred to Congress' express findings that a warrant requirement for searches conducted pursuant to the Mine Safety and Health Act would seriously frustrate enforcement. Id. at 603. The Act required inspections of all mines and specifically defined the frequency and scope of the inspections. Id. at 603-604. The Court held that the Act provided a predictable and carefully tailored regulatory inspection scheme. Id.

37. An "administrative search" is one conducted pursuant to a statutory administrative inspection scheme. Shoemaker, 795 F.2d at 1142.

38. Id. at 1142. In Biswell the Court held that effective deterrence of gun sales to undesirables, a compelling governmental interest, required warrantless searches under the Gun Control Act, 18 U.S.C. § 921 (1968). Biswell, 406 U.S. at 316-317.

39. See, e.g., Biswell, 406 U.S. at 315-317 (warrantless searches of gun dealers required to promote federal efforts to prevent violent crime).


41. Id. at 600. The Donovan Court, however, held that the regularity and pervasiveness of the regulation had more significance than merely its longevity. Id. at 606.

42. Id. at 600.

43. See, e.g., United States v. Biswell, 406 U.S. 311, 316 (1972). In Biswell the Court implied consent to warrantless searches and observed that the federal government annually provides gun dealer licensees a revised compilation of gun control laws. Id.


46. 29 U.S.C. § 657(a) (1970). The statute imposes health and safety standards on all businesses engaged in or affecting interstate employees and authorizes representatives of the Secretary to conduct inspections to enforce the Act. Id. at §§ 652(5), 657(a).
searches in regulated businesses. The Court concluded that OSHA’s failure to provide detailed search standards gave few assurances that the search was fair and neutral. Accordingly, the Supreme Court held that the employee’s privacy interests outweighed the need for surprise inspections and required a warrant for OSHA searches.

Recently, a few courts articulated an additional exception to the warrant requirement in cases involving government employer searches pertaining to an employee’s job performance. In *Allen v. City of Marietta*, a federal district court held that a city could conduct warrantless searches of electrical workers to determine drug use. Purporting to apply a balancing test, the court concluded that a governmental employer, like its private counterpart, has a right to supervise its employees and investigate job-related misconduct. Thus, the court held

---

48. Id. at 323-324 n.21-22.
49. Cf. Donovan, 452 U.S. 594, 603-605 (1981). The Donovan Court held that the Mine Safety and Health Act contained detailed provisions curtailing agency discretion and delineating search procedures. Id. at 603-605. Specifically, the Act notified mine operators of regular inspections, articulated health and safety standards, and prohibited forcible entry. Id.
52. Id. at 491. In *Allen* an undercover agent working for the city observed electrical workers smoking marijuana on the job. Id. at 484. The Electrical Distribution Superintendent then allegedly correlated the names turned in by the informant with those associated with “unexplained” accidents on the job. Based on information from the supervisor and the informant, Marietta’s city manager tested six employees suspected of drug use. Id. After all six tested positive for marijuana, the city terminated the employees. Id. at 484-85.
53. Id. at 491. Although the court addressed the employer’s right to oversee its employees and prevent drug abuse from curtailing the agency’s ability to perform its duties, it failed to adequately balance employee privacy concerns. Id. The court emphasized the search’s intrusiveness, observing that the city conducted the search in the employment rather than the criminal context. Id. Other courts addressing this issue, however, rejected this distinction and held that the fourth amendment protects everyone. Camara v. Municipal Court, 387 U.S. 523, 530 (1967) (fourth amendment safeguards the privacy of all individuals against arbitrary invasions by government officials). See also McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (citing *Camara* and recognizing the potential for future criminal investigations).
54. Allen, 601 F. Supp. at 491. The court concluded that a government employer had the right to search an employee’s desk or jacket to gather evidence of impropriety related to job performance. Id. For a discussion concerning the rights of California private employers to conduct urinalysis, see Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California?* 19 LOYOLA L.A. LAW REV. 1451 (1986).
that a governmental employee cannot legitimately expect exemption from searches relating to job performance.\textsuperscript{55}

Holding the city's urinalysis program constitutional in \textit{Allen}, the court relied on the fact that the city conducted tests for reasons other than criminal investigations.\textsuperscript{56} Significantly, \textit{Allen} and other cases relying on the government employment exception to uphold warrantless searches\textsuperscript{57} involved prior suspicion of individual employee's misconduct.\textsuperscript{58} The \textit{Allen} court recognized that although government employees work in the public sector they retain their fourth amendment rights.\textsuperscript{59} Courts, therefore, must balance expectations and interests in the government employment search context\textsuperscript{60} while recognizing that inquiries into employee misconduct have potential to become criminal investigations.\textsuperscript{61}

\section*{III. THE FOURTH AMENDMENT AND EMPLOYMENT DRUG TESTING}

Several federal courts recently addressed the issue of the fourth amendment's reasonable search and seizure requirement in the context of public employee drug testing.\textsuperscript{62} The courts in \textit{Shoemaker v. Handel},\textsuperscript{63} \textit{Capua v. City of Plainfield},\textsuperscript{64} and \textit{National Treasury Employees Union

\textsuperscript{55} \textit{Allen}, 601 F. Supp. at 491.
\textsuperscript{56} \textit{Id.} For contrary authority, see supra note 53.
\textsuperscript{57} \textit{See Division 241 Amalgamated Transit Union v. Suscy}, 538 F.2d 1264, 1267 (8th Cir. 1976) (blood and urinalysis tests of bus drivers directly involved in serious accidents or suspected of drug abuse held reasonable).
\textsuperscript{58} \textit{See supra notes 52, 57. In both Allen and Suscy, the city minimized the intrusiveness of the searches by requiring an individualized basis for the search and by limiting the scope of the search. See supra notes 52, 57; cf. Capua v. City of Plainfield, 643 F. Supp. 1507, 1516 (D.N.J. 1986) (the city conducted urinalysis without prior individualized suspicion or general complaints of inadequate fire protection due to drug impairment).
\textsuperscript{59} \textit{Allen v. City of Marietta}, 601 F. Supp. 482, 491 (N.D. Ga. 1985). \textit{See also McKinley v. City of Eloy}, 705 F.2d 1110, 1116 (9th Cir. 1983); CHEYNEY STATE COLLEGE FACULTY v. HUFSTEDLER, 703 F.2d 732, 737 (3d Cir. 1983).
\textsuperscript{60} \textit{Allen}, 601 F. Supp. at 491; accord \textit{Capua v. City of Plainfield}, 643 F. Supp. at 1516.
\textsuperscript{61} \textit{See McDonnell v. Hunter}, 612 F. Supp. 1122, 1127 n.2 (D. Iowa 1985) (although primary purpose of search may be for prison security reasons, a criminal investigation will follow the discovery of drugs or weapons).
\textsuperscript{62} This Recent Development addresses only drug testing of public employees. For a discussion of drug urinalysis of private employees, see generally Note, supra note 9.
\textsuperscript{63} 795 F.2d 1136 (3d Cir. 1986).
v. Von Raab, and Lowvorn v. City of Chattanooga, balanced employee privacy concerns against the government's interest in a drug-free workplace. Each found urinalysis to be a fourth amendment search. The Shoemaker and Von Raab courts analogized searches of public employees to administrative searches, holding random urinalysis reasonable in certain highly regulated and sensitive positions.

A. Urinalysis as a Search

In Schmerber v. California the Supreme Court held that the involuntary extraction of blood for a blood-alcohol test constituted a search for fourth amendment purposes. By applying fourth amendment principles to bodily intrusions, the Court implied that an individual has a reasonable expectation of privacy in the "information" contained in the blood.

Like blood, laboratories can analyze urine to discover physiological

65. 816 F.2d 170 (5th Cir. 1987).
67. Shoemaker, 795 F.2d at 1142-1143; Capua, 643 F. Supp. at 1513; Von Raab, 816 F.2d at 180; Lowvorn, 647 F. Supp. at 879-880.
68. Shoemaker, 795 F.2d at 1142; Von Raab, 816 F.2d at 175; Capua, 642 F. Supp. at 1513; Lowvorn, 647 F. Supp. at 879.
69. Shoemaker, 795 F.2d at 1142; Von Raab, 816 F.2d at 179.
71. In Schmerber, the petitioner was hospitalized after an automobile accident. At the accident scene and later at the hospital, a police officer smelled liquor on the man's breath and placed him under arrest. After informing the man of his rights, the officer directed a physician to take the petitioner's blood sample over the latter's objection. Id. at 758-59. In petitioner's trial for driving under the influence, the trial court admitted into evidence the blood test showing intoxication. Id. at 759. Before the Supreme Court, the petitioner argued that the officer subjected him to an unreasonable search and seizure in violation of the fourth amendment. Id.
72. Id. at 767. In holding the fourth amendment applicable to involuntary extractions of blood, the Court relied on the amendment's explicit provision protecting an individual's right to be secure in his or her person. Id.
73. Id. at 769-70. Invoking an individual's interests in privacy and dignity, the Court held that a police officer must have probable cause and a belief in the likely success of a blood-alcohol test before he or she can require a search. Id. at 770. In the blood-alcohol context, the information contained in the blood is potential evidence of the person's guilt or innocence. Id. Absent probable cause to search the individual in this manner, the person's privacy interests would outweigh the need for an immediate search. Id. The Schmerber Court found the particular search in question reasonable because medical personnel in a hospital performed it following the police officer's reasonable suspicion of the petitioner's intoxication. Id. at 771-72.
information, including the recent use of alcohol or drugs.\textsuperscript{74} In \textit{McDonnell v. Hunter}\textsuperscript{75} the federal district court, relying on \textit{Schmerber},\textsuperscript{76} found that the taking of a urine sample by a government official is a search and seizure within the fourth amendment.\textsuperscript{77} Unlike blood, urine is routinely discharged, requiring no bodily intrusion for its seizure.\textsuperscript{78} Yet, the \textit{McDonnell} court found that an individual normally discharges urine under circumstances indicating a reasonable expectation of privacy.\textsuperscript{79} Therefore, the court held that an individual’s interests in safeguarding the personal information contained in a urine sample\textsuperscript{80} are sufficiently important to merit fourth amendment protection from arbitrary interference.\textsuperscript{81}

B. Shoemaker \textit{v. Handel—Administrative Search Exception Applied to Mass Urinalysis}

In \textit{Shoemaker \textit{v. Handel}}\textsuperscript{82} the Third Circuit Court of Appeals up-

\textsuperscript{74} McDonnell \textit{v. Hunter}, 612 F. Supp. 1122, 1127 (D. Iowa 1985); see supra notes 8-21 and accompanying text.

\textsuperscript{75} 612 F. Supp. 1122 (D. Iowa 1985).

\textsuperscript{76} Id. at 1127, citing \textit{Schmerber}, 384 U.S. at 767.


In \textit{Storms}, prison officials conducted random urinalysis of prisoners for marijuana and narcotics. \textit{Id.} at 1216. The \textit{Storms} court found urinalysis analogous to the blood testing in \textit{Schmerber} because both involved the involuntary taking of bodily fluids. \textit{Id.} at 1218. Since urinalysis involves an intrusion into the body, the court found it more intrusive than traditional searches. \textit{Id.} at 1218. Finding urination in the presence of prison officials even more intrusive and degrading than blood tests, the \textit{Storms} court held that urinalysis should receive the same level of scrutiny as blood testing. \textit{Id.} Therefore, the court required a clear indication of drug usage before government officials could perform urinalysis. \textit{Id.} However, the \textit{Storms} court held that the “clear indication” requirement did not apply to prisoners because of the special security needs of penitentiaries. \textit{Id.} The court held that the mere likelihood of finding drugs was sufficient to support a finding of cause given an inmate’s limited constitutional rights. \textit{Id.} Since prison inmates have a lower expectation of privacy than the general population, the \textit{Storms} court explicitly restricted its holding to prisoners. Those not incarcerated, however, can legitimately expect a higher showing of cause before state officials can perform urinalysis. \textit{Id.}

\textsuperscript{78} McDonnell, 612 F. Supp. at 1127.

\textsuperscript{79} Id. The court concluded that only pursuant to a medical examination does one reasonably expect to donate urine for chemical analysis. \textit{Id.}

\textsuperscript{80} See supra note 34, and accompanying text for discussion of an individual’s right to privacy in personal medical information.

\textsuperscript{81} McDonnell, 612 F. Supp. at 1127.

\textsuperscript{82} 795 F.2d 1136 (3d Cir. 1986), cert. denied, — U.S. —, 107 S. Ct. 577 (1986).
held a breath and urine testing program for horse racing jockeys, trainers, and grooms.\textsuperscript{83} The New Jersey Racing Commission\textsuperscript{84} required drug testing of horse racing employees to preserve the appearance of integrity in the sport.\textsuperscript{85} The \textit{Shoemaker} court found that New Jersey had a valid interest in maintaining public confidence in the industry\textsuperscript{86} because the state received substantial revenue from horse racing.\textsuperscript{87}

Challenging the drug testing program in \textit{Shoemaker}, the jockeys argued that absent individualized suspicion of drug use, random urinalysis and warrantless production of breath samples violated the fourth amendment.\textsuperscript{88} The Racing Commission conceded that the mandatory tests involved a search and seizure,\textsuperscript{89} but contended that the searches were reasonable because the employees voluntarily participated in a highly regulated industry.\textsuperscript{90}

Addressing the fourth amendment claim,\textsuperscript{91} the \textit{Shoemaker} court rec-
ognized that the New Jersey horse racing industry is closely regulated. Next, the court addressed the question whether the administrative search exception applied to warrantless drug testing of persons engaged in a pervasively regulated occupation. The court examined the requirements for applying this exception. First, a strong state interest must exist for conducting a search. Second, the subjects of the search must have a reduced expectation of personal privacy from pervasive regulation of the industry. The court found both of these requirements satisfied and accepted the state's interest in maintaining public confidence in horse racing. Noting the existence of Racing Commission regulations permitting searches of stables to find evidence of horse drugging, the court found horse racing employees had a reduced expectation of privacy on the job.

Although the drug testing of jockeys was within the administrative search exception, the Shoemaker court recognized that the search must also withstand a reasonableness test. In assessing the jockeys' claim that the testing was arbitrary, the court held that the administrative

Commission promulgated confidentiality regulations when the action was pending, the Shoemaker court held the privacy cause of action not ripe for review. 795 F.2d at 1144.

92. Id. at 1142. For a discussion of other cases holding an industry "closely regulated" for purposes of the "administrative search exception," see supra notes 35-43 and accompanying text.

93. 795 F.2d at 1142. The court acknowledged that previous "administrative search" exception cases involved searches of premises rather than persons. Id. Generally, courts apply a higher level of scrutiny to searches involving bodily intrusions because of a greater expectation of privacy. See supra note 31. The Shoemaker court concluded, however, that because the chief regulatory concerns involved persons engaged in horse racing, the distinction did not make the testing unreasonable. 795 F.2d at 1142.

94. Id. See supra notes 38-40 and accompanying text for examples of compelling state interests justifying the application of the "administrative search" exception.

95. 795 F.2d at 1142. See supra notes 33, 34, 42, 43 for discussion of an individual's expectation of privacy for fourth admendment purposes.

96. 795 F.2d at 1142.

97. Id. The court found periodic drug testing to be the most effective way to demonstrate the industry's integrity and autonomy to the public. Id. at 1142, 1143.

98. See supra note 85.

99. 795 F.2d at 1142. The court further observed that, unlike other cases involving warrantless searches, the Racing Commission warned the jockeys of drug testing after a specified date. Id.

100. Id. at 1142-43.

101. Id. at 1143.

102. Id. The jockeys argued that the regulation vested standardless discretion in
trative regulations sufficiently limited the Racing Commission's discretion in conducting the searches. In contrast with the OSHA regulations in Marshall v. Barlow's, Inc., the Racing Commission regulations vested no discretion in the state field testing officer to conduct the tests and choose the subjects. In sum, the court found the testing reasonable in Shoemaker because it protected the jockeys from arbitrary, standardless intrusions into their privacy.

Significantly, Shoemaker is the first federal circuit court decision on testing officers and therefore (following Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), discussed supra notes 45-50 and accompanying text) should be invalidated. 795 F.2d at 1143.

103. Id. at 1143.
104. See supra note 46.
105. The names of all jockeys participating in a particular race are placed in an envelope. The state field testing officer then draws the names of three to five jockeys for drug testing. 795 F.2d at 1143. If the officer draws a jockey's name more than three times in one week, he disregards the choice and draws another name. Id. After their last race of the day, the selected jockeys must fill out a form listing all prescription or non-prescription drugs recently taken. Then, the jockeys must provide a urine sample for testing. Id. The Racing Commission may use test results only in an administrative or judicial ruling following a hearing. Id. N.J. ADMIN. CODE tit. 13, § 70-14A.11(e) (1985).
106. Id. at 1143. The Shoemaker court held that the lottery system employed by the Racing Commission effectively eliminated the opportunity for the officers to make arbitrary or biased selections. Approving random selection for testing, the court cited United States v. Martinez-Fuerte, 428 U.S. 543, 564-66 (1976) (holding constitutional a random search at a border check-point selected by law enforcement officials). Id. The Shoemaker court declined to follow the reasoning in Security and Law Enforcement Employees, Dist. Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984) in which the court held unconstitutional random strip and body cavity searches of prison employees for contraband. 795 F.2d at 1143 n.7. But cf. Storms v. Coughlin, 600 F. Supp. 1214, (S.D. N.Y. 1984), in which the court held constitutional random urinalysis of prisoners. The Shoemaker court limited its holding to random searches of voluntary participants in a highly regulated industry. 795 F.2d at 1143, n.7. The implied consent to warrantless searches by participants in a regulated industry is analogous to random searches of prisoners. In both contexts, the subjects have a reduced expectation of privacy. See supra notes 43 and 77. Therefore, the constitutionality of random selection of urinalysis subjects through lottery without prior suspicion of drug use may be limited to situations in which the subject's expectation of privacy is limited. Cf. Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975) in which the court held that the armed forces could subject personnel to warrantless drug testing. Members of the armed forces have a significantly lower expectation of privacy because they are subjected to frequent mandatory inspections. Id. at 477. See also Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 882 (E.D. Tenn. 1986) (distinguishing firefighters' privacy expectations from soldiers').
107. Shoemaker, 795 F.2d at 1143.
the constitutionality of public sector drug testing. Further, *Shoe-maker* is the first application of the administrative search exception in the drug testing context.

C. Capua v. City of Plainfield

In *Capua v. City of Plainfield*, the federal district court for New Jersey struck down a random and unannounced mandatory drug testing program directed at firefighters. Plainfield's city agents administered a urinalysis program without notice and without the guidance of regulation or directive. The city failed to provide either a written basis for the testing, or procedures for collecting, testing, and utilizing the information. The city immediately terminated sixteen firefighters whose tests indicated the presence of a controlled sub-


109. *See supra* notes 93-100 and accompanying text. With the Fifth Circuit's decision in *national Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), an additional circuit has elaborated on the application of the administrative search exception analogy regarding urinalysis of public employees. *See infra* text accompanying notes 139-160.


111. *Id.* at 1522.

112. The city required each fire department employee to urinate under the surveillance and supervision of bonded testing agents. *Id.* at 1511. None of the 103 firefighters tested received prior notice of sub-standard job performance or were under investigation for drug use. *Id.* at 1516. The city failed to provide written procedures for collecting, testing and utilizing the information gathered. The city also failed to inform the terminated employees of the particular substance found in their samples. *Id.* at 1511-12.


114. 643 F. Supp. at 1511. The collective bargaining agreement between the firefighters and the city failed to provide for urinalysis. *Id.* The lack of written regulations mandating drug testing is relevant to the firefighters' legitimate expectation of privacy. In *Shoemaker*, the existence of extensive prior regulation of the horse racing industry lowered the jockeys' expectations of privacy so as to permit warrantless drug testing.

115. The lack of procedural safeguards triggered procedural due process concerns. 643 F. Supp. at 1521. Since the court subsequently held that the city lacked just cause to terminate the firefighters, their discharge violated fourteenth amendment due process rights. *Id.* at 1521-22. The court found that requiring urinalysis under the threat of termination coerced a waiver of the rights against self-incrimination found in the collective bargaining agreement. *Id.* at 1521.
stance and charged them with "commission of a criminal act." The court found that urinalysis constituted a search and seizure under the fourth amendment, and then examined the reasonableness of the testing. The court balanced Plainfield's valid concern with eradicating drug use against the degree of intrusion engendered by the search.

By examining the firefighters' privacy interests, the court initially assessed the degree of intrusion. Recognizing that urination is traditionally a private function, the court noted that most municipalities prohibit the act in public. Like strip search exposure, the court found surveillance of employee urination highly intrusive, regardless of how professionally and courteously conducted. Furthermore, the court held that compulsory urinalysis forces subjects to divulge private medical information unrelated to drug abuse on the job.

The court addressed the application of the "administrative search exception" to Plainfield's urinalysis program. Distinguishing Shoe-
maker v. Handel, the court held that the regulation of firefighting, unlike horse racing, is not so intense as to diminish the firefighters' legitimate expectations of privacy. The court emphasized that neither the initial employment agreement with the city nor any civil service requirement called for drug testing.

The Capua court further distinguished Shoemaker on the ground that the state's interest in horse racing justified mass urinalysis more readily than the city's interests in Capua. The Shoemaker court based its decision on the state's interest in upholding the perception of integrity in the racing industry in the face of public suspicion of criminal influences. The Plainfield firefighters' job performance, on the other hand, did not depend upon the public's perception of their integrity. After ruling that the city's determination of job capability did not require mandatory urinalysis, the court stated that the individualized suspicion standard was the only safe, constitutional manner of protecting governmental interests.

The Capua court found individualized suspicion absent and held Plainfield's drug testing program unconstitutionally overinclusive. The court permanently enjoined the city from further urine testing,
ordered the immediate reinstatement of the suspended firefighters, and approved the plaintiff's 42 U.S.C. § 1983 action against city officials.

D. National Treasury Employees Union v. Von Raab

In National Treasury Employees Union v. Von Raab the Fifth Circuit considered the constitutionality of mandatory urinalysis as a condition of promotion to certain positions with the United States Customs Service. Under the Customs program, employees who tested positive through drug screening could not be considered for promotion and faced possible termination. The Service also refused to promote employees who refused to submit to the test. Addressing whether the fourth amendment applied to urinalysis, the Von Raab court held that urinalysis constitutes a search and seizure. The court found that because urinalysis infringes on an employee's right to privacy, the test is a "search." This expectation of

137. 643 F. Supp. at 1522.
138. Id.
140. 649 F. Supp. at 382. The court did not specify the nature of the "covered positions" within the Customs Service.
141. Pursuant to the drug testing scheme, the Customs Service first required subjects to fill out a pre-test form describing medications taken within the last thirty days and any contact with illegal drugs within that time. Next, the agency required employees to urinate into a sample jar while under the direct observation of a laboratory representative standing behind a partition. Id. The laboratory technician was able to observe subjects from the shoulder up. Id.
142. Id.
143. Id.
144. The key inquiry involves whether urinalysis constitutes a search for fourth amendment purposes. See supra notes 70-81 and accompanying text.
145. 816 F.2d at 175. See also the district court's opinion stating that drug testing is a full-scale search of the person, and thus more intrusive than pat-down searches or searches of the home. 649 F. Supp. at 386. Courts addressing "pat-down" or "frisk" searches in the Customs context applied a lesser standard for justification. In United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981), the court held that Customs workers could conduct frisk searches of individuals crossing the border without any justification. Id. at 1169. The court specifically limited its holding to pat-down searches, refusing to address more intrusive searches, such as those involving breaches of the body's surface. Id. The Sandler court believed that as the intrusiveness of the search increases so does the justification required for the search. Id. at 1166, citing United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978). Courts traditionally require at least reasonable
privacy is unimpaired by the fact that a person chooses to use a public facility, and is evidenced by the prohibition of public urination.\textsuperscript{147} In addition, the court emphasized that urinalysis reveals more personal information than mere illicit drug use.\textsuperscript{148} Giving a jar of bodily wastes to Customs officials, according to the court, constituted a seizure for fourth amendment purposes.\textsuperscript{149}

After determining that the fourth amendment applies to Customs Service testing, the court considered the reasonableness of the search.\textsuperscript{150} The court balanced the need for the search against the infringement of the employee’s privacy.\textsuperscript{151} Ultimately, the court found the government’s interest stronger and vacated the stay granted by the district court in favor of the employees.\textsuperscript{152}

Examining the scope and manner of the search, the court stated that since only employees seeking promotion to sensitive positions are subject to urinalysis and since the test results are not discretionary, the program’s scope is limited enough to be “reasonable” under the fourth amendment.\textsuperscript{153} The court found that the service could justify its program because the agency had a “strong interest” in ensuring the effective operation of employees in potentially sensitive job positions.\textsuperscript{154} The court found that the test is consensual to a small degree since only those employees seeking advancement are subject to the test.\textsuperscript{155}

The Fifth Circuit examined the nature of federal employment, finding that, within limits, government employees may be subject to restraints that would be impermissible absent the employment relationship.\textsuperscript{156} The fact that the search is required for an administrat-
tive purpose is acceptable if the government demonstrates a need for the testing to preserve the service's reputation.157

The court stated that although this is not a highly regulated industry, it would employ the balancing test used in those industries.158 The court further found that urinalysis is an effective means of determining if an employee is a drug addict.159 Thus, the court vacated the district court's stay and allowed the drug screening program to continue.160

E. Lovvorn v. City of Chattanooga

In Lovvorn v. City of Chattanooga,161 the court considered a constitutional challenge to a mandatory urinalysis program of city firefighters.162 Fire department officials in Lovvorn lacked individualized suspicion of drug use among firefighters.163 The fire commissioner, upon hearing rumors that firefighters taking an earlier drug test164 switched urine samples, retested the entire department.165

As in Capua, the Chattanooga fire commissioner instituted the mass urinalysis without published or uniform standards and testing procedures.166 Although the commissioner performed a GC/MS confirmation test,

157. Id.
158. Id. at 179-80.
159. Id. at 180-81. In addition, the court found that there are no less intrusive measures available to reach the same end. Id. at 180.
160. Id. at 182. The court also briefly addressed due process and quality assurance issues. Id. at 181-82.
162. Id. at 879. In 1984 the Chattanooga fire and police commissioner administered the urine tests after supervisors found "civilian" employees smoking marijuana. In early 1985 the fire chief sent notice to all firefighters directing them to report to an independent laboratory for blood and urine testing. The urinalysis consisted of urination under direct observation of an assistant fire chief followed by EMIT testing. Id. at 877. Without conducting a confirmation test other than a follow-up EMIT test, the department suspended several firefighters and released their names to the press. Id. at 878. The fire department failed to provide written guidelines regarding testing procedure, standards for disciplinary action, and confidentiality of test results. Id. at 878-79. After the department completed its initial testing and fired ten employees, it performed confirmation tests on the samples. Id. See supra notes 20-24 for discussion of the GC/MS confirmation test.
163. Lovvorn, 647 F. Supp. at 878.
164. See supra note 166.
165. 647 F. Supp. at 878. This proposed retesting of the entire department is the subject of the lawsuit.
166. The department decided that a "positive" test result for the 1985 testing was 100 nanograms of cannabinoids per milliliter with "trace" (50 to 100 ng/ml) and "mi-
tion test during the 1985 testing, it was unclear whether the proposed new tests would include this vital secondary procedure.

After the parties stipulated that the urinalysis constituted a search and seizure, the court examined the reasonableness of the test. Following the approach taken in *Capua* and *Von Raab*, the court balanced the need for the search against the intrusion of privacy. The court recognized the city's compelling interest in a drug-free work force, arising from fire fighting's hazardous nature and the need for quick thinking. Next, the court addressed the degree of the test's intrusiveness. Finding that forced urination under the direct observation of city agents would offend some firefighters, the court held that urinalysis interferes with the firefighters' subjective expectation of privacy. The court, however, held that observation of the donation does not by itself make the urinalysis unconstitutional.

The court next considered whether the firefighters' expectation of...
privacy was reasonable under the circumstances.\textsuperscript{178} Although the court acknowledged that firefighters, as city employees engaged in a hazardous activity, have a somewhat diminished privacy expectation,\textsuperscript{179} it nevertheless required individualized suspicion prior to mandatory urinalysis.\textsuperscript{180} In defense, the city urged the court to follow \textit{Shoemaker} and create an exception to the reasonable suspicion standard announced in \textit{Capua, Von Raab}, and \textit{McDonnell}.\textsuperscript{181} The court rejected the administrative search analogy and held that Chattanooga's plan lacked the substantive and procedural safeguards present in \textit{Shoemaker}.\textsuperscript{182} The court also found that firefighting was not a pervasively regulated industry. Thus, the city's plan was a victim of the standardless discretion denounced in \textit{Marshall v. Barlow's, Inc.}\textsuperscript{183}

Next, the city analogized the case to those cases upholding drug testing in the armed forces.\textsuperscript{184} The court held the "military exception" to the reasonable suspicion standard inapplicable,\textsuperscript{185} reasoning that the military instituted drug testing following an increased incidence of drug abuse which created a significant threat to national security.\textsuperscript{186} In addition, the court observed that, unlike firefighters, the military immediately subjects soldiers to strict military inspection.\textsuperscript{187}

The \textit{Lovvorn} court delineated requirements for a valid drug testing program.\textsuperscript{188} The city must obtain a reasonable individualized suspicion of drug use from observation of inadequate job performance or physical or mental deficiencies.\textsuperscript{189} The court suggested that the fire department could implement personnel procedures to uncover drug

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{178}] Lovvorn, 647 F. Supp. at 880.
\item[\textsuperscript{179}] \textit{Id.}, citing Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985).
\item[\textsuperscript{180}] Lovvorn, 647 F. Supp. at 880.
\item[\textsuperscript{181}] \textit{Id.} at 881.
\item[\textsuperscript{182}] \textit{Id.}
\item[\textsuperscript{183}] \textit{Id.} See \textit{supra} notes 44-50 and accompanying text.
\item[\textsuperscript{184}] 647 F. Supp. at 882. See, e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975).
\item[\textsuperscript{185}] Lovvorn, 647 F. Supp. at 882.
\item[\textsuperscript{186}] Callaway, 518 F.2d at 476.
\item[\textsuperscript{187}] \textit{Id.} at 477. In this respect, military service is analogous to participation in a highly regulated industry. See \textit{supra} note 106.
\item[\textsuperscript{188}] Lovvorn, 647 F. Supp. at 883.
\item[\textsuperscript{189}] \textit{Id. Cf. Capua v. City of Plainfield, 643 F. Supp. 1507, 1518 (D.N.J. 1986) (requiring manifestation of outward symptoms of drug use).}
\end{itemize}
\end{footnotesize}
abuse symptoms such as absenteeism, irregular conduct, and financial problems. Finally, the court held that the testing must be narrowly tailored and as unintrusive as feasible.

Finding reasonable suspicion of drug use entirely absent in Lovvorn, the court enjoined Chattanooga from implementing drug testing of firefighters except in accordance with the court's opinion.

IV. CONCLUSION

The Capua, Shoemaker, Von Raab, and Lovvorn cases, together provide guidance regarding constitutionally permissible drug testing programs. First, if the industry is highly regulated, the administrative search exception may permit mass drug testing without individualized suspicion if instituted pursuant to a detailed, published regulatory scheme. An analogy to warrantless armed services drug testing may fail because extensive government supervision significantly reduces the privacy expectations of military personnel. Even with a highly regulated industry, the state has a strong interest to support mandatory drug testing.

In cases not involving a pervasively regulated industry, case law instructs that reasonable, individualized suspicion of drug use is a minimum requirement. Even with particularized suspicion, drug testing schemes must provide reasonable procedures for collection, testing, utilization of results, and confidentiality of personal medical

---

190. 647 F. Supp. at 883.
191. Id. The court held testing of the entire fire department after learning of the substituted urine samples of only fifteen firefighters impermissible. Id.
192. Id.
193. See supra notes 35-50 and accompanying text.
195. See supra notes 106, 192 and accompanying text.
196. See supra notes 38-40 and accompanying text.
199. Courts will probably require some confirmation testing methods, such as GC/MS, to uphold a drug testing plan. See Lovvorn v. City of Chattanooga, 647 F. Supp. 875, 878-79 (E.D. Tenn. 1986).
information received.\textsuperscript{201}

As a result of the growing number of cases striking down drug testing of public employees,\textsuperscript{202} government employers should pursue the issue at the bargaining table rather than in court.\textsuperscript{203} Although surprise testing has advantages,\textsuperscript{204} the recent cases require particularized standards embodied in administrative regulations or a collective bargaining agreement.\textsuperscript{205}

The requirements enunciated in the federal cases from \textit{Shoemaker} to \textit{Lovvorn} will prove burdensome to the federal government in light of its current plan for widespread drug testing of federal employees. By executive order,\textsuperscript{206} President Reagan called for mandatory testing of employees in "sensitive positions."\textsuperscript{207} The order apparently allows agency executives to implement drug testing without individualized suspicion of drug use.\textsuperscript{208} Further, the order allows the administrators considerable discretion in determining the criteria and scope of such testing.\textsuperscript{209} To its credit, the executive order contains guidelines for proper notice of testing,\textsuperscript{210} custodial safeguards,\textsuperscript{211} and mandatory confirmation tests.\textsuperscript{212} In addition, the order requires that urine donation procedures

\textsuperscript{200} The testing agency must proceed pursuant to detailed, written procedures regarding test results leading to termination. \textit{See} \textit{Lovvorn}, 647 F. Supp. at 883. The absence of written guidelines may lead to invalidation on procedural due process grounds. \textit{Id.}

\textsuperscript{201} \textit{See} \textit{Capua}, 643 F. Supp. at 1515. The confidentiality guidelines contained in the New Jersey Racing Commission regulations may provide adequate protection for these concerns. \textit{See supra} note 105; and \textit{Shoemaker}, 795 F.2d at 1138 n.2.

\textsuperscript{202} \textit{Capua}, \textit{Von Raab}, and \textit{Lovvorn}, holding mandatory mass urinalysis unconstitutional, were decided in the last four months of 1986.

\textsuperscript{203} Drug testing contained in a collective bargaining agreement would provide the necessary guidelines for proper testing procedures, would apprise employees of grounds for termination, and would provide an avenue for dispute resolution.

\textsuperscript{204} \textit{See}, e.g., \textit{Capua} v. City of Plainfield, 643 F. Supp. at 1507, 1511 (D.N.J. 1986).

\textsuperscript{205} \textit{Id.}


\textsuperscript{207} Exec. Order No. 12564. The order leaves "sensitive positions" undefined.

\textsuperscript{208} \textit{Id.} at § 3.

\textsuperscript{209} \textit{Id.} The order also appears to allow agency heads to conduct both voluntary drug testing and urinalysis based on reasonable suspicion of drug use. \textit{Id.} The agency head must base his decision on considerations of the agency's duties, public health and safety concerns, and national security. \textit{Id.}

\textsuperscript{210} \textit{Id.} at § 4. The order provides sixty days notice prior to implementation of a plan. § 4(a).

\textsuperscript{211} \textit{Id.} at 2178, § 4(e).

\textsuperscript{212} \textit{Id.} at § 5(e).
respect individual privacy.\textsuperscript{213}

To the extent that the president's plan allows urinalysis without reasonable suspicion of drug use, its constitutionality is suspect.\textsuperscript{214} The order may also grant excessive discretion to agency officials regarding the scope and frequency of the tests.\textsuperscript{215} Such a finding would defeat the use of the administrative search exception to the probable cause requirement.\textsuperscript{216} Regardless of the outcome, the executive order is likely to be the subject of considerable future litigation.\textsuperscript{217}

The reasonable suspicion requirement will result in greater administrative costs in monitoring employee behavior,\textsuperscript{218} and decreased success in the "war on drugs."\textsuperscript{219} Yet, as the \textit{Capua} court admonished,\textsuperscript{220} society should not disregard the constitutional rights of the innocent to discover the guilty.\textsuperscript{221}

\begin{flushright}
Russell Buhite*
\end{flushright}

\begin{itemize}
\item \textsuperscript{213} \textit{Id.} at § 4(c).
\item \textsuperscript{214} \textit{See supra} note 201 and accompanying text.
\item \textsuperscript{215} \textit{See supra} notes 46-52 and accompanying text.
\item \textsuperscript{216} Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986).
\item \textsuperscript{217} The testing of customs employees in National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), may be an example of government testing of "sensitive position" employment. \textit{See supra} note 144.
\item \textsuperscript{218} \textit{See supra} notes 194-97 and accompanying text for personnel procedures aimed at detecting drug abuse on the job.
\item \textsuperscript{219} In Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986), the court observed that even mass urine testing does not guarantee that drug users will not escape detection and pose safety problems. \textit{Id.} at 883.
\item \textsuperscript{220} \textit{Capua} v. City of Plainfield, 643 F. Supp. 1507, 1522 (D.N.J. 1986).
\item \textsuperscript{221} Although the \textit{Capua} court concluded that education and treatment were important weapons in the war on drugs, it stated that even reduced drug use fails to justify infringements on constitutional rights. \textit{Id.} at 1522.
\end{itemize}

* J.D. 1987, Washington University.