Coates' Canons Blog: North Carolina Court of Appeals Strikes Down School Board's Random Drug-Testing Program

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The Fourth Amendment to the United States Constitution provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated." In the context of public employment, this constitutional protection against unreasonable searches comes regularly in the context of drug testing. It has become common practice for private and governmental employers to test applicants and current employees for drug use, usually by collecting and analyzing urine samples.

When the government is the employer, the practice constitutes a search because it "intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989). To comply with the Fourth Amendment, the collection of urine for drug testing (the "search") must not be unreasonable. As the Supreme Court has said, "[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. What is reasonable, of course, depends on all the circumstances surrounding the search or seizure itself." *Skinner*, 489 U.S. at 619.

Determining what is "reasonable" is, in essence, striking a balance between the interests of the government in making its search and the interests of the citizen in protecting his or her privacy.

The courts have uniformly held that a reasonable suspicion that a particular employee is using drugs sufficiently strikes the balance in favor of the employer to justify requiring the employee to undergo a drug test. Sometimes, moreover, drug testing constitutes a "reasonable search" even if the employees to be tested have given no reason to suspect that they individually have been using drugs. In the *Skinner* case quoted from above, the United States Supreme Court upheld—in the limited context of railroad employment—the testing of railroad workers after accidents, deciding that the interests of the public in safe railroad operation outweighed the interests of the workers in their privacy. The Court emphasized the great risk that impaired rail operators posed to the public, the deterrent effect that testing might have, and the fact that drugs had been known to be factors in previous accidents. In another Supreme Court case, the random testing of customs agents who worked in drug interdiction was upheld. The Court this time emphasized the need to keep drug enforcement officers drug free and stressed the fact that these officers carry firearms and therefore would pose a great threat if impaired. The North Carolina Court of Appeals upheld an airport authority's random drug testing program, in the first random testing case to come to our state's appellate courts. *Boesche v. Raleigh?Durham Airport Auth*., 111 N.C. App. 149, 432 S.E.2d 137, *disc. review allowed*, 334 N.C. 687, 436 S.E.2d 370 (1993), *review denied as improvidently granted*, 336 N.C. 304, 442 S.E.2d 320 (1994). In that case, the employee involved had clearance to operate a motor vehicle on the fringe areas of the runway, and the court found that the safety risk that he would pose by driving impaired in that area outweighed his interest in privacy.

The lesson of these cases is that in certain circumstances—especially where the safety of others is involved—the balance may be struck in favor of the employer's interest in drug testing over the employee's interest in privacy, even in the absence of any suspicion that the particular employee is using drugs.

What about public school employees—teachers, teacher assistants, administrators, coaches, bookkeepers, custodians, maintenance workers? May a school system adopt a policy calling for random drug testing of all school employees, on the theory that all school employees have a direct link to the safety of public school children?

That is exactly what the Graham County Board of Education did in 2006. It subjected all school employees to random drug testing by declaring that all positions—full-time and part-time, permanent and temporary—were "safety sensitive positions."

An individual teacher and the North Carolina Association of Educators sued.

In the summer of 2009, the North Carolina Court of Appeals struck down the board's random drug testing program, as a violation of the Fourth Amendment and, as a consequence, a violation of the corresponding "unreasonable searches" provision of the North Carolina Constitution, **Article I, Section 20**. ***Jones v. Graham County Board of Education***. Here is what the court said in its conclusion:

"Lest the American people, and the people of North Carolina in particular, forget the foundational importance of the Fourth Amendment right to be secure against unreasonable searches and seizures, we should recall that the cherished liberties enjoyed in our brief historical moment have been inherited by this generation only because they have been nurtured and protected by earlier generations of Americans so driven in their pursuit of liberty that life itself was not too great a cost to purchase liberty for themselves and their posterity. [citation omitted] We are cognizant of the fact that the policy was enacted by the duly elected representatives of the people of Graham County. Moreover, the evidence in the record establishes that the policy had ample support by Board employees. Nevertheless, in our view, the policy violates Plaintiffs' rights under **Article I, Section 20** to be free from unreasonable searches. Constitutional rights are not lightly cast aside."

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