

Summer 1987

## Employee Drug Testing: Guilty until Proven Innocent

Christina Louise Mell

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### Recommended Citation

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## COMMENTS

# EMPLOYEE DRUG TESTING: GUILTY UNTIL PROVEN INNOCENT?

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### I. INTRODUCTION

On September 15, 1986, President Reagan announced a program calling for mandatory drug testing for federal employees whose positions demand a high degree of public trust and confidence.<sup>1</sup> Employees affected by this program include those involved in law enforcement, public health and safety, and air traffic control.<sup>2</sup> Because of this program, up to 1.2 million federal employees will be required to submit to drug tests.<sup>3</sup> Most people are not aware of what drug testing actually involves. The effect of this program is that "men and women alike will have to expose [them-

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1. Reidinger, *Reagan's Drug Testing Policy*, 72 A.B.A. J. 53 (Nov. 1986).

2. *Id.* at 53.

3. *Id.*

selves] before a government . . . witness'' and produce a urine sample for analysis.<sup>4</sup> Assistant United States Attorney General Richard Willard stated that the purpose of these tests was to instill fear into the American people and thereby help to eliminate drug abuse.<sup>5</sup> Advocates of drug testing have one point in their favor: it works.<sup>6</sup> However, the more difficult question is whether mandatory drug testing can survive constitutional scrutiny.<sup>7</sup>

This Comment will examine what recourse, if any, is available to government employees required to submit to drug testing.<sup>8</sup> It will examine the drug testing issue in light of the right to due process under the fifth and fourteenth amendments, the fifth amendment protection against self-incrimination, and the fourth amendment protection against unreasonable search and seizure. The Comment will also examine the present state of Missouri law and the implications for the drug testing issues that will, undoubtedly, arise here. Finally, it will attempt to draw some conclusions concerning the state of the law on mandatory employee drug testing at present and its implications for the future.

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4. This is required in order to establish a "chain of custody" to make the test legally valid. See Dujack, *An Unhealthy Speciman, Drug Tests are Unconstitutional and Sometimes Wrong*, Washington Post, Aug. 17, 1986, at C5, col. 4.

5. Reidinger, *supra* note 1, at 53.

6. Dujack, *supra* note 4, at C5, col. 4. According to a Washington Post article:

Georgia Power Co. saw work-related injury rates drop by more than 90 percent after instituting drug-testing.

The Southern Pacific Railway reduced on-the-job accidents by more than 70 percent.

In the Navy, illegal drug use itself dropped from 48 percent of enlistees to 4 percent.

*Id.*

7. One district court has stated:

No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it — searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists). That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.

*Bostic v. McClendon*, 650 F. Supp. 245, 250 n.2 (N.D. Ga. 1986) (quoting *McDonell v. Hunter*, 612 F. Supp. 1122, 1130 (D.C. Iowa 1985)). In *Bostic*, the court examined the constitutionality of testing police officers suspected of marijuana use.

8. When dealing with mandatory drug testing of government employees, finding state action will generally not be an issue. Because a discussion of what constitutes state action is beyond the scope of this Comment, the Comment will be confined to situations concerning government employers and employees.

## II. CONSTITUTIONAL LIMITATIONS ON EMPLOYEE DRUG TESTING

A. *Drug Testing as a Violation of the Due Process Clause of the Fifth and Fourteenth Amendments*

One source of constitutional limitation on the mandatory drug testing of federal employees is the due process clause of the fifth and fourteenth amendments to the Constitution.<sup>9</sup>

In *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*,<sup>10</sup> a case involving mandatory blood or urine testing, a bus drivers' union challenged on due process grounds<sup>11</sup> the constitutionality of rules "requiring bus drivers to submit to blood or urine tests following their involvement in a serious accident or when they were suspected of being intoxicated or under the influence of narcotics."<sup>12</sup> In setting forth the standard of review, the court stated that:

The test of constitutionality for invasions of a public employee's protected rights are derived from the nature of the rights involved. Where the employee argues he is being deprived of a right specifically protected by the Constitution, the standard generally applicable to deprivations of that right prevail. . . . [W]here the employee asserts that his right is protected by the general ambit of the fourteenth amendment, the state need show only that the rule is reasonable.<sup>13</sup>

The court further stated that any due process claims failed, finding that "a governmental agency can place reasonable conditions on public employment."<sup>14</sup>

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9. The fifth amendment provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. The fourteenth amendment provides that: "[No] state [shall] deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

10. 538 F.2d 1264 (7th Cir. 1976).

11. *Id.* at 1266. Petitioners also objected to the chemical testing on the grounds that it violated their fourth amendment rights. *Id.*

12. *Suscy*, 538 F.2d at 1264.

13. *Id.* at 1266; see also *Kelly v. Johnson*, 425 U.S. 238, 245 (1976) (regulations regarding length of police officers' hair were valid absent a showing by petitioners that there was "no rational connection between the regulation . . . and the promotion of safety of persons and property." *Kelly*, 425 U.S. at 247 (footnotes omitted).

14. *Suscy*, 538 F.2d at 1267. The court considered the alleged violation of the fourteenth amendment with the alleged violation of the fourth amendment, and in their final analysis decided that "the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." *Id.*

The Supreme Court in *Kelly v. Johnson*<sup>15</sup> addressed a state's attempt to regulate a "substantive liberty interest protected by the fourteenth amendment."<sup>16</sup> In so doing, the Court balanced the state's interest in regulation against the plaintiff's interest in liberty. The Court characterized the constitutional issue as "whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary' and therefore a deprivation of respondent's 'liberty' interest in freedom to choose his own hairstyle."<sup>17</sup> The result of this test was to defeat the respondent's liberty interest.<sup>18</sup>

Ten years later, the U. S. District Court for the District of Columbia in *Jones v. McKenzie*,<sup>19</sup> reviewed the case of Juanita Jones, a school bus attendant discharged for alleged marijuana use discovered in a drug test conducted by her employer.<sup>20</sup> Plaintiff challenged her dismissal on the grounds that her discharge was arbitrary and capricious, thus violating her rights under the due process clause of the fifth amendment.<sup>21</sup>

The rules which governed the plaintiff's employment provided for termination only for cause which "shall not be arbitrary or capricious."<sup>22</sup> The court held that this conferred "a property interest which [could] not be taken by a government employer without due process."<sup>23</sup> The court also found that the plaintiff had a liberty interest because "the discharge of plaintiff on unsupported charges of drug abuse could severely affect her interest in her good name, reputation, honor or integrity."<sup>24</sup> Because of such a deprivation of her liberty and property interests, fifth amendment due process requirements were triggered.<sup>25</sup>

Once it established that a liberty or property interest existed, the court next examined how much process was given to the plaintiff.<sup>26</sup> The plaintiff

15. 425 U.S. 238 (1976).

16. *Id.* at 245.

17. *Id.* at 248. The Court characterized the policy of the police regulation as either "a desire to make police officers readily recognizable to . . . the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself." *Id.*

18. *Id.*

19. 628 F. Supp. 1500 (D.D.C. 1986).

20. *Id.* at 1503.

21. *Id.* at 1501. Plaintiff also alleged that her discharge was in violation of the fourth amendment protection against unreasonable search and seizure and her right to privacy. *See infra* notes 116-22 and accompanying text.

22. *McKenzie*, 628 F. Supp. at 1504. The court opinion sets out the pertinent parts of the Board of Education rules for termination of employees. *Id.*

23. *Id.*; *see also* *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985).

24. *Jones v. McKenzie*, 628 F. Supp. 1500, 1505 (D.D.C. 1986).

25. *Id.*

26. *Id.* at 1505-06.

established that "the EMIT test<sup>27</sup> was the sole basis for the defendants' decision to terminate her employment."<sup>28</sup> The court found the need for confirmation of the test to be apparent from "numerous decisions by state and federal courts around the country,"<sup>29</sup> and further found that such confirmation was not effected by a manual rerun of an automated EMIT test.<sup>30</sup> Because of the lack of confirmation, the court held that the plaintiff's discharge was arbitrary and capricious, and thus violated her due process rights.<sup>31</sup> The court's final order stated that "before defendant can terminate plaintiff again on grounds of drug abuse, they must confirm a positive EMIT test result by an alternative process."<sup>32</sup>

Clearly, after *McKenzie* there is a right to some sort of due process when a government employer seeks to terminate an employee. Questions which remain unanswered in this area include: first, how much due process is required; and second, if this rule applies to pre-employment screening as well.

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27. The Enzyme Multiple Immune Assay Technique (EMIT) is an inexpensive urine screen, not unlike a home pregnancy test. It is normally used for the initial stage of drug testing. Antibodies specifically designed to detect the presence of certain drugs are added to vials of urine, which change color when those drugs are present. The tests cost \$15-\$25 each, and the necessary equipment costs about \$5,000. Rust, *The Legal Dilemma*, 72 A.B.A. J. 51 (1986).

28. *McKenzie*, 628 F. Supp. at 1505. The manufacturer's label on the EMIT test contained a clear warning that "positive results should be confirmed by an alternate method." *Id.* Other experts which state the need for subsequent confirmatory tests when using EMIT to discover marijuana use include a scientific advisory written by the U.S. Center for Disease Control (published by the Public Health Service of the Department of Health and Human Services) and toxicologists in a letter published in the Journal of the American Medical Association. *Id.* at 1506.

29. *Id.* at 1506; see, e.g., *Anable v. Ford*, 663 F. Supp. 149 (W.D. Ark. 1985); *Higgs v. Wilson*, 616 F. Supp. 226 (W.D. Ky. 1985).

30. *McKenzie*, 628 F. Supp. at 1506. *But cf.* *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1507, 1514 & n.16 (S.D.N.Y. 1985) (denied preliminary injunctive relief for disciplinary proceedings against prison inmates on the basis of unconfirmed EMIT test).

31. *McKenzie*, 628 F. Supp. at 1506.

32. *Id.* Adequate alternative methods available at this time include thin layer chromatography and gas chromatography. J. ANNINOL & R. GRESE, *CLINICAL CHEMISTRY PRINCIPLES & PROCEDURE* (4th ed. 1976). A new method being developed is brainwave-form reading:

[An] example of promising developments is . . . [a] new technique that seems to be cheaper, faster and much less invasive than existing blood and urine tests and more reliable. The Veritas 100 Analyzer is a micro-computer-based software program that uses a plastic headband to obtain a brainwave-form reading. This produces a distinctive "signature" if alcohol, marijuana or cocaine is active in the individual's system at the time of the test.

Westin, *Drug Testing vs. Employee Privacy: Long Struggle for Fairness Lies Ahead*, L.A. Times, Feb. 10, 1986, § 2, at 5, col. 1.

The inadequacy of the EMIT test was not the only ground the court used to invalidate the plaintiff's discharge. The Supreme Court in *Cleveland Board of Education v. Loudermill*,<sup>33</sup> held that a deprivation of property by terminating employment must be "preceded by notice and opportunity for hearing appropriate to the nature of the case."<sup>34</sup> The *McKenzie* court found the discharge violated the *Loudermill* standard as well and held that it "afford[ed] a second ground for a decision in her favor."<sup>35</sup> However, the court in *McKenzie* did not describe what form of pre-termination hearing would be sufficient.<sup>36</sup> It did suggest that "at a minimum . . . before plaintiff can be discharged on account of a urine test positive for drugs, some adversary process is in order to determine that (1) she is, in fact, the subject of the particular positive test, and (2) that the positive test has been appropriately confirmed."<sup>37</sup>

The United States District Court for the Eastern District of Tennessee in *Lovvorn v. City of Chattanooga*,<sup>38</sup> also held that due process required that the city's fire fighters be provided with a hearing prior to termination.<sup>39</sup> However, the court found that the pre-termination and post-termination hearings provided by the city satisfied due process.<sup>40</sup>

Thus, it appears that the courts have yet to set forth a clear standard of how much due process is required. It is clear that the requirement is greater than the standard afforded in *McKenzie*; and that that given in *Lovvorn* was sufficient. In other words, a pre-termination hearing is minimal

33. 105 S. Ct. 1487 (1985).

34. *Id.* at 1493 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

35. *McKenzie*, 628 F. Supp. at 1507. In *McKenzie*, "the plaintiff had no hearing before she was terminated and her post-discharge hearing was limited to a written submission." *Id.* The court held the absence of a hearing before her discharge was sufficient to establish her procedural due process claim. *Id.*

36. *Id.* The court stated it was "neither necessary nor appropriate" for them to describe a sufficient pre-termination hearing. *Id.*

37. *Id.* The court further held that the requirement of a pre-termination hearing "need not preclude temporary reassignment, or even suspension, pending confirmation of a positive EMIT test and a hearing [because of the] public's vital interest in the safety of school children. . . ." *Id.* However, the court allowed this only "provid[ing] that the hearing is held and the issue resolved promptly, and, if plaintiff survives the confirmation test and the hearing, she is fairly compensated for any loss incurred on account of the reassignment or suspension." *Id.*

38. 647 F. Supp. 875 (E.D. Tenn. 1986).

39. *Id.* at 883. The court stated that: "Due process entitle[d] each fire fighter to oral or written notice of the charges against them, an explanation of the evidence, and an opportunity to present his or her side of the story." *Id.* (quoting *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493 (1985)).

40. *Lovvorn*, 647 F. Supp. at 883. The fire fighters were given a pre-termination hearing by the chief of the Chattanooga fire department. They were also given post-termination hearings before the City Commission, and state law gave them an opportunity to appeal the commission's decision in the state courts. *Id.*

and the extent to which the employer provides for further protection of his employees will weigh heavily in a court's determination of the program's validity under due process.

The issue of whether this standard applies to potential employees as well as regular employees has not been decided by the courts. However, while the potential employee might not have a property interest as recognized in *McKenzie* and *Lovvorn*,<sup>41</sup> the employee would still have a liberty interest in his "good name, reputation, honor or integrity," giving him a cause of action under the due process clause.<sup>42</sup>

The decisions thus far in the area of due process can be summarized as follows: substantive due process offers protection of the employee's liberty interest in his reputation,<sup>43</sup> while procedural due process offers protection for the employee's property interest in his employment.<sup>44</sup> The courts will balance the important interests of the state<sup>45</sup> against the legitimate liberty or property interest of the employee.<sup>46</sup> It is important to note, however, that relief on due process grounds does not prevent the employer from administering the test. Instead, it gives the employee the right to more process or more tests. For that reason, this constitutional protection is more appropriate in circumstances where the employee claims he was wrongfully discharged because of inadequate testing procedures than cases where the employee finds the test offensive and seeks to avoid it entirely. In the latter situation, a challenge on the basis of the fifth amendment could be more appropriate.

#### B. *Drug Testing as a Violation of the Fifth Amendment Privilege Against Self-Incrimination*

A second constitutional challenge to the mandatory drug testing of federal employees is found in the law protecting criminal defendants against self-incrimination. The fifth amendment to the United States Constitution

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41. *Jones v. McKenzie*, 628 F. Supp. 1500, 1504 (D.D.C. 1986); *Lovvorn*, 647 F. Supp. at 883.

42. *Lovvorn*, 647 F. Supp. at 883; *McKenzie*, 628 F. Supp. at 1505.

43. *Kelly v. Johnson*, 425 U.S. 238, 248 (1976); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Lovvorn*, 647 F. Supp. at 883; *McKenzie*, 628 F. Supp. at 1505.

44. *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493 (1985); *Lovvorn*, 647 F. Supp. at 883; *McKenzie*, 628 F. Supp. at 1505.

45. See *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir. 1976) (state has right to require bus drivers involved in serious accidents or suspected of drug use to submit to drug testing); see also *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) (state has interest in regulating policemen's hairstyle); *Lovvorn*, 647 F. Supp. at 883 (state's right to test fire fighters for use of drugs and to dismiss after hearing is valid under due process).

46. See *Loudermill*, 105 S. Ct. at 1493; *Lovvorn*, 647 F. Supp. at 883; *McKenzie*, 628 F. Supp. at 1507.



states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself. . . ." <sup>47</sup> The prerequisites for applying this provision to employee drug testing are twofold. First, the taking of urine for testing must be found to be within the scope of the privilege against self-incrimination; and second, the testing must be found to be encompassed by the concept of a "criminal case" within the meaning of the fifth amendment.

The question of whether chemical tests are within the scope of the fifth amendment was decided by the United States Supreme Court in *Schmerber v. State of California*.<sup>48</sup> In *Schmerber*, the defendant had a blood test taken in the hospital to determine his blood alcohol level.<sup>49</sup> The defendant contended that the evidence from the blood analysis was inadmissible because it was taken in violation of his fifth amendment privilege against self-incrimination.<sup>50</sup> The Supreme Court held that "the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications. . . ." <sup>51</sup> However, the Court distinguished between the compulsion of communication or testimonial evidence and the compulsion that "makes a suspect or accused the source of 'real or physical evidence.'" <sup>52</sup> The Court held that only communications were protected under the fifth amendment privilege against self-incrimination.<sup>53</sup> The Supreme Court stated that:

[Schmerber's] testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis . . . alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.<sup>54</sup>

Assuming that this was the only authority regarding the applicability of the fifth amendment to chemical analysis, it would be safe to say that the fifth

47. U.S. CONST. amend. V.

48. 384 U.S. 757 (1966).

49. *Id.* at 758. The blood sample, although taken at the hospital while receiving treatment for injuries, was taken at the direction of the police, and was used as evidence in Schmerber's criminal trial for driving under the influence of intoxicating liquor. *Id.* at 758-59.

50. *Id.* at 759. The defendant also objected to the chemical analysis on the basis of the fourteenth amendment due process clause and his right not to be subjected to unreasonable searches and seizures in violation of the fourth amendment. *Id.*

51. *Id.* at 763-64.

52. *Id.* at 764. The Court listed several forms of physical evidence which both state and federal courts held as unprotected. This list included the "compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.*

53. *Id.* at 765.

54. *Id.* (footnote omitted).

amendment offers federal employees no protection from mandatory drug testing. However, not all sources agree with this narrowing of the fifth amendment privilege. The Supreme Court in *Schmerber* cautioned that "[t]o compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses,<sup>55</sup> whether willed or not, is to evoke the spirit and history of the fifth amendment."<sup>56</sup> However, the Court went on to say that chemical tests were not entitled to this protection.<sup>57</sup> Justice Black, dissenting in *Schmerber*, wrote that while the chemical test is "not oral testimony given by an accused . . . it can certainly 'communicate' to a court and jury the fact of guilt."<sup>58</sup>

In *U.S. v. Ruiz*,<sup>59</sup> the Court of Military Appeals examined the issue of self-incrimination through compulsion to furnish a urine specimen for urinalysis for the Army's Drug Abuse and Rehabilitation Program.<sup>60</sup> The privilege against self-incrimination as codified in Article 31(a) of the Uniform Code of Military Justice, provides: "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate himself."<sup>61</sup> In this case, the Court of Military Appeals held that the order to the defendant to submit to drug testing was unlawful because it violated his right against self-incrimination as set out in Article 31(a).<sup>62</sup> In so holding, however, the court acknowledged that the scope of Article 31 was broader than the fifth amendment,<sup>63</sup> thereby distinguishing the case from *Schmerber v. State of California*.<sup>64</sup>

One district court had recently held that drug testing was a violation of the employee's fifth amendment rights. In *National Treasury Employees' Union v. Von Raab*,<sup>65</sup> the United States District Court in Louisiana held that compulsory urinalysis coupled with a requirement that the employee fill out

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55. One example of this is testing with a lie detector.

56. *Schmerber*, 384 U.S. at 764.

57. *Id.* at 765.

58. *Id.* at 775 (Black, J., dissenting).

59. 23 C.M.A. 181, 48 C.M.R. 797 (1974).

60. *Id.* at \_\_\_\_, 48 C.M.R. at 797.

61. 10 U.S.C. § 831(a) (1982).

62. *United States v. Ruiz*, 23 C.M.A. at \_\_\_\_, 48 C.M.R. at 799.

63. *Id.* at \_\_\_\_, 48 C.M.R. at 798; see *United States v. Musguire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958) (struck down order to submit to a blood alcohol test under Art. 31); *United States v. Jordan*, 7 C.M.A. 452, 22 C.M.R. 242 (1957) (order to furnish a urine specimen for chemical analysis was illegal; conviction was set aside); *United States v. Rosato*, 3 C.M.A. 143, 11 C.M.R. 143 (1953) (order to furnish handwriting exemplars is illegal as violative of accused's Art. 31 right against self-incrimination).

64. *United States v. Ruiz*, 23 C.M.A. at \_\_\_\_, 48 C.M.R. at 798 n.1.

65. 649 F. Supp. 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987).

a pre-test form violated the employee's fifth amendment protection against self-incrimination.<sup>66</sup>

The drug testing plan at issue was the U.S. Customs Service requirement that "workers who seek promotion into certain covered positions . . . submit to drug screening through urinalysis."<sup>67</sup> The district court held that the tests violated the employee's fifth amendment right, distinguishing the case from *Schmerber* in three ways. First, *Schmerber* required probable cause; the Customs Service's testing procedure involved workers who were not even under suspicion. Second, *Schmerber* only involved a blood test while the testing procedure under review also required the employee to complete a pre-test form. Finally, the Customs Service plan, unlike the test in *Schmerber*, was found to be an embarrassing and degrading procedure.<sup>68</sup>

However, the decision was vacated by the Court of Appeals for the Fifth Circuit.<sup>69</sup> The circuit court rejected the district court's attempt to distinguish the case from *Schmerber*, holding instead that mandatory urine testing did not implicate fifth amendment rights.<sup>70</sup> The privilege against self-incrimination was held to apply only to testimonial evidence, not to the "physical characteristics" revealed by urinalysis.<sup>71</sup>

Thus, it seems clear that the fifth amendment is not a major factor in determining the constitutionality of employee drug testing even though "regardless of the order's purpose, the accused knows that compliance will in fact produce incriminating evidence."<sup>72</sup> Once the test has occurred, the employee's ability to protect himself against self-incrimination is much more limited because the results are already in the hands of third parties. The fifth amendment arguably should provide for protection *before* the test. However, in light of the foregoing cases, the fifth amendment privilege against self-incrimination is not a viable defense for federal employees when faced with the prospect of mandatory drug testing.

### C. Drug Testing as a Violation of the Fourth Amendment Prohibition Against Unreasonable Searches and Seizures

The most important constitutional protection against mandatory drug testing is the fourth amendment's prohibition against unreasonable searches

66. *Id.* at 388. The form asked the employee to state any medications taken and circumstances in which he may have been in contact with illegal substances within 30 days.

67. *Id.* at 382.

68. *Id.* at 388. The procedure called for a collector to be present in the restroom during the process requiring that observation be "close but not 'direct.'" *Id.* at 382. The court stated: "This gross invasion of privacy is a degrading procedure that so detracts from human dignity and self respect that it 'shocks the conscience' and offends this Court's sense of justice." *Id.* at 388.

69. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987).

70. *Id.* at 181.

71. *Id.*

72. *United States v. Ruiz*, 23 C.M.A. 181, —, 48 C.M.R. 797, 798 (1974).

and seizures.<sup>73</sup> In dealing with chemical testing, there are two questions that must be answered. First, is compulsory urinalysis a search or seizure within the meaning of the fourth amendment?<sup>74</sup> If so, is the search or seizure reasonable?<sup>75</sup>

### 1. Was There a Search or Seizure?

The United States Supreme Court in *Schmerber v. State of California*, examined whether the extraction of blood for chemical analysis was a search or seizure within the meaning of the fourth amendment.<sup>76</sup> The Court declared that "[t]he overriding function of the fourth amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."<sup>77</sup> The Court held that the extraction of blood for analysis "plainly involves the broadly conceived reach of a search and seizure under the fourth amendment."<sup>78</sup>

Courts have applied *Schmerber* to breathalyzer tests,<sup>79</sup> and at least four cases have treated urine tests as searches within the ambit of the fourth amendment.<sup>80</sup> These decisions make it apparent that mandatory drug testing by urinalysis is a search and seizure within the fourth amendment.<sup>81</sup>

73. The fourth amendment provides:

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, and the persons or things to be seized.

U.S. CONST. amend. IV.

74. See *Allen v. City of Marietta*, 601 F. Supp. 482, 488 (N.D. Ga. 1985).

75. *Id.* at 489.

76. *Schmerber v. California*, 384 U.S. 757 (1966).

77. *Id.* at 767.

78. *Id.* The Supreme Court added that "[s]uch testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." *Id.*

79. See, e.g., *Davis v. District of Columbia*, 247 A.2d 417, 418 (D.C. 1968); *State v. Locke*, 418 A.2d 843, 847 (R.I. 1980); *State v. Berker*, 120 R.I. 849, 856, 391 A.2d 107, 111 (1978).

80. See *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985).

81. But see *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1010 (D.C. 1985) (Nebeker, J., concurring). Judge Nebeker in his concurring opinion expressed the view that urinalysis was not within the ambit of the fourth amendment. *Id.* He distinguished between the intrusions on the physical body and the "seizure of an individual's physical characteristics," finding that seizure of the characteristics would not be protected by the fourth amendment because it did "not involve the same degree of intrusion into an individual's privacy because such physical characteristics are constantly exposed to the public." *Id.* In other words, Judge Nebeker felt there was no right to be free of search or seizure under the fourth amendment because plaintiff had no reasonable expectation of privacy in regard to his body waste. *Id.* at 1011.

## 2. Was the Search Reasonable?

Once it is determined that there has been a search or seizure, the court must next examine whether that search or seizure was reasonable.<sup>82</sup> In the case of mandatory drug testing, no warrants are sought or issued before testing. The Supreme Court has held that warrantless searches "are *per se* unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions."<sup>83</sup> One such exception involves exigent circumstances, such as the risk that evidence could vanish or be destroyed while a warrant was being obtained.<sup>84</sup> Another exception concerns certain classes of government employees.<sup>85</sup> A third exception is the distinction between a search for criminal purposes and a search for administrative purposes.<sup>86</sup> The final exception to the warrant requirement is that for a search which has been voluntarily consented to.<sup>87</sup>

Thus, in order to determine whether mandatory drug testing was a reasonable search and seizure the court must examine it in light of the above-mentioned exceptions to the general rule regarding warrantless searches.<sup>88</sup> Should the search fail under these exceptions, it would give rise to a cause of action for violation of the employee's fourth amendment rights.

### a. Exigent Circumstances

As stated earlier, one justification for a warrantless search is the risk that the evidence could be destroyed while a warrant was being obtained.<sup>89</sup>

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82. *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985).

83. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

84. *See, e.g., Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (blood analysis to determine alcohol content).

85. While all cases hold that a government employee does not give up his constitutional rights by working for the government, courts do limit the employees' reasonable expectation of privacy according to his job. *See McDonell v. Hunter*, 612 F. Supp. 1122, 1128 (S.D. Iowa 1985); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1008 (D.C. 1985). Courts have also limited the employees' reasonable expectation of privacy in jobs where public safety considerations require it. *See Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985). *But cf. Jones v. McKenzie*, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986) (requiring adversarial pre-termination hearing; holding employee had property interest in job and liberty interest in reputation).

86. *See Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986). The court in *Shoemaker* stated that the State may conduct administrative warrantless searches when "the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search." *Id.*

87. *See McDonell v. Hunter*, 612 F. Supp. 1122, 1131 (S.D. Iowa 1985).

88. *See supra* notes 83-87 and accompanying text.

89. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

This argument was considered to be appropriate by the United States Supreme Court in *Schmerber v. California*;<sup>90</sup> however, it is not equally applicable to the issue of urinalysis to detect drug use. *Schmerber* involved a blood test to determine the percentage of alcohol in the petitioner's blood.<sup>91</sup> The Court found that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."<sup>92</sup> For these reasons, the Court held that:

Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.<sup>93</sup>

The Court's reasoning in *Schmerber* can be argued to be inapplicable to employee drug testing through urinalysis in two ways. First, the search is not done incident to arrest or accompanied by the probable cause necessary for arrest.<sup>94</sup> Second, and perhaps more importantly, the exigent circumstances discussed in *Schmerber* do not exist in cases of urinalysis.<sup>95</sup> Unlike blood-alcohol level, the effects of drugs such as marijuana remain in the urine for up to a month.<sup>96</sup> This makes it much harder for a court to determine, as was done in *Schmerber*, that there was no time to get a search warrant.<sup>97</sup>

#### b. Government Employees

No court has held that an employee gives up his constitutional rights by virtue of working for the government.<sup>98</sup> However, a class of cases have emerged involving searches of government employees which allow an exception to the general rule against warrantless searches by limiting the employees' expectation of privacy.<sup>99</sup>

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90. *Id.*

91. *Id.* at 758-59.

92. *Id.* at 770.

93. *Id.* at 770-71.

94. For a discussion of Missouri's interpretation of *Schmerber*, see *infra* notes 155-62 and accompanying text.

95. See Rust, *supra* note 27, at 52 ("Urine retains a trace of drugs for a period of days, sometimes even weeks, long after the drug has ceased to affect mental capacity.').

96. N.Y. Times, Mar. 19, 1986, at A12, col. 6.

97. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

98. See *supra* note 85.

99. See *United States v. Bunkers*, 521 F.2d 1217 (9th Cir.), *cert. denied*, 423 U.S. 989 (1975) (warrantless search of a postal employee's locker for stolen mail upheld as reasonable); *United States v. Collins*, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960, *reh'g denied*, 384 U.S. 947 (1966) (warrantless search of Customs employee's jacket was reasonable where his supervisors had grounds to believe

In *Allen v. City of Marietta*,<sup>100</sup> a United States District Court in Georgia summarized the theme of this group of cases as follows:

Government employees . . . have as much of a right to be free from warrantless government searches as any other citizens. At the same time, however, the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties. . . . Because the government as employer has the same rights to discover and prevent employee misconduct relevant to the employee's performance of her duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature. Added to this balance of expectations and interests is the fact that government investigations of employee misconduct always carry the potential to become criminal investigations. . . . [C]ourts have been unwilling to find that the fourth amendment does not protect government employees from warrantless searches undertaken for a criminal investigatory purpose.<sup>101</sup>

In *Allen*, the district court allowed the warrantless drug testing of employees of the Board of Lights and Water "for evidence of misconduct relevant to the employee's performance of his duties."<sup>102</sup>

The court in *McDonell v. Hunter*,<sup>103</sup> held that requiring employees working for the Department of Corrections to submit to chemical analysis violated the fourth amendment unless it was "on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcohol . . . or controlled substances."<sup>104</sup>

In *Turner v. Fraternal Order of Police*,<sup>105</sup> the District of Columbia Court of Appeals held that the order of the Metropolitan Police Department that "the Department for administrative purposes may compel police officers to

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he was pilfering goods coming through customs). *But see* United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968) (evidence obtained as a result of warrantless wiretap of a government employee's conversation was inadmissible in subsequent perjury trial); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (warrantless search of employee's desk for evidence of petty larceny violated her fourth amendment rights).

100. 601 F. Supp. 482 (N.D. Ga. 1985).

101. *Id.* at 491.

102. *Id.*

103. 612 F. Supp. 1122 (S.D. Iowa 1985).

104. *Id.* at 1130. The court limited its holding by stating that:

The Fourth Amendment . . . does not preclude taking a [urine] specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees, nor does it prohibit taking a specimen of blood, urine, or breath on a periodic basis as a condition of continued employment under a disciplinary disposition if such condition is reasonably related to the underlying basis for the disciplinary action and the duration of the condition is specified and is reasonable in length.

*Id.* at 1130 n.6.

105. 500 A.2d 1005 (D.C. 1985).

submit to urinalysis testing based upon 'suspected drug use' or 'at the discretion' of the Board of Police and Fire Surgeons" was not unconstitutional.<sup>106</sup> In reaching their decision, the court examined the concept of a "legitimate expectation of privacy," finding that "[e]ach individual's privacy interest is shaped by the context in which it is asserted."<sup>107</sup> The court concluded that "not all individuals enjoy the same expectation of privacy, and, therefore, not the same degree of fourth amendment protection."<sup>108</sup> In examining the role of the police force in society, the court held that the "police officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen . . . [and] that this [was] one of those circumstances."<sup>109</sup>

In *Suscy*, the United States District Court of Appeals upheld the requirement that any bus driver involved in a serious accident or suspected of being intoxicated or under the influence of narcotics submit to a blood or urine test.<sup>110</sup> The court balanced the interest of protecting the public against the individual interest in "refusing to disclose physical evidence of intoxication or drug abuse," and decided that the "valid public interest justify[ed] the intrusion contemplated."<sup>111</sup>

A reading of the cases mentioned in this section gives the impression that searches of government employees are valid due to the rights of the employer to regulate his employees and the reduced expectation of privacy. It is important to note, however, that the cases mentioned previously were easy cases for purposes of the balancing test. *Allen* involved city employees handling high voltage electricity;<sup>112</sup> *McDonell* involved employees working in a prison facility;<sup>113</sup> *Turner* involved police officers;<sup>114</sup> and *Suscy* involved bus

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106. *Id.* at 1007.

107. *Id.*

108. *Id.* at 1007-08.

109. *Id.* at 1008. The court called the police a "para-military organization dealing hourly with the general public in delicate and often dangerous situations." *Id.*

110. *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976).

111. *Id.* at 1267.

112. *Allen v. City of Marietta*, 601 F. Supp. 482, 484 (N.D. Ga. 1985). The court in *Allen* held: "The City has a right to make warrantless searches of its employees for the purpose of determining whether they are using or abusing drugs which would affect their ability to perform safely their work with hazardous materials." *Id.* at 491.

113. *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (1987). The court in *McDonell* stated: "Correctional facility security considerations reduce the scope of reasonable expectations of privacy that one normally holds and makes reasonable some intrusions that would not be reasonable outside of the facility." *Id.* at 1128. The court went on to say, however, that "prison employees do not lose all of their Fourth Amendment rights at the prison gates." *Id.*

114. *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985). The court in *Turner* specifically stated: "The public interest consideration is strong in relation to the test of the police officer, but not in the instance of a private citizen. The normal constitutional requirements in relation to private citizens are not mandated here." *Id.* at 1009.



drivers who had been involved in serious accidents or suspected of being under the influence while on duty.<sup>115</sup> Not every case would present such a strong public interest.

In cases where the public interest is weaker the expectation of privacy would be greater, thus presenting a stronger case for fourth amendment protection.<sup>116</sup> One such case is *Jones v. McKenzie*.<sup>117</sup> The plaintiff in *McKenzie* was a school bus attendant who assisted handicapped students in traveling by bus to and from school.<sup>118</sup> The United States District Court for the District of Columbia held that the plaintiff had "a reasonable expectation of privacy from a search by mandatory drug testing,"<sup>119</sup> and ruled that the testing violated her fourth amendment rights.<sup>120</sup>

It should be noted that even the cases which allowed the search required a finding of reasonable cause.<sup>121</sup> Thus, while the searches may not fall under the general rule of unconstitutionality of warrantless searches, they would appear to require a reasonable suspicion.<sup>122</sup>

### c. Administrative or Criminal Purposes

A third arena in which courts have permitted warrantless chemical testing by government employers is where the search is for administrative purposes as distinguished from a search as part of a criminal investigation.

In *Shoemaker v. Handel*,<sup>123</sup> the United States Court of Appeals for the Third Circuit recognized an exception to the warrant requirement in cases where there is a strong state interest in conducting an unannounced search, and "the pervasive regulation of the industry . . . ha[s] reduced the justifiable privacy expectation of the subject of the search."<sup>124</sup>

115. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); see text accompanying notes 10-12.

116. See *supra* text accompanying notes 107-08.

117. 628 F. Supp. 1500 (D.D.C. 1986).

118. *Id.* at 1508.

119. *Id.*

120. *Id.* at 1509.

121. See Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976); McDonell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. 1985).

122. See *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (drug testing of fire fighters without *individualized* suspicion is invalid). But see *National Treasury Employees' Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (Customs Service drug testing program upheld).

123. 795 F.2d 1136 (3d Cir. 1986).

124. *Id.* at 1142; see also *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). The Court in *Donovan* explained: "It is the pervasiveness and regularity of the federal regulat[ory] [scheme] that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment." *Id.* at 606.

The court in *Shoemaker* examined the regulations of the State Racing Commission, which required all jockeys to submit to breathalyzer tests and random urinalysis tests at the race track so as to discover the use of alcohol or drugs.<sup>125</sup> It was the plaintiffs' position that the tests could not be conducted in the absence of "individualized suspicion."<sup>126</sup> The court examined the history of intense regulation which the horse racing industry had enforced in New Jersey and concluded that "the licensees have always participated in the industry with full awareness that it is the subject of intense state regulation."<sup>127</sup>

The court held that the state's "strong interest in assuring the public of the integrity of the horse racing industry" outweighed the plaintiffs' right to be free from warrantless testing.<sup>128</sup> For those reasons, the court held that "the administrative search exception applie[d] to warrantless breath and urine testing of employees in the heavily regulated horseracing industry."<sup>129</sup>

The next issue the court examined was whether the Commission's discretion in conducting the searches was sufficiently circumscribed.<sup>130</sup> In other words, does a random selection method satisfy the requirements of the fourth amendment? In deciding this issue, the court observed that "[r]andom searches and seizures that have been held to violate the fourth amendment have left the exercise of discretion as to selected targets in the hands of a field officer with no limiting guidelines."<sup>131</sup> The court found that in this case the tests were administered pursuant to the regulatory scheme with the Steward having

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125. *Shoemaker*, 795 F.2d at 1137-38. The plaintiffs objected to the tests on the basis of violation of fourteenth amendment due process rights, violation of the equal protection clause and violation of their privacy rights under the fourteenth amendment. *Id.* at 1141.

126. *Id.* at 1141. The plaintiffs conceded that the tests could be validly administered "if the racing officials [were] aware of specific objective facts suggesting that certain persons [had] recently used alcohol or drugs." *Id.*; see also *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1517 (D.N.J. 1986).

127. *Shoemaker*, 795 F.2d at 1141. These regulations included the licensing of all employees in the industry. N.J. STAT. ANN. § 5:5-33 (West Supp. 1985).

128. *Shoemaker*, 795 F.2d at 1142. The court also found that the intense regulation of the industry reduced the justifiable expectations of privacy of persons who sought and obtained a license to participate therein. *Id.*

129. *Id.*

130. *Id.* at 1143. All jockeys were required to take a breathalyzer test daily, while the urine tests were administered at random. The names of all the jockeys participating in a race were placed in an envelope and a representative of the racing commission drew the names of from three to five jockeys for testing. The selected jockeys had to provide the sample after the last race of that day. The results were marked with identifying numbers and sent to a laboratory for testing. *Id.* at 1139-40.

131. *Id.* at 1143 (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-84 (1975).

no discretion.<sup>132</sup> Because the daily determination of who would be tested was made by the Commission, the court held that it did not violate the fourth amendment.<sup>133</sup>

The court of appeal's decision in *Shoemaker* had several effects. It established the exception for administrative searches in the area of chemical testing.<sup>134</sup> More importantly, it provided that some administrative searches could be upheld as valid although no individualized suspicion of the employee existed at the time of the search.<sup>135</sup> For these reasons, the court's decision in *Shoemaker* broadened the exception for government employees where there is a strong public interest and the "pervasive regulation of the industry [has] reduced the justifiable privacy expectation of the [employee]."<sup>136</sup>

However, any change in the position of the courts regarding fourth amendment protection following *Shoemaker* is minimal. The court itself in *Shoemaker* limited its holding to "breathalyzer and urine sampling of voluntary participants in a highly regulated industry."<sup>137</sup> This could be interpreted by the courts to include only industries which license all of their employees,<sup>138</sup> or even further limited to encompass only the horse racing industry.<sup>139</sup> A court faced with a compelling case of invasion of privacy could have considerable discretion in interpreting *Shoemaker*.<sup>140</sup>

### 3. Was There Consent?

A test that would otherwise be unreasonable nevertheless does not violate the fourth amendment if it was done pursuant to voluntary consent.<sup>141</sup> The Supreme Court in *Schneckloth v. Bustamonte* described voluntariness as "a

132. *Shoemaker*, 795 F.2d at 1143. For a description of the lottery method used, see *supra* note 130.

133. *Shoemaker*, 795 F.2d at 1143.

134. *Id.* at 1142.

135. *Id.* at 1143.

136. *Id.* at 1142.

137. *Id.* at 1142 n.5.

138. The court made a point of the fact that plaintiffs were licensees who were aware of the regulation of the industry. *Id.* at 1142.

139. *Id.* at 1142 n.5. The court specifically said its decision "should not be read as dispositive of the distinct issue presented in testing of children subject to mandatory school attendance laws or the testing of motor vehicle drivers." *Id.*

140. *Id.* at 1142-43. The court did not indulge in broad terms but continually framed its holding to apply to "employees of the horse racing industry." *Id.*

141. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In *Bustamonte*, the Court stated:

[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

*Id.* at 248.

question of fact to be determined from all the circumstances. . . ."<sup>142</sup> In response to suggestions that mandatory drug testing might violate an employee's right to be free from unreasonable searches and seizures, Attorney General Edwin Meese said, "By definition, it's not an unreasonable seizure because it's something the employee [sic] consents to as a condition [of his employment]."<sup>143</sup>

In *McDonell v. Hunter*,<sup>144</sup> the United States District in Iowa disagreed. *McDonell* involved mandatory drug testing of prison employees. The Department of Corrections contended that, even if the test violated the reasonableness standard of the fourth amendment, it was still valid because the plaintiffs "signed a written consent validly consent[ing] to searches under the Department's policy."<sup>145</sup>

The district court held that it could not "rest its decision on [the] assumption that plaintiff McDonell and class members who signed consents voluntarily consented in advance to any search made under the Department's policy."<sup>146</sup> The court added that, "the consent form does not constitute a blanket waiver of all fourth amendment rights."<sup>147</sup> The function of the consent form was characterized by the court as "serv[ing] to alert employees to the fact that their fourth amendment rights are more limited inside the correctional institution, but the consent cannot be construed to be a valid consent to any search other than one that is, under the circumstances, reasonable and, therefore, permissible under the Fourth Amendment."<sup>148</sup> Thus, in *McDonell*, the court provided that voluntary consent may be used to limit the reasonable expectation of privacy but cannot be used to legalize unreasonable searches.<sup>149</sup>

### III. THE IMPLICATIONS FOR MISSOURI

At the present time, Missouri courts have not examined the issue of employee drug testing. Because of the increase in the number of cases involving drug testing across the country, however, it is likely to become an issue in Missouri.

Since there has been no definitive position set forth by the United States Supreme Court, state courts are deciding these cases with no firm precedent to rely on. Missouri has dealt with the issue of blood tests to determine blood

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142. *Id.* at 248-49.

143. Washington Post, Mar. 5, 1986, at A3, col. 4.

144. 612 F. Supp. 1122 (S.D. Iowa 1985).

145. *Id.* at 1131.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

alcohol level in criminal cases.<sup>150</sup> Because courts have dealt with the issue of urinalysis in much the same way as blood testing,<sup>151</sup> a discussion of Missouri's position on this issue is helpful.

In 1982, the Missouri General Assembly rewrote section 577.020 of the Revised Statutes of Missouri<sup>152</sup> and adopted section 577.041,<sup>153</sup> dealing with the administering of chemical tests to determine blood alcohol level.<sup>154</sup>

In *State v. Ikerman*,<sup>155</sup> the Missouri Court of Appeals construed *Schmerber v. State of California*<sup>156</sup> and the Missouri chemical testing statutes.<sup>157</sup> In *Ikerman*, the defendant was involved in a traffic accident.<sup>158</sup> The State argued that under *Schmerber* it had the right to take a blood sample from the defendant without his consent, a warrant, or an arrest.<sup>159</sup> However, the court of appeals interpreted *Schmerber* as applying only to a search incident to a lawful arrest.<sup>160</sup>

The court held that in Missouri, "a blood sample may be taken without a warrant to test for intoxication without offending federal constitutional guarantees and Missouri statutes where the defendant is under arrest and has not negated his implied consent under [section] 577.020 by invoking his right of refusal under [section] 577.041."<sup>161</sup> Because the defendant was not under arrest, this implied consent did not apply to him.<sup>162</sup>

150. See, e.g., *State v. Ikerman*, 698 S.W.2d 902 (Mo. Ct. App. 1985); *State v. Copeland*, 680 S.W.2d 327 (Mo. Ct. App. 1984); Mo. REV. STAT. § 577.020 (1986); Mo. REV. STAT. § 577.041 (1986).

151. Most of the cases discussed previously have used the standards set out in *Schmerber* in analyzing the drug testing issues. *Schmerber* dealt with a blood test to determine blood alcohol level. *Schmerber v. California*, 384 U.S. 757 (1966).

152. Mo. REV. STAT. § 577.020 (1986).

153. Mo. REV. STAT. § 577.041 (1986).

154. Mo. REV. STAT. § 577.020(1) (1986) (implied consent to the test if a party is arrested for the offense); Mo. REV. STAT. § 577.041 (1986) (allows a party to refuse the chemical test but authorizes revocation of the party's license for doing so).

155. 698 S.W.2d 902 (Mo. Ct. App. 1985).

156. 384 U.S. 757 (1966).

157. See *supra* note 154.

158. *Ikerman*, 698 S.W.2d at 904.

159. *Id.* It was the State's position that under *Schmerber*, "where police officers have probable cause to believe [the] defendant has committed a crime in which intoxication is an element and exigent circumstances exist, the taking of a blood sample in a reasonable manner without consent, warrant, or arrest is constitutionally permissible." *Id.* at 904-05.

160. *Id.* at 905.

161. *Id.* at 906. It was the court's position that section 577.020 was enacted by the legislature in response to *Schmerber*. *Id.* at 905. Section 577.020 provides for implied consent to allow the chemical test, while section 577.041 gives the defendant the right to refuse that consent. Mo. REV. STAT. § 577.020, .041 (1986).

162. *Ikerman*, 698 S.W.2d at 906.

The state also argued that the defendant did, in fact, consent to the extraction of the blood sample.<sup>163</sup> The court held that defendant's consent after initial refusal was involuntary consent.<sup>164</sup> For those reasons, the court excluded the evidence of the results of the testing of defendant's blood alcohol level.<sup>165</sup>

In *State v. Copeland*,<sup>166</sup> the Missouri Court of Appeals held that persons have "an expectation of privacy in the contents of [their] blood which Missouri law recognize[s] as legitimate."<sup>167</sup> For this reason, the court held that when "[t]he blood was taken at the direction of a physician for use in testing for medical purposes . . . the implied consent is limited to those purposes."<sup>168</sup> In other words, the hospital, by giving defendant's blood sample to law enforcement authorities, violated his constitutional right to privacy.<sup>169</sup>

In view of Missouri's limited reading of *Schmerber*, and its recognition of a reasonable expectation of privacy in the body's fluids, it is reasonable to presume that the constitutional analysis of mandatory drug testing in Missouri will be similar to that of the states which have examined drug cases previously.

#### IV. CONCLUSION

This Comment has come full circle and now must examine the original question. Do government employees have any recourse against mandatory drug testing? It could be argued that such testing is a violation of the fifth amendment privilege against self-incrimination. But given the Fifth Circuit's holding in *Von Rabb*,<sup>170</sup> the chances to prevail on this ground are slim. This is unfortunate as the fifth amendment would offer just the type of protection employees seek: freedom to refuse to take the test, not relief after the test is already forcibly imposed.

It could be argued that drug testing constitutes a denial of due process under the fifth and fourteenth amendments, including a pre-termination hearing or post-termination hearing. However, even if an employee prevailed on

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163. *Id.* at 907.

164. *Id.* When asked to take the blood test, the defendant declined. After a lengthy discussion with law enforcement officers, the defendant agreed to take the test. *Id.* at 904. The court stated: "Once the voluntariness is challenged, the state carries the burden of proving the voluntariness of the consent by a preponderance of the evidence." *Id.* at 907.

165. *Id.* at 908.

166. 680 S.W.2d 327 (Mo. Ct. App. 1984).

167. *Id.* at 329.

168. *Id.*

169. *Id.* at 330.

170. *National Treasury Employees' Union v. Von Rabb*, 816 F.2d 170 (5th Cir. 1987).

this ground, it would only entitle him to more process and the possibility of a repeat of the EMIT test or a similar back-up test. This would not prevent the employer from requiring an employee to submit to another drug test, but in fact would give him the right to be tested further. While due process is a valid challenge for an employee who is innocent and wishes to prove it, it does not offer a very suitable alternative to someone whose sensibilities are offended by the compulsory urinalysis.

Another possibility which would enable an employee to avoid testing entirely is the fourth amendment prohibition against unreasonable searches and seizures. If the search did not fall within any of the exceptions for exigent circumstances, government employees, or administrative searches, and was found to be unreasonable, the employee could prevent the test from being administered at all.

In conclusion, what constitutional provision a party chooses to claim protection under depends upon what type of relief that party seeks and the facts of the particular case. Any theory would be valid for some cases and invalid for others, and until there are some definitive standards set out by the higher courts, the issues will be decided on a case by case basis. At this point in time, the only thing that can be predicted with any certainty is that the drug testing issue will be with us well into the future. What began with a presidential mandate, and presently resides in the ad hoc decisionmaking process of the district and appellate courts, will one day be examined by the Supreme Court. But until that time attorneys will have to deal with this issue in the shadow of *Schmerber*<sup>171</sup> and its progeny. The more interesting question is whether the Supreme Court, when faced with the issue, will use its analysis in *Schmerber* in the area of employee drug testing, or limit *Schmerber* to its unique circumstances.<sup>172</sup> The Court may rise to the challenge of the drug testing issue by blazing a new trail and developing standards which are truly applicable to the issue raised in the context of employee drug testing.

CHRISTINA LOUISE MELL

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171. *Schmerber v. California*, 384 U.S. 757 (1966).

172. *Schmerber* involved a breathalyzer test to measure blood alcohol level administered pursuant to a lawful arrest. *Id.* at 758-59.