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Constitutional Concerns in Drug Testing

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I. PUBLIC SECTOR DRUG TESTING: AN OVERVIEW.

A. THE NON-CONSENSUAL TAKING OF URINE BY THE GOVERNMENT IS A SEARCH AND SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

1. The United States Supreme Court has held that the taking blood is a search and seizure within the meaning of the fourth amendment. *Schmerber v. California*, 384 U.S. 757 (1966).

2. The overwhelming majority of recent federal and state decisions holds that the taking of urine is a search and seizure within the meaning of the fourth amendment. *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *on remand from* 746 F.2d 785 (8th Cir. 1984) (interlocutory appeal affirming district court's preliminary injunction), *appeal docketed*, No. 85-1919-S1 (8th Cir. 1985); *Capua v. City of Plainfield*, No. 86-2992, slip op. at 8 (D.N.J. Sept. 18, 1986); *Bostic v. McClendon*, No. C-85-2330A, slip op. at 6 (N.D. Ga. July 10, 1986); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); *City of Palm Pay v. Bauman*, 475 So. 2d 1322, 1325 (Fla. Dist Ct. App. 1985); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983); *Caruso v. Ward*, No. 6791 (N.Y. Sup. Ct. July 1, 1986).

(a) In *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), the court, noting the difference between the taking of blood from the body and the taking of urine, nevertheless declared that the seizure of urine is also a search within the meaning of the fourth amendment. The court further noted that urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. Indeed, the court stated:

> It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids. Therefore, governmental taking of a urine specimen is a seizure within the meaning of the fourth amendment.

Id.

(b) In an even more recent case, the United States District Court for the District of New Jersey, holding that the taking of urine is a search and seizure within the meaning of the fourth amendment, concluded that the public interest in eliminating drugs in the workplace, although substantial, is not sufficient to invade the privacy of innocent individuals in order to discover those who may be guilty. Citing to *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), the court, in *Capua v. City of Plainfield*, No. 86-2992 (D.N.J. Sept. 18, 1986), concluded that "[a]s with blood, each individual has a reasonable expectation of privacy in the personal 'information' bodily fluids contain. For these reasons, governmental taking of a urine specimen constitutes a search and seizure within the meaning of the Fourth Amendment." *Capua*, slip op. at 7-8 (citations omitted).

B. THE INDIVIDUALIZED REASONABLE SUSPICION STANDARD.

Most recent authority indicates that urinalysis of public employees generally does not require a warrant, or particularized probable cause, but rather, individualized, reasonable suspicion based on objective facts. *See, e.g., McDonnell v. Hunter*, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985), *on remand from* 746 F.2d 785 (8th Cir. 1984) (interlocutory appeal affirming district court's preliminary injunction), *appeal docketed*, No 85-1919-S1 (8th Cir. 1985); *Capua v. City of Plainfield*, No. 86-2992 (D.N.J. Sept. 18, 1986); *Bostic v. McClendon*, No. C-85-2330A (N.D. Ga. July 10, 1986); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986); *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1009 (D.C. 1985); *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1325-26 (Fla. Dist. Ct. App. 1985); *Allen v. County of Passaic*, No. L-19262-86PW, slip op. at 18 (N.J. Super. Ct. Law. Div. June 23, 1986); *Caruso v. Ward*, No. 6791, slip op. at 12-13 (N.Y. Sup. Ct. July 1, 1986); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Odenheim v. Carlstadt-East Rutherford Regional School District*, 211 N.J. Super. 54, ___, 510 A.2d 709, 713 (1985); *Anable v. Ford*, No 84-6033, slip op. at 45 (S.D. Ark. July 12, 1985) (available on WESTLAW); *Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District*, No. 85-8759, slip op. at 5-6 (N.Y. Sup. Ct. Suffolk Co. June 14, 1985), *aff'd*, 119 A.D. 2d 35, 505 N.Y.S.2d 888 (1986); *cf. Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985); *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, No. L-095001-85E (N.J. Super. Ct. Law Div. June 16, 1986); *King v. McMickens*, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986).

1. CORRECTIONAL EMPLOYEES

McDonnell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985), *on remand from* 746 F.2d 785 (8th Cir. 1984) (interlocutory appeal affirming district court's preliminary injunction), *appeal docketed*, No. 85-1919-S1 (8th Cir. 1985). Department of Corrections employees brought action challenging, on fourth and fourteenth amendment grounds, the constitutionality of Department policy subjecting employees to searches of vehicles and persons. The court determined that the state's weighty interest in preserving security and order within the prison should be balanced against the individual's significant invasion of privacy. In conclusion, the court held that the fourth amendment allows the state to demand urine, blood or breath specimens of employees only on the basis of a reasonable suspicion which is to be based upon specific objective facts and reasonable inferences drawn from those facts that the employee is then under the influence of alcoholic beverages or controlled substances.

King v. McMickens, 120 A.2d 351, N.Y.S.2d 679 (1986). Two corrections officers were dismissed for refusing to submit urine samples for drug analysis subsequent to a report from the office of the special prosecutor that a confidential informant had alleged that plaintiffs were involved in illegal drug activities. The court concluded that there was substantial evidence and a rational basis for a determination that the plaintiffs were involved in illegal drug activities, and thus there was a basis for reasonable suspicion that plaintiffs were engaged in activities inappropriate to their office. Therefore, there was no constitutional violation.

2. POLICE OFFICERS AND COURT CLERKS

Bostic v. McClendon, No. C-85-2330A (N.D. Ga. July 10, 1986). Plaintiff Bostic, a court clerk, and plaintiff Thigpen, a police officer, were terminated after their urinalyses produced positive results indicating the presence of illegal drug substances. After initially deciding that the urinalyses constituted a search and seizure within the meaning of the fourth amendment, the court utilized a balancing test in which the individual's expectation of privacy was balanced against the the government's right as an employer to investigate employee misconduct, which is or may be directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities. The court noted that the plaintiffs had a significant expectation of privacy

which was clearly infringed upon by the governmental conduct at issue. On the other hand, the court reasoned that the defendant police department had a strong interest in protecting the public by ensuring that its employees were fit to perform their jobs. However, the fact that the police department had a legitimate interest in detecting drug use by its officers did not authorize it to use any method to detect such use.

> Considering the nature of the police department's legitimate interests and the individual officers' reasonable expectation of privacy, the court holds the Fourth Amendment allows the defendants to demand a urine sample from an employee for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences from those facts in the light of experience, that a urinalysis will produce evidence of illegal drug use by that particular employee.

Bostic, slip op. at 10.

Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. 1985). Police department regulation providing any department official may order any member of force to submit to urinalysis upon suspicion of drug abuse, and also mandating testing at discretion of member of Board of Police and Fire Surgeons, was constitutional on its face and was not violative of fourth amendment when term "suspected" was construed as requiring reasonable, objective basis for medical investigation through urinalysis related to police officer's fitness for duty. There must be a reasonable, objective basis to suspect the urinalysis would produce evidence of illegal drug use.

City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325-26 (Fla. Dist. Ct. App. 1985). Urinalysis is constitutionally permissible under reasonable suspicion standard. City has the right to adopt a policy which prohibits police officers and fire fighters from using controlled substances at any time while they are so employed, whether such use was on or off the job. But city's present policy of requiring all fire fighters and police officers to submit to urine testing or be subject to discipline up to and including discharge is violative of the fourth amendment. The court stated that the fourth amendment requires only that there be a reasonable suspicion that urinalysis would produce evidence of illegal drug use.

Allen v. County of Passaic, No. L-19262-86PW, slip op. at 18 (N.J. Super. Ct. Law. Div. June 23, 1986). Sheriff issued directive requiring all personnel employed in the sheriff's department to undergo urinalysis to test for the use of controlled and dangerous substances. Plaintiffs, employees of the department, brought action challenging directive on fourth amendment grounds. The court determined that the appropriate standard to be applied was that of reasonable suspicion. The official conducting the test must be able to point to specific objective facts, and the suspicion must be directed to a specified person. If these burdens are met, testing becomes constitutionally permissible.

Caruso v. Ward, No. 6791, slip op. at 12-13 (N.Y. Sup. Ct. July 1, 1986). Petitioners sought to permanently enjoin respondents from requiring current and future members of the City of New York Police Department's organized crime bureau to consent and submit to future periodic random drug testing. The court determined that respondents had failed to demonstrate or to document that drug use presents a discernible problem or danger sufficient to warrant the constitutional intrusion occasioned by standardless, random drug testing of the approximately 1,200 members of the OCB. The court concluded that a reasonable belief of suspicion standard, coupled with greater vigilance, drug education and other less intrusive methods, may accomplish the same purpose with a lesser invasion of privacy.

3. FIRE FIGHTERS, FIRE OFFICERS, AND COMMUNICATIONS OPERATORS

Capua v. City of Plainfield, No. 86-2992 (D.N.J. Sept. 18, 1986). Plaintiffs, all fire fighters and fire officers employed by the City of Plainfield, and a communications operator for the Plainfield Police Department, were ordered to submit to surprise urinalyses. Prior to the testing, the plaintiffs had no notice of the city's intent to conduct the mass urinalyses. Furthermore, the urinalyses had not been provided for in the city's collective bargaining agreement, nor was there any written directive, order, departmental policy or regulation promulgated establishing the basis for such testing and prescribing appropriate standards and procedures for collecting, testing and utilizing the information derived. As a result of the urinalyses, sixteen fire fighters tested positive for the presence of controlled dangerous substances. They were then immediately terminated without pay. Those who tested

positive were not informed of the particular substance found in their urine or of its concentration. Neither were they provided with copies of the actual laboratory results. Furthermore, written complaints were served upon these individuals, charging them with numerous violations, including "commission of a criminal act." *Capua*, slip op. at 4. Defendants had no warrants, no probable cause, nor any particularized reason to believe that any of the individuals tested used, possessed or were under the influence of drugs. Utilizing a balancing test, the court reasoned that the ultimate determination of the "search's" reasonableness required a judicious balancing of the intrusiveness of the search against its promotion of a legitimate governmental interest. The court noted that the defendants' mass urine testing program subjected plaintiffs to a relatively high degree of bodily intrusion. Furthermore, the requirement of surveillance during urine collection forced those tested to expose parts of their anatomy to the testing official in a manner akin to a strip search exposure. The court reasoned that the manner of taking the test, regardless of how professionally or courteously conducted, was likely to be a very embarrassing and humiliating experience. The court further noted that compulsory urinalysis forced the individuals tested to divulge private, personal medical information unrelated to the government's professed interest in discovering illegal drug abuse. Since the Supreme Court and the Third Circuit had recently recognized a right of privacy in such medical information, *see Whalen v. Roe*, 429 U.S. 589, 602 (1977), and *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980), the District Court of New Jersey determined that the medical disclosure resulting as a by-product of urinalysis created cause for grave confidentiality concerns. The court thus concluded:

> The sweeping manner in which defendants set about to accomplish their goals violated the fire fighter's individual liberties. As to each individual tested the search was unreasonable because defendants lacked any specific suspicion as to that fire fighter. . . .
>
> The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. . . . Although plaintiffs' privacy and liberty interests may be diminished on the job, these interests are not extinguished and therefore must be accorded some constitutional protection.

Capua, slip op. at 16-17. Further noting that the fourth amendment speaks in terms of individual guarantees, the court reasoned that "[e]very individual has the absolute right to be free from searches and seizures absent the establishment of some degree of reasonable suspicion against him or her." *Id.* at 17. Therefore, the mass surprise urinalyses conducted by the city of Plainfield was unreasonable and unconstitutional.

4. SCHOOL BUS ATTENDANTS

Jones v. McKenzie, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986). Plaintiff, a school bus attendant for school system, was terminated on the basis of a single, unconfirmed EMIT test after being subjected to directive of school system's drug use surveillance program, which required mandatory urinalysis. Defendants had no warrant, no probable cause, nor any particularized reason to believe plaintiff used, possessed or was under the influence of drugs. The court held that a school bus attendant should not reasonably expect to be exposed to such testing. Indeed, the court stated that public safety considerations do not require testing of a school bus attendant similar to that imposed by the military, nor do they require more stringent testing than so far found permissible for the police or for bus drivers in the absence of particularized probable cause. Thus, the termination was unconstitutional in the absence of individualized reasonable suspicion.

5. BUS DRIVERS

Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir. 1976). Bus drivers' union brought action against transit authority, challenging 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. The court recognized that the state has a paramount interest in protecting the public by ensuring that bus drivers are fit to perform their jobs. The bus drivers had no reasonable expectation of privacy with regard to submitting to blood and urine tests under the circumstances enumerated above. The tests were given only in hospitals and only upon the concurrence of two supervisory employees. Thus, the conditions under which the intrusions were made were reasonable.

6. PUBLIC SCHOOL STUDENTS

Odenheim v. Carlstadt-East Rutherford Regional School District, 211 N.J. Super. 54, ___, 510 A.2d 709, 713 (1985). Board of Education policy required urinalyses of students as part of an annual physical. The court, finding the random policy unconstitutional as violative of the students' expectation of privacy, applied the balancing test articulated by the United States Supreme Court in *New Jersey v. T.L.O.*, ___ U.S. ___, 105 S. Ct. 733, (1985). The court concluded that defendants' actions were not justified at their inception, nor was the "search" reasonably related in scope to the circumstances which justified the interference in the first place.

Anable v. Ford, No. 84-6033, slip op. at 45 (S.D. Ark. July 12, 1985) (available on WESTLAW). Urinalyses were utilized by school officials to determine whether students had used marijuana at school. The court determined that before such a search could ever be justified, there would have to be a "high probability" that the search would disclose evidence of a violation of school rules or the criminal laws. The court stated that other less intrusive means were available and would be consistent with constitutional requirements, since they were reasonably related to the maintenance of order and security in the school.

7. PUBLIC SCHOOL TEACHERS AND OFFICIALS

Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, No. 85-8759, slip op. at 5-6 (N.Y. Sup. Ct. Suffolk Co. June 14, 1985), *aff'd*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986). Mandate of school district that all teachers being considered for grant of tenure must submit to a urine test to determine the presence of illegal drugs constituted an impermissible and unconstitutional search under the fourth amendment. The court concluded that an invasive bodily search could constitutionally be made only when based upon reasonable suspicion supported by objective facts.

C. EXCEPTIONS TO REQUIREMENTS OF INDIVIDUALIZED REASONABLE SUSPICION.

1. ROUTINE PHYSICAL EXAMINATIONS

McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *on remand from* 746 F.2d 785 (8th Cir. 1984) (interlocutory appeal affirming district court's preliminary injunction), *appeal docketed*,

No. 85-1919-S1 (8th Cir. 1985). Although holding that correctional employees could not be subjected to urinalyses in the absence of individualized reasonable suspicion that such testing would produce evidence of illegal drug use, the court recognized three possible exceptions to the reasonable suspicion standard: (1) as part of a routine pre-employment examination; (2) as part of a routine periodic physical administered to all employees; or (3) on a periodic basis as a condition of employment "under a disciplinary disposition."

2. REGULATED INDUSTRIES

Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986). Five well known jockeys brought an action challenging the constitutionality of regulations adopted by the commission that permitted the state racing steward to direct any official, jockey, trainer or groom to submit to breathalyzer or urine testing to detect alcohol or drug consumption. The regulations provided for sanctions of varying severity, including lifetime suspension from racing for persons testing positive. The court noted that the statutory powers of the New Jersey racing commission included "full power to prescribe rules, regulations and conditions under which all horse races shall be conducted." N.J. STAT. ANN. § 5:5-30 (West 1973). The court further noted that because the public wagers on the outcome of races, the commission's regulations were focused upon the necessity for preserving both the fact and the appearance of integrity of the racing performances. The jockeys urged that the mandatory daily breathalyzer test and the random urine test could not be required without individualized suspicion. The commission, which did not argue that the mandatory test did not involve a search or seizure within the meaning of the fourth amendment, instead urged that such warrantless searches or seizures by voluntary participants in the highly regulated racing industry were reasonable. The court opined that in general, a warrant is required for a search to be considered reasonable under the fourth amendment. However, "[i]n closely regulated industries, . . . an exception to the warrant requirement has been carved out for searches of premises pursuant to an administrative inspection scheme." *Shoemaker*, 795 F.2d at 1142. The court stated that there are two interrelated requirements justifying the warrantless administrative search exception. The first is that there must be a strong state interest in conducting an unannounced search; the second is the pervasive regulation of

the industry must have reduced the justifiable privacy expectation of the subject of the search. *Id.* The court concluded that because both these requirements were present in the warrantless testing of persons involved in the New Jersey horse racing industry, the testing was reasonable, and therefore there was no constitutional violation. In conclusion, the breathalyzer and urine tests of the jockeys at the race track proximate to race time absent any individualized suspicion, and, as administered under regulations, were deemed reasonable in light of the regulated nature of horse racing and the government's interest in maintaining the integrity of the industry and safety of the sport.

3. SAFETY SENSITIVE POSITIONS

Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986). School bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to urine and blood tests not required of other employees without particularized suspicion.

Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976). Fourth amendment prohibits only unreasonable searches. In determining whether or not a search is reasonable, court weighs governmental interests against expectation of privacy. Where government interest is particularly high, and policy requiring mandatory, non-individualized suspicion test is announced, balance tips in favor of permitting test.

Sanders v. WMATA, No. 84-3072 (D.D.C. Jan. 9, 1986). Post-accident and post-sick leave testing of transit workers is constitutionally permissible.

Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, No. L-095001-85E (N.J. Super. Ct. Law Div. June 16, 1986). Police might reasonably expect to be subject to urine and blood tests because of safety-sensitive position.

4. NON-CRIMINAL INVESTIGATIONS OR PROCEDURES

Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985). Plaintiffs worked in the electrical distribution division of the Board of Lights and Water and worked around high voltage electric wires. Defendant city manager, and the manager of the Board of Lights and Water, began receiving reports from various sources of drug usage by employees of the Board. The city manager formed the belief that such drug usage may have been responsible for what ap-

peared to be a large number of injuries to Board employees. Based upon investigatory information, the city manager decided that he had sufficient evidence to terminate certain employees for use of drugs on the job. When none of the employees volunteered to resign, the city manager advised them that they would be fired unless they chose to submit to urinalyses. The plaintiffs elected to undergo urinalyses, and each of them tested positive for the presence of marijuana. All of the plaintiffs were fired as a result of the urinalyses. Although the court held that urinalysis is a search and seizure within the meaning of the fourth amendment, it adopted an exception to the warrant requirement which involves searches of government employees. Essentially, the court held that while government employees did not surrender their fourth amendment rights merely because they go to work for the government, the government nevertheless has the same right as any 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 his or her duties, the employee cannot claim a legitimate expectation of privacy from searches related to the employee's performance of his or her duties. Because the urinalysis in this case was conducted in a purely employment context and was not done in connection with any criminal investigation or procedure, the urinalyses administered were not unreasonable searches in violation of the fourth amendment.

5. MILITARY

Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975). Class action was brought on behalf of enlisted members of the Army's European Command, in which it was claimed that various features of the drug abuse prevention plan adopted by the Command were unconstitutional. When a soldier has been identified as a possible drug user, on the basis of an inspection or otherwise, he is subject to mandatory drug processing. Balancing a number of factors, including the fact that the military forces are charged with the responsibility of continuously protecting the nation's interests both on the domestic and international levels, the court determined that the GI's interest in his own personal privacy and security was outweighed by the government's interest.

Thus, the warrantless drug inspections under the plan adopted by the Command were reasonable and constitutionally permissible under the fourth amendment.

Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983). Applying factors enunciated in *Callaway*, the court concluded that even though the compulsory urinalysis to which Murray was subjected constituted a "seizure" of his urine within the meaning of the fourth amendment, the seizure was reasonable. The court stated that urine specimens were not included within the protection accorded to service members, *i.e.*, furnishing a urine specimen — even pursuant to a military order or direction — is not an "intrusion into" a body cavity within the meaning of MIL. R. EVID. 312 (c), or an "intrusive search of the body" within the meaning of MIL. R. EVID. 312(e).

II. EMPLOYEE CONSENT AND/OR WAIVER TO URINALYSIS.

A. Courts will not normally find valid consent where the consent is required as a condition of employment.

B. Public employees cannot be bound by unreasonable conditions of employment. *See, e.g., McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985); *cf. Hester v. City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

III. STATE CONSTITUTIONAL OR STATUTORY PROVISIONS.

A. *Recent San Francisco Ordinance Bars Most Employee Drug Testing*, 23 Gov't Empl. Rel. Rep. (BNA) 1748 (Dec. 9, 1985).

B. State search and seizure guarantees may be interpreted more broadly than fourth amendment.

IV. OBJECTIONS TO USE OF TEST RESULTS.

A. CONSTITUTIONAL VIOLATIONS.

1. DISCIPLINE AND/OR DISCHARGE

Discipline or discharge based on unconstitutional urinalysis, *i.e.*, not based on individualized reasonable suspicion or probable cause, is generally invalidated. *See, e.g., Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986). Arguments based on inapplicability of exclusionary rule were not raised in *Jones*, nor do they appear to have been raised elsewhere; as a federal constitutional matter, *see I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

2. DUE PROCESS OBJECTIONS

Even where policy is valid, there may be due process objections to the imposition of discipline or other adverse action based on reliability of test results, *e.g.*, inherent test limitations, unconfirmed tests, chain of custody problems.

(a) INHERENT UNRELIABILITY

Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), cites extensive authority for unreliability of standard (EMIT) test absent confirmation by alternative methods. Instructions of company producing EMIT test say it is insufficient for adverse action absent such confirmation. Experts have agreed that unconfirmed EMIT tests are too unreliable for adverse action. *See e.g.*, Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16 J. PSYCHIATRIC DRUGS 305 (1984). False positives (drug reading where no drugs present) occur at unacceptably high rates; they may be caused by lawful over-the-counter drugs, such as Contact or Sudafed, poppy seed cake or bagels, melanin in skin, passive inhalation, or herbal teas. *See, e.g.*, Greenblatt, *The Admissibility of Positive EMIT Results as Scientific Evidence*, 6 J. CLINICAL PSYCHOPHARMACOLOGY 114-16 (1985); ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES 29 (BNA Special Report 1986).

(b) UNRELIABLE LABORATORY HANDLING

The Centers for Disease Control has found lab accuracy ranges from 37% to 69%. Hansen, Caudill, & Boone, *Crisis in Drug Testing: Results of a CDC Blind Study*, 253 J. A.M.A. 2382 (1985); ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS AND CONTROVERSIES 30 (BNA Special Report 1986). As of 1984, the Army was reported to have mishandled 52,000 urine samples. One Army Lab had an error rate of 97%. ARMY TIMES, Apr. 2, 1982, at 1. *See also Banks v. FAA*, 587 F.2d 92 (5th Cir. 1982) (overturning discipline of an air traffic controller where the samples were destroyed and not available for verification); *Storms v. Coughlin*, 600 F. Supp. 1214, 1221-22, 1225 (1984).

(c) UNCONFIRMED TESTS

Where agency policy requires confirmed tests, discipline based on an unconfirmed test is arbitrary and capricious, in violation of due process. *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986).

V. TORT — DEFAMATION.

Houston Belt & Terminal Railway Co. v. Wherry, 548 S.W.2d 743 (Tex. Ct. App. 1976) (switchman awarded $150,000.00 compensatory damages and $50,000.00 punitive damages where employer relied on unconfirmed erroneous drug report and then defamed plaintiff with results).

VI. FEDERAL EMPLOYEES — EXHAUSTION OF ADMINISTRATIVE REMEDIES.

National Federation of Federal Employees v. Weinberger, 640 F. Supp. 642 (D.D.C. 1986). Federal employees who are subject to the Civil Service Reform Act, and have available to them remedial procedures provided for therein, must pursue their constitutional and statutory challenges to agency action before an appropriate administrative tribunal before they are entitled to judicial review. Thus, an action wherein a union of critical federal employees sought to enjoin the government from implementing a drug abuse testing program for federal employees in the Department of the Army, was more appropriately characterized as involving a labor/management dispute, which was an issue of federal personnel policy under the Civil Service Reform Act, and as such, was not an action as to which jurisdiction was vested in federal court to rule on the merits of whether urinalysis of the federal employees required a warrant, particularized probable cause, or individualized reasonable suspicion. In conclusion, the court held that plaintiffs' claims belonged before either the Federal Labor Relations Authority or the Merit System Protection Board, since the action involved a labor/management dispute and was governed by the exclusive jurisdictional framework of the Civil Service Reform Act.