



#184 – Drug testing in the public sector: An overview of legal issues and pre-employment testing

Cheri Hass

Wednesday, March 30, 2011
1:15 to 2:15 p.m.



Drug Testing in the Public Sector

Overview of Legal Issues and Pre-Employment Testing

*By Cheri B. Hass
Downes Fishel Hass Kim LLP*

Pre-Employment Testing

Government mandated drug testing is a “search & seizure” under the Fourth Amendment.



Applicants v. Employees



Clerical Support Staff

- Largest risk applies to routine and entry-level positions.



Reasonable Suspicion

- An Employer may test if they can state reasonable suspicion.
 - What constitutes reasonable suspicion?



Employer Policy

Necessary to withstand employee challenges.



Presented By: Cheri B. Hass
Downes Fishel Hass Kim LLP
Please Visit Our Website for More
Information.
www.downesfishel.com

Points of view, ideas, products, demonstrations or devices presented or displayed at the Ohio Safety Congress & Expo do not constitute endorsements by BWC. BWC is not liable for any errors or omissions in event materials.

OSC | 11
Ohio Safety Congress & Expo



400 South Fifth Street, Suite 200
Columbus, Ohio 43215-5492
(614) 221 1216 PH
(614) 221 8769 FX
www.downesfishel.com

PRESENTATION TO:
Ohio Safety Congress

Drug Testing in the Public Sector

Overview of Legal Issues and Pre-Employment Testing

PRESENTED BY:
Cheri B. Hass
March 30, 2011

This material is intended solely for informational and presentation purposes only and in no way should be construed as offering or providing legal advice.



Cheri B. Hass is a partner with the Columbus law firm of Downes Fishel Hass Kim LLP. Cheri received her law degree, cum laude, from The University of Toledo, College of Law and a Bachelor of Arts degree from The Ohio State University. Prior to her employment at Downes Fishel Hass Kim LLP, she served as a judicial clerk for the Honorable Don J. Young in the United States District Court, Northern District of Ohio. Cheri frequently presents seminars and training in a variety of fields including discrimination and harassment, hiring practices, law enforcement liability, Fair Labor Standards Act, and the Family Medical Leave Act. She is also experienced in employment and civil rights litigation, law enforcement liability, administrative matters, arbitrations, civil service law and collective bargaining. Cheri is a member of the National Sheriffs' Association, Legal Affairs Committee, Federal and Ohio State Bar Associations, Ohio Association of Trial Attorneys and a member of the Public Risk Management Association.

DOWNES FISHEL HASS KIM LLP

Downes Fishel Hass Kim LLP defends business entities, public officials, and the owners and boards of these entities, and private individuals. The philosophy of the firm is to provide services that promote the development of systems and human resource management to maximize the goals and direction of the organization and to avoid and minimize conflict. This may include employee and supervisory training, the development and implementation of policies and procedures, and consultation. Vigorous representation is the first concern with consideration to both the short and long term effects. Services are provided to unionized, non-unionized, and mixed unionized/non-unionized clients. The firm's perspective is pro-management.

The firm also represents clients in pretrial, trial and appellate stages of litigation in both federal and state court and related administrative matters. Our litigation practice includes the defense of discrimination and harassment suits, Constitutional matters, professional partnerships and small business litigation, corporate dissolutions and shareholder disputes, wrongful termination, wage and hour, Family Medical Leave, Fair Labor Standards Act, and other civil actions.

The firm's defense philosophy is proactive, while maintaining a balance between appropriate defenses without unnecessary discovery or discovery disputes. The firm focuses on both the short-term and long-term impact of litigation. A concerted effort is placed on determining issues of liability as early as possible in litigation, allowing the client to make informed decisions concerning case resolution. The firm is flexible as to services based on clients' needs and wishes. The attorneys regularly work in conjunction with all levels of management staff, legal advisors, officers, and directors providing advice, background information, research and/or consultation on specific issues.

TABLE OF CONTENTS

	Page No.
I. Introduction & Pre-Employment Testing	1
A. Introduction.....	1
B. Pre-Employment Suspicionless Drug Testing	1
II. An Employer May Test If They Can State Reasonable Suspicion	6
A. Reasonable Suspicion Defined	6
B. Case Law Interpretations - What Constitutes Reasonable Suspicion	7
Sample Pre-Employment Drug Testing Consent Form	11

I. INTRODUCTION & PRE-EMPLOYMENT TESTING

A. Introduction

1. Government mandated drug testing is a “search and seizure” under the Fourth Amendment of the United States Constitution. A government employee does not lose his right to privacy simply by the conditions of his employment. However, under certain circumstances, a public employer may engage in pre-employment drug testing, reasonable suspicion drug testing and even random testing.

B. Pre-Employment Suspicionless Drug Testing

1. Pre-employment suspicionless drug testing has been an issue for public employers for years due to concerns about whether such testing is an improper search and seizure in violation of an applicant’s constitutional rights. Although the cases are quite fact-specific, certain guidelines may be followed to minimize the risk of pre-employment drug testing.
2. Applicants v. Employees - Public employees generally have a property interest in their jobs. As such, drug testing of current employees for promotional purposes implicates a greater employee interest than does drug testing an applicant for employment. Most of the case law in this area addresses individuals already in an employment relationship. When reviewing those decisions, a distinction must be noted between employees and applicants.
3. Clerical Support Staff may provide the largest risk. As will be discussed further in the case law below, the largest area of risk relative to pre-employment suspicionless testing applies with positions that are very routine and entry-level in nature such as non-fiduciary administrative staff.
4. Drug or Alcohol Testing of County Employees and Job Applicants, 2007 OPR 003 (May 30, 2007) The Office of the Ohio Attorney General issued “informal guidance” regarding pre-employment drug testing. The “informal opinion” related specifically to requirements contained in the Bureau of Workers’ Compensation (BWC) Drug Free Workplace Discount Program (DFWP). In the program, the Attorney General’s Office informally concluded only that a public employer may not participate in the BWC DWFP due to a public employer’s inability to conduct pre-employment or new hire drug and alcohol testing for all employees as a result of the “special needs” test articulated by the Ohio Supreme Court (relying in large part upon State ex. rel. Ohio AFL-CIO v. Ohio Bureau of Workers’ Comp., 97 Ohio St.3d 504 (2002)). In sum, the Attorney General’s Office informally stated that because it is improper for a public employer to drug test all applicants and/or new hires, public entities are not eligible for the DWFP offered by the BWC. It is important to recognize that the Attorney General Opinion is intended for “informal guidance” only and that all prior judicial precedent remains the same.

NOTE: AFL-CIO **did not** address pre-employment testing and its conclusions were based upon employees who were already in an employment relationship.

BWC revised program in 2010. Drug Free Safety Program (“DFSP”) now allows private and public employer taxing districts to participate. Self insuring employees and state agencies are not eligible to participate in DFSP.

DFSP has basic and advanced levels:

- a. Basic level - Employer must provide pre-employment, reasonable suspicion, post accident, return-to-duty, and follow up testing.
- b. Advanced level - Employer must provide the same requirements for basic level plus 15% random testing.

5. Middlebrooks v. Wayne County, 521 N.W.2d 774 (Mich. Sup. Ct.1994).

Plaintiff’s invasion of privacy and due process claims were rejected by the Michigan Supreme Court as Plaintiff consented to a pre-employment drug test and had an opportunity to appeal the positive result.

Middlebrooks completed and signed a “Consent Form and Questionnaire” that indicated he had not taken any prescription medication within the past month or any nonprescription medication within the last ninety-six hours, and which provided that he “understands that the results of this examination will be reported to the agency that referred me for the tests.”

Middlebrooks also signed a “Medical Examination” form that indicated he was not “taking any medication at the present time.” He acknowledged a “habit” of tobacco, and did “certify that the above information is true and agree and understand any misstatement of material facts contained in this form may cause forfeiture of all my rights to employment with the County of Wayne.”

In light of the above in conjunction with the lack of precedent, public employers are wise to narrowly tailor their pre-employment suspicionless drug testing of employment applicants. When conducting pre-employment testing, public employers may want to consider requiring applicants to consent in writing. (See Appendix for Sample Form). Additionally, some form of an appeal should be provided to the applicant to contest a positive result.

6. Knox County Education Association v. Knox County Board of Education, 158 F.3d 361, 373 (1998).

Pre-employment drug testing can be done when “special need” exists. When determining whether a “special need” exists to permit suspicionless drug testing, a two-part test must be used. First, the public interest in the testing must be considered. In reviewing the

public interest in the testing, courts will consider whether the group occupies a unique position whereby the existence of a pronounced drug problem is unnecessary to justify suspicionless testing and the magnitude of harm that could result from the use of illicit drugs. Second, the privacy interests of the employees must be considered.

In Knox County, the Sixth Circuit upheld a school board policy that required drug testing for all individuals who apply for, transfer to, or are promoted to “safety sensitive” positions. Ultimately, the court upheld the school board’s drug testing policy which did not require reasonable suspicion because of the nature of the duties performed by the individuals subject to the policy. The Knox court determined that testing people hired to serve in teaching and administrative positions is reasonable. *Id.* at 384. The Court also noted the *in loco parentis* responsibility of teachers.

- a. Testing can also administered when a teacher behaves in a manner suggesting that he or she may be engaged in drug use. See Catlett v. Duncanville Independent School Dist., 2010 WL 3467325 (2010).
7. Distinguishable from Knox County, in Lanier v. City of Woodburn, 518 F.3d 1147, 1151 (2008), the Ninth District rejected mandatory pre-employment drug tests for job applicants to the City library. The Court held that a library employee does not have the same *in loco parentis* responsibility for children as teachers do. The Court said that there was no indication that school student’s safety and security is entrusted to a library employee, or that such an employee is in a position to exert influence over children by virtue of continuous interaction or supervision. Therefore, the Ninth Circuit concluded that a library employee is not “safety-sensitive” in the same sense that a teaching position was held to be in Knox County and they rejected the City’s mandatory pre-employment drug testing.
8. In Veronia School District 47J v. Acton, 515 U.S. 646 (1995), the United States Supreme Court concluded that students who voluntarily participate in student athletics are akin to employees in a heavily regulated industry and can properly be subject to suspicionless drug-testing. Analogously, as certain public entities conduct business in heavily regulated industries, an argument exists to provide for drug testing for those positions.
9. In Chandler v. Miller, 520 U.S. 305 (1997), the United States Supreme Court overturned a Georgia statute requiring candidates choosing to run for state office to pass a drug test before being placed on the ballot. The Court rejected the state’s proffered reasons for the drug-testing. The Court held that the positions of elected officials were not safety sensitive and that the state’s proffered rationale was “merely symbolic.”
10. Safety sensitive positions subject to pre-employment drug testing. Consequently, Employers can likely subject job applicants for these positions to pre-employment drug testing.

The following positions are established by case law to be safety-sensitive and subject to suspicionless drug testing: nuclear power plant workers, seaman operating oil tankers,

meter repairmen for a gas company, firefighters and emergency medical technicians, process technicians at a petrol-refining facility, police officers, bus drivers, pipeline operators, airline industry personnel, correctional officers, and Justice Department personnel with top-secret security clearance. See Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir. 1988); Exxon v. Exxon Seaman's Union, 73 F.3d 1287 (3rd Cir. 1996); Mountaineer Gas Company v. Oil, Chemical & Atomic Workers International Union, 76 F.3d 606 (4th Cir. 1996); Gulf Coast Industrial Workers Union v. Exxon, 991 F.2d 244 (5th Cir. 1993); Ford v. Dowd, 931 F.2d 1286, Tanks v. Greater Cleveland Regional Transit Authority, 930 F.2d 475 (6th Cir. 1991); International Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990) (noting cases in which courts have upheld random drug tests for employees with safety-sensitive, security-sensitive, or public integrity-sensitive jobs.).

II. AN EMPLOYER MAY TEST IF THEY CAN STATE REASONABLE SUSPICION

A. Reasonable Suspicion Defined:

The requirement of reasonable individualized suspicion for random employee drug testing has been difficult for the courts to define. However, the following are examples of court-made or statutorily enacted definitions of “reasonable suspicion:”

1. Under Ohio Administrative Code, reasonable suspicion:

“...Must be based upon objective facts or specific circumstances found to exist that present a reasonable basis to believe that an employee is under the influence of, or is using or abusing, alcohol and/or other drugs.

“Examples of reasonable suspicion shall include, but need not be limited to: Slurred speech, disorientation, and abnormal conduct or behavior. O.A.C. 123:1-76-10.

2. “Reasonable-suspicion drug testing’ means drug or alcohol testing based on a belief that an employee is using or has used drugs or alcohol in violation of the covered employer’s policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

- a. Observable phenomena while at work, such as direct observation of drug or alcohol use or of the physical symptoms or manifestations of being under the influence of a drug or alcohol.
- b. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
- c. A report of drug or alcohol use, provided by a reliable and credible source.

- d. Evidence that an individual has tampered with a drug or alcohol test during employment with the current covered employer.
 - e. Information that an employee has caused, contributed to or been involved in an accident while at work.
 - f. Evidence that an employee has used, possessed, sold, solicited or transferred drugs or used alcohol while working or while on the covered employer's premises or while operating the covered employer's vehicle, machinery or equipment. See Tenn. Code Ann. 50-9-103(15) (1999).
3. Reasonable suspicion should be based on:
- a. The nature of the tip or information.
 - b. The reliability of the informant.
 - c. The degree of corroboration.
 - d. Other facts contributing to suspicion or lack thereof. See Copeland v. Philadelphia Police Department, 840 F.2d 1139, 1144 (3rd Cir. 1988) (cited with approval in the 2nd Circuit).

B. Case Law Interpretations - What Constitutes Reasonable Suspicion?

Regardless of a statutorily-enacted definition of “reasonable suspicion,” it is still necessary for the courts to interpret the meaning of “reasonable suspicion” through concrete factual settings.

1. The testing of employees for drug use does not constitute an unreasonable search and seizure under the Fourth Amendment if the employer can either demonstrate a reasonable suspicion of drug use, or that the employer’s interest in public safety, protection of sensitive information, or employee integrity is considered substantial. See e.g., Skinner and Von Raab, supra.
2. Courts will generally look at the totality of the circumstances to determine if reasonable suspicion is present.

Pernell v. Montgomery County Board of Commissioners, 1996 Ohio App. LEXIS 4954 (November 15, 1996), Montgomery App. No. 94-929: The court upheld a drug screening test of a county solid waste manager based on reasonable suspicion.

Facts: The employee refused to submit to a drug screening test by his supervisor. After discharged from his position for insubordination, Pernell claimed his employer did not have reasonable suspicion to require him to submit to a drug test.

Holding: The Court of Appeals found the employer did in fact establish reasonable suspicion. The court pointed to such factors as Pernell’s knowledge of the employer’s drug policy, Pernell providing marijuana off-duty to another employee, the odor of marijuana emanating from Pernell’s office on two prior occasions, and marijuana found in Pernell’s home after a deputy executed a warrant. After the culmination of these factors, he was ordered to submit to a drug test by his supervisor. The court reasoned that under the county’s policy, all that was required was “reasonable suspicion that substances are affecting performance in the workplace,” and Pernell’s conduct definitely met this standard.

But see, In the Matter of Barnesville Exempted Village School District Board of Education v. Barnesville Association of Classified Employees, (1997) 123 Ohio App.3d 272: The court held that the school district had not presented enough articulable facts rising to the level of reasonable suspicion to drug test an employee who inspected and maintained a school’s boilers, where the employee, at most, admitted to drinking occasionally.

Hassell v. City of Chesapeake, 64 F.Supp.2d 573 (E.D. Va. 1999):

Facts: The parole officer was required to submit to a drug test based on a co-worker’s report that she smelled the odor of marijuana on him.

Holding: The court upheld the drug testing of a counselor / parole officer. The court held that the employee’s Fourth Amendment rights were not violated. The evidentiary standard necessary to establish reasonable suspicion of someone at a detention home is a lesser standard that necessary to test those in less sensitive positions.

3. Other factors leading to “reasonable suspicion.”

In determining whether “reasonable suspicion” exists to compel an employee to submit to random drug testing, courts generally look to the following factors: (Again, not any one of these factors is dispositive of off-duty substance abuse, but combined might lead the court to draw the inference that reasonable suspicion for testing exists.)

- a. The conviction of illegal drug use or abuse of alcohol, or employee involvement where the abuse of substances is suspected.
- b. Observed use or possession of illegal substances, including the sale or use of illegal drugs or prescription medications, while on the job.
- c. Recent, marked changes in personal behavior.
- d. Physical impairment and the inability to perform related job tasks.

4. Practice Tip: The existence of an employer policy regarding drug testing is imperative to withstand later employee challenges.

In re Morgan County Department of Human Services and AFSCME Local No. 3560, Case No. 00-00612 (Ruben 2000), Arbitrator Alan Ruben defined when employers have “just cause” to compel an employee to submit to drug testing resulting from suspected off-duty use.

Facts: A County Department of Human Services caseworker was required to undergo a series of drug tests. During one of these examinations, the employee tested positive for marijuana and cocaine. The employee’s conduct, attendance, and work performance had declined in the months before drug testing was initiated, and she became hostile when supervisors attempted to address these issues with her. Further, the agency had received several complaints from clients about her conduct and alleged drug use while she was off-duty. In addition, the county received documentation of a positive drug test result for marijuana by the employee that stemmed from the employee’s ongoing child custody dispute in the County’s Juvenile and Family Court. Based on these factors, the Department chose to mandate reasonable suspicion drug testing, which ultimately led to her five-day suspension from work.

Holding: The employee grieved the suspension, although she did not deny the use of drugs, predominantly on the basis that she was off-duty when the alleged drug use took place. Arbitrator Ruben ruled that the factors the Department used to compel the drug testing constituted reasonable suspicion. Moreover, the mere fact that the drug use took place while she was not directly acting within the scope of her employment was of little consequence, because it affected her work performance. Pointing to several instances in the record where her clientele complained of her attendance, conduct, and absenteeism, coupled with her insubordination to her supervisors and the positive results of an independent drug test, the Department’s actions were sustained. The Arbitrator also noted several outside factors which contributed to sustaining the suspension, such as the small geographic area in which the employee worked, the irreparable damage that might occur to the Department’s credibility, and the nature of her work as a drug and alcohol counselor to welfare recipients.

a. Important considerations:

In Morgan County, the Arbitrator upheld the validity of the drug testing based on a series of objective indications observed by the employer. The discipline was proper because the employer’s public service function and credibility in the community, and also the employee’s drug referral and treatment related duties were directly undermined by the employee’s off-duty drug use.

In re Canton, SERB 94-011(6-29-94): The implementation of a drug-testing policy is a mandatory subject of bargaining where the employees affected are not in safety-sensitive positions, which would require immediate action by the employer in the interest of public safety, or in furtherance of the employer’s overall mission.

In re Findlay City School District Board of Education, SERB 87-031 (12-17-87). Employer began to directly deal with employees by mailing them proposed drafts of

policy statement on drug and alcohol abuse, which included discipline for such actions. It is a mandatory subject of bargaining whether an employer will adopt a policy statement on drug and alcohol abuse that invites disciplining of employees whose dependence on such substances affects their work. SERB found this to be “clearly pertinent to the working environment.” Thus, the employer’s mailing and adoption of the statement without bargaining were both found to be unfair labor practices under O.R.C. 4117.11(A)(1) and O.R.C. 4117.11(A)(5).

Sample Pre-Employment Drug Testing Consent Form

I understand that any offer of employment which may be made to me by the [PUBLIC ENTITY] is contingent upon my successfully passing a Drug Screening Test. I hereby give my consent to [PUBLIC ENTITY] to conduct a drug test that will be performed by a laboratory selected by [PUBLIC ENTITY], and which will provide for split sample testing. I also understand and agree that if the pre-employment Drug Screening Test indicates a violation of the Drug Testing Policy, any contingent job offer which may be or has been made to me will be null and void.

I further agree that in the event that the pre-employment Drug Screening Test indicates a violation of the Drug Testing Policy, I will have an opportunity to challenge this violation before [PUBLIC ENTITY HUMAN RESOURCES DEPARTMENT and/or appropriate department] by submitting a written request to the [APPROPRIATE DEPARTMENT] to review the record. I may submit additional written information that I believe to be appropriate to the [PUBLIC ENTITY] for consideration. Additionally, I may, at my cost, have the split sample referenced above tested to ensure the accuracy of the testing procedure. I understand that the decision of the [PUBLIC ENTITY HUMAN RESOURCES DEPARTMENT and/or appropriate department] shall be final.

Signature of Applicant _____ Date _____