

# OSC | 11

Ohio Safety Congress & Expo



## #185 – Drug testing public employees: Collective bargaining issues, reasonable suspicion and testing

Cheri Hass

Wednesday, March 30, 2011  
2:30 to 3:30 p.m.

Ohio Bureau of Workers' Compensation

## Drug Testing Public Employees

Random Testing, Workers' Compensation,  
& Off-Duty Conduct

By Cheri B. Hass  
Downes Fishel Hass Kim LLP

## Random Drug Testing

Special Needs  
Pervasive Government Regulations  
Integrity Of The Workforce



3

## DON'T OVERLOOK Collective Bargaining Agreements



4

## Workers' Compensation



5

## Off-Duty Conduct

On-Duty

Off-Duty



Considerations Before Disciplining For Off-duty Conduct...

6

Presented By: Cheri B. Hass  
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7

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# *Drug Testing Public Employees*

*Random Testing, Workers' Compensation,  
& Off-Duty Conduct*

**PRESENTED BY:**  
**Cheri B. Hass**  
**March 30, 2011**

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**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.

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## TABLE OF CONTENTS

	<b>Page No.</b>
I. When Can A Public Employer Perform Random Drug Testing On Employees? .....	1
A. Leading Case.....	1
B. Companion Case .....	1
C. Test Case.....	2
II. What Constitutes “Special Needs?” .....	2
A. Safety Sensitive Positions Exception.....	2
B. Operation Of Public Transportation Or Vehicles .....	3
C. Don’t Overlook Collective Bargaining Agreements.....	4
III. Workers’ Compensation And Drug And Alcohol Abuse .....	5
A. Ohio Revised Code Section: § 4123.54 .....	5
B. Exceptions To Rebuttable Presumption.....	6
C. Employer Considerations.....	6
D. Case Interpretations .....	6
IV. Off-Duty Conduct .....	7
A. Considerations Before Disciplining For Off-Duty Conduct.....	7
B. Once An Employee Has Tested Positive For Drugs.....	7

## **I. WHEN CAN A PUBLIC EMPLOYER PERFORM RANDOM DRUG TESTING ON EMPLOYEES?**

An Employer can compel random drug testing in “special needs” cases.

### **A. Leading Case:**

Skinner v. Railway Labor Executive Association, (1989) 489 U.S. 602.

Holding: The Supreme Court recognized “special needs” cases, where the courts have balanced the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in employee drug testing cases.

Since the Skinner decision, if the employer can demonstrate that the particular employee occupies a position of “special need,” then the reasonable suspicion requirement is suspended.

These occupations normally include public safety positions and governmental employees equipped with special knowledge or confidential information.

### **B. Companion Case:**

National Treasury Employees Union v. Von Raab, (1989) 489 U.S. 656.

Holding: Public employees subjected to suspicionless testing were found to have diminished privacy expectations due to the pervasive governmental regulations of the jobs they performed.

In interpreting these decisions (the leading cases on employee drug testing), the courts have developed the “special needs” test as follows:

1. Urinalysis, if compelled by the government, is a “search” subject to the restrictions of the Fourth Amendment.
2. However, individualized suspicion of a particular employee is not required by the Constitution.
3. Nor is it necessary that a documented drug problem exist within the particular workplace at issue.
4. Rather, where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectation against the government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

### **C. Test Case:**

Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989).

Facts: The U.S. Department of Justice argued that, as federal employees, the government had an interest in ensuring the integrity of the workforce as justification for its random drug testing policy.

Holding: There is no absolute test to determine what constitutes “special needs,” but the courts will engage in a case-by-case determination.

The court reasoned that government employment “alone is not a sufficient predicate for mandatory urinalysis,” and the random drug testing was not allowed.

Therefore, there must be a distinct relationship between the governmental interests involved and the nature of the employee’s duties to justify random drug testing.

## **II. WHAT CONSTITUTES “SPECIAL NEEDS?”**

### **A. Safety Sensitive Positions Exception.**

The U.S. Code of Federal Regulations, 49 C.F.R. 653.35, defines “safety-sensitive employees” as “employees who perform job duties related to the safe operation of mass transit service including the operation, dispatch, and control, maintenance, and supervision of revenue service vehicles, and any employee who holds a commercial drivers license.”

However, the courts have interpreted “safety sensitive” positions beyond the language of the statute. Employees need not fit the traditional definition of the statute to be subject to the employer’s interests in random drug testing.

#### 1. Case: Saavedra v. City of Albuquerque, 73 F.3d 1525 (10<sup>th</sup> Cir. 1996):

Facts: Saavedra had referred himself to a city health center for an evaluation after becoming increasingly violent towards his supervisors and girlfriend. After a second urinalysis showed positive signs of marijuana use, he admitted at a pre-termination hearing to using the substance. After discharged, Saavedra claimed a violation of his Fourth Amendment right under 42 U.S.C. § 1983.

Holding: The 10<sup>th</sup> Circuit held that the City had reasonable suspicion to test Saavedra based on his erratic, violent behavior, and his admittance to using marijuana. However, the court reasoned that the city could compel him to submit to drug testing even without this suspicion, based on Saavedra’s employment as a firefighter and emergency medical technician with the City. “There can be little doubt that the search conducted by the City in this case was executed pursuant to special needs independent of traditional criminal law enforcement.” *Id.* Therefore, the government’s interest in ensuring public safety outweighed any privacy interest of the employee.

2. Case: Hatley v. Department of the Navy, 164 F.3d 602 (C.A. Fed Cir. 1998):

Holding: The court upheld suspicionless drug testing of a firefighter. “The safety of others was in his hands, and an impairment due to illegal drug use could well have led to otherwise avoidable injury or death. It is generally established that employees responsible for the safety of others may be subjected to drug testing, even in the absence of suspicion of wrongdoing.”

**B. Operation of Public Transportation or Vehicles.**

The safety sensitive position exception to suspicionless drug testing often manifests itself in the form of the operation of public transportation or vehicles. The courts generally recognize the government’s interest in testing employees, focusing on two factors:

1. Whether the group of people targeted exhibits a pronounced drug problem; and, if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and,
2. The magnitude of the harm that could result from the use of illicit drugs on the job.

See, Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6<sup>th</sup> Cir. 1998): where the court upheld drug testing of school bus drivers, and;

National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990), where the court upheld drug testing for operators of passenger shuttle buses, concluding that there were strong safety interests to validate testing of operators responsible for the operation these vehicles.

Operation of a public emergency transportation vehicle fits the second factor listed above: the magnitude of harm to the general public possible from operating a public vehicle under the influence of illicit substances.

See also, Krieg v. Seybold, 427 F. Supp. 2d 842 (N.D. IN Apr. 3, 2006). This case involved a former city street and sanitation department employee that operated a dump truck, plow, riding lawn mower and a backhoe as part of his job duties. After refusing to submit to a random, suspicionless drug test, the employee sued the City arguing the City violated his 4<sup>th</sup> Amendment rights. In ruling for the City, the Court noted the former employee’s position was “safety-sensitive” and therefore subject to suspicionless random drug testing. The Court noted there was a risk of serious harm to the public if the employee operated vehicles, heavy equipment and machinery while under the influence of alcohol or drugs.

### 3. Safety Sensitive Positions Subject to Suspicionless Testing

The following positions are established by case law to be safety-sensitive and consequently 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 (8<sup>th</sup> Cir. 1988); Exxon v. Exxon Seaman's Union, 73 F.3d 1287 (3<sup>rd</sup> Cir. 1996); Mountaineer Gas Company v. Oil, Chemical & Atomic Workers International Union, 76 F.3d 606 (4<sup>th</sup> Cir. 1996); Gulf Coast Industrial Workers Union v. Exxon, 991 F.2d 244 (5<sup>th</sup> Cir. 1993); Ford v. Dowd, 931 F.2d 1286, Tanks v. Greater Cleveland Regional Transit Authority, 930 F.2d 475 (6<sup>th</sup> Cir. 1991); International Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454 (9<sup>th</sup> Cir. 1990) (noting cases in which courts have upheld random drug tests for employees with safety-sensitive, security-sensitive, or public integrity-sensitive jobs.).

## C. Don't Overlook Collective Bargaining Agreements.

### 1. Discipline Stemming from Drug Testing is a Mandatory Subject

SERB has addressed the issue of substance abuse policies. In In re Findlay City School District Bd. of Ed., SERB 87-031 (12-17-87), *aff'd*, SERB v. Findlay City School District. 1988 SERB 4-54 (CP, Hancock, 5-11-88),<sup>20</sup> SERB was asked to determine whether an employer's adoption of a drug and alcohol use policy, which provided for employee discipline in the event substance abuse adversely affected the employee's job performance, constituted a mandatory subject of bargaining. SERB concluded that the unilateral implementation of such a policy constituted a violation of 4117.11(A)(1) and (A)(5). In so concluding, SERB stated in pertinent part:

The inclusion of the sentence in the drug and alcohol policy inviting the imposition of discipline on employees whose performance is adversely affected by chemical dependency makes the adoption of such a "statement" a mandatory subject of bargaining. The threat of disciplinary action...brings the policy statement clearly within the scope of bargaining. The subject of discipline for chemical dependency adversely affecting job performance is clearly pertinent to the working environment of employees and the requirement to bargain over same does not abridge the employer's freedom to manage its operations in any significant manner. The negotiable nature of this subject is analogous to the Employer's duty to bargain over safety provisions adopted by the Employer which also involve "...an essential part of the employees' terms and conditions of employment." Citing Gulf Power Co., 156 NLRB 622 (1966); *enf'd* NLRB v. Gulf Power Co., 384 F.2d 822 (5<sup>th</sup> Cir. 1967).

Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union Local 627, (2001), Ohio St. 3d 108: The Ohio Supreme Court overruled the appellate court and

reinstated an Arbitrator's award reinstating a transit union employee after he had tested positive for marijuana in a random drug test administered while on the job.

Facts: The employee's position was defined by federal regulations and the employer's drug and alcohol policy as a "safety-sensitive" position. His position duties included repairing and maintaining buses, road-testing buses, and operating other vehicles for which he was required to hold a commercial driver's license.

Holding: Ohio has no dominant and well-defined public policy that renders unlawful an arbitration award reinstating a safety-sensitive employee who was terminated for testing positive for a controlled substance, assuming that the award is otherwise reasonable in its terms for reinstatement. The drug testing policy was subject to just cause provisions in the collective bargaining agreement, and under the circumstances of an award that provided safeguards to the public the award did not violate any clear state public policy.

### III. WORKERS' COMPENSATION AND DRUG AND ALCOHOL ABUSE

#### A. Ohio Revised Code Section: § 4123.54

1. Under Ohio's workers' compensation laws, there is a presumption that an employee's injury caused by drug or alcohol abuse is **not** compensable.
2. Ohio Revised Code § 4123.54 provides that every employee, who is injured in a work-related incident shall be entitled to receive workers' compensation, provided the injury was not:
  - a. Purposely self-inflicted; or
  - b. Provided that an employer has posted written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described under this division may affect the employee's eligibility for compensation and benefits pursuant to this chapter and Chapter 4121. of the Revised Code, there is a rebuttable presumption that an employee is intoxicated or under the influence of a controlled substance not prescribed by the employee's physician and that being intoxicated or under the influence of a controlled substance not prescribed by the employee's physician is the proximate cause of an injury under either of the following conditions..." O.R.C. 4123.54 (A)-(B).
    - i. Employers may not conduct warrantless drug and alcohol testing of injured workers without an individualized suspicion of drug or alcohol use. State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation et al., (2002), 97 Ohio St. 3d 504 at syllabus.
    - ii. If an employee tests positive for alcohol or controlled substances following an on-the-job accident or injury, the alcohol or controlled substance was the **proximate cause** of the employee's injury.

- iii. If the alcohol or controlled substances was the proximate cause of the employee's injury, the employee is not eligible to receive workers' compensation benefits.

**B. Exceptions to Rebuttable Presumption:**

1. If an employee tests positive for a controlled substance prescribed by his or her physician, no presumption arises.
2. An employee must test positive for drugs or controlled substances at the .10 blood alcohol level set forth in the criminal law for Driving While Intoxicated.
3. A test administered within eight hours of the accident or injury may be the Enzyme Multiplied Immunoassay Test (EMIT), while a test administered between 8-32 hours after the accident or injury must be the Gas Chromatography Mass Spectrometry Test (GMST).

**C. Employer Considerations:**

1. Employers must give employees notice that the refusal to submit to a requested test, or receipt of a positive result on the test, may affect employees' eligibility to participate in workers' compensation.
2. Of course, employers with collective bargaining agreements must negotiate the effects of implementing such a policy.

**D. Case Interpretations:**

1. Vance v. Trimble (1996), 116 Ohio App.3d 549. Decedent was injured while working for Ohio State University. He was taken to the student medical center, where the physician prescribed Darvocet. After leaving work, the decedent went to a friend's house and was observed to be "pretty much drunk." The toxicology report indicated that he had 18-20 pills in his system at the time of his death.
  - a. The court upheld that denial of workers' compensation benefits to his widow on the grounds that Vance's death was purposefully self-inflicted. There was no evidence to suggest that the decedent took the pills other than voluntarily.
  - b. When faced with a similar set of facts (i.e. injured worker's death caused by an overdose of pain medication approximately two (2) months after compensable injury) the Tenth Appellate Court followed Vance in denying decedent's Workers' Compensation claim. See: Embry v. Administrator, Bureau of Workers' Comp., 2005 Ohio 7021; 2005 Ohio App. LEXIS 6287 (2005) *unreported*.

#### IV. OFF-DUTY CONDUCT

##### A. Considerations Before Disciplining for Off-Duty Conduct:

1. If there is a substantial nexus between the employee's job duties and prohibited off-duty conduct, an employer will likely have "just cause" to discipline the employee for engaging in that activity.
2. Off-duty consumption of alcohol, tobacco, or other lawful products can be regulated by employers, but only to the extent that there is a substantial nexus between the employee's off-duty conduct and the impact of the use of those substances on job-performance. Very few jurisdictions have enacted legislation disallowing employers from denying or conditioning employment on the off-duty use of legal substances.
  - a. For example, New York's applicable statute reads "Employers may not discharge or discriminate because of an employee's legal recreational activities outside work hours." N.Y. Labor Law, § 201-d2.
3. Until Ohio enacts legislation on employers' ability to regulate the off-duty use of lawful substances, employers are free to deny or condition employment upon the employee's non-use of these substances.
4. However, the employer **may not unilaterally** implement a drug and alcohol testing policy unless the employee occupies a safety-sensitive position. Otherwise, the employer has committed an unfair labor practice under the Ohio.

##### B. Once An Employee Has Tested Positive For Drugs:

1. In Silkert v. Ohio Dept. of Job & Family Servs.(2009), 184 Ohio App.3d 78, the Court of Appeals in Montgomery County held that an employer has the burden in an unemployment compensation proceeding to come forward with some evidence to show that a positive drug test for marijuana was reliable where existence of just cause for claimant's termination depended upon the positive drug test. The court found that facts governing the reliability of the test were peculiarly within the knowledge of employer, and that, in this case, the claimant presented some evidence to impeach the reliability of test, namely, his testimony that he had never used marijuana. R.C. § 4141.29(D)(2)(a).