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Constitutional Law - Search and Seizure - Urine Testing - Public Employees

Robert J. Goduto

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—URINE TESTING—PUBLIC EMPLOYEES—The New York Court of Appeals held that mandatory urinalysis examination of public school teachers violates an employee's privacy interests secured by the fourth amendment when a public employer fails to demonstrate a reasonable suspicion of drug usage by the tested employees.

Patchogue-Medford Congress v. Board of Educ.,[1] 70 N.Y.2d 57 (1987).

On May 3, 1985, probationary teachers employed by the Patchogue-Medford Union Free School District were informed by letter that they must submit to a urinalysis examination[2] for the conceded purpose of detecting the use of controlled substances.[3] Prior to May 13, 1985, the date when said urine samples were to be collected by school nurses, the Patchogue-Medford Congress of Teachers[4] commenced proceedings pursuant to C.P.L.R. 78[5] in the New York

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1. 119 A.D. 2d 35 (2d Dept. 1986), 505 N.Y.S.2d 888 (1986), *aff'd* 70 N.Y.2d 57 (1987).

2. 70 N.Y.2d 57 (1987). A collective bargaining agreement required "probationary teachers to submit to a full physical examination in their first year of employment and again during the final year of their probationary term when they become eligible for tenure." *Id.* at 63. The probationary teachers involved in this case had completed the required physical examinations prior to the superintendent's additional requirement of May 3, 1985. *Id.*

3. *Id.*

4. 119 A.D. 35 (2d Dept. 1986), 505 N.Y.S.2d 888 (1986).

The union, Patchogue-Medford Congress of Teachers was the named plaintiff in the case. The union sought a judgment "prohibiting the school district from directing probationary teachers eligible for tenure to submit to urine tests for the purpose of detecting the use of controlled substances." *Id.* at 36.

5. N.Y. Civ. Prac. L. & R. (McKinney 1981). Title 78 in pertinent part states:

> Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Whenever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by

Supreme Court, Suffolk County, to determine whether the school district's required urinalysis testing program comported with their protected right to be free from unreasonable searches and seizures.[6] In granting petitioner's requested relief, the New York Supreme Court, Suffolk County, made a factual determination that the school district's directive mandating that the urinalysis examination was not part of the collective bargaining agreement[7] nor permissible under the applicable New York Education statutes.[8]

By appeal of the Board of Education, the New York Supreme Court, Appellate Division, Second Department, found, in accord with a number of other courts passing on the issue,[9] that the proposed urine test was a search and seizure within the meaning of the fourth

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law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

6. 70 N.Y.2d 57 (1987). The propriety of the required urinalysis testing was examined by the New York Court of Appeals in light of the federal constitution's fourth amendment protection against unreasonable searches and seizures as well as the New York State Constitutional protection under Article I, section 12. *Id.* at 65. It is noted that Justice Simon's concurring opinion objected, on procedural grounds, to the court's inclusion of the state constitution as petitioner's supporting papers only alleged violations on federal constitutional grounds. *Id.* at 71.

7. 119 A.D.2d 35 (2d Dept. 1986). The school district maintained that the disputed urine test was in conformance with Article XIX (D) of the collective bargaining agreement requiring non-tenured teachers to "fulfill the requirements for a medical examination and tuberculin test" prior to being granted tenure positions. *Id.* at 36-37.

8. N.Y. [Educ.] Law § 913 (McKinney 1969). In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district shall be empowered to require any person employed by the board of education or trustees to submit to a medical examination by a physician of his choice of school medical inspector of the board of education or trustees, in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the board of education or trustees and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

9. 119 A.D.2d at 36. *See also* Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), *cert. denied,* 429 U.S. 1029 (1976); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985).

amendment even though no physical intrusion was involved.[10] The appellate division held that "reasonable suspicion" was required before a search such as the urinalysis could be conducted by a public employer.[11]

The school district appealed to the New York Court of Appeals where the Supreme Court, Appellate Division's decision was affirmed.[12] The court of appeals noted that the United States Supreme Court has not reached the question of whether the fourth amendment protection applies in cases involving state sponsored compulsory urine testing of public employees.[13] Further, the New York Court of Appeals stated that those courts which have considered this issue have found that such testing involves a search and seizure.[14]

As the claim before the New York Court of Appeals referred generally to a violation of the teachers' constitutional rights, the court intimated that its decisions relating to search and seizure claims traditionally rest upon both the New York State Constitution as well as the United States Constitution.[15] The court noted that judicial decisions are divided as to whether the term "reasonable," within the meaning of the fourth amendment, permits random testing of a particular class of employees, or whether reasonable suspicion of an individual employee is required before such a search may be conducted.[16]

The New York Court of Appeals recognized numerous cases which collectively determined that the taking of blood samples for criminal

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10. *Id.* at 36. *See* Division 241 Amalgamated Transit Union v. Suscy, 405 F.Supp. 750 (N.D. Ill. 1975), *aff'd*, 538 F.2d 1264 (7th Cir 1976), *cert. denied*, 429 U.S. 1029 (1976), and Allen v. City of Marietta, 601 F.Supp 482 (N.D. Ga. 1985).

11. 119 A.D.2d at 40. The court rejected the argument that the administration of the type of test in this case required probable cause, as this standard is utilized primarily for criminal proceedings. *Id.*

12. 70 N.Y.2d 57 (1987).

13. *Id.* at 64.

14. *Id.* One of the earlier of these cases is *Suscy*, 538 F.2d 1264. The Seventh Circuit Court in *Suscy* stated: "the Fourth Amendment protects an individual's reasonable expectation of privacy from unreasonable intrusions by the state." *Id.* at 1267. Although the intrusion involved a fourth amendment analysis, the court held "the [Chicago Transit Authority] (CTA) rules [requiring blood and urinalysis after serious accidents] and the General Bulletin facially comply with the Fourth Amendment standards. . ." *Id.*

15. 70 N.Y.2d at 66. The New York Court of Appeals cites a number of state cases in support of this proposition ending with the recent decision in Matter of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6 (1982).

16. 70 N.Y.2d at 65-66.

investigations was a search and seizure requiring the application of a reasonable test.[17] By analogy, the court intimated that a government employer's demand for urine samples was an infringement on a protected privacy interest,[18] and although urine is a waste product, it is not ordinarily eliminated in such a way as to allow government officials access to "read" its contents.[19] As such,the New York Court of Appeals concluded that the government employer's directive mandating an employee to submit to a urine test constituted a search and seizure.[20]

Finally, the New York Court of Appeals noted that although drug testing, in general, is directed at the control of a prevalent problem among society's work forces, there was no evidence presented in the record to substantiate the fact that this particular problem extended to teachers in general nor to the teachers working in the Patchogue-Medford Union Free School District.[21] The court stated "searches intended to secure the public interest, however effective, may themselves undermine the public's interest in maintaining the privacy. . . ."[22] Accordingly, the New York Court of Appeals balanced individual privacy interests invaded by the urine test against the governmental interest in conducting the test and, as a result, adopted the legal standard that requires a public employer to have reasonable suspicion prior to conducting a search of this type.[23]

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17. *Id.* at 67, *citing* to Matter of Abe A., 56 N.Y.2d 288 (1982); Schmerber v. California, 384 U.S. 757 (1966).

18. 70 N.Y.2d at 67. Even though the production of a urine sample involves no intrusion into the body, like the taking of blood samples, both tests are capable of revealing information regarding habits, lifestyles and other data of a personal nature. *Id.*

19. *Id.* The New York Court of Appeals reasoned that "[I]t is settled that a person can have no reasonable expectation of privacy in things which are intentionally abandoned or discarded.(citation omitted). But it does not follow from this rule that a person has no privacy interests in a waste product before it is abandoned and therefore no right to dispose of it in a way which maintains privacy." *Id.*

20. *Id.* at 68. The New York Court of Appeals stated: "The act of discharging urine is a private, indeed intimate, one and the product may contain revealing information concerning an individual's personal life and habits for those capable of analyzing it." *Id.* at 67. Furthermore, the court intimated that: "Ordering a person to empty his or her bladder . . . for inspection and analysis by public officials is no less offensive to personal dignity than requiring an individual to empty his pockets and produce a report containing the results of a urinalysis examination." *Id.* at 68.

21. *Id.* at 70.

22. *Id.*

23. *Id.*

In a concurring opinion,[24] Justice Simons agreed with the conclusion of the majority of the court that the mandatory urine testing violated the fourth amendment prohibitions against unreasonable searches and seizures.[25] However, Justice Simons found that the majority, in contravention to procedural rules, expanded the issue presented to include the decision under the state constitution as well as the federal constitution.[26] The concurring opinion, in effect, found the majority's inclusion of the state constitution to be nothing more than an act of advocacy by the court on behalf of the teachers in this case.[27]

Justice Simons noted that, even if state grounds were advanced by the teachers in this case, the New York Court of Appeals would still be limited by national standards as a minimum "floor" for determining the constitutionality of the urine testing in question under the state constitution.[28] Further, Justice Simons questioned the majority's apparent conclusion that a citizen employed in the State of New York may somehow have a different expectation of privacy than that of other citizens employed throughout the remainder of the nation.[29] The concurring opinion suggested that the fact that the United States Supreme Court has not addressed the issue presented before the New York Court of Appeals should not prevent application of the federal constitution to the case at bar.[30] Moreover, the instances in which the state constitution should be invoked include circumstances where the state courts have followed a federal constitutional standard established by the United States Supreme Court providing a given level of protection only to have subsequent Supreme Court decisions operate to lower the "floor" of protection.[31]

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24. *Id.* at 71. (Justice Simons was the sole justice to write separately.)

25. *Id.*

26. *Id.* The concurring opinion notes that the original allegation only claimed a violation of the teachers' "constitutional" rights in the general sense, and only through subsequent supporting papers was the claim stated as a fourth amendment violation. *Id.* Further, the fact that *amicus* raised the state constitutional issue is irrelevant for the purposes of defining the issues before the court. *Id.*

27. *Id.* "[It] is also an inappropriate imposition on the [school board] and their counsel who, after defending the Board's action against the only ground raised for some years, now find the proceedings decided against them for reasons of which they were unaware and which they had no chance to address or refute." *Id.*

28. *Id.* at 72. "The Federal Bill of Rights 'creates a federal floor of protection and . . . the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor'." (emphasis in original). *Id.* (citation omitted).

29. *Id.*

30. *Id.*

31. *Id.* at 73.

The concurrence found that absent a United States Supreme Court decision setting the "floor," and the lack of the benefit of argument on the issue of the applicability of the state constitution, there is no justification for the conclusion that citizens of the State of New York have a higher expectation of privacy than other citizens of the United States.[32] Justice Simons concluded that the "Board's order falls below the 'floor of the federal protection' and therefore is unconstitutional."[33]

The fourth amendment to the United States Constitution provides in relevant part:

> [the] right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated 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.[34]

"The overriding function of the fourth amendment is to protect personal privacy and dignity against unwarranted intrusions by the state."[35]

Although the issue of mandatory urinalysis testing has only recently gained notoriety through legal writings,[36] challenges to these tests were initiated in the courts as early as 1975. In *Division 241 Amalgamated Transit Union v. Suscy*,[37] a bus driver's union challenged a series of Chicago Transit Authority (C.T.A.) rules compelling a bus driver involved in "any serious accident" to submit to a blood and

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32. *Id.* at 74.
33. *Id.*
34. U.S. CONST. amend. IV.
35. Schmerber v. California, 384 U.S. 757, 767 (1966).
36. Miller, MANDATORY URINALYSIS TESTING AND PRIVACY RIGHTS OF SUBJECT EMPLOYEES: TOWARDS A GENERAL RULE OF LEGALITY UNDER THE FOURTH AMENDMENT, 48 PITT. L. REV. 201 (1986). (Examines the constitutional implications of urinalysis testing and the development of a general rule of legality. Critiques the established rule to date as well as advancing proposals for expanding the rule to the nongovernment employment context.)

Zeese, *Urine Testing and the Fourth Amendment*, 14 SEARCH AND SEIZURE LAW REPORT 97 (1987). (A brief survey of case law and the urinalysis tests used in administrative searches.)

37. 405 F.Supp. 750 (N.D. Ill.1975), *aff'd*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976). Plaintiff union filed a complaint alleging violation of the Civil Rights Act, 42 U.S.C. § 1983, challenging the constitutionality of (CTA) rules 10 and 14 and (CTA) General Bulletin G2-75 requiring blood and urine testing for drivers involved in a "'serious accident' or 'suspected of being intoxicated or under the influence of narcotics'." 538 F.2d at 1266.

urine test.[38] The Court of Appeals for the Seventh Circuit, in affirming the district court's decision to uphold the validity of the testing plan, balanced the individual's privacy expectations against the governmental interests involved and found that public safety outweighed the driver's expectation of privacy regarding such testing.[39] Accordingly, the court concluded that the testing scheme provided the C.T.A. with probable cause prior to subjecting a driver to the blood and urine test.[40]

Within the past several years, the courts have developed a more cohesive and in-depth analysis when reviewing fourth amendment challenges to public employer's compulsory urine testing schemes.[41] In their analysis of fourth amendment challenges to urine testing, courts have expressly adopted the reasoning set forth in *Schmerber*

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38. 538 F.2d at 1266. "Rule 10 of the CTA General Rule Book provides:

> Employees are subject to physical examinations and other medical tests, as deemed necessary to assume fitness to perform their assigned duties.

Rule 14(a) provides in pertinent part:

> The following acts are not permissible:
> (a). Use or possession of intoxicating liquor or narcotics of any kind while on duty, or reporting for duty while under the influence of same. Use of illegal drugs is forbidden whether on or off duty.

CTA General Bulletin G2-75 provides:

> operating employees directly involved in any serious accident . . . may be required to be hospitalized for medical attention, a physical examination and/or a blood and urinalysis test. . . .

Under Rule 14, the employee can be discharged for violations of Rule 10." 538 F.2d at 1266.

39. 538 F.2d at 1267. The court found "the conditions under which the intrusion is made and the manner of taking the samples are reasonable." Id. A criticism of this holding finds that the court, in effect, limited the holding to the facts of the case. *See* Miller, *supra* note 36, at 219.

40. 538 F.2d at 1267. The tests were administered only to drivers "involved in 'any serious accident' or 'suspected of being under the influence' of intoxicating liquor or narcotics . . . . No medical testing of this type is required unless two supervisory employees concurred." *Id.* Although *Suscy* states that probable cause is the standard that the court applies, this is inconsistent as probable cause is an objective test; in fact *Suscy* utilized a balancing standard founded on reasonableness. *See* Miller, *supra* note 36, at 219.

41. *See, e.g.*, Allen v. City of Marietta, 601 F.Supp. 482 (N.D. Ga. 1985), where the United States District Court for the Northern District of Georgia, first questioned whether urinalysis was a search, and when the court found such testing to be a search, questioned whether the search was reasonable. *Id.* at 488-89; Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986), stating that "what is reasonable depends upon the context in which the search takes place." *Id.* at 1513. Both *Allen* and *Capua* balanced the intrusiveness of the search against its promotion of a legitimate governmental interest.

v. California[42] in order to find the taking of urine to be a search within the meaning of the fourth amendment.

The rational in *Schmerber* was utilized by a federal district court in *Allen v. City of Marietta*[43] under the first part of a two-step fourth amendment analysis, *i.e.*, whether urinalysis constitutes a search.[44] In *Allen*, employees of a government-owned utility company were discharged for smoking marijuana during working hours in violation of company policy.[45] This discharge was primarily a result of an investigation whereby the company engaged an informant who witnessed employees smoking marijuana; and secondarily, based on the fact that the employees tested positive when they submitted to urinalysis.[46] The discharged employees brought an action pursuant to 42 U.S.C. § 1983,[47] alleging a violation of their fourth amendment

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42. *Schmerber*, *supra* note 35. "[Blood] testing procedures plainly constitute searches of the 'person,' and depend antecedently upon seizure of 'persons' within the meaning of [the fourth] amendment." 384 U.S. at 767.

43. 601 F.Supp. 482 (N.D. Ga. 1985).

44. *Id.* at 488. *See, e.g.*, Patchougue-Medford Congress v. Board of Educ., 70 N.Y.2d 57 (1987); American Federation of Government Employees v. Weinberger, 651 F. Supp. 726 (S.D. GA. 1986) (Police union brought action on behalf of civilian employees challenging mandatory periodic urinalysis for the detection of drugs. The court held that the testing program violated the fourth amendment as unreasonable; and consent to such a search could not be required and did not constitute a waiver of the employees constitutional rights.); Lovvorn v. City of Chattanooga, 647 F.Supp. 875 (E.D. Tenn. 1986) (where three fire fighters sought injunctive and declaratory relief under 42 U.S.C. § 1983, challenging the constitutionality of urinalysis testing conducted by the City of Chattanooga. The District Court for the Eastern District of Tennessee held the proposed testing "would violate the fire fighters rights under the fourth amendment.").

45. 601 F.Supp. at 492. "The employee handbook given to every city employee,. . . contained. . .

Section II: Safety Rules and Regulations. . .

D. Intoxicating Beverages and Drugs.

Use of intoxicating beverages of drugs on city premises or on the job or during working hours is prohibited and shall be cause for disciplinary action. Any employee under the influence of intoxicating beverages or drugs shall not be allowed on the job. . .

E. Conduct of Employee. . .

2. Any act deemed irresponsible or unsafe on the part of any employee . . . which . . . causes . . . damage to persons or property . . . shall be grounds for immediate dismissal. . ."

Id. at 492.

46. *Id.* at 484.

47. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983 (1981).

rights.[48] Although the District Court for the Northern District of Georgia entertained some doubts as to whether the framers of the fourth amendment would have considered urine testing a search, it stated that it was limited, in light of *Schmerber*, to find urinalysis to be a search.[49] The district court's inquiry into whether the search was reasonable further defined the structure for analyzing urinalysis testing, including those challenges based on the "exceptions to the warrant requirement which appear to have emerged in a class of cases involving searches of government employees."[50] Further, the *Allen* court, like the *Suscy* court, chose to balance individual privacy interests against governmental interests in conducting the search.[51] This basic analytical structure for reviewing urinalysis cases has since been consistently applied allowing courts to fluidly enforce the strictures of the fourth amendment.[52]

In 1985, the United States Supreme Court, in *New Jersey v. T.L.O.*,[53] recently established the most adaptable analytical framework for guiding courts when presented with challenges to warrantless administrative searches conducted by a governmental entity.[54] Al-

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48. 601 F.Supp. at 485. "Count I of plaintiff's complaint asserts that the urinalysis test administered on July 12, 1983 was an unreasonable search and seizure in violation of the fourth amendment." *Id.*

49. *Id.* at 488. The Court stated: "While the extraction of blood from an unwilling defendant is qualitatively different from a requirement that an individual provide the government samples of his biological waste products, other courts have applied *Schmerber* to breathalyzer tests, in which a person is asked to provide samples of his breath." *Id.*

50. *Id.* at 489. The court notes the following warrantless searches held to be reasonable: searches of a customs employee's jacket in United States v. Collins, 349 F.2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966); a search of a postal worker's locker in United States v. Bunker, 521 F.2d 1217 (9th Cir. 1975), *cert. denied*, 423 U.S. 989 (1975); a search of the living quarters of a Marine corporal in United Sates v. Danato, 269 F.Supp. 921 (E.D. Pa. 1967), *aff'd*, 379 F.2d 288 (3d Cir. 1967). 601 F.Supp. at 489.

51. 601 F.Supp. at 489. *See also Suscy*, *supra* note 9, at 1267.

52. *See* Zeese, *supra* note 36 for a survey of cases utilizing this approach to the urine testing problem.

53. 469 U.S. 325 (1985).

54. *Id.* at 333. T.L.O., a high school student, was found smoking in the lavatory by a teacher. *Id.* at 328. As a result of her denial that she smoked at all, the Assistant Vice Principal searched T.L.O.'s purse. *Id.* Upon the discovery of cigarette rolling papers, the Assistant Vice Principal continued his search discovering a small amount of marijuana and other items implicating T.L.O as a dealer of drugs. *Id.* The Court first found the fourth amendment applied to students in the context of searches conducted by school officials. *Id.* at 333. Further, the Court adopted a twofold inquiry for "[d]etermining the reasonableness of any search: First, one must consider 'whether the . . . action was justified from its inception,'

though urinalysis cases prior to *T.L.O.* primarily utilized the traditional fourth amendment balancing test,[55] the *T.L.O.* court provided an open question as to whether individualized suspicion is a necessary element in the analysis of administrative searches.[56]

The most influential decision involving urine testing, *McDonell v. Hunter*,[57] maintained the balancing test for reasonableness.[58] But the distinguishing factor in *McDonell*, as compared with *Suscy* and *Allen*, is the announcement of a legal standard - "reasonable suspicion."[59] In *McDonell*, three correctional institution employees brought an action seeking declaratory judgment and injunctive relief alleging an Iowa Department of Corrections policy subjecting employees to searches of their persons and vehicles violated their fourth amendment rights.[60] The court first found urinalysis to be a search within the meaning of the fourth amendment.[61] Through balancing the indivi-

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Terry v. Ohio, 392 U.S. at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place'." 469 U.S. at 341.

55. *See* Miller, *supra* note 36, at 220-21.

56. 469 U.S. at 342. The Court noted that "some quantum of suspicion is usually a prerequisite. . ." to administrative searches. In further defining the standard applied, the Court stated:

> [A] search . . . will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive. . . ."

Id. at 342.

57. 809 F.2d 1302 (8th Cir. 1987).

58. *Id.* at 1305.

59. *Id.* at 1312.

60. *Id.* at 1304. McDonell, a corrections officer, had signed a consent to search form in 1979. *Id.* In 1984, his supervisors requested that he submit to urinalysis as he had been seen with individuals under investigation for drug usage. *Id.* McDonell refused to submit to the test and as a result was discharged. *Id.* Subsequently, he was reinstated with back-pay and transferred to another facility. *Id.* at 1305. The other two plaintiffs, Curran and Phipps, refused to sign the consent to search form when presented by their employer. *Id.* Although they were informed that refusal to sign would result in suspension of pay, there was in fact no action taken by the employer. The district court held:

> It is this court's conclusion that the fourth amendment allows [employers] to demand of an employee a urine, blood, or breath specimen for chemical analysis only 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 alcoholic beverages or controlled substances.

612 F.Supp. 1122, 1130.

61. 809 F.2d at 1307. The court's recitation begins with a conclusion that

dual's expectation of privacy against the interest of the government in conducting the search, the *McDonell* court made two distinct findings.[62] First, the finding that urinalysis, if administered properly, is not as intrusive as a body search, and in light of the central interest of the correctional institution in security, the court of appeals held "that urinalysis may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day to day basis in medium or maximum security prisons. Selection must not be arbitrary or discriminatory."[63] Second, any urinalysis testing not conforming to a uniform or systematic random selection may only be conducted if there is reasonable suspicion that the employee has been using drugs.[64] Finally, it must be noted that both the district court[65] and the circuit court in *McDonell*[66] rejected the employer's argument that employees can waive their fourth amendment rights through signing a consent to search form in advance.[67]

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urine testing is a search, then through reference to *Allen*, *Capua*, and *Schmerber*, the court justified its conclusion stating that although "urine, unlike blood, is routinely discharged from the body so that no actual [physical] intrusion is required for its collection, 'both can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came.' *Capua*, *supra* 643 F.Supp. at 1513." 809 F.2d at 1307.

62. 809 F.2d at 1308. In the first of these findings, the court relied upon *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986). The fourth amendment challenge in *Shoemaker* involved the constitutionality of a regulation of the New Jersey Racing Commission which regulates horse racing in that state. *Id.* at 1137. The regulation "provides that every official, jockey, trainer, and groom for any race may be subjected to a urine test for the detection of use of 'Controlled Dangerous Substance[s]', and may be subjected to sanctions for failure to submit to such a test, and for positive results in such a test." *Id.* at 1138. The Third Circuit upheld the random testing scheme reasoning that the governmental interest "in assuring the public of the integrity of the persons engaged in the horse racing industry" was controlling. *Id.* at 1142.

63. 809 F.2d at 1308.

64. *Id.* at 1308-09.

The court initially related the reasonable suspicion standard enumerated by the district court. However, the reasonable suspicion requirement was expanded. Where the district court only required a reasonable suspicion that an employee had been using drugs during working hours, the circuit court found an employer has the right to test an employee when "there is a reasonable suspicion . . . that controlled substances have been used within the twenty-four hour period prior to the required test." *Id.* at 1309.

65. 612 F.Supp. 1122.

66. 809 F.2d 1302.

67. *Id.* at 1310. Specifically the court stated that "The state may only use a consent form which delineates the rights of the employees consistent with the views of this opinion and which does not require the waiver of any of those rights." *Id.*

A thorough examination indicates that state court decisions have paralleled those rendered in the federal courts. In *City of Palm Bay v. Bauman*[68] all city police officers and fire fighters were subject to random urinalysis testing conducted at unspecified times.[69] The Florida District Court of Appeals, in striking down the city's testing policy, found random urinalysis of police and fire fighters absent a "scintilla of suspicion" to be a violation of Florida's search and seizure statute protecting citizens from unreasonable governmental intrusions.[70] In affirming the trial court's decision, the Florida District Court of Appeals modified the time period in which reasonable suspicion may be applied from the narrow view held by the trial court limiting the city to testing for drug use violations only on the job to the more expansive view that the city may mandate urine tests if there is reasonable suspicion of drug usage at *any* time while an individual is employed.[71]

State courts have not, however, uniformly invalidated governmental urine testing schemes.[72] In *Turner v. Fraternal Order of Police,*[73] the Chief of Police successfully appealed a trial court's grant of injunctive relief prohibiting the implementation of a program to subject police to urine testing.[74] The District of Columbia Court of Appeals,

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68. 475 So.2d 1322 (Fla. Dist. Ct. App. 1985).

69. *Id.* at 1323.

70. *Id.* In reaching this conclusion, the court adopted the federal legal standard announced in *McDonell*, requiring reasonable suspicion prior to any search. *Id.* at 1325. The court also noted that the state search and seizure statute was coextensive with the fourth amendment. *Id.* at 1326. *Bauman*'s holding was further in accord with the early federal cases *-Suscy* and *Allen* - when it intimated: "the 'reasonable suspicion' test requires that to justify [the] intrusion, officials must point to specific objective facts and rational inferences that they are entitled to draw from these facts in light of their experience. (citations omitted)." *Bauman, supra* note 68, at 1326. *See also* Matter of Caruso v. Ward, 133 Misc.2d 544, 506 N.Y.S.2d 786 (1986), requiring reasonable suspicion in an almost identical factual situation.

71. 475 So.2d at 1326. (emphasis added). Although the Florida court follows the federal lead in the legal standard, it is noted that the courts unlimited time standard is in excess of that currently established in *McDonell. Id.*

72. *See* Zeese, *supra* note 36.

73. 500 A.2d 1005 (D.C. 1985).

74. *Id.* at 1006. The police Department's testing program was conducted pursuant to Special order 83-21, "Drug Testing for Illicit Narcotic or Controlled Substance Use," which provides:

> Additionally, the police and fire Clinic will conduct urinalysis testing for narcotic or controlled substance use by any member of the force suspected of such drug use, as directed by any official of the Department. Members may also be directed to submit to urinalysis testing at the discretion of a member of the Board of Police and Fire Surgeons.

Id.

applying the fourth amendment balancing test, concluded that a police officer's expectation of privacy is lower than the ordinary citizen.[75] Against this, the court weighed the police department's "paramount interest in protecting the public by ensuring that its employees are fit to perform their jobs"[76] and held that the department's testing scheme comported with constitutional requirements so long as the phrase "suspected of such drug use" is construed to conform with the objective standard of reasonable suspicion.[77]

Even though the reasonable suspicion requirement provides a legal standard by which courts may measure the legality of government searches involving urinalysis, the courts, with few exceptions,[78] have failed to refine this standard to conform with the more structured approach of the United States Supreme Court when reviewing administrative searches.[79]

The first inquiry under *T.L.O.*,[80] requires the legal standard of reasonable suspicion to be applied.[81] The utilization of *T.L.O.*'s twofold inquiry[82] would not require the courts to abandon the traditional fourth amendment balancing test,[83] but rather would incorporate a refinement into the analytical structure which would focus upon the scope of the search involved.[84]

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75. *Id.* at 1008. The District of Columbia Court of Appeals stated, "the fact remains the police force is a para-military organization dealing hourly with the general public in delicate and often dangerous situations. So we recognize that . . . police officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen." *Id.*

76. *Id.*

77. *Id.* at 1008-09. The objective standard that the court refers to is that of the independent professional judgment of the Police and Fire Surgeons Board resulting from a physician's medical observations. *Id.*

78. *See, e.g.*, Anable v. Ford, 653 F.Supp. 22 (W.D. Ark. 1985). Everett v. Napper, 825 F. 341 (11th Cir. 1987).

79. *See T.L.O.*, *supra* note 54; O'Connor v. Ortega, 107 S. Ct. 1492 (1987).

80. 469 U.S. at 341.

81. *See supra* note 55 and accompanying text.

82. 469 U.S. 325; *see also supra* note 54 and accompanying text.

83. *See supra* note 40; *see also O'Connor*, 107 S. Ct. 1492 (1987).

84. *See* Anable v. Ford, 653 F.Supp. 22 (W.D. Ark. 1985), involving the use of the EMIT immunoassay tests for Metabolites which was capable of detecting some traces of the psychoactive ingredients, tetrahyrdocanrabinol for weeks after ingestion. The EMIT immunoassay test also produces a high rate of false positives detecting chemical substances similar to the make-up of metabolites found when the examinee has used marijuana. *Id.* at 27-28. The *Anable* court utilized these facts to conclude that an administrative search must not go beyond the time limit of the government authority mandating the search in the first place. *Id.* at 40. *Cf. Turner*, 500 A.2d at 1005, where the state concluded it was reasonable to have no bounds conforming employer suspicion to work hours as police officers are on 24 hour call.

Despite the carefully outlined *T.L.O.* two-prong inquiry, the *Patchogue-Medford* court relied upon the traditional fourth amendment balancing test and the legal standard requiring only reasonable suspicion.[85] In this sense, the New York Court of Appeals conformed its analysis and decision to the federal legal standard announced in *McDonell*.[86] Furthermore, the New York court's structural approach to analyzing the case also coincided with the traditional methods developed in the federal courts as well as in other state jurisdictions.[87] Because the teacher's fourth amendment challenge to the proposed testing only sought a declaratory judgement under C.P.L.R. 78,[88] it might be speculated that the court did not need to determine whether the scope of the school district's proposed urine testing conformed to the *T.L.O.* standards of reasonableness.[89] Although the New York Court of Appeals in *Patchogue-Medford* cites *T.L.O.* in its opinion, the court fails to recognize the crux of the Supreme Court's analysis.[90] Instead, the opinion of the court primarily stresses the intrusiveness of the search involved.[91] The New York Court of Appeals notes that teachers have a diminished expectation of privacy,[92] much like the public safety cases upon which the court relied.[93] The New York Court of Appeals further noted that this diminished expectation, however, does not evaporate all privacy rights of employees when the state decides to conduct a search.[94] The New York Court of Appeals, in dicta, espouses the emotional analogy of requiring a

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85. 70 N.Y.2d 57 (1987).

86. 809 F. 1302 (8th Cir. 1987). The standard set by the court in *McDonell* requires reasonable suspicion before an employee can be subjected to drug testing.

87. *See supra* notes 40 and 69 and accompanying text. Courts first determine whether urine tests are a search and then determine the reasonableness of the test using a fourth amendment balancing test.

88. *See supra* note 5 and accompanying text.

89. 469 U.S. at 341.

90. 70 N.Y.2d 57 (1987). The *Patchogue-Medford* court's utilization of *T.L.O.* is ineffective as the court only cites *T.L.O.* for the proposition that the fourth amendment places restrictions on government conducted searches including not permitting random searches by school authorities. *Id.* at 66.

91. *Id.* at 67. The court states:

> The act of discharging urine is a private, indeed intimate, one and the product may contain revealing information concerning an individual's personal life and habits for those capable of analyzing it . . . Requiring a person to urinate in the presence of a government official or agent, as is sometimes required in these cases (citation omitted) is at least as intrusive as a strip search.

Id. at 67-68.

92. *See supra* note 8 and accompanying text.

93. 70 N.Y.2d at 65.

94. *Id.*

person to empty his or her pockets to produce the written report of a blood or urine examination. [95] This serves as an underlying thread in the court reaching its conclusion. The reasoning in *Patchogue-Medford*, leading to the New York Court's adoption of the "reasonable suspicion" standard for government compelled urine testing, leaves unclear why the New York Court of Appeals chose to apply a standard traditionally utilized in cases involving public safety to teachers in the school environment.[96] The *Patchogue-Medford* decision was potentially timely as it provided the New York Court of Appeals the opportunity to further formulate the developing analytical structure by which courts evaluate the constitutionality of modern technological administrative searches. As the New York Court of Appeals noted in its opinion, the Supreme Court of the United States has yet to be presented with the issue of drug testing through urinalysis in the government work-place.[97] However, the absence of a decision by the Supreme Court on this precise issue should not limit the New York courts in the future, as it has been decided that searches such as those conducted through urinalysis are labeled administrative searches for the purpose of a fourth amendment analysis.[98]

Robert J. Goduto

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95. 70 N.Y.2d 57.

96. *See* Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986) (where the plaintiffs were members of the Plainfield Fire Department); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985); Allen v. City of Marietta, 601 F.Supp. 482 (N.D. Ga. 1985) (where the plaintiffs were employees of a municipal utility); City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. Dist. Ct. App. 1985) (where plaintiffs were members of the police department and members of the city fire department); Matter of Caruso v. Ward, 133 Misc.2d 544, 506 N.Y.S.2d 786 (1986) (an action by the Patrolman's Benevolent Association on behalf of its members against the City of New York).

97. 70 N.Y.2d at 64.

98. *See* Everett v. Napper, 825 F.2d 341 (11th Cir. 1987) applying the standards developed in New Jersey v. T.L.O., 469 U.S. 325 (1985), and O'Connor v. Ortega, 107 S. Ct. 1492 (1987), to analyze the propriety of urine testing in the government work-place.