WEEDING OUT BAD EMPLOYEES: RANDOM DRUG TESTING AND CITIES 2023 UPDATE

(TAYLOR'S VERSION)

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Many cities find it useful to drug test their employees to ensure the safety of the employees, residents, city property, and visitors. Cities generally: (1) desire to implement random drug testing for all their employees; or (2) already have such a policy in place. However, unlike private employers, cities face constitutional challenges to drug testing their employees.

This is Why We Can't Have Nice Things: 4th Amendment and Employees

Cities are limited in how and when they can drug test due to the search and seizure limitations in the United States Constitution Bill of Rights, Amendment 4, and the Texas Constitution. *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (library workers). Cities are government actors under the United States and Texas Constitutions even when they are solely acting as employers and cannot have suspicionless drug testing for most employees. A city may only drug test an employee without individualized suspicion if there is a "special need" that outweighs the individual's privacy interest. *Skinner v. Ry. Labor Execs. Ass'n*., 489 U.S. 602 (1989); *Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656 (1989). This standard means that most city employees and applicants, may not be tested for drugs without individualized suspicion.

A city may only "randomly" drug test an employee when the employee performs safety-sensitive or security-sensitive duties as part of their position. Not all law enforcement fits into this category, but backhoe drivers might. Examples of job duties that the courts have found to be safety or security sensitive sufficient to warrant suspicionless drug testing include:

- driving passengers as United States Department of Transportation licensed drivers;
- operation of trucks that weigh more than 26,000 pounds;
- tending to or driving school children as school bus attendants and drivers;
- teaching children;
- armed law enforcement officials whose duties include investigation of drugs;
- nuclear power plant duties; and
- working on gas pipelines, among others. *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007) (licensed drivers).

Int'l Bhd. of Teamsters, v. Dep't of Transp., 932 F.2d 1292 (9th Cir. 1991) (large trucks); *Nat'l Treas. Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (employees involved in interdiction of drugs); *Jones v. McKenzie*, 628 F.Supp. 1500 (D.D.C. 1986) (school bus); *Crager v. Bd. of Educ. of Knott County*, 313 F.Supp.2d 690 (E.D. Ky. 2004) (teachers); *IBEW, Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521 (9th Cir.1992) (nuclear power plant, gas pipelines). Examples of employees whose job duties have not been sufficient to warrant drug testing according to a court include federal prosecutors who prosecute drug cases and library workers. [1] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (prosecute drug cases); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (library workers).

When an employee or applicant does not perform safety or security sensitive duties, the only constitutional drug testing is if the city has reasonable suspicion to believe an employee may be intoxicated or impaired.

Illicit Affairs: What is Reasonable Suspicion

Reasonable suspicion, based on individualized conduct, is a decision that the supervisor needs to make based on objective factors including physical, behavioral, or psychological signs displayed by the employee. *Skinner*, 489 U.S. at 630; *Von Raab*, 489 U.S. at 677. For example, an employer may test for drugs after an accident where there is evidence that the employee had some fault. *Skinner*, 489 U.S. at 630; *Von Raab*, 489 U.S. at 677; *Bryant v. City of Monroe*, 593 Fed.Appx. 291, 299 (5th Cir. 2014) (not desig. for pub.). Drug testing of any employee involved in a city-related vehicle accident should occur for all employees equally based on their job duties and the only criteria should be whether there is any evidence that the employee was negligent in the accident. Any drug testing should only be done pursuant to a written policy. The employee's actions and appearance that cause the supervisor to have individualized suspicion that the employee is on drugs should also be documented in writing.

Another activity that could allow for individualized suspicion is where a person has been recently arrested for drug use or had a recent positive drug test. *Laverpool v. New York City Transit Auth.*, 835 F. Supp. 1440, 1456 (E.D.N.Y. 1993), *aff'd without opinion*, 41 F.3d 1501 (2nd Cir. 1994). Using older arrests or positive drug tests lessens this argument significantly. Phrases like "erratic behavior" have been determined to be overbroad by federal district courts. Also, if review of behavior is going to be used for individualized suspicion for drug testing, the city needs to ensure that the individuals making this determination have adequate training in this area, preferably from a medical professional. *See Nat'l Fed. Of Fed. Emps, AFL-CIO v. Cheney*, 742 F.Supp. 4 (D.C.D.C. 1990).

> Nothing in defendants' filings explains why employees who make too many personal telephone calls may reasonably on that account be subjected to drug tests. Nor is there any appreciable link between drug use and over-sensitivity to criticism, preoccupation with personal problems, or erratic work habits. Likewise, it defies common sense to assert that an off-the-job injury is symptomatic of drug abuse. The proposition that long lunch breaks are indicia of drug abuse is nothing short of ludicrous; there are dozens of more likely reasons.
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> *Cheney*, 742 F.Supp. 4.

The Federal Office of Human Resources Management of the Department of Commerce has its own conditions list:

- Direct observation of drug use and/or the physical symptoms of being under the influence of drugs or alcohol
- A pattern of abnormal conduct or erratic behavior
- Arrest or conviction for a drug-related offense; or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking
- Information either provided by reliable and credible sources or independently corroborated
- Newly discovered evidence that the employee has tampered with a previous drug test

https://www.commerce.gov/hr/employees/drug-free-workplace#:~:text=Reasonable%20Suspicion%20Testing&text=This%20belief%20must%20be%20based,influence%20of%20drugs%20or%20alcohol last visited September 19, 2023.

These guidelines are quite broad and could face an as applied Fourth Amendment case depending on how the guidelines are actually applied as was shown in the *Cheney* case listed above. Each city should carefully consider what objective factors to use to make these determinations, and then get trained on observing them.

When People Believe Ya: Drug Testing Applicants

In the last twenty years of examining drug testing, the most common question now is whether applicants can be drug tested. Many of the city employees that I have asked about this, including planners, public works employees, attorneys, city secretaries, and other city hall staff, have indicated they were drug tested as applicants. According to case law, this drug testing is a violation of the United States Constitution when these employees were not in safety or security sensitive positions.

In *Lanier v. City of Woodburn*, the Ninth Circuit looked at whether an applicant for a city library position could be drug tested. 518 F.3d 1147, 1152 (9th Cir. 2008). The Court held that because the library position was not a safety sensitive position, the applicant could not be drug tested without individualized suspicion. In a case in Florida, the Governor passed an executive order requiring random/suspicionless drug testing of all government employees and applicants. *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott,* 717 F.3d 851, 882 (11th Cir. 2013). The union representing all government employees brought suit to overturn the drug testing policy and were successful. The Court held that random drug testing must be tied to safety and security sensitive positions regardless of whether it's a current employee or an applicant. This type of analysis requires that each job be reviewed individually before allowing random drug testing, which takes time and effort, "[n]onetheless, convenience cannot override the commands of the Constitution." *Id.* at 882. Cities can only drug test applicants if they are in a security or safety sensitive position. A chart follows this paper which lists safety and security sensitive positions as found by courts throughout the United States.

Lavender Haze: Introduction of CBD and THC after the Federal Farm Bill and state legalization

Drug testing by cities is limited by the United States and Texas Constitution, and now may be limited further by the legalization of a product that can cause positive drug test results. While some states protect employees when they use legal products such as CBD, currently, there is no law in Texas that prohibits employment discrimination based on a person's use of legal products. *Marijuana and the Workplace: What's New for 2020?*, Lisa Nagele-Piazza, J.D., SHRM-SCP (January 2020) *available at* https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/marijuana-and-the-workplace-new-for-2020.aspx. Thus, in Texas, if an employee tests positive for THC, even if it is based on legal CBD or THC use, an employee may be disciplined if a city decided to take that route.

A. 4th Amendment: Protecting Constitutional Rights while Protecting the Public

The main issue of the legalization of CBD as it relates to employee drug testing, is that even legal CBD use could result in a positive THC drug test. *Some CBD Products May Yield Cannabis-Positive Urine Drug Tests*, John Hopkins Medicine, (November 4, 2019); *Can You Take CBD and Pass a Drug Test?*, Lisa L. Gill (May 15, 2019) *available athttps://www.consumerreports.org/CBD/can-you-take-CBD-and-pass-a-drug-test.* This is an issue, because it is still unclear when and whether the use of products with THC, which could include legal CBD products, impairs driving. *See* National Highway Traffic Safety Administration, DOT HS 812 440 (July 2017). Alternatively, there could be safety issues if an employee is using CBD that includes THC. An Insurance Institute for Highway Safety study in 2016 indicated a 5.2% increase in crashes where police reports were filed in states where the retail sale of marijuana has been legalized. Monfort, Samuel S. *Effect of recreational marijuana sales on police-reported crashes in Colorado, Oregon, and Washington,* Insurance Institute for Highway Safety (October 2018) *available at* https://www.iihs.org/topics/bibliography/ref/2173.

Drug testing for tetrahydrocannabinol (THC), the active ingredient in marijuana and that appears in some cannabidiol (CBD) products, has become more problematic under recent legalization. The term "marijuana" often is used to refer to both Hemp and Marijuana which are both types of cannabis plants. But marijuana is known for containing THC which is the substance that provides euphoria and other mind-altering attributes. CBD is the main substance extracted from hemp products used for ingestion. CBD and THC are the most common cannabinoids and both substances are found in both marijuana and hemp. Marketed CBD products can contain THC practically because THC can be present in cannabis plants, but also legally CBD products can have up to .3% THC. *See, e.g., Warning Letters and Test Results for Cannabidiol-Related Products*, Food and Drug Administration (November 26, 2019) *available at* https://www.fda.gov/news-events/public-health-focus/warning-letters-and-test-results-cannabidiol-related-products.
Marijuana and hemp for ingestion, including CBD products, have been illegal under federal law in the United States since 1970. COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, H.R. 18583, 91st Cong., (1970). In recent years, many states have started to legalize the use of marijuana and hemp for ingestion, both recreationally and for medical purposes. Texas has not followed suit as it relates to the legalization of marijuana. Iris Hentze, CANNABIS & EMPLOYMENT LAWS, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 9, 2019), https://www.ncsl.org/research/labor-and-employment/cannabis-employment-laws.aspx#State%20Laws. *See* id.

The federal Farm Bill legalized hemp and hemp products, and low to zero-THC cannabis, but did not legalize marijuana. (2018 Farm Bill, PL 115-334). The Texas Legislature followed in 2019 by legalizing the growth, sale, and manufacturing of hemp to produce low to zero THC products that contain CBD. Acts 2019, 86th Leg., R.S., Ch. 764 (H.B. 1325), Sec. 2, eff. June 10, 2019. TEX. AGRIC. CODE § 121.001. Texas legislation also ensured state regulatory authority over hemp growers and products and provided a process for licensing and monitoring production of CBD products from hemp. TEX. AGRIC. CODE § 121.002. One aspect of the legislation is that growers must allow state and local authorities onto land and into facilities to conduct inspections. TEX. AGRIC. CODE § 122.053. In addition, the bill prohibits any city, county, or other political subdivision from enacting or enforcing any "rule, ordinance, order, resolution, or other regulation

that prohibits the cultivation, handling, transportation, or sale of hemp as authorized by this chapter." TEX. AGRIC. CODE § 122.002. Hemp regulations were adopted by the Texas Department of Agriculture on March 6, 2020, which was the final step in setting up hemp production in Texas. https://texasagriculture.gov/RegulatoryPrograms/Hemp.aspx The Department of State Health Services is drafting its own rules for consumable hemp products as it relates to: (1) manufacturing licensing for consumable products; (2) creation of a registration of retailers; and (3) and testing of the products. https://www.dshs.texas.gov/consumerprotection/hemp-program/default.aspx. The legislation did not limit or regulate employer drug testing.

B. Americans with Disabilities Act: An Interactive Process for Working with Employees

Use of CBD or other legal prescriptions could be protected by the Americans with Disabilities Act (ADA) if it: (1) is used to treat a medical condition that would be considered a disability; or (2) is used legally but causes side effects that cause an individual to be considered to have a disability. The ADA includes prohibitions on discrimination against individuals with disabilities in employment relationships. 42 U.S.C. § 12101-12111.

A city employer may not discriminate against qualified individuals in matters of hiring, firing, promotions, pay, training, benefits, or any other term or condition of employment, which could include drug testing that tests for prescribed drugs without the ability of an employee to dispute or explain a positive drug test. According to the EEOC, this protection extends to both the use of prescription and over-the-counter drugs that an individual might use to treat a disability. *See, e.g.*, *Product Fabricators to Pay $40,000 to Settle Disability Discrimination Suit*, EEOC news release, February 15, 2012.

The ADA does allow drug testing despite its possible implications for individuals with disabilities:

> (c) Authority of covered entity: A covered entity—
>
> (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
> (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
> (3) may require that employees behave in conformance with the requirements established under chapter 81 of title 41;
> (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

42 U.S.C. § 12114.

Drug testing is allowed under the Act, but medical examinations are not allowed in most cases. A drug test for illegal drugs is not a medical examination, but the asking of questions regarding whether an individual is taking prescription or over-the-counter medications can be. *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, Equal Employment Opportunity Commission (July 27, 2000) *available at*

https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees. Cities can perform drug tests if constitutionally allowed but should be prepared to discuss the possibility of ADA protection.

For example, in the Tenth Circuit, the Court reviewed a case where a terminated employee alleged an ADA violation of a prohibited medical examination because he tested positive for amphetamines but argued he had only been taking an over-the-counter cold medication. "A test for the illegal use of drugs does not necessarily become a medical examination simply because it reveals the potential legal use of drugs." *Turner v. Phillips 66 Co.*, 791 Fed. Appx. 699, 709 (10th Cir. 2019, not desig. for pub.). Asking about over-the-counter medications likely violates the Americans with Disabilities Act, but drug tests for illegal drugs, such as marijuana, do not create a prohibited medical examination even if the result is a positive test result for illegal substances that come from legal medications like CBD. *Id.*; 29 C.F.R. § 1630.16.

Where a city can legally drug test employees, if an employee tests positive the employer should initiate a conversation. During this conversation, the city many need to start the ADA interactive process to determine reasonable accommodation, with the employee regarding the source of the positive test result comes from in case the result comes from legal use of CBD (or other legal medications). In addition, if the city will be disciplining employees for positive marijuana/THC results, it should be made clear in the policy and require that if an employee has a prescription for THC or CBD, they need to let their employer know. Using marijuana or other drugs where it is legal to do so does not protect an employee's position if they later test positive, except possibly if the employee has a prescription.

C. Commercial Drivers Licenses: CBD meets CDLs

Neither state nor federal law requires that cities drug test their employees unless those employees fall under federal transportation law such as those with Commercial Drivers Licenses. 49 C.F.R. Part 382. Employees engaged in transportation or operation of motor vehicles that are covered by the U.S. Department of Transportation must be drug tested. Considering this requirement, the United States Department of Transportation (DOT) has weighed in on the issue of positive drug test results when the results are from legal drug use of CBD and marijuana.

First, guidance from the DOT makes it clear that even if an individual has a prescription for medical marijuana, a positive drug test can still be used for disciplinary purposes. "It remains unacceptable for any safety-sensitive employee, subject to drug testing under the Department of Transportation's drug testing regulations, to use marijuana." https://www.transportation.gov/odapc/medical-marijuana-notice; 49 C.F.R. § 40.151. But the tests under DOT regulations are only for marijuana, not for CBD. It has stated that:

> Furthermore, CBD use is not a legitimate medical explanation for a laboratory-confirmed marijuana positive result. Therefore, Medical Review Officers will verify a drug test confirmed at the appropriate cutoffs as positive, even if an employee claims they only used a CBD product.
> It remains unacceptable for any safety-sensitive employee subject to the Department of Transportation's drug testing regulations to use marijuana. Since the use of CBD products could lead to a positive drug test result, Department of Transportation-regulated

safety-sensitive employees should exercise caution when considering whether to use CBD products.

DOT "CBD" Notice, U.S. Department of Transportation (February 18, 2020) *available at* https://www.transportation.gov/odapc/cbd-notice. Under this guidance, if a city is providing drug testing to its employees that are covered by the Department of Transportation regulations and they test positive for THC, they can be disciplined, even if the use is only from legal CBD or THC products.

D. Consistency is the Answer: Treating Similarly Situated Employees the Same

Once the city has a solid drug policy that reflects 4th Amendment limitations, provides for the interactive process under the Americans with Disabilities, and clarifies what is required of CDL/DOT employees, the next step is to ensure that it is applied consistently for all similarly situated employees. For example, a longtime employee creates a reasonable suspicion allowing for drug testing and tests positive for THC. They do not have a disability but claim that they only used legal CBD products in Texas. Under Texas law, that employee has no protection for their "legal" drug use, this employee can be disciplined or terminated so long as the entity's policy allows it. The same is true if the employee tests positive for drug use in a state where marijuana is legal. If the employee is not disciplined, what happens when another employee tests positive for THC? Maybe another employee has not been working at the entity as long and is not as a good performer. Can that employee be terminated without a discrimination claim for the same positive THC test? Likely a termination in Texas would be upheld, but an argument for discrimination can always be brought where two individuals who are similarly situated are treated differently when it comes to discipline for the same activity. Contrast that with an employee who is using CBD based on a disability or an employee who tests positive for THC while being under DOT regulations. So, while consistency is key, some factors such as DOT regulations can lead to treating different employees differently.

Blank Space: Drug-Testing Policies

Cities can, and should, adopt a written drug testing policy. Section 21.120 of the Texas Labor Code allows it, and federal law requires it for commercial drivers who have CDLs. The policy should be given to each employee and the city should have each employee acknowledge receipt. A drug testing policy should include when an employee may be drug tested, which employees or applicants may be tested, what job duties are considered safety or security sensitive, drug testing procedures that are minimally intrusive and respect the employee's right to privacy as much as possible, notice procedures for those who may be tested, how the results will be treated, and a policy for what occurs should a drug test come back positive.

A city should also ensure that its policy follows any Americans with Disabilities Act regulations, as well as other state and federal law that deal with medical information. The written drug policy should be strictly and consistently followed. In addition, if a city is a federal contractor or a grantee of federal funds, the city must comply with the federal Drug-free Workplace Act of 1988. This act requires that a city adopt a "drug-free awareness" program and drug policy. The federal Omnibus Transportation Employee Testing Act of 1991 requires drug testing of safety-sensitive

employees in the aviation, motor carrier, railroad, and mass transit industries which includes those with Commercial Drivers Licenses. These employees would be required to be tested for drugs pre-employment, post-accident, reasonable suspicion, and other testing. Any written city policy should reflect these requirements if a city has CDL employees.

Practical Steps:

1. Ensure your policies do not violate the 4th Amendment by allowing random drug testing or drug testing of all employees or applicants.
2. Update your drug-free workplace policy to reference CBD and THC use in other states in a way that reflects what is needed for safety, security, and job performance.
3. Train and educate your employees on how even the use of legal medication or alcohol can lead to positive drug or alcohol results and impair the employee's ability to safely perform their jobs.
4. A drug and alcohol policy must provide for the interactive process under the Americans with Disabilities Act to ensure all qualified individuals with a disability are not discriminated against simply because of their use of legal medications. (There is no protection for employees for the current use of illegal drugs).
5. Educate supervisors on how to proceed if there is a positive drug test administered because of job performance issues, including the option to terminate, if even legal drug use causes safety issues for the employee, other employees, or the public.
6. Clarify, to the extent possible, what is considered for individualized suspicion for drug testing.

Dear Reader: Final Thoughts

The first discussion, though, is to ask your city what benefits they find in drug testing and provide a pro and con analysis. CDL holders have to be drug tested and some liability carriers may require drug testing after an accident. At the end of the day, if an employee is cannot perform the essential functions of the job on any given day, or simply is not performing up to city standards, then a discussion and possible discipline needs to be had, regardless of the reason for the poor performance.

WEEDING OUT BAD EMPLOYEES: RANDOM DRUG TESTING AND CITIES 2023 UPDATE CHART

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		TRANSPORTATION
Position	Case	Holding
Interstate Truck Drivers Random	*Int'l Brotherhood of Teamsters v. Dept. of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991).	"The FHWA has a compelling interest in preventing drivers from using illegal drugs while behind the wheel. Both this court and the Supreme Court have acknowledged the vital governmental interest in ensuring the sobriety and fitness of operators of dangerous instrumentalities or equipment."
Subway train drivers and other workers Random if safety sensitive	*Burka v. New York City Transit Auth.*, 739 F. Supp. 814, 821-23 (S.D.N.Y. 1990)	The ability of the performance of the worker's job to influence the safety of passengers or others determines whether they are in a safety sensitive position. Also, how much supervision an individual has and how many checks and balances on their performance determines whether their particular job at the subway is safety-sensitive. Finally, employees who carry guns likely are safety-sensitive positions.
Carry passengers Random if carrying dignitaries Random when carrying children	*AFGE v. Skinner*, 885 F. 2d 884, 892 (D.C.Cir. 1989), cert. denied, 495 U.S. 923 (1990); *Jones v. McKenzie*, 833 F.2d 335, 340 (D.C.Cir.1987); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir. 1990) (yes to testing); *National Treasury Employees Union v. Watkins*, 722	*AFGE*: "[S]trong safety interests support the testing of most Department [of Transportation] motor vehicle operators, who are responsible for, *inter alia*, the transportation of visiting foreign dignitaries and key Department officials and the operation of passenger-laden shuttle buses. Shuttle buses transport as many as 1,200 passengers each day. Thus, obvious safety interests support the testing of the majority of the Department's motor vehicle operators." *Jones:* "While the safety concern may be somewhat greater for a school bus driver, it is still quite significant in the case of an employee who is responsible for supervising, attending and carrying handicapped children. For example, the danger to a young, handicapped child, should she be dropped by an attendant or ignored while crossing the street, is obvious."

	F. Supp. 766 (D.D.C. 1989) (no to testing)	
CDLs Random	*Keaveney v. Town of Brookline*, 937 F. Supp. 975, 987 (D. Mass. 1996)	"Congress has expressly found that random testing is the most effective deterrent to limiting the number of drug and alcohol related accidents on the nation's highways. Although I find that the intrusion imposed upon the plaintiffs in this case is substantial, still it is true that the government has a legitimate, compelling interest in seeking "to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person[.]" *Von Raab*, 489 U.S. at 668, 109 S.Ct. at 1392. I conclude that Brookline's Testing Policy does not violate the Fourth Amendment and plaintiffs' claim under 42 U.S.C. § 1983 fails."
Backhoe driver, dump truck driver Random	*Krieg v. Seybold*, 481 F.3d 512, 518 (7th Cir. 2007).	"After reviewing the record, we hold that Krieg performed a safety sensitive job. Krieg testified that he regularly operated a one-ton dump truck, a dump truck with a plow, a front end loader, and a backhoe. These large vehicles and equipment present a substantial risk of injury to others if operated by an employee under the influence of drugs or alcohol. Moreover, they are significantly larger and more difficult to operate than the vans or passenger cars operated by the plaintiffs in either *Watkins* or *Lyng*."
Crane and tractor driver on public roads; environmental protection specialists Random	*Plane v. United States*, 796 F. Supp. 1070, 1078 (W.D. Mich. 1992)	"As held by the Supreme Court in *Skinner* and *Von Raab*, government mandated urinalysis drug testing is not an unreasonable search and does not violate the fourth amendment when the government's compelling interest outweighs the intrusion on the employees' privacy. The facts of this case conclusively show that random drug testing of heavy equipment operators or environmental protection specialists who directly handle or inspect hazardous materials promotes a compelling government interest in protecting the safety of its employees and the public. Further, this Court

		holds that the safety interest promoted by the random drug testing program outweighs the intrusion on the privacy of the employees in these job classifications."
Aircraft Mechanic Random	*AFGE v. Skinner*, 885 F. 2d 884 (D.C.Cir. 1989), cert. denied, 495 U.S. 923 (1990) (aircraft mechanic) *Am. Fed. Of Gov't Empls., AFL-CIO v. Dole*, 670 F.Supp. 445, 448-49 (D.D.C. 1987).	"Thus, on balance, the preponderance of the proof supports the reasonableness of the random plan. DOT's duty to assure the integrity of its sensitive aviation and other critical jobs and to protect the public safety is undisputed. The plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion. The plan must be sustained against this generalized facial attack."
School Bus Mechanic Random	*English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775, 783 (N.D. Ala. 1996) (school bus mechanic)	"This case presents facts nearly identical to those in *Skinner*. Here, the unrebutted Affidavit of defendant Hayes establishes the obvious-that an employee who inspects, repairs, and drives large buses (sometimes filled with containers of oil) cannot be impaired by drug use. Sloppy inspection, repair, or driving could all create the potential for great human loss, particularly when one considers buses loaded with children. And, the random nature of the Board's testing serves the same deterrent effect as the tests in *Skinner*. And, as in *Skinner*, requiring the Board to base drug testing decisions on individualized suspicion would severely undercut the utility of the tests; the Supreme Court accepted the argument in *Skinner* that railroad employees could cause great injury before signs of drug use were evident, and the same is true here.

		So, to conclude, the Board's intrusion on plaintiff's privacy interests was minimal, and was justified by compelling governmental needs that would be frustrated if individualized suspicion were required. *Skinner* controls this case, and the Court concludes that defendants' drug testing policies were not "unreasonable" under the Fourth Amendment."
Air Traffic Controllers Random	*Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	"In the present case, the FAA administrative record included evidence that a number of pilots and other airline crew members had received treatment for cocaine overdoses or addiction; that tests by companies in the industry had turned up instances of drug use by pilots and mechanics; and that drugs were present in the bodies of pilots in two airplane crashes.[FN6] Moreover, the harm that can be caused by an airplane crash is surely no less than the harm that might be caused by drug impairment in the course of Customs Service employment. When viewed in this light, the need for the FAA's testing program equals, if not exceeds, that for the Customs Service program approved in *Von Raab*." "FN6. Although the FAA has made a showing of drug use by airline employees, we note that nothing in *Von Raab* requires such a showing. *See Harmon v. Thornburgh*, 878 F.2d 484, 487 (D.C.Cir.1989) ("Nor is it necessary [under *Von Raab*] that a documented drug problem exist within the particular workplace at issue.")."
Coast guard ship cooks and painters Reasonable Suspicion	*Transp. Inst. v. U.S. Coast Guard*, 727 F.Supp. 648, 658-59 (D.D.C. 1989) (no to testing)	"The Court has not been shown that the governmental interest randomly testing all crewmembers for drugs in the interest of safety outweighs the crewmembers' privacy interests. The regulations providing for random testing, as currently drawn, cannot be sustained under the Fourth Amendment. As such, the Court will enjoin the implementation of the regulations providing for the random testing of all crewmembers.

		It is likely, however, that some crewmen within the currently drawn regulations perform duties so directly tied to safety, that they could constitutionally be required to undergo random testing. *See Harmon,* 878 F.2d at 493. Given the minimal information the Court now has regarding the job and emergency duties of the various crewmembers, the Court will decline to draw lines which the Coast Guard itself has not drawn. The Court will leave the reformulation of the regulations providing for random testing to the Coast Guard."
Flight Crews Random	*Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	See above
Custodian Reasonable Suspicion or Random Random needs more information than just the person is a Custodian, i.e., use of	*Bolden v. S.E. Pa. Transp. Auth.*, 953 F.2d 807, 823 (3rd Cir. 1991), cert. denied, 504 U.S. 943 (1992) (no to testing); *Aubrey v. Sch. Bd. Of Lafayette Parish*, 148 F.3d 559, 564-65 (5th Cir. 1998) (yes to testing school custodian)	Bolden: "It is clear that compulsory, suspicionless drug testing of a person holding Bolden's job falls outside the precedents discussed above. In all of those cases, the employees subjected to suspicionless testing were found to have diminished privacy expectations due to pervasive governmental regulation of the jobs they performed. Here, SEPTA has not shown that maintenance custodians are pervasively regulated or that they have diminished privacy expectations for any other reason." Aubrey: "The custodial position was considered safety sensitive because of the handling of potentially dangerous machinery and hazardous substances in an environment including a large number of children ranging in age from three to eleven. Aubrey and other custodial employees "reasonably should expect effective inquiry into their fitness and probity" to operate and use

equipment and dangerous chemicals		such material in a school setting. The position has a possible impact on the physical safety of the students in their educational environment and the presence of someone using illegal drugs increases the likelihood that children will have an open avenue to obtain the drugs." "The school system's role as a guardian does not end with protecting children from their own actions, but must deter potentially dangerous actions of adults, including school employees, who may have interaction with and influence upon them. We therefore conclude and hold that the Board's need to conduct the suspicionless searches pursuant to the drug testing policy outweighs the privacy interests of the employees in an elementary school who interact regularly with students, use hazardous substances, operate potentially dangerous equipment, or otherwise pose any threat or danger to the students."
Aircraft dispatchers	*Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	See above
Flight attendants Random	*Bluestein v. Skinner*, 908 F.2d 451, 457-58, n.10 (9th Cir. 1990), cert. denied, 498 U.S. 1083)	"Petitioners also argue that the FAA's decision to include flight attendants within the testing requirements is inconsistent with prior FAA decisions denying petitions of flight attendants to establish safety rules limiting their on-duty time. The duty time decisions, however, do not stand for the proposition that impairment of flight attendants' performance is never a public safety consideration. Rather, the FAA concluded that, on the evidence before it, there was no correlation between flight attendant duty time and risk to passengers. We see no conflict between the duty time decisions and the inclusion of flight attendants in the drug testing program.**FN10** Accordingly, we hold that the FAA acted within its authority in requiring random drug testing of flight attendants."

		"FN10. Although petitioners do not directly contend in this proceeding that flight attendant positions are not safety-sensitive, it is nonetheless worth noting that the administrative record adequately supports the FAA determination that such positions are, in fact, safety-sensitive. Flight attendants must perform important safety functions in the event of emergencies, and are also routinely responsible for ensuring that luggage is safely stored and the airplane doors properly closed and locked prior to departure."
Railway employees Random	*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620-21 (1989).	"This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty."

		Public Safety
Position	Case	
Police Random – if involved in drug investigation	*Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656, 672 (1989) (firearms and drug interdiction); *Carroll v. City of Westminster*, 233 F.3d	*Von Raab:* "We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their

	208, 213 (4th Cir. 2000); *Penny v. Kennedy*, 915 F.2d 1065 (6th Cir. 1990); *Brown v. City of Detroit*, 715 F. Supp 832 (E.D. Mich. 1989) (allowing testing for officers who use force and make arrests)	judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. Cf. *In re Caruso v. Ward*, 72 N.Y.2d 432, 441, 534 N.Y.S.2d 142, 146-148, 530 N.E.2d 850, 854-855 (1988). While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders." *Carroll:* "Moreover, courts have long recognized that individuals in certain safety-sensitive professions, such as law enforcement, have a reduced expectation of privacy."
Firefighters Random	*Hatley v. Dept. of the Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998); *Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) (yes); *Brown v. Winkle*, 715 F. Supp. 195 (N.D. Ohio 1989) (yes); *Wilcher v. City of Wilmington*, 891 F. Supp. 993 (D. Del. 1995) (yes); *Beattie v. City of St. Petersburg Beach*, 733 F. Supp. 1455, 1458 (M.D. Fla. 1990) (no)	*Hatley:* "Petitioner was a firefighter. The safety of others was in his hands, and an impairment due to 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. Employees who have been held to be subject to random drug testing without violation of the Fourth Amendment include pipeline operators, airline industry personnel, correctional officers, various transportation workers, Army civilian guards, civilian workers in a military weapons plant, Justice Department employees with clearance for top-secret information, police officers carrying firearms or engaged in drug interdiction efforts, and nuclear power plant engineers." *Penny*: "Next, it is apparent that the district court's principal conclusion that drug-testing of these employees must be based upon particularized suspicion of drug or alcohol use would seriously impede the employer's ability to obtain information needed to advance the established compelling interest. Without reviewing all of the rationale or the various considerations

		marshaled by the majority in *Von Raab* and *Skinner*, it is sufficient to hold here that the district court's conclusion that this employer must require a reasonable and particularized suspicion as a precondition to any such testing must perforce fail." *Beattie*: "On the facts of this case, the Court finds that the City's interest is not of such a compelling nature that it is impractical to require some level of individualized suspicion. The annual physicals have protected the public's welfare since 1974. The City does not claim that the physical exams and daily observation of the firefighters' job performances are now insufficient to judge their job fitness. Without some form of individualized suspicion or some compelling reason beyond a hypothetical future problem, the invasion of the firefighters privacy interests is unjustified in this case."
Police cadets Random	*O'Connor v. Police Comm'r of Boston*, 408 Mass. 324, 330; 557 N.E.2d 1146 (Mass. 1990)	"As we have said, the defendants had a compelling interest in determining whether cadets were using drugs and in deterring such use. Those interests outweigh the plaintiff's privacy interest not only under art. 14, but under G.L. c. 214, § 1B, as well."
Police who do not carry firearms and are not involved in drug crimes Random	*Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir.), cert. denied, 493 U.S. 963 (1989) (questioning right to randomly test)	"The record in our case makes clear that the drug testing before us applies to police officers who carry firearms and to those who participate in drug interdiction. To this extent, since we can find no relevant distinction between a customs officer and a police officer, we hold the Police Department's drug testing rule to be constitutional. The rule also seems to apply to other members of the Department who may not carry firearms or enforce the drug laws."

EMTs Random	*Piroglu v. Coleman*, 25 F.3d 1098, 1103 (D.C. Cir. 1994)	"On this record, Piroglu's privacy interest in being free from a warrantless drug test is insubstantial. Because the District's interest in randomly testing its trainees outweighs Piroglu's privacy interest, we reject her argument that the fourth amendment required the District to obtain a warrant before testing her."
Customs Officials doing Drug Interdiction Random	*Nat'l Treasury Emps. v. Von Raab*, 489 U.S. 656, 672 (1989); *Nat'l Treasury Empls. Union v. Hallett*, 756 F. Supp. 947 (E.D. La. 1991); *Nat'l Treasury Empls. Union v. Hallett*, 776 F. Supp. 680 (E.D.N.Y. 1991); *Nat'l Treasury Empls. Union v. U.S. Customs Serv.*, 27 F.3d 623 (D.C. Cir. 1994)	"We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness."
Chain of Custody employees Random	*Nat'l Treasury Empls. Union v. U.S. Customs Serv.*, 27 F.3d 623, 630 (D.C. Cir. 1994) (not subject to random drug testing)	"Over the past decade and more, the United States Government has waged an extraordinary and costly campaign to contain the drug trade. A single shipment that arrives in the United States undetected may have a value in the millions of dollars and can bring misery and death to large numbers of our citizens. The Customs Service has made a plausible case that a drug trafficker in possession of the information contained in the ACS and TECS II databases can significantly improve his chances of successfully smuggling his next shipment of drugs into the United States. That being the case, we have no difficulty in concluding that the Government's interest in protecting this information outweighs the intrusion that random drug testing imposes on

		employees whose expectations of privacy have been diminished by their subjection to comprehensive background checks."
Prison Guards Random	*AFGE v. Roberts*, 9 F.3d 1464 (9th Cir. 1993), *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989), *Seeling v. Koeher*, 76 N.Y. 2d 87, 556 N.E.2d 125, 556 N.Y.S.2d 832 (N.Y.), cert. denied, 498 U.S. 847 (1990)	"That decision, which came two months after the injunction issued by the district court herein, may now be followed by it in setting out the criteria for testing for reasonable suspicion. We have already held that all correctional officers are primary law enforcement employees, so that the Bureau has a special need to test them randomly. By the same reasoning, all are subject to testing for reasonable suspicion of the use of drugs, on duty or off. *See id.* at 792. The injunction of the district court must be modified so that it enjoins only the random testing of employees outside correctional institutions who do not have access to information regarding the Witness Security program or the Witness/Victim program and so that it allows testing on suspicion of all employees subject to random testing in accordance with the criteria of *Martin.*"
Juvenile Detention Center lieutenant Random	*Washington v. Unified Gov't of Wyandotte Cnty., Kansas*, 847 F.3d 1192, 1197 (10th Cir. 2017)	County's random drug test did not violate the Fourth Amendment's probable cause and warrant requirements. Because County's interests in safety and welfare of individuals at juvenile detention center outweighed county employee's privacy interests.
Federal prosecutors with access to grand jury proceedings Random	*Harmon v. Thornburgh*, 878 F.2d 484, 496. Cir. 1989), cert. denied, sub nom, *Bell v. Thornburgh*, 493 U.S. 1056 (1990)	"We conclude that all DOJ employees holding top secret national security clearances may constitutionally be required to undergo random urinalysis. The district court should therefore modify the current injunction so as to permit the testing of individuals within this category. The injunction should, however, be maintained insofar as it prohibits the Department from implementing its current plan to test all federal prosecutors and all

		employees having access to grand jury proceedings. The case is remanded to the district court for further proceedings not inconsistent with this opinion."
Executive Department with security clearance Random	*Hartness v. Bush*, 794 F. Supp. 15, 17 (D.C.C. 1992); *AFGE v. Sullivan*, 744 F.Supp. 294 (D.D.C. 1990); *Hartness v. Bush*, 919 F.2d 170 (D.C. Cir. 1990), cert. denied, 501 U.S. 1251 (1991); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, sub nom, *Bell v. Thornburgh*, 493 U.S. 1056 (1990)	"A further question remains with respect to Ms. Ferrantello. If she is otherwise properly included in the category of EOP employees earmarked for testing, her "secret" clearance would preclude the relief she seeks, irrespective of her access to the Old EOB."

		Medical Personnel
Nurses Random	*AFGE v. Derwinsky*, 777 F.Supp. 1493, 1499 (N.D. Cal. 1991)	"Because the positions occupied by the five named plaintiffs, those of physician, nurse, pharmacist, medical technician and dialysis technician, require the discharge of duties fraught with such risk of injury to others that even a momentary lapse of attention can have disastrous consequences, the court finds that defendants have a compelling interest in requiring the proposed random drug testing and that interest prevails over the expectation of privacy entertained by the incumbents of those five positions."

Pharmacists	*AFGE v. Derwinsky*, 777 F.Supp. 1493, 1499 (N.D. Cal. 1991)	See above
Dentists	*AFGE v. Derwinsky*, 777 F.Supp. 1493, 1499 (N.D. Cal. 1991)	See above

		Elected Officials
Elected Officials No drug testing.	*Chandler v. Miller*, 520 U.S. 305, 308, 318-19 (1997).	"Georgia's requirement that candidates for state office pass a drug test, we hold, does not fit within the closely guarded category of constitutionally permissible suspicionless searches." "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion. See supra, at 1300–1302. Georgia has failed to show, in justification of § 21–2–140, a special need of that kind. Respondents' defense of the statute rests primarily on the incompatibility of unlawful drug use with holding high state office. The statute is justified, respondents contend, because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. Brief for Respondents 11–18. The statute, according to respondents, serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office. Id., at 17–18. Notably lacking in respondents' presentation is any

		indication of a concrete danger demanding departure from the Fourth Amendment's main rule."

		Applicants
Applicants Random only if security or safety sensitive position	*Lanier v. City of Woodburn*, 518 F.3d 1147, 1152 (9th Cir. 2008) (library page applicant could not be tested): *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013), *cert denied.*	*Lanier:* "We conclude that Woodburn has not articulated any special need to screen Lanier without suspicion. This is the "core issue." *Chandler*, 520 U.S. at 317–18, 117 S.Ct. 1295. Beyond it, we discern no substantial risk to public safety posed by Lanier's prospective position as a part-time library page. Consequently, we need not pause over the City's remaining points—that invasion of Lanier's privacy interests is slight given the minimally intrusive form of testing, that the testing would have occurred pre-employment, and that she was in any event subject to an extensive background check which further diminished any expectation of privacy she may reasonably have had. We express no opinion as to the weight of these considerations, if any, in a different case."
Tour Guides Random	*Kagan v. City of New Orleans*, 957 F. Supp. 2d 774, 784 (E.D. La. 2013), *aff'd sub nom. Kagan v. City of New Orleans, La.*, 753 F.3d 560 (5th Cir. 2014)	"It [the City] need only show that its goal of protecting tour group participants from the harmful behaviors associated with drug use "would be achieved less effectively absent the" drug-testing requirement." The undisputed facts demonstrate that the City's licensing scheme for tour guides is content neutral and passes intermediate scrutiny. Accordingly, it is constitutional.

Waste Management Director Reasonable Suspicion	*Voss v. City of Key W.*, 24 F. Supp. 3d 1219, 1228 (S.D. Fla. 2014)	**Holdings:** The District Court, James Lawrence King, J., held that: 1 city's interest in the safe, effective, and efficient delivery of public services did not constitute special need sufficient, under the Fourth Amendment, to justify city's policy of suspicionless drug testing of all applicants for employment with the city, and 2 applicant's position was not safety-sensitive position as would justify city's preemployment suspicionless drug testing of all applicants for that position. Position: The City's Job Description for the newly created position of "Solid Waste Coordinator" states, "[t]he primary focus of this highly visible marketing and planning position is to develop, implement and expand the City's recycling programs, with a secondary focus of overseeing other tasks within the City's Solid Waste Utility." "While suspicion-less drug testing of applicants for employment may have become routine for private employers, this Court is bound by controlling precedent to find that the Policy is unconstitutional as applied to Plaintiff."
Substitute Teachers Random (applicant was a safety sensitive position)	*Friedenberg v. Sch. Bd. of Palm Beach Cnty.*, 257 F. Supp. 3d 1295 (S.D. Fla. 2017), *aff'd*, 911 F.3d 1084 (11th Cir. 2018)	Job applicant who received conditional offer for employment as substitute teacher brought putative class action against county school board, alleging that board's pre-enrollment screening policy imposing suspicionless drug testing on applicants for non-safety sensitive positions violated Fourth Amendment. Applicant moved for temporary restraining order or in the alternative for preliminary injunction. Protection of students was compelling governmental interest that outweighed privacy interests of substitute teacher applicants, as would support finding that drug testing policy did not violate Fourth Amendment, and thus applicant was not entitled to preliminary injunction.

		Behavior and Accidents-Suspicion
Prior Drug Test Came Back Positive	*Laverpool v. New York City Transit Auth.*, 835 F. Supp. 1440, 1456 (E.D.N.Y. 1993), aff'd without opinion, 41 F.3d 1501 (2nd Cir. 1994) (no to testing)	"This Court finds, as a matter of law, that the Transit Authority regulation permitting mandatory drug screening "when a Controlled Substance has been identified in a prior test" (Policy Instruction, at § 5.3.5) satisfies the Fourth Amendment requirement for reasonableness."
Accident with Inanimate Object-Simple Fault	*Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 480 (6th Cir. 1991).	"By requiring drivers to undergo drug testing after certain specified accidents, GCRTA's drug policy supplied "an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place." *Skinner*, 109 S.Ct. at 1419. A collision with a fixed object is "a triggering event, the timing of which no employee can predict with certainty." *Id.* at 1420. Therefore, GCRTA's post-accident testing policy is reasonably related to the compelling governmental interest in protecting public safety."
Injury with No Showing of Individual Fault	*United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998).	"The two parish school boards have offered no legal justification for insisting upon drug testing urine without a showing of individualized suspicion of wrongdoing in a given case, certainly nothing beyond the ordinary needs of law enforcement. Special needs are just that, special, an exception to the command of the Fourth Amendment. It cannot be the case that a state's preference for means of detection is enough to waive off the protections of privacy afforded by insisting upon individualized suspicion. It is true that the principles we apply are not absolute in their restraint of government, but it is equally true that they do not kneel to the convenience

		of government, or allow their teaching to be so lightly slipped past. Surely then it is self-evident that we cannot rest upon the rhetoric of the drug wars."
Railroad Employees at Scene of Major Accident	*Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 633 (1989).	"We conclude that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns."
Behavior May Not Be Enough	*Nat'l Fed. Of Fed. Emps, AFL-CIO v. Cheney*, 742 F.Supp. 4 (D.C.D.C. 1990).	"This list appears to have nothing to do with drug abuse; rather it appears to be catalogue of symptoms of poor work habits, bad attitudes, or even bad luck. Nothing in defendants' filings explains why employees who make too many personal telephone calls may reasonably on that account be subjected to drug tests. Nor is there any appreciable link between drug use and over-sensitivity to criticism, preoccupation with personal problems, or erratic work habits. Likewise, it defies common sense to assert that an off-the-job injury is symptomatic of drug abuse. The proposition that long lunch breaks are indicia of drug abuse is nothing short of ludicrous; there are dozens of more likely reasons."
Erratic Behavior of ER Doctor—Qualified Immunity	*Pierce v. Smith*, 117 F.3d 866 (5th Cir. 1997).	"Considering that *Skinner* authorized drug tests on a discretionary, ad hoc basis if the employee had been involved in certain rule violations but without further individualized suspicion, that that principle had not (and has not) been held by the Supreme Court or this Court to be dependent on the prior existence of a rule so providing, and that objective factors distinguished Dr. Pierce from other residents in the program so that she was not singled out arbitrarily or capriciously, and considering also the minimal intrusiveness and extent of the invasion of Dr. Pierce's Fourth Amendment interests and the legitimate special needs of the medical school program where she was a

		student-employee, we conclude that Drs. Smith and Binder are entitled to qualified immunity as a matter of law. The question is not whether other reasonable or more reasonable courses of action were available. It is, rather, whether of medical school officials similarly situated to Drs. Smith and Binder "all but the plainly incompetent" would have realized at the time that what they did violated Dr. Pierce's Fourth Amendment rights. *Hunter* at 228, 112 S.Ct. at 537; *Blackwell* at 304. Under the circumstances, that question must be answered in the negative."