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Lovvorn v. City of Chattanooga: Watering Down Public Employees' Fourth Amendment Rights, 20 J. Marshall L. Rev. 809 (1987)

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LOVVORN v. CITY OF CHATTANOOGA.*
WATERING DOWN PUBLIC EMPLOYEES'
FOURTH AMENDMENT RIGHTS

As drug abuse has become an increasingly pervasive problem throughout society,¹ government employers have sought new and better means of combatting drug abuse within the public workforce. Drug testing by urinalysis is the most effective method for detecting offenders and deterring drug use.² Opponents of such testing, however, contend that it violates employee's fourth amendment rights.³ The United States District Court for the Eastern District of Tennes-

* 647 F. Supp. 875 (E.D. Tenn. 1986).

1. Based upon its 1982 National Household Survey, the National Institute of Drug Abuse found: (1) over 17% of all Americans over the age of 12 (31.5 million) used illicit drugs last year; (2) over 11% used illicit drugs in the last month; (3) 64% of the 18-25 year-olds entering the workforce have used illegal drugs, 40% of which have used illegal drugs in the last year; (4) 20 million Americans have used marijuana at least once in the past month; (5) 11.9 million Americans have used cocaine at least once during the past year; and (6) 4.1 million Americans have used cocaine during the last month. Brief for Appellant at 3, *National Treasury Employees Union v. Von Raab*, No. 86-3522 (E.D. La. 1986). In 1983, drug abuse cost the United States economy over \$59 billion, including over \$33 billion in reduced worker productivity, over \$20 billion in costs associated with crime, victims of crime and incarceration, and over \$2 billion in treatment and support. Brief for Appellant at Attachment 1, ¶ 6, *Von Raab*, No. 86-3522 (E.D. La. 1986). Additionally, studies indicate that employees who use drugs have three to four times more accidents at work and 2.5 times more absences than non-users. *Id.* See also *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980 Research Triangle Institute, ADAMHA*, updated through 1983 (drug abuse produced staggering costs to society and employers); Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 AM. BUS. L.J. 309, 314 (1986) (on the job drug abuse pervades American industry). Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 203 (1986) (drug use occurs on the job or at a time affecting job performance).

2. For a discussion on the effectiveness of drug testing through urinalysis, see Bible, *supra* note 1, at 315 (urinalysis aids immeasurable in saving lives and protecting employers' businesses); Miller, *supra* note 1, at 204 (urinalysis drug testing greatly enhances worker safety and productivity and reduces accident rates).

3. The fourth amendment to the United States Constitution states:

The right of people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated, and no Warrants shall issue 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.

U.S. CONST. amend. IV.

The fourth amendment applies to the states through the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). Most courts have allowed random urine testing of government employees only upon a showing of reasonable suspicion that the employee is using drugs. See *infra* notes 5 and 6.

see in *Louvorn v. City of Chattanooga*,⁴ addressed the constitutionality of investigatory random urine testing used to detect firefighters' use of controlled substances. The *Louvorn* court held that a fire department may administer such tests if it possesses objective evidence⁵ that gives rise to an individualized,⁶ reasonable suspicion⁷ that a firefighter is using an illegal substance.

In April, 1985, the Chattanooga Fire Commissioner required all firefighters⁸ to submit to urine tests for the purpose of detecting the presence of illegal drugs in their systems.⁹ The Fire Commissioner implemented the procedure because he had acquired independent information that some firefighters had used illegal drugs.¹⁰ Immedi-

4. 647 F. Supp. 875 (E.D. Tenn. 1986).

5. *Id.* at 882. For cases upholding the requirement of objective evidence, see, e.g., *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Brignoni-Ponce*, 442 U.S. 873, 882 (1979); *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1517 (D.N.J. 1986); *McDonell v. Hunter*, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985).

6. *Louvorn*, 647 F. Supp. at 880, 882. The government must possess reasonable suspicion directed specifically towards the person to be searched, and the fourth amendment prohibits the automatic transference of this suspicion to others. See, e.g., *Capua*, 643 F. Supp. 1507 (urine testing of policemen and firemen); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (urine testing of school bus attendant); *American Fed'n of Gov't Employees v. Weinberger*, No. 486-353 (S.C. Ga. 1986) (urine testing of civilian security guards at military base); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App.) (urine testing of policemen); *Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 119 A.D. 2d 35, 505 N.Y.S. 2d 888 (1986) (urine testing of teachers). Cf. *McDonell v. Hunter*, No. 85-1919 (8th Cir. 1987) (fourth amendment applies to urine testing). But see *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3389 (urine testing of jockeys held constitutional).

7. *Louvorn*, 647 F. Supp. at 880. For cases upholding the reasonable suspicion requirement, see *Capua* 643 F. Supp. at 1517 (firefighters); *McDonnell*, 612 F. Supp. at 1122 (correctional officers); *Bauman*, 475 So. 2d 1322 (police officers and firefighters); *Patchogue-Medford Congress*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (teachers). Cf. *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (employees working with high voltage electric wires). But see *Donnovan v. Dewey*, 452 U.S. 594 (1981) (warrantless search of mine); *Bell v. Wolfish*, 441 U.S. 520 (1979) (visual body cavity search of pretrial detainees without reasonable suspicion); *Shoemaker*, 619 F. Supp. 1089 (urine testing of jockeys without reasonable suspicion).

8. Firefighters refers to firefighters and emergency medical technicians ("EMT"). *Louvorn*, 647 F. Supp. at 877. The Fire Commissioner fired one firefighter for refusing to submit to the urine test. *Id.*

9. *Id.* The test determined the presence of amphetamines, barbituates, benzodiazepines, such as Valium; cannabinoids, propoxyphene, such as Darvon; meperidine, or Demoral; PCP as others in the firefighters' urine. Trial Brief for Defendant, at 1, *Louvorn*, 647 F. Supp. 875. The Commissioner gave no written notice of the urine test. Word of the tests, however, circulated among the firefighters. *Louvorn*, 647 F. Supp. at 847.

10. *Louvorn*, 647 F. Supp. at 877. The Fire Commissioner, who is also Police Commissioner for the City of Chattanooga, implemented similar testing in the Chattanooga Police Department, based on independent evidence that the police officers had used illegal drugs and on the previous drug-related conviction of two police officers. *Penny v. City of Chattanooga, Tenn.*, No. 1-86-417, slip op. at 3 (E.D. Tenn. 1986). *Penny* is a companion case to *Louvorn* and involves the Chattanooga police

ately before taking the specimens, fire department supervisors frisked some donors. During the actual taking of specimens, department officials observed all but fifteen firefighters urinate in order to prevent the reoccurrence of firefighters giving substitute specimens.¹¹ The Fire Commissioner then subjected the samples to an enzyme multiple immunoassay technique (EMIT) test¹² to determine the presence of illegal substances.

Further, he suspended firefighters with two positive EMIT tests,¹³ provided them with hearings before the Fire Chief,¹⁴ and released their names to the press. The Fire Commissioner ordered new tests for any firefighter whose urine sample showed a trace of drugs.¹⁵ As a result of the additional testings and hearings, the Com-

officers' proposed 1986 constitutional challenge of the proposed 1986 urine test.

11. *Louvorn*, 647 F. Supp. at 877. The Fire Commissioner acquired information that some firefighters were hiding balloons containing unadulterated urine samples in their pants. *Id.*

12. *Id.* EMIT is popular among employers because it is inexpensive (\$15-\$25 per urine sample), and also does not require a lab technician to perform the test. Rust, *The Legal Dilema*, A.B.A.J., Nov. 1986, at 51. The use of EMIT, however, is highly controversial due to EMIT's accuracy. *Id.* Inaccuracies occur 5-20 percent of the time depending upon who performs the test and where it is performed. *Id.* Employees claim that employers who impose discipline based on positive EMIT results violate their substantive due process rights under the fourteenth amendment. *Id.* Generally, courts have not allowed employers to discipline employees based on a single positive EMIT. See e.g., *Higgs v. Wilson*, 616 F. Supp. 226, 230-31 (D.C. Ky. 1985) (EMIT confirmation needed to prevent unnecessary punitive action as a result of inaccurate scientific procedure); *Wykoff v. Resig*, 613 F. Supp. 1504, 1512 (D.C. Ind. 1985) (EMIT must be confirmed by a second EMIT or its equivalent); *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1514 (D.C.N.Y. 1985) (double EMIT does not violate due process). For further legal considerations regarding EMIT, see Rust, *supra* at 51.

The biochemical principles involved in EMIT are beyond the scope of this note. For an excellent discussion, see Bible, *supra* note 1, at 311.

The Fire Commissioner used gas chromatography/mass spectrometry to confirm the positive test results. *Louvorn*, 647 F. Supp. at 878. GCMS is a procedure used to confirm the results of EMIT. GCMS costs between \$100 and \$200 to test each specimen, making it less appealing than EMIT. Rust, *supra*, at 52. Additionally, a trained technician must perform the test in a laboratory. *Id.* However, GCMS is virtually 100 percent accurate. *Id.* For an excellent discussion of the biochemical principles involved in GCMS, see Bible, *supra* note 1, at 313. See also Rust, *supra*, at 52.

13. *Louvorn*, 647 F. Supp. at 878. The Fire Commissioner considered urine testing 100 nanograms of cannabinoids (ng) per millileter (ml) or more as positive. *Id.*

14. *Id.* The Fire Chief heard the firefighters' explanation of the test result and recommended appropriate discipline to the Fire Commissioner. *Id.* The Fire Chief cited the firefighters for disobeying a departmental drug regulation which states: "No member shall report for, or be on duty under the influence of any intoxicating liquors, drugs or compounds, nor shall he absent himself from duty or render himself unfit to fully perform his duties for reasons, attributable to, or produced by indulgence in intoxicants." Chattanooga Fire Department Rules and Regulations, 38, General Conduct, 38.11, cited in *Louvorn*, 647 F. Supp. at 878.

15. *Louvorn*, 647 F. Supp. at 878. Test results triggering disciplinary action such as suspension, demotion in rank, or termination include the following numerical values: 100 nanograms of cannabinoid (ng) per milliliter (ml) or more was a positive test, 50 ng/ml to 100 ng/ml was considered trace, and 20 ng/ml to 50 ng/ml was considered minus trace. *Id.*

missioner fired ten employees and placed seventeen others on probation, requiring them to submit to unannounced urine tests.¹⁶ Five other employees resigned.¹⁷

In September, 1986, the Fire Commissioner proposed the implementation of another series of mandatory urine tests for the fire department.¹⁸ As in the 1985 tests, the Fire Commissioner set forth no written procedures or standards for the proposed tests.¹⁹ The District Court granted the firefighters' request to enjoin the City from requiring its firefighters to submit to these new urine tests on the grounds that the proposed test violated the firefighters' fourth amendment rights.²⁰

In its analysis, the *Louvorn* court initially determined that the urine tests constituted a search and seizure under the fourth amendment.²¹ The court next found three reasons why the urine tests were

16. *Id.*

17. *Id.*

18. *Id.* The Fire Commissioner based his reason for the proposed 1986 testing on the facts that one rehired firefighter who had attended a drug rehabilitation program again tested positive, and firefighters who were disciplined after the 1985 tests reported that some of the firefighters had switched the urine samples. *Id.* The Fire Commissioner had no objective evidence upon which to base the tests nor had he attempted to obtain any. *Id.*

19. No written guidelines on procedures governed the 1985 urine tests regarding the methods for testing, release of test results, standards for analysis or disciplinary procedures. *Louvorn*, 647 F. Supp. at 877. Further, no provisions safeguarding the confidentiality of the test results existed. *Id.* at 878. The Fire Commissioner made no indication that he would confirm the positive 1986 test results to insure their accuracy prior to disciplinary action or that he would administer the tests in a more consistent manner. *Id.* at 879.

20. *Id.* at 883. The *Louvorn* court additionally held that the Fire Department's procedures for conducting the urine test and administering discipline did not deprive the firefighters of their procedural due process rights under the fourteenth amendment. *Id.* The fourteenth amendment provides in part that no state shall "deprive any person of life, liberty or property without due process of the law." U.S. CONST. amend. XIV. The court found that the City protected the firefighters' property interests in their jobs and liberty interests in their reputations by providing a pre-termination hearing before the Fire Chief, a post-termination hearing before the City Commissioner, and an opportunity to appeal under state law. *Id.* Any further discussion regarding the firefighters' procedural due process rights is beyond the scope of this case note. For further information regarding procedural due process rights, see *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 567 (1972); *McMurphy v. City of Flushing*, 802 F.2d 191, (6th Cir. 1986); *Shoemaker v. Handel*, 619 F. Supp. 1089, 1104 (D.C.N.J. 1985), *aff'd.*, 795 F.2d 795 (3rd Cir. 1986), *cert. denied*, 55 U.S.L.W. 3389 (1986); *Allen v. City of Marietta*, 601 F. Supp. 482 (1985).

21. *Louvorn*, 647 F. Supp. at 879. Courts addressing the issue have uniformly characterized urinalysis search and seizure within the fourth amendment's protection. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D.Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1984); *Patchogue-Medford Congress of Teachers v. Board of Education*, 119 A.D. 35, 505 N.Y.S.2d 888, 889 (1986); *City of Palm Bay v. Bauman*, 475 So.2d 1322, 1325-27 (Fla. Dist. Ct. App. 1985). *Cf. Everett v. Napper*, 632 F. Supp. 1481, 1484 (N.D. Ga. 1986) (no search occurred).

unreasonable and thus constituted an illegal search and seizure under the fourth amendment. First, the firefighters' privacy interests outweighed the state's need to test;²² second, the City lacked the reasonable suspicion required to search;²³ and, finally, no reasonable relationship existed between the scope of the search and its objectives.²⁴

In determining the reasonableness of the urine test, the *Louvorn* court first applied the balancing test which the United States Supreme Court set forth in *New Jersey v. T.L.O.*²⁵ This test consists of two parts. The first prong of the *T.L.O.*-test²⁶ required the court to analyze society's need to test the firefighters for drug use. The court considered the nature of the firefighters' work,²⁷ their need for sharp

22. *Louvorn*, 647 F. Supp. at 879-82.

23. *Id.* at 882. The actual inquiry the *Louvorn* court considered here was set forth in *Terry v. Ohio*, 392 U.S. 1, 20 (1968). The United States Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), quoted *Terry* and stated:

Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider whether the . . . action was justified at its inception [and] 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.

Id.

The results of these inquiries will either positively or negatively influence the government's justification for the search. Miller, *supra* note 1, at 214.

24. See *supra* note 23.

25. 469 U.S. 325 (1985). The *Louvorn* court properly applied the balancing test set forth in *T.L.O.*, *Id.* (teacher searching a student's purse). The *T.L.O.*-test requires a balancing of the need to search against the search's invasion of personal rights. *Id.* In determining whether a search invades personal rights, the Court correctly viewed it within the context of the individual's legitimate expectation of privacy. *Id.* The test for determining the legitimacy of a privacy expectation is set forth in *Katz v. United States*, 389 U.S. 347, 361 (1967), and requires first, that a person have a subjective privacy expectation and, second, that society would recognize that expectation.

The *T.L.O.*-test applies to other categories of police action subject to fourth amendment constraints. *U.S. v. Brignoni-Ponce*, 442 U.S. 873, 879 (1974) (police officer searching automobile for illegal aliens); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967) (building inspector's unwarranted search of a private residence).

26. The first prong of the *T.L.O.*-test required the *Louvorn* court to look at society's need to search the firefighters. *T.L.O.*, 469 U.S. at 337.

27. *Louvorn*, 647 F. Supp. at 879. To properly perform his hazardous duties, a fireman must retain sharp mental and motor skills. *Id.* After the fire alarm rings, the firemen must dispatch fire engines and support vehicle and operate them as authorized emergency vehicles on crowded city streets. Trial Brief for Defendant at 2, *Louvorn*, 647 F. Supp. 875. When the firemen arrive at the fire scene, they must first save lives and then save property. *Id.* Extinguishing a fire could take many hours of strenuous work under hazardous conditions. *Id.* Furthermore, the firefighter must quickly react to unanticipated emergencies. *Id.* At times, firefighters plan their strategy and, thus, they must know and remember the location of hazardous chemicals and water sources. *Id.*

Emergency medical technicians ("EMTs") must also be mentally and physically prepared for emergency. *Id.* The EMT must administer first aid or medical treatment to the fire victims. *Id.* The EMT's performance can be critical to the patient's survival, particularly if the patient received serious injuries or had a heart attack. *Id.*

mental and motor skills,²⁸ the adverse affects of marijuana upon neuromuscular functions,²⁹ and society's need to establish a drug-free fire department.³⁰ The second prong of the *T.L.O.*-test³¹ required the court to determine whether the urine tests would invade the firefighters' privacy interests. To make this determination, the court employed the *Katz*-test³² which instructs a court to consider the firefighters' subjective privacy expectations and society's recognition of it.³³

In applying the *Katz*-test, the court found that each person expects a certain degree of privacy in the act of urination.³⁴ It held that the City's proposed test would interfere to some extent with this privacy expectation because the City required the firefighters to urinate in the presence of department officials.³⁵ While the court

28. *Id.* See *supra* note 27 for a brief summary of firefighters' and EMTs' work.

29. The isomer responsible for the psychological and physiological effects of marijuana is 1-delta9-tetra-hydrocannabinol ("THC"). A. GOODMAN & K. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 558 (1985). THC most prominently effects the central nervous system ("CNS") and the cardiovascular system. *Id.* at 559. THC causes different effects depending upon the dose, route of administration, setting and the experience and expectations of subjects. *Id.* THC impairs short-term memory and deteriorates an individual's capacity to carry out tasks requiring multiple steps to reach a goal. *Id.* Low doses of THC affect balance, stability, muscle strength, and hand steadiness. *Id.* Higher doses affect performance of relatively simple motor tasks and reaction times and can cause hallucinations, delusions or paranoia. *Id.* Thinking may become confused and disorganized. *Id.* If the user is in a hot environment, as firemen may be, cannabis-induced inhibition of sweating leads to a rise of body temperature. *Id.* at 560. Pharmacological effects occur within minutes of smoking. *Id.* Nevertheless the subjective effects of smoking marijuana peak 20 to 30 minutes after inhalation and normally do not last longer than two or three hours. *Id.*

30. See *infra* notes 59-61 and a accompanying text for a discussion of the City's need to test its firefighters for drugs.

31. The second prong of the *T.L.O.*-test required the *Lovorn* court to determine the invasiveness of the search. *T.L.O.*, 469 U.S. at 337.

32. For a discussion of the *Katz* test, see *supra* note 25.

33. *Lovorn*, 647 F. Supp. at 879-80. In determining the individuals subjective expectation of privacy, the *Lovorn* court looked solely to the manner in which the Fire Department conducted the test. *Id.* at 880. The court emphasized the fact that the Department's proposed tests required the firemen to urinate in the presence of government officials. *Id.* The *Lovorn* court implied here that if the test allowed the firemen to urinate privately, then the firemen would not have a subjective privacy expectation to protect. *Id.*

Other authorities, however, indicate that the individual not only expects freedom from observation during urination, but also retains a privacy expectation in the wealth of medical information which may be obtained through urinalysis. See *National Treasury Employees Union v. Von Raab*, No. 86-3522, slip op. at 18 (E.D. La. 1986) (quoting *McDonnell*, 612 F. Supp. at 1127 (D.C. Iowa 1986)), Bible, *supra* note 1, at 207; 48 Stille, *Drug Testing: Is It Legal?* 8 NAT'L L.J. 122 (April 7, 1986). Accord *Weinberger*, No. 486-353 (S.D. Ga. 1986).

34. For a discussion of individual privacy expectations violated through urinalysis, see *supra* note 33.

35. *Lovorn*, 647 F. Supp. at 887. President Ronald Reagan, through the Department of Health & Human Services ("HSS"), issued the *Scientific and Technical Guidelines for Drug Testing Programs*. The guidelines require federal agencies to at least test their employees for marijuana and cocaine use under its specified proce-

found that society expects firefighters to give up a portion of their privacy, it held that firefighters do not entirely surrender their fourth amendment rights simply because they become City employees.³⁶ The court concluded that the proposed urine tests therefore invaded the firefighters' privacy expectations, and this factor outweighed the societal needs set forth in the first prong of the *T.L.O.*-test.³⁷

Next, the court questioned whether or not the City had the reasonable suspicion necessary to conduct the tests.³⁸ The court found that prior to conducting the drug test, the City must have reasonable suspicion to believe that the test results would positively indicate the firefighters' use of illegal drugs.³⁹ The court also stated that this suspicion must be an *individualized* suspicion because no safeguards existed to ensure that the Chattanooga fire officials could not

dures. Remarks by Otis R. Bowen, M.D., Secretary of HHS, *Press Conference on Drug Testing Guidelines* at 2 (Feb. 19, 1987) [hereinafter *Press Conference*]. The guidelines allow the employee to urinate *privately* and provide strict procedures for specimen collection, handling, and transportation, and reporting and review of the test results. *Id.*

More specifically, the toilet within the stall where the employee will urinate must contain toilet bluing. ADAMHA Scientific and Technical Guidelines for Drug Testing Programs at 4 (Feb. 3, 1987) [hereinafter ADAMHA guidelines]. After the employee urinates privately, he must hand the specimen to the "collection site person" who will flush the toilet and determine the temperature of the sample. *Id.* at 5-6. The "collection site person" must then label and seal the sample properly in the presence of the employee. *Id.* at 6. In order to prevent the employee from tampering with the sample, the "collection site person" must listen carefully when the sample is being given, note any abnormal temperature deviation, and keep the specimen bottle within sight before and after urination. *Id.* at 5-6.

An initial assay test will screen for the presence of an illegal drug in the employee's urine. *Id.* at 9. If the result is positive, a second, more precise test will reconfirm the result. *Id.* If the result is positive again, a physician will evaluate the result for alternate medical reasons. *Id.* at 15.

President Reagan's and HHS's goal is to deter illegal drug use and to counsel and rehabilitate those employees who have a drug problem. *See, e.g., Press Conference, supra* note 35, at 2. The guidelines were designed to maximize individual privacy and fairness in the testing procedure. *See* ADAMHA guidelines, *supra* note 35. U.S. Department of Health and Human Services, *HHS News* (Feb. 19, 1987); *Press Conference, supra* note 35.

36. *Allen v. City of Marietta*, 601 F. Supp. 482, 490 (1985). No court has held that citizens lose their privacy expectations when they become government employees, and further, the government cannot require them to relinquish their privacy expectations as a condition of employment. *E.g., Sec. & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.D.C. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *Armstrong v. New York State Comm'r of Correction*, 545 F. Supp. 728 (N.D.N.Y. 1982); *City of Palm Beach v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); *Patchogue-Medford Congress of Teachers v. Board of Education*, 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986).

37. *Louvorn*, 647 F. Supp. at 879-882.

38. *See supra* note 23 for a discussion of the origin of the *Louvorn* court's inquiry.

39. *Louvorn*, 647 F. Supp. at 822.

randomly test firefighters at their discretion.⁴⁰ The court held that the City lacked the reasonable suspicion required to conduct its proposed 1986 tests for three reasons. First, only *some* of the firefighters tested positive in 1985. Second, evidence indicated that only *some* of the firefighters had switched their samples in the 1985 tests, and third, no objective evidence existed which indicated deficient job performance by individual firefighters or the department as a whole.⁴¹

The court denied the City's request that the court make an exception to the reasonable suspicion requirement. The City asked the court to characterize the Fire Department as a paramilitary organization,⁴² or the proposed tests as an administrative search of a regulated industry.⁴³ The court stated that the "administrative search" exception did not apply because neither the City nor the Fire Commissioner established any standard testing procedures characteristic to that situation.⁴⁴ The court additionally held the "military" exception inapplicable on the grounds that a firefighter possesses a different expectation of privacy than a soldier does, that no objective facts indicated that drug abuse was a problem within the fire department, and that the City did not have specific regulations or standards for testing.⁴⁵

Finally, the court determined that the drug testing of firefight-

40. *Id.* See *supra* notes 6 and 7 for cases requiring individualized suspicion. *McKenzie* is an excellent example of a case where the court required individualized suspicion. 628 F. Supp. 1500 (D.D.C. 1986). In *McKenzie*, the Transit Department had generalized evidence of growing absenteeism, and increased bus traffic accidents, and had discovered syringes in its employee restroom. *Id.* The Transit Department proceeded to subject a school bus attendant and two hundred other employees to urinalysis without individualized reasonable suspicion. *Id.* Despite this overwhelming evidence of employee drug use, the court held that drug screening of all employees was unreasonable in the absence of individualized suspicion that a particular bus attendant was a drug user. *Id.*

41. *Lovvorn*, 647 F. Supp. at 882.

42. *Id.* The City argued that the Chattanooga Fire Department was structured as a paramilitary organization and therefore the reasonable suspicion exception should apply as in *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). The City of Chattanooga noted that a chain of command existed within the Fire Department from a superior as occurs in the military. Trial Brief for Defendant at 4, *Lovvorn*, 647 F. Supp. at 875. The City also pointed out the similarity between the Fire Department's and the Military's need for discipline. *Id.*

43. *Lovvorn*, 647 F. Supp. at 881. See *infra* note 73 and accompanying text.

44. *Id.*

45. *Id.* at 882. The *Lovvorn* court's refusal to recognize the theories offered by the City has recently proven to be a mistake. The Fifth Circuit Court of Appeals recently held that the United States Customs Service may randomly administer urine tests to its employees in sensitive positions. *National Treasury Employees Union v. Von Raab*, No. 86-3833, slip op. (5th Cir. April 22, 1987). The Customs Service instituted rigid testing procedures designed to protect individual privacy and dignity. *Id.* at 15. The court ultimately found the tests reasonable in light of the need to have customs officers free from drug corruption while attempting to eliminate narcotics smuggling. *Id.* at 17.

ers constituted an illegal search and seizure and violated the fourth amendment because the scope of the testing exceeded the objective of the test.⁴⁶ The court held that if the City had objective facts indicating an individual firefighter's drug use, it could test that firefighter.⁴⁷ The City, however, could not rely on information pertaining to one firefighter to justify mass testing.⁴⁸ The court stated that the fire department should have considered each firefighter's absenteeism, conduct, and financial difficulties in establishing whether or not there was reasonable suspicion to test that individual.⁴⁹ The court recognized that the use of these factors might prove less effective than random testing, placing public safety at risk. Nevertheless, it held that this would be a societal cost for the greater good of living under the protection of the Constitution.⁵⁰

The *Louvorn* court correctly decided that the Fire Department's proposed urine tests could not withstand fourth amendment scrutiny. Nevertheless, its analysis lacked depth.⁵¹ First, the court only briefly mentioned the fourth amendment principles which lie at the heart of this issue.⁵² Second, the *Louvorn* court failed to adequately consider society's need to screen firefighters for drug use.⁵³ Finally, the court took too firm a stance in upholding the reasonable suspicion requirement without thoroughly considering its consequences or providing an alternative approach.⁵⁴

At the start of its analysis, the *Louvorn* court should have stressed the importance of fourth amendment rights. The fourth amendment protects persons and their property from unreasonable searches and seizures.⁵⁵ In essence, however, the fourth amendment safeguards personal privacy and dignity from arbitrary and unwarranted governmental intrusion.⁵⁶ The fourth amendment provides

46. *Louvorn*, 647 F. Supp. at 882.

47. *Id.*

48. *Id.*

49. *Id.* at 883.

50. *Id.*

51. Although the *Louvorn* court applied the test set forth in *New Jersey v. T.L.O.*, 392 U.S. 1 (1968), its analysis was shallow. See *supra* note 25 for a discussion of *T.L.O.*

52. *Louvorn*, 647 F. Supp. at 879-880.

53. *Id.* at 879.

54. *Id.* at 883.

55. U.S. CONST. amend. IV.

56. The overriding function of the fourth amendment is "to protect personal privacy and dignity from unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). James Madison advocated for the inclusion of the fourth amendment in the Bill of Rights in order to prevent the warrantless intrusions so prevalent under British rule. See Comment, *Drug Testing: America's New Work Ethic*, 15 STETSON L. REV. 883. (1986). The fourth amendment governs all governmental intrusions on individual privacy and not just those actions the government takes in its capacity as law enforcer. *E.g.*, *T.L.O.*, 469 U.S. 335 (1985) (teachers); *Camara v. Mun. Court*, 387 U.S. at 528 (building inspectors); *Franks v. Smith*, 717 F.2d 183, 186

substantial protection of personal interests and should be limited only with great caution.⁵⁷ Fourth amendment rights constituted the heart of the issue at bar, and the *Louvorn* court failed to thoroughly stress their importance.

Next, the *Louvorn* court correctly used the *T.L.O.*-balancing test which emerged as an exception to the fourth amendment's warrant requirement.⁵⁸ Nevertheless, in weighing the interests of both parties, the court did not sufficiently emphasize the City's need for the drug tests.⁵⁹ The court gave little weight to the fact that the City's concern lies in the public's safety. Here, the City possessed a legitimate fear. An enormous drug problem faces America which has entered the American workplace and which had been previously detected in Chattanooga's Fire Department.⁶⁰ Certainly, the substantial possibility of public injury and fatality caused by drugged firefighters should weigh heavily in favor of drug testing, and the court simply failed to address these factors.⁶¹

Finally, the *Louvorn* court failed to adequately consider the possibility of dismissing the City's need for individualized, reasonable suspicion prior to conducting a urine test.⁶² On-the-job drug abuse creates extreme risks which make early detection a necessity.⁶³ Additionally, signs of drug use are often difficult to detect.⁶⁴ Because drugs affect users in a variety of ways, no single symptom provides definitive evidence that an individual is using them.⁶⁵ Re-

(5th Cir. 1983) (domestic relations). The fourth amendment, however, only protects an individual's privacy expectation that society is prepared to consider reasonable. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Where an individual has no expectation of privacy, the fourth amendment does not apply. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent to search); *Harris v. United States*, 390 U.S. 234 (1968) (publicly exposed objects); *Abel v. United States*, 362 U.S. 217, 240-41 (1960) (abandoned property).

57. *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, No. 85-1919, slip op. at 15 (1987) (Lay, J., concurring in part and dissenting in part).

58. *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (1985). Generally, the Supreme Court has held warrantless searches unreasonable *per se*. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). Nevertheless, a few exceptions apply in cases where an officer or the community may be harmed, see *Terry v. Ohio*, 192 U.S. 1 (1968), where the evidence may be destroyed, *Schmerber v. California*, 384 U.S. 757 (1966), or when a legitimate governmental purpose makes the intrusion into privacy reasonable, *SEC & Law Enforcement Employees District Council 82 v. Carey*, 737 F.2d 187, 203 (1984).

59. *Louvorn*, 647 F. Supp. at 879.

60. *Id.* at 878. The Fire Commissioner disciplined 32 Fire Department employees for illegal drug use as a result of the 1985 urine tests. *Id.*

61. *Id.* at 879. For further information discussing the benefits of random drug testing through urinalysis, see Bible, *supra* note 1; Miller, *supra*, note 1; Note, *Worker's Drinks & Drugs: Can Employers Test?*, 55 U. CIN. L. REV. 127 (1986)[hereinafter Note, *Worker's Drinks & Drugs*].

62. *Louvorn*, 647 F. Supp. at 881-882.

63. See Note, *Workers, Drinks & Drugs*, *supra* note 61, at 147.

64. *Id.*

65. *Id.*

quiring reasonable suspicion endangers lives and has already sacrificed many.⁶⁶ The *Louvorn* court's brief acknowledgement of these risks was inadequate. Additionally, the court's willingness to sacrifice life and limb for reasonable suspicion was unjustifiable because other methods are available for alleviating privacy concerns.⁶⁷

In light of the overwhelming public safety concerns, the *Louvorn* court should have followed the reasoning in two recent cases which dismissed the requirement of reasonable suspicion and eliminated public employees' privacy expectations under certain circumstances. In the first case, *Allen v. City of Marietta*,⁶⁸ the district court held that the City had the same right as any private employer to oversee its employees and to investigate potential misconduct relevant to the employee's performance of his duties.⁶⁹ As long as the City's purpose for the search was not to collect evidence of a crime, the employee could not claim a legitimate expectation of privacy.⁷⁰ The City had a right to subject its employees to urinalysis for the purpose of determining whether or not they were using drugs which would affect their ability to perform their work safely.⁷¹

In the second case, *Shoemaker v. Handel*,⁷² the district court found that the state's strong interest in safeguarding the integrity of the horse racing industry justified the continuation of random urinalysis. The court held that since the jockeys knew about the regulations, their privacy expectations were significantly reduced.⁷³ Ad-

66. In the railroad industry alone, 55 train accidents have occurred since 1975 as a result of drug use, killing 39 people and injuring 80. Castro, *Battling the Enemy Within*, TIME, Mar. 17, 1986, at 52,53.

67. See *supra* note 35. The guidelines issued by President Reagan and HHS delineate many ways to protect employee privacy expectations and eliminate arbitrary governmental intrusion. ADAMHA Guidelines, *supra* note 35. Otis R. Bowen, M.D., Secretary of HHS, stated that the model language recommended to agencies for the development of contract statements of work for the services required for drug testing programs may be useful for private-sector employers who want to combat employee drug use. *Press Conference*, *supra* note 35, at 4.

68. 601 F. Supp. 482 (1985). Historically, courts have distinguished job-related searches from criminal investigatory searches. *E.g.* *United States v. Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 479 F.2d 290 (2d Cir. 1973). If an employer conducts a criminal investigation, reasonable suspicion is required, but when the government acts in its capacity as employer, it appears that reasonable suspicion may not be required. See *McDonell v. Hunter*, No. 85-1919 (8th Cir. 1987); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985); *Kahan*, 350 F. Supp. at 784.

69. *City of Marietta*, 601 F. Supp. at 491.

70. *Id.*

71. *Id.*

72. 619 F. Supp. 1089, (D.N.J. 1985) *aff'd* 795 F.2d 1136, (3rd Cir. 1986), *cert. denied*, 55 U.S.L.W. 3389 (1986).

73. *Id.* at 1102. *Shoemaker* marks the first time that random urinalysis testing was held constitutionally permissible. *Shoemaker* falls into what the courts recognize as an administrative search exception to the fourth amendment warrant requirement. *Louvorn*, 647 F. Supp. at 881. This exception exists because a legitimate government purpose makes intrusion into privacy reasonable, and the pervasiveness and regular-

ditionally, the horse-racing commission administered the tests neutrally, which provided a safeguard against arbitrary discrimination and a substitute for the lack of individualized suspicion.⁷⁴ Thus, because the testing procedure protected the jockeys' privacy and dignity, the court allowed the mandatory testing to continue.

Had the *Louvorn* court admitted the possible applicability of the *Allen*⁷⁵ and *Shoemaker*⁷⁶ holdings and stressed the importance of organized testing as the key to reducing fourth amendment concerns, its opinion could have had significant precedential value. In January 1987, the Court of Appeals for the Eighth Circuit performed this analysis in deciding *McDonell v. Hunter*,⁷⁷ a case involving urinalysis of maximum security prison guards. The *McDonell* court relied on the reasoning of both *Allen* and *Shoemaker* and held that the state, without reasonable suspicion,⁷⁸ may subject maximum or medium security prison employees who have regular daily contact with prisoners to random urine tests. The court reasoned that prison security is a compelling state interest and that the only effective means available to maintain maximum prison security is to permit limited random urine testing.⁷⁹ Finding urine tests less intrusive than body searches, the *McDonell* court found that society would accept this limited intrusion as reasonable.⁸⁰

The *Louvorn* court had the opportunity to review the constitutionality of random drug testing under the fourth amendment and should have developed the same line of reasoning as the *McDonell* court subsequently established. Although the *Louvorn* court's decision would have remained the same due to the Fire Department's unorganized testing methods, the court's reasoning would have al-

ity of the inspection program guard against fourth amendment violations. See *Shoemaker*, 619 F. Supp. at 1099 (jockeys). See also *Donnovan v. Dewey*, 452 U.S. 594 (1980)(mines); *United States v. Biswell*, 406 U.S. 311 (1972)(firearms); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)(liquor). *Accord* *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

74. *Shoemaker*, 619 F. Supp. at 1094. In *Shoemaker*, the racing commission conducted the urine testing procedure as follows: after the names of all the jockeys were placed in an envelope, the steward would draw the names of 3 to 5 jockeys for testing. *Id.* The number of jockeys drawn for testing could vary each day. *Id.* at 1094-95. The jockey would then provide a urine sample and could disclose any medical treatment he received which could alter the test result. *Id.* at 1095. The racing commission kept the results strictly confidential and refused to supply them to any law enforcement agency. *Id.*

75. *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

76. *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3rd Cir. 1986), cert. denied, 55 U.S.L.W. 3389 (1986).

77. 612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, No. 85-1919 (8th Cir. 1987).

78. The district court had ruled that random urinalysis could only be conducted based on individualized, reasonable suspicion. *McDonell*, 612 F. Supp. 1122 (D.C. Iowa) (1985), *aff'd*, No. 85-1919 (8th Cir. 1987).

79. *McDonell*, No. 85-1919, slip op. at 10.

80. *Id.*

lowed public employers with organized urine testing programs to constitutionally conduct their test.⁸¹ The *McDonell* holding will encourage employers of public safety personnel to develop strict urinalysis procedures which protect employees' privacy expectations and guard against arbitrary governmental intrusions.⁸² Furthermore, courts guided by *McDonell* will only allow urinalysis under limited circumstances where the greatest public interests are at stake and concern of arbitrary intrusion is nonexistent.⁸³ With drug abuse and corresponding public safety concern on the rise, courts will rely on *McDonell* to tip the scales in favor of public interest. Unfortunately, the *Louvorn* court's reasoning was incomplete and overly rigid. As a result, *Louvorn's* precedential value is questionable.

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81. See *McDonell*, No. 85-1919 (8th Cir. 1987).

82. Many state legislatures have already proposed drug testing guidelines. See Beissert, *Drug-Testing Guidelines are Considered by States*, U.S.A. Today, March 18, 1987.

83. *McDonell*, No. 85-1919 (8th Cir. 1987).

