

## Public employers, you can't drug test as if you were in the private sector

By Tommy Eden on August 6, 2014

Public employers often mistakenly believe that they have the same drug testing rights as employers in the private sector. As a recent decision from a federal court in Florida shows, it ain't necessarily so.

Karen Voss was offered a newly created position of Solid Waste Coordinator with the City of Key West. The job entailed marketing and planning related to the city's recycling programs, and "overseeing other tasks within the City's Solid Waste Utility."

The offer, like most job offers, was contingent on her taking a drug test. Ms. Voss consented in writing to be tested, but instead of going to the collection site for the test, she went to the city attorney's office and complained that the testing violated her rights. Because she refused to be tested, the city hired another candidate.



When it came to being drug tested, Ms. Voss just said no.

Ms. Voss sued the city with the help of the American Civil Liberties Union, contending that the drug test requirement violated her rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. The court granted her motion for summary judgment as to liability.\*

*\*With respect to damages, Ms. Voss has filed a motion seeking a declaration that the City's drug testing*

*policy is unconstitutional, an injunction, and about \$255,000. A hearing is scheduled for September 25.*

The Fourth Amendment prohibits unreasonable searches and seizures, and the Fourteenth Amendment makes these and other restrictions applicable to the states. Urinalysis drug tests are generally considered to be “searches and seizures” because they “intrude[] upon expectations of privacy that society has long recognized as reasonable.”



Why does anyone need drugs when they live in Margaritaville?

If the “search” is not based on “individualized suspicion of wrongdoing,” the government has to show that it had a “special need” or that the testing served an “important governmental interest.”

Because this was a standard pre-employment drug test, there was, of course, no individualized suspicion. But the City argued that the need for a drug-free workplace was a “special need,” that the “search” was not unreasonable because it applied only to applicants, and that the job was safety-sensitive, which justified the drug test. The court rejected all of these arguments.

Regarding the need for a drug-free workplace, the court found that there was no evidence showing that drug abuse was a problem with city employees or with applicants for city jobs. The court found that the job was not safety-sensitive because it did not require exposure to dangerous machinery and for the most part was a “desk job.” Perhaps the most damaging fact for the city’s case was that it did not require employees in this position or in related positions to be tested randomly for drug use.



Sad, but true: this is probably not safety-sensitive work.

Finally, the court rejected the city's argument that applicants could "reasonably" be tested even if employees could not.

If Key West had been a private sector employer, its drug testing program probably would have been fine, but public employers do not have the freedom of private sector employers. Public employers should carefully evaluate their drug-testing policies and the manner in which they apply those policies to make sure that the testing is not prohibited by the Fourth Amendment.

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