

Pre-Employment Drug and Alcohol Testing – Is It Constitutional?

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At least one court, the Ninth Circuit Court of Appeals (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington), has determined that pre-employment drug and alcohol testing, in limited circumstances, is not constitutional. The case, Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008), involves an applicant for a position of part-time page for a municipal library. Prior to employment, Lanier received a conditional offer of employment which required, consistent with the municipality's policies, that she successfully pass drug and alcohol screens. She refused to do so and the conditional offer of employment was revoked.

The Ninth Circuit, in analyzing Lanier's claim, noted that the municipality's "drug screening policy effects a search within the meaning of the Fourth Amendment." Id. at 1149-1150. The question presented to the Court was whether the screening policy fell within the "closely guarded category of constitutionally permissible suspicionless searches."

In support of its policy, the municipality cited the following three (3) reasons in support of its policy: (1) "drug abuse is one of the most serious problems confronting society today"; (2) "drug use has an adverse impact on job performance"; and (3) "children must be protected from those who use drugs or could influence children to use drugs." While the Court agreed that the societal problems articulated by the municipality were "worthy of concern," they found that there was "scant, if any, indication that on account of them, the City ha[d] 'special needs' of sufficient weight to justify an exception to the Fourth Amendment's requirement of individualized suspicion." Id. at 1150. In particular, the Court noted that the municipality could not demonstrate that there was a particular problem of drug use among library employees or that the one instance of drug abuse by a library employee (over the past twenty-three years) was sufficient to demonstrate an adverse impact on job performance. The Court also explained that a library page's involvement with children was limited to one hour on an as-needed basis and therefore was insufficient to demonstrate a serious concern regarding library pages influencing children.

Although this case is not binding in Pennsylvania, it may illustrate how appellate courts in the Third Circuit will analyze similar facts, if presented for their review. It also is a stark contrast to existing case law which has found suspicionless drug and alcohol testing for "safety sensitive" positions to be permissible under the Fourth Amendment.