Legal Alert: Public Employers: Drug Screening All Applicants Held Unconstitutional

4/14/2008

The Ninth Circuit recently held that a city's policy of requiring candidates of choice for city positions to pass a pre-employment drug test as a condition of the job offer is unconstitutional as applied to an applicant for the position of library page. *See Lanier v. City of Woodburn* (March 13, 2008). The court held that the city failed to demonstrate a special need to screen prospective library pages for drugs, thus the policy is unconstitutional as applied to that position. The court also held, however, that the plaintiff did not show that the policy could never be constitutionally applied to any city position, thus it was not unconstitutional on its face.

Public employers, such as the city employer in this case, face more restrictions on the implementation of drug testing policies than do private (non-governmental) employers. The U.S. Supreme Court has held that drug testing implicates the constitutionally protected right to privacy and is a "search" that falls within the restrictions of the Fourth and Fourteenth Amendments. *See Chandler v. Miller* (1997). In *Chandler,* the Court held that that it was unconstitutional for Georgia to require candidates for state office to pass a drug test. The Court noted that to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. However, some exceptions to this rule may be justified based upon "special needs, beyond the normal need for law enforcement." In *Chandler,* the Court held that Georgia failed to show any special need that would justify its requirement that candidates for state office pass a drug test.

Similarly, in *Lanier,* the Ninth Circuit held that the City of Woodburn failed to show any special interest that would justify drug testing applicants for the library page position. In *Lanier,* the city's showing of an impact on job performance consisted of unspecified difficulty with employees under the influence experienced by a few department heads over the years, and one library employee in twenty-three years who had to undergo rehabilitation on a couple of occasions. In *Lanier,* as in *Chandler,* the city failed to present any indication of "a concrete danger demanding departure from the Fourth Amendment's main rule."

Employers' Bottom Line:

The court's decision in this case emphasizes that public employers must be able to show a "special interest" – above and beyond weeding out drug users – to justify the implementation of a pre-employment drug testing policy. If you have questions about the decision in this case or your drug testing policies,

please contact the Ford & Harrison attorney with whom you usually work or Troy Foster, a partner in our Phoenix, Arizona office, at tfoster@fordharrison.com or 602-627-3504.