

MEMORANDUM

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TO: Nancy Stangel, ACWA-JPIA

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RE: Pre-Employment Drug Tests After *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147

Background

In March of 2008, the Federal Ninth Circuit Court of Appeal, in which California sits, held that a city in Oregon violated the constitutional rights of an applicant for a public library job when it withdrew a job offer because the applicant refused to submit to a mandatory drug and alcohol test.

Facts of the Case

Starting in 2002, the City of Woodburn adopted a policy of preemployment drug testing for all its job candidates regardless of the nature of the position. The City's written policies provided for an extensive pre-employment investigation of an applicant's employment and criminal history for positions identified as "security sensitive", which was defined as any position that was responsible for the supervision or control of juveniles. All positions in the Recreation and Parks Department and in the Library qualified as "security sensitive."

In 2004, Janet Lanier applied for a part-time position as a library page for the City of Woodburn, Oregon. Her duties would include retrieving books from the book drop, shelving books, and occasionally manning the desk in the youth and children section of the library. The City gave Lanier an offer of part-time employment contingent on Lanier passing a background check and a preemployment drug and alcohol screening. Lanier refused to take the drug test, and her contingent offer of employment was withdrawn. She brought suit against the City and its Library Director, alleging that the mandatory pre-employment drug test violated the 4th Amendment to the United States Constitution.

The District Court dismissed the City's Library Director from the case on the ground of qualified immunity. The district court then granted summary judgment in favor of Lanier, finding that the City's pre-employment drug testing policy was unconstitutional on its face as an unreasonable search without warrant or suspicion, and unsupported by a special need that would outweigh a reasonable expectation of privacy. The City appealed.

Legal Analysis

At issue before the Ninth Circuit was whether the City's policy of requiring candidates to pass a pre-employment drug test was constitutional on its face and as applied to this particular candidate.

The Ninth Circuit stated that since a pre-employment drug test is a suspicionless search, it is constitutionally permissible only in very limited circumstances.

In that particular case, the City's arguments in support of its drug-testing policy were that drug abuse is one of the most serious societal problems, has an adverse impact on job performance, and must be kept away from children. The Ninth Circuit, however, held that the need for a suspicionless pre-employment drug test must be much more specific and substantial than the general existence of a societal problem.

The City invoked the fact that the library page may interact with children while manning the young and children section of the library. The Ninth Circuit found this argument unpersuasive. It found that while Lanier may staff a youth services desk for an hour or so on an as-needed basis, there was no evidence that children's safety or security is entrusted to her, or that she was in a position to exert influence over children through continuous interaction or supervision. The Ninth Circuit distinguished the facts of this case from those in *Knox County Education Association v. Knox County Board of Education* (6th Cir. 1998) 158 F.3d 361, in which the court of appeal upheld the county's policy of conducting suspicionless drug tests on school teachers and administrators due to the fact that people in these positions acted in lieu of parents and were charged with enforcing anti-drug laws in schools. Other job positions that the Ninth Circuit deemed sufficiently significant to public safety to warrant suspicionless drug testing included railway car operator, armed interdiction of illegal drugs, work in a nuclear power facility, work involving matters of national security, work involving the operation of natural gas and liquified natural gas pipelines, work in the aviation industry, and work involving the operation of dangerous instrumentalities, such as trucks that weigh more than 26,000 pounds, that are used

to transport hazardous materials, or that carry more than fourteen passengers at a time.

However, in *Lanier* the court found that the library did not sufficiently establish that the position of library page amounted to a safety or security sensitive job warranting a drug test in the absence of suspicion. Thus, the requirement of a pre-employment drug test for *Lanier's* position was declared unconstitutional.

Application

This decision is in stark contrast to California Appellate and Supreme Court rulings. California courts have long held that blanket pre-employment drug testing is acceptable. This decision establishes that in Federal Court in order for pre-employment drug testing to be constitutional, public employers must be able to demonstrate a special need for the test above and beyond the generalized interest in screening out drug users from employment.

Therefore, blanket drug testing of applicants for public employment is not going to pass constitutional muster unless the employer can demonstrate that the position sought involves public safety or poses a significant danger to public safety.

Some guidance for how to meet the requirements of *Lanier* may be found in *Smith vs Fresno Irrigation District*, which is a California random post-employment drug test case, focusing on the issue of safety. The court determined that safety sensitive positions are subject to post employment random drug testing, finding that the position of ditch tender qualified as a safety sensitive position. In reaching its decision, the court discussed what qualifies as a safety sensitive job as follows:

These cases demonstrate that it is not the number of persons who could be injured by a drug-impaired worker that determines the constitutional validity of random drug testing. Instead, the cases focus on the degree, severity and immediacy of the harm posed. The " 'immediacy' " of the threat of injury and the fact that a single misperformed duty could have irremediable consequences have been determined to be important factors in determining the safety sensitivity of a job. [citation] Irremediable consequences result when an employee is not able to rectify his or her mistake and the coworkers of the employee have no opportunity to intervene before harm occurs. [citation]

We also reject plaintiff's assertion that his coworkers' safety was adequately assured by the fact a supervisory

employee always worked in his construction and maintenance crew. Plaintiff contends the opportunity to scrutinize a worker in his day-to-day activities is an adequate remedy for the District's safety concerns. We disagree. As the United States Supreme Court noted, a drug-impaired individual will seldom display any outward signs detectable by the layperson. [citation]

The *Smith* court also referenced the trial court's reliance on Cal. Admin. Code tit. 2, § 599.961, which defines "sensitive positions" in which drugs and alcohol could endanger the health and safety of others. The regulation describes such positions as follows:

- (1) Their duties involve a greater than normal level of trust, responsibility for or impact on the health and safety of others; and
- (2) errors in judgment, inattentiveness or diminished coordination, dexterity or composure while performing their duties could clearly result in mistakes that would endanger the health and safety of others; and
- (3) employees in these positions work with such independence, or, perform such tasks that it cannot be safely assumed that mistakes such as those described in (2) could be prevented by a supervisor or another employee.

Recommendations

At this point, this case is good federal law applicable to California public agencies. We recommend that the ACWA-JPIA advise its member agencies that a pre-employment drug test for a nonsafety or security related job position without "special need" may be found unconstitutional, subjecting the agency to legal exposure. We would recommend that pre-employment drug testing now be conducted only on positions which the District determines are safety or security sensitive in nature. In making that determination, some objective guidance can be found in the *Smith* decision and the definitions found in 2 CCR §559.961, although there is no guarantee that a federal court will necessarily agree.

We recommend that each District review its job descriptions in advance of pre-employment testing to identify safety and security sensitive positions and define them as such in their job description in advance of performing pre-employment drug and alcohol tests.

As always, a new decision which impacts the HR operations of the members presents an excellent opportunity for an annual review of job descriptions and policies.