

Direct observation rule for urine tests upheld

by Chris Arbery and Robert Dumbacher

BNSF Railway Co. v. U.S. Dept. of Transp., D.C. Cir., No. 08-1264 (May 15, 2009).

The U.S. Circuit Court of Appeals for the District of Columbia has upheld U.S. Department of Transportation (DOT) regulations that require “direct observation” of drug test urine specimen collection from workers returning to safety-sensitive functions after testing positive for or refusing to submit to a drug test.

Under federal law, companies with transportation activities subject to regulation by the DOT must implement programs for per-employment, post-accident and random drug testing of employees who perform such activities. Individuals who test positive or who refuse to submit to testing are barred from performing safety-sensitive duties until they complete a treatment program. These individuals must pass a “return-to-duty” urine test before resuming safety-sensitive duties and must pass at least six unannounced “follow-up” urine tests within the next 12 months.

In June 2008, the DOT adopted regulations in response to concerns that there was rampant cheating and substitution of urine samples among drivers and other transportation workers.

To combat efforts to cheat or evade return-to-duty and follow-up testing, the regulations require a same-gender observer to “watch the urine go from the employee’s body into the collection container” for such tests. The regulations specify that, immediately prior to the sample collection, employees must lift or lower clothing to expose their genitals and allow observers to verify the absence of any cheating devices.

Soon after the regulations were enacted, several transportation workers’ unions and the BNSF Railway Co. sued the DOT to prevent enforcement, alleging that the rule constituted arbitrary and capricious agency action and violated the Fourth Amendment’s protection against unreasonable searches. Note that the rule was challenged by labor unions--and an employer concerned about being forced to administer, and subject employees to, highly intrusive tests.

The D.C. Circuit rejected the petitioners’ arguments and upheld the regulations. The court concluded that the rule was not arbitrary and capricious because it was based on a rational connection between the facts found by the agency and the rule adopted to address those facts. The court defended the DOT’s conclusion that employees returning to duty following a positive drug test and treatment program were more likely to attempt to cheat. The court acknowledged the department’s evidence and arguments that returning employees have a heightened incentive to cheat, in part because of heavy sanctions imposed on repeat violators such as a “two strikes

and out” policy commonly adopted by employers in the industry. The policy requires termination upon a second drug violation.

The court rejected the petitioners’ argument that the direct observation rule violated the Fourth Amendment’s protection against unreasonable searches. Although the court acknowledged that compulsory urine testing was subject to the Fourth Amendment and that the regulations applied even if there was no particular suspicion of cheating, it found that drug testing for transportation safety falls into the “special needs” exception to the requirement for search warrants because the government’s interest in conducting the search outweighs individuals’ privacy interests. The court noted that the government has a compelling interest in transportation safety and that, while “direct observation is extremely invasive,” individuals’ interests are diminished because they are performing safety-sensitive functions within a closely regulated industry.

The court further observed that those subject to “suspicionless” direct observation testing already have been deemed to have violated the DOT’s regulations by either testing positive for drugs or by refusing to submit to a drug test. The intrusive nature of direct observation, the court noted, “is mitigated by the fact that employees can avoid it altogether by simply complying with the drug regulations.”

Professional Pointer

Although this case relates only to employees subject to DOT regulations, it demonstrates how government agencies can require employers to go to great lengths in meeting compelling public interests.