

ELA

Case Commentary



In-depth explanation and commentary on a case of interest

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***Friedenberg v. School Board of Palm Beach County:* Does Suspicionless Drug Testing of Applicants for Substitute Teacher Positions Violate the Fourth Amendment Rights of the Applicants?**

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Introduction

In *Friedenberg v. School Board of Palm Beach County*,¹ Joan Friedenberg applied for and was offered a substitute teacher's position in Palm Beach County School District, but the offer was conditional. Under School District Policy 3.96 (8) (a), the school district required all job applicants to submit to suspicionless drug testing and undergo a criminal background check. However, drug testing was not conducted until *after* receipt of a conditional job offer. Applicants were required to complete the criminal background check and the drug test before being allowed to participate in New Employee Orientation.

Friedenberg underwent fingerprinting in compliance with the required criminal background check, but refused to submit to a drug test. She filed suit in federal court, challenging the mandatory drug test on Fourth Amendment grounds.² The school district's Policy 3.96, titled "Drug and Alcohol-Free Workplace," had many provisions related to applicant screening, but Friedenberg only challenged Section (8) (a), which required suspicionless drug testing of applicants for all positions in the school district. Furthermore, Friedenberg only challenged Policy 3.96 (8) (a) as it applied to applicants for non-safety-sensitive positions, which included all teachers in the district, full-time as well as substitute teachers.

In response to a request from the court, Friedenberg clarified that she was using the term non-safety-sensitive to refer to all positions in the school district except school bus drivers, security personnel, district police officers, and swimming pool lifeguards.³ After considering the facts in the case, the District Court concluded that Friedenberg only had standing to challenge the application of the policy to substitute teacher applicants.

This commentary analyzes *Friedenberg v. School Board of Palm Beach County*, which was decided by the United States District Court for the Southern District of Florida on June 14, 2017. As explained below, the District Court ultimately denied Friedenberg's motion for a preliminary injunction and upheld the school district's policy that required all applicants for a substitute teacher position to pass a drug test before participating in New Employment Orientation and assuming duties as a substitute teacher.

Pertinent Facts

Mandatory drug testing by a public employer is a search under the Fourth Amendment, the *Friedenberg* court observed, because the test constitutes a significant intrusion into an individual's right to privacy.⁴ Since Palm Beach County School District is a governmental agency, its policy on drug testing must be reasonable.⁵ As a general rule, the court noted, a search must be based on individualized suspicion of wrongdoing,⁶ but the United States Supreme Court has upheld certain searches (e.g., suspicionless drug testing) absent a showing of individualized suspicion when "special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement [under the Fourth Amendment] impracticable."⁷ Furthermore, the Supreme Court has emphasized that proffered "special needs" for drug testing must be *substantial* and demonstrating such need is the defendant's burden. If the defendant fails to show a special need, the plaintiff prevails.⁸

To date, the *Friedenberg* Court continued, the U.S. Supreme Court has recognized two concerns sufficiently substantial to justify an exemption to Fourth Amendment restrictions limiting searches and seizures. Those concerns include the specific risk to public safety by employees engaged in inherently dangerous jobs and the protection of children entrusted to public schools' care and tutelage.⁹ The District Court in Florida acknowledged that an analysis of previous Supreme Court decisions on these two concerns was essential to properly adjudicate the question before the court: to wit, whether Palm Beach County School had demonstrated a substantial special need for imposing suspicionless drug testing on applicants for substitute teacher positions.¹⁰

The District Court's Analysis

The District Court began its analysis by reflecting on two 1989 Supreme Court opinions (both handed down March 21) in which the Court recognized a special need to conduct suspicionless drug testing because of specified risks to public safety. The two cases were *Skinner v. Railway Labor Executives' Association*,¹¹ and *National Treasury Employees Union v. Von Raab*.¹² The issue in *Skinner* concerned regulations imposing

suspicionless blood and urine testing on railroad employees who had violated industry safety rules and/or been involved in a train accident. The Supreme Court found a special need to impose suspicionless drug testing on certain railroad employees who held “safety-sensitive positions,” which the court defined as positions in which “employees discharge duties [so] fraught with risk of injury to others that even a momentary lapse of attention can have disastrous consequences.”¹³ In the end, the court ruled that the government’s compelling interest in railroad safety constituted a special need that justified a deviation from the normal probable cause and warrant requirements of a government search under the Fourth Amendment. In addition, the Court concluded that railroad employees in safety-sensitive jobs had diminished expectations of privacy because they worked in a highly regulated industry.¹⁴ Therefore, the Court permitted suspicionless drug testing of railroad employees in the interest of public safety.

In *Von Raab*, the Supreme Court upheld a United States Customs Service policy that required agents to pass a suspicionless drug test before being promoted or transferred to positions involving drug interdiction while carrying a firearm.¹⁵ Although there was no evidence of drug abuse in the Customs Service, the record demonstrated that customs officers contended with attempted bribery from the criminal element and with temptation springing from “their access to vast sources of valuable contraband seized and controlled by the service.”¹⁶ The Court described the unique mission of the Customs Service as the “first line of defense” against the smuggling of illicit drugs into the United States and concluded that armed agents involved in drug interdiction did indeed hold safety-sensitive positions. Consequently, suspicionless drug testing of agents applying for or transferring to positions requiring them to carry firearms while carrying out drug interdiction duties was reasonable under the Fourth Amendment.¹⁷

After reflecting on *Skinner* and *Von Raab*, the District Court considered two other cases in which the Supreme Court found a special need based on the protection of school children: *Vernonia School District 47J v. Acton*,¹⁸ and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.¹⁹ In *Vernonia*, the Supreme Court approved a program imposing random drug testing on high school athletes, because rampant drug use had caused a significant increase in disciplinary problems in the Vernonia schools, and student athletes were “leaders of the drug culture.”²⁰ The Court’s opinion in *Vernonia* heavily emphasized the student athletes’ diminished expectations of privacy. In the Court’s view, the school’s responsibility to ensure students’ safety constituted a special need justifying random drug testing of athletes.²¹

In *Earls*, the Supreme Court sustained a policy requiring suspicionless drug testing of *all* students participating in an extracurricular activity—not just athletes. Facts in the case documented unacceptable levels of drug use in the school district, constituting a special need that justified suspicionless drug testing of all extracurricular participants. Once again, the Court’s opinion in *Earls* emphasized the diminished expecta-

tions of privacy among athletes and all other student participants in extracurricular activities.²²

In *Friedenberg*, the District Court also noted that the majority of the lower courts have concluded that classroom teachers do not occupy safety-sensitive positions,²³ citing a federal district court ruling in *American Federation of Teachers v. Kanawha County Board of Education*²⁴ as one example. In *Kanawha*, a West Virginia federal court ruled that classroom teachers are not safety-sensitive employees comparable to railroad workers and drug enforcement agents. Moreover, in that court’s opinion, the school district had not articulated a special need that outweighed teachers’ constitutionally protected privacy interests.²⁵

In addition, the District Court noted that the Sixth Circuit Court of Appeals is the only circuit court to impose suspicionless drug testing on applicants for teaching positions. The Sixth Circuit’s decision in *Knox County Education Association v. Knox County Board of Education*²⁶ was based on a perceived special need to address documented drug abuse issues in the county’s schools. In the end, the Sixth Circuit concluded that teachers “discharge duties fraught with risks of injury to others such that even a momentary lapse of attention can have disastrous consequences.”²⁷ While acknowledging that teachers do not “fit neatly into the prototypical safety-sensitive positions,” the Sixth Circuit declined to interpret the term “safety-sensitive” so narrowly as to exclude teachers. Instead, the Court emphasized the unique *in loco parentis* role occupied by teachers. The Sixth Circuit observed that, “Children, especially younger children, are active, unpredictable, and in need of constant attention and supervision,” and “Even momentary inattention or delay in dealing with a potentially dangerous or emergency situation could have grievous consequences.”²⁸

Conclusion

In the years since the Supreme Court’s decisions in *Skinner* and *Von Raab*, some public school administrators and boards have maintained that public school teachers and other school employees occupy safety-sensitive positions because they are responsible for the safety and security of children under their tutelage and care. In light of increasing levels of substance abuse and violence in the public schools, proponents of suspicionless drug testing assert that teachers and other school employees, like railroad employees and customs agents, should have a reduced expectation of privacy and that suspicionless drug testing is as constitutional and reasonable in the public schools as it is in other governmental agencies when a special need is demonstrated.²⁹

In *Friedenberg*, the Palm Beach County School District justified its policy requiring suspicionless drug tests for substitute teacher applicants on the grounds that a substitute teacher is “as legally responsible for students, equipment, and materials as is the regular teacher for whom [he or she] is substituting.”³⁰ Furthermore, substitute teachers have the responsibility at all times to monitor and supervise children and ensure their safety while they are on school campuses.³¹ Substitute teachers are

also “on the frontlines of securing the campus and are often the first responders to any given incident.”³² Since substitute teachers are often alone with students for five-and-a-half hours or more during the school day, it is imperative that “substitute teachers be of sound mind at all times.”³³

In the end, the school district’s policy statements justifying suspicionless drug testing of substitute teacher applicants were persuasive. The District Court agreed that substitute teachers were, in fact, often the first responders to life-threatening incidents; that constant awareness was imperative; and that any impairment (drug-induced or otherwise) would compromise awareness. Accordingly, the District Court concluded that Palm Beach County School District had a compelling interest in drug testing applicants for substitute teacher positions.

Friedenberg’s motion for a preliminary injunction was denied because she had not shown a likelihood of success on the merits, but only insofar as she sought to enjoin the application of Policy 3.96 (8) (a) to applicants for substitute teacher positions. The Court agreed to consider future arguments as to other positions upon an appropriate motion if a class were certified.³⁴

Endnotes

¹ 257 F. Supp. 3d 1295 (S.D. Fla. 2017).

² *Id.* at 1298.

³ *Id.* at 1300.

⁴ *Id.* at 1302, citing *Lebron v. Sec’y, Florida Dep’t of Children & Families*, 710 F.3d 1202, 1206 (11th Cir. 2013).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1303, citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (internal quotation omitted).

⁸ *Id.*, citing *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (emphasis added).

⁹ *Id.* at 1306, citing *Lebron*, 710 F.3d at 1207.

¹⁰ *Id.*

¹¹ *Skinner v. Railway Labor Executives Assn*, 489 U.S. 602, 619 (1989) [hereinafter *Skinner*].

¹² *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) [hereinafter *Von Raab*].

¹³ *Skinner*, 489 U.S. at 628.

¹⁴ *Id.* at 627.

¹⁵ *Von Raab*, 489 U.S. at 661.

¹⁶ *Id.* at 669.

¹⁷ *Id.* at 677.

¹⁸ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) [hereinafter *Vernonia*].

¹⁹ *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002) [hereinafter *Earls*].

²⁰ *Vernonia*, 515 U.S. at 649.

²¹ *Id.* at 661-664.

²² *Earls*, 536 U.S. at 831-32.

²³ *Friedenberg*, 257 F. Supp. 3d at 1308.

²⁴ *AFT-W. Va. v. Kanawha Cty. Bd. of Educ.*, 592 F. Supp. 2d 883 (S.D.W.Va. 2009).

²⁵ *Id.* at 903-904.

²⁶ *Knox County Educ. Ass’n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998).

²⁷ *Id.* at 377.

²⁸ *Id.* at 378.

²⁹ Robert C. Cloud, *Suspicionless Drug Testing of Public School Teachers and Other School Employees*. *West’s Education Law Reporter*, 282 Ed.Law Rep. [1, 3-4] (Sept. 13, 2012).

³⁰ *Friedenberg*, 257 F. Supp. 3d at 1301, quoting Palm Beach County School District’s job application form, DE 22-2 at para. 6.

³¹ *Id.*, quoting Palm Beach County School District’s job application form, DE 22-3 at ¶ 9.

³² *Id.*, quoting Palm Beach County’s job application form, DE 22-1 at ¶ 16.

³³ *Id.*, quoting Palm Beach County’s job application form, DE 22-3 at ¶ 16.

³⁴ *Id.* at 1314.

Planning well under way for the 2018 ELA Conference in Cleveland



Currently undergoing a major renovation that will be completed before summer, the Marriott is adjacent to Cleveland’s new Global Center for Health Innovation and Huntington Convention Center.



It’s not too early to start your own planning for this year’s annual conference, November 7-10, 2018 at the substantially remodeled Cleveland Downtown Marriott Key Center in Cleveland, Ohio, site of the 2015 conference. Because it is home to ELA headquarters, Cleveland offers exciting partnership opportunities that will enhance the experience for attendees.

To showcase our home in Cleveland and our relationship with Cleveland-Marshall College of Law, located at Cleveland State University, the program on Friday afternoon, November 9, will be held at the law school. Transportation will be offered. This special panel presentation on the First Amendment in Education will feature Mary Beth Tinker, famed First Amendment advocate, as a speaker (the 50th anniversary of the landmark Supreme Court decision in *Tinker v. Des Moines ISD* will be celebrated in 2019.) This part of the annual conference will be open to the local education and legal communities and will be followed by a reception.

The 2018 conference team (which has been meeting since last November’s conference) is led by co-chairs Susan Bon and Joy Blanchard, serving with Cynthia Dieterich, Susan Clark, Annie Blankenship, Stephanie Klupinski, and David Nguyen. 2017 co-chairs Mark Paige and KB Melear also are aiding the team.

The deadline for submitting proposals for presentations was extended to Monday, March 5. Proposals for the round table and poster sessions will be accepted April 15 - July 15.

Registration and hotel registration information should be available by mid-April. Watch for regular news updates as the conference program develops.