UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBERT T. GUINEY, Plaintiff, v. FRANCIS M. ROACHE, Defendant.	)	Civil Action No. 86-1346-K

MEMORANDUM OF POINTS AND AUTHORITIES
OF AMICUS CURIAE UNITED STATES IN
SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Respectfully submitted,

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PRELIMINARY STATEMENT

"To help combat the national epidemic in the illicit use of drugs and to . . . foster the efficient operation of the Boston Police Department," the City of Boston has proposed to commence drug testing of employees engaged in law enforcement activities.[1] Under the program to be established pursuant to Rule 111, law enforcement officers will be tested on an objective and random basis.[2] The testing will be conducted in private, and procedures

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[1] The United States has a significant interest in this issue stemming from its position as the largest employer of law enforcement personnel. At this time, several law enforcement agencies of the United States have drug testing programs in place, and other agencies will be establishing programs in the near future consistent with the Executive Order issued by the President on September 15, 1986 (attached as Exhibit A). Any decision by this Court will have a significant impact on the development of the law on drug testing generally, and therefore, the United States wishes to submit its views on this issue for the consideration of the Court.

[2] Urinalysis may also be ordered where there is "reasonable suspicion" of illegal drug use based upon "objective facts obtained by the Department and the rational inferences which may be obtained from those facts." Rule 111, § 4. The amicus has
(continued...)

have been designed "to maintain anonymity and to assure privacy throughout the sampling and testing procedure." All employees have been provided advance notice of the program and, because the testing is "drug-specific," no information beyond use of illegal drugs will be revealed.

The City of Boston is just one of an increasing number of employers who have recognized a need to commence drug testing of employees. Because of the high rate of illegal drug abuse in our society and its debilitating effects on the workforce, both public and private employers are increasingly instituting drug testing programs to identify, and to deter, employees' use of illegal drugs. In private industry, approximately 25 percent of the Fortune 500 companies, including Ford Motor Company, IBM, Alcoa Aluminum, Lockheed, Boise Cascade and the New York Times have instituted testing programs using urinalysis for drug detection.[3] Testing programs such as these have been enormously successful, resulting in fewer-on-the-job accidents, increased productivity and improved employee morale.[4] Consequently, their

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[2](...continued)
been advised that the parties are no longer in disagreement concerning such testing, and accordingly such testing is not addressed in this memorandum.

[3] See BNA Special Report, "Alcohol & Drugs In The Workplace: Costs, Controls & Controversies", 1986; Peter Bensinger, "Drugs In The Workplace: Employer's Rights and Responsibilities", The Washington Legal Foundation, 1984.

[4] Employees who use drugs have three times the accident rate of non-users, double the rate of absenteeism, higher job turnover rates and cost three times as much in terms of medical benefits. See The Conference Board Research Report, "Corporate Strategies

(continued...)

use is growing. It is estimated that an additional 20 percent of Fortune 500 companies will institute drug testing programs within the next two years.[5]

Here, plaintiff alleges that the Fourth Amendment precludes the City of Boston from conducting testing similar to that routinely conducted by the private sector. However, as explained below, drug testing does not implicate the Fourth Amendment as it does not intrude on a legitimate expectation of privacy protected under the Fourth Amendment. Simply stated, in the context of the workplace, employees have no recognized, absolute expectation of privacy that precludes an employer from conducting reasonable inquiries into an employee's fitness for duty -- particularly where the employee has advance notice of the inquiry. Employers, both public and private, are afforded great latitude and deference in testing for fitness for duty, and drug testing raises no greater constitutional concern than other testing devices such as physical examinations, fingerprint checks, or background investigations routinely employed as screening devices. Unobserved drug testing is no more intrusive than the taking of hair samples or fingerprints, and, when used solely as a screening device for employment, raises none of the traditional concerns regarding abuse of police power that the Fourth

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[4](...continued)
for Controlling Substance Abuse", The Conference Board, Inc., 1986; Peter Bensinger, "Drugs In The Workplace: Employer's Rights and Responsibilities"; National Institute on Drug Abuse National Household Survey.

[5] See note 2, supra.

Amendment is designed to reach and prohibit. Unobserved drug testing as a condition of employment does not trigger the Fourth Amendment.

Moreover, even if a Fourth Amendment interest is implicated, the reasonableness of testing in the employment context as conducted by the City of Boston fully comports with the Fourth Amendment. Unobserved testing is not intrusive, the standards governing the program here preclude subjective and arbitrary harassment by administering officials, and all employees have advance notice of the requirement before testing is initiated.

Most importantly, the program furthers the substantial governmental interest in ensuring the reliability and effectiveness of public employees who provide services affecting public health, safety and security. This interest is all the more critical with respect to employees who are responsible for the fundamental and essential task of enforcing the law and preserving public order. Illegal drug use by law enforcement officers defeats the very job law enforcement is to perform -- enforcement of the law that both is, and is perceived to be, fair, impartial and effective. Illegal drug use impairs an officer's ability to discharge his duties, and, because of the hazardous nature of the work, exposes the public to too great a risk to be permitted. The City of Boston is fully justified in refusing to tolerate even the possibility of illegal drug use by initiating a testing program.

ARGUMENT

I. DRUG TESTING TO ASSURE FITNESS FOR DUTY DOES NOT IMPLICATE THE FOURTH AMENDMENT

The Fourth Amendment protects expectations of privacy that society is prepared to consider reasonable. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See also California v. Ciraolo, 106 S. Ct. 1809 (1986); Maryland v. Macon, 105 S. Ct. 2778, 2782 (1985). Where there is no expectation of privacy, such as a "search" of objects that are publicly exposed, Coolidge v. New Hampshire, 403 U.S. 443 (1973), or of property that has been abandoned, Abel v. United States, 362 U.S. 217, 241 (1960), or where there is consent, United States v. Matlock, 415 U.S. 164, 170 (1974), no Fourth Amendment interest is implicated. This threshold inquiry determining whether there is a "search" at all turns on "whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust, or solicitude and hence give rise to a 'reasonable' expectation of privacy." Dow Chemical Co. v. United States, 749 F.2d 307, 312 (6th Cir. 1984), aff'd, 106 S. Ct. 1819 (1986).[6]

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[6] Thus, the word "reasonable" for the Fourth Amendment may be used in two different contexts. First, there is the threshold inquiry to determine whether the conduct at issue implicates a "reasonable" expectation of privacy that society is prepared to recognize, triggering review under the Fourth Amendment. Second, where such a privacy interest is recognized, the issue then devolves to the question of whether the intrusive conduct is "reasonable" which turns on test "balancing the need to search against the invasion which the search entails." New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985).

The Supreme Court has repeatedly held that the protections of the Fourth Amendment are implicated only when "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v. Maryland, 442 U.S. 735, 740 (1979). Whether there has been a "search" or "seizure" within the meaning of the Fourth Amendment turns in each instance on the facts and circumstances at issue.[7] Numerous cases underscore the fundamental point that the Fourth Amendment does not recognize privacy interests in the abstract, but only in the concrete circumstances in which the objective reasonableness of a claimed privacy interest can be examined in the most practical light. See, e.g., Wyman v. James, 400 U.S. 309 (1971) ("home visit" by welfare workers not a Fourth Amendment search because of context and purpose); United States v. Thomas, 729 F.2d 120, 123-24 (2d Cir.), cert. denied, 105 S. Ct. 158 (1984); Committee for GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975). Drug testing must accordingly be viewed in the context in which

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[7] Historically, the courts have applied a two-part test to determine whether the Fourth Amendment protects an asserted privacy interest. See Katz v. United States, 389 U.S. 347, 351-53 (1967) (announcing test to determine expectation of privacy). First, the individual must exhibit a "subjective expectation of privacy." Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978). Second, the expectation must be "one that society is prepared to recognize as 'reasonable'". Id., (quoting Katz 389 U.S. at 361 (Harlan, J., concurring)). The Supreme Court has recognized however, that the objective test is controlling. Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984). Cf. Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts Of Appeals 1984-1985, 74 Georgetown Law Journal 499, 503 n.7 (1986).

it is performed which necessarily defines the privacy interests to be considered and respected. See Terry v. Ohio, 392 U.S. 1, 21 (1967). As shown below, in the context of the workplace, there is no recognized, absolute expectation of privacy under the Fourth Amendment that precludes an employer from conducting reasonable inquiries into an employee's fitness for duty, particularly where the employee has advance notice of the requirement.

A. An Employee's Privacy Interests At The Workplace Are Defined By The Circumstances of Employment

In the employment context, the scope of the privacy interests that society is prepared to recognize for employees have traditionally been defined in part by the employer's judgment in prescribing reasonable conditions of employment. Thus, the courts have repeatedly recognized that employers are afforded broad latitude and deference in defining conditions of employment. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937) (National Labor Relations Act respects "the normal exercise of the right of the employer to select its employees or to discharge them."); Paramont Mining Corp. v. NLRB, 631 F.2d 346, 348 (4th Cir. 1980)(same); Sioux Quality Packers v. NLRB, 581 F.2d 153, 156 (8th Cir. 1978). "[L]arge corporate employer[s], except to the extent limited by statute or contractual obligation, must be accorded wide latitude in determining whom [they] will employ and retain in employment in

high and sensitive managerial positions . . . ." Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976).

In practice, this deference afforded the employer to determine an employee's fitness for duty explains the general acceptance of a variety of testing devices that might otherwise raise Fourth Amendment concerns. In the federal government, for example, employees routinely submit to fingerprint checks, full field background investigations, physical examinations and, for employees engaged in national security functions, questioning subject to polygraphs as conditions of employment.[8] These employment tests involve differing degrees of intrusiveness into an employee's privacy as well as exercises of dominion and control, albeit slight, over the employee. Nonetheless, none of these activities have been found to impinge upon an applicant's or employee's Fourth Amendment rights, because, in the employment context, there is no recognized right of privacy that precludes an employer from conducting reasonable inquiries into an employee's fitness for duties. Cf. Schlagenhauf v. Holder, 379

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[8] The federal government routinely requires applicants for or employees in positions which have physical or medical standards to submit to physical examinations either prior to appointment or selection, 5 C.F.R. § 339.301(a)(1), on a regularly recurring periodic basis, id. at (a)(2), or whenever there is a direct question about an employee's continued capacity to meet the physical or medical requirements of the position, id. at (a)(3). In so doing, the government may designate the examining physician, although employees are permitted to submit medical documentation from their personal physician which the government will review and consider. In addition, the government conducts extensive full-field investigations into the background of applicants for sensitive positions in the federal service to determine the individual's suitability for employment. See Federal Personnel Manual, Chapter 733 (attached as Exhibit B).

U.S. 104, 114 (1964) (physical examinations under Fed. R. Civ. P. 35 are "free of constitutional difficulty"); Brachter v. United States, 149 F.2d 742 (4th Cir.), cert. denied, 325 U.S. 885 (1945) (routine, warrantless pre-induction physical upheld); McDonell v. Hunter, 612 F. Supp. 1122, 1130 n.6 (S.D. Iowa 1985) (routine physicals do not violate Fourth Amendment); Curry v. New York Transit Authority, 56 N.Y.2d 798, 437 N.E.2d 1158 (1982) (discharge after physical examination upheld). Drug testing presents no different concerns, nor should it be evaluated by a different yardstick.

In an analogous context, courts have recognized the employer's right in regulating the workplace and thereby establishing or circumscribing the privacy expectations of an employee that society is prepared to recognize as protected under the Fourth Amendment. In United States v. Donato, 269 F. Supp. 921, 923 (E.D. Pa.), aff'd on the basis of opinion below, 379 F.2d 288 (3d Cir. 1967), the Court recognized that an employee's privacy interest in his locker was subject to the employer's rules and regulations governing use of the lockers. Regardless of whether the employee had actual notice of the regulation, a warrantless search was found not to implicate the Fourth Amendment because no legitimate expectation of privacy could be recognized in the face of a regulation to the contrary. 269 F. Supp. at 923-24. Similarly, in United States v. Bunkers, 521 F.2d 1217, 1220 (9th Cir.), cert. denied, 423 U.S. 989 (1975), the court held that the extent of an employee's expectation of

privacy in a government supplied locker was defined by the "restricted and regulated employment use thereof." While the employee may have had a subjective expectation of privacy, the court found that there was no reasonable expectation of privacy "that society is prepared to recognize" in view of the pervasive regulation of the workplace in which "official surveillance has traditionally been the order of the day." 521 F.2d at 1220. Accord United States v. Sanders, 568 F.2d 1175 (5th Cir. 1978); see also Duplantier v. United States, 606 F.2d 654, 670 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) ("legitimate expectation of privacy" of a public official is "necessarily circumscribed").[9]

Here, Rule 111 delimits the reasonable expectations of privacy that society is prepared to recognize for the City's law enforcement personnel. Like any employer, the City of Boston is

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[9] Even in cases where courts have found an employer's particular condition of employment to implicate an employee's constitutional rights, the courts have nevertheless recognized employers' discretion in fashioning reasonable conditions of employment for their respective workplaces. See, e.g., Sec. & Law Enforcement Emp., Dist. C. 82 v. Carey, 737 F.2d 187, 203 (2d Cir. 1984) (strip searches of correction officers are not per se violative of the Fourth Amendment in light of "the legitimate penological imperatives of maintaining prison security and preserving internal order and discipline"); Garguil v. Tompkins. 704 F.2d 661, 668 (2d Cir. 1983) ("There can be no dispute that safeguarding the health and welfare of students is a legitimate governmental objective, and that requiring a medical appraisal of a teacher's physical or mental fitness is rationally related to that objective"), vacated on other grounds, 465 U.S. 1016 (1984); McDonell v. Hunter, 612 F. Supp. 1122, 1128 (S.D. Iowa 1985) ("There is no doubt that [correction facility employers] can constitutionally conduct such 'regulatory' searches of persons entering Iowa's correctional facilities, including employees, as are reasonably necessary to serve security considerations . . .").

fully authorized to prescribe reasonable conditions of employment for its personnel to determine fitness for duty, and these conditions control an employee's privacy interests. Thus, in the first federal case to address drug testing of law enforcement personnel, the court held that an FBI agent had a "diminished expectation of privacy," because he had been advised in advance "of the FBI's strong interest in assuring that its agents' personal and professional affairs are beyond reproach." Mack v. United States, No. 85 Civ. 5764, slip. op. at 7 (S.D.N.Y. April 21, 1986)(attached as Exhibit C); see also Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.) (in view of "paramount interest in protecting the public," bus and train operators "can have no reasonable expectation of privacy with regard to submitting to blood and urine tests."), cert. denied, 429 U.S. 1029 (1976); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (pervasive regulation of industry eliminates expectation of privacy). Similarly here, the employer's discretion in setting reasonable conditions of employment allows the City of Boston to require drug testing of its employees without implicating the Fourth Amendment.[10]

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[10] Of course, what society is prepared to recognize as a reasonable privacy expectation under the Fourth Amendment may change over time. Thus, Donovan v. Dewey, 452 U.S. 594, 606 (1981), upheld searches based on the diminished expectation of privacy of those in a regulated industry, id. at 598-99, and expressly rejected the argument that the government could not rely on diminished expectations it created by extending regulation to an industry for the first time (452 U.S. at 606):

> [I]f the length of regulation were the only

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B. No Special Fourth Amendment Rule Should Be Prescribed For Governmental Drug Testing

Unobserved drug testing by an employer fails to raise a Fourth Amendment concern for additional reasons. First, where, as here, the program is preceded by advance notice affording an opportunity for employees to avoid the testing by declining the employment, no legitimate expectation of privacy to the contrary can reasonably be recognized. Second, drug testing is conducted by the government in its proprietary capacity as an employer, rendering inapposite the concerns lying at the core of the Fourth Amendment regarding abuse of the police power. Finally, where drug testing of employees is conducted without observation, none of the activities involved in testing constitutes a "search" or "seizure" under traditional Fourth Amendment analysis. Each of

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[10](...continued)
criterion, absurd results would occur. Under appellees' view, new or emerging industries, including ones such as nuclear power that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program because of the recent vintage of regulation.

Airport security measures were to a large extent adopted after, and as a reaction to, the "bitter experience" of air piracy, United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973), and a "wave of airplane hijacking," United States v. Bell, 464 F.2d 667, 674 (2d Cir. 1972) (Friendly, C.J., concurring). Bitter experience with drug use, and with the deleterious affect of such use on work performance, has similarly occasioned employer responses to assure, or, in some cases, restore, the efficiency and integrity of the working environment. See Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (racing commission "has exercised its authority in ways that have reduced the justifiable expectations of persons engaged in the horse-racing industry") (emphasis supplied).

these considerations buttress the finding that drug testing as conducted by the City of Boston does not raise Fourth Amendment concerns.

1. No legitimate expectation of privacy can be recognized where the employee has advance notice that the employer is conducting drug testing as a reasonable means of determining fitness for duty, and the employee can avoid the test by declining the employment. In such circumstances, any expectation of privacy is inconsistent with the actual circumstances governing the employee's workplace.[11] For this reason, in Shoemaker v. Handel, 795 F.2d at 1142, the court found that racing jockeys had no legitimate expectation of privacy that defeated drug testing. "When jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry." The holding was predicated upon the Supreme Court's decisions finding that, in closely regulated industries, no warrant for searches of premises pursuant to an administrative inspection scheme is required because the pervasive regulation of the industry reduces or eliminates any justifiable expectation of privacy. See, e.g., Donovan v. Dewey, 452 U.S. 594, 602-605

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[11] While advance notice cannot defeat all intrusive actions by a governmental employer that might otherwise be subject to the Fourth Amendment, such notice is pertinent where the issue is one of an employer's right to conduct reasonable testing of his employees for fitness for duty.

(1981) (coal mines); United States v. Biswell, 406 U.S. 311, 316-17 (1972) (gun selling).

Similarly here, advance notice of the testing does afford the employee the opportunity to avoid the testing by declining the employment. Advance notice of the drug testing requirement necessarily diminishes or eliminates whatever minimal privacy interests an employee might otherwise have in the workplace. See United States v. Donato, 269 F. Supp. at 923; United States v. Bunkers, 521 F.2d at 1220.

2. Governmental action in its proprietary capacity as an employer is fundamentally distinct from the types of governmental action that would traditionally raise Fourth Amendment concerns. Indeed, while it is clear that the Fourth Amendment is "applicable to the activities of civil as well as criminal authorities," New Jersey v. T.L.O., 105 S. Ct. 733, 740 (1985), the Court's cases so holding have involved the exercise of regulatory or police power authority, albeit civil rather than criminal authority, and not the exercise of proprietary rights as an employer. See Camara v. Municipal Court, 387 U.S. 523 (1967) (building inspections); Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (OSHA inspections); Michigan v. Tyler, 436 U.S. 499 (1978) (search of fire site). In New Jersey v. T.L.O., 105 S. Ct. 733 (1985), the Court held that the Fourth Amendment applied to searches by school officials, but in doing so found it necessary to reject the argument that their "authority was that of the parent, not the State," and noted that "[t]oday's public school

officials do not merely exercise authority voluntarily conferred on them by individual parents; rather they act in furtherance of publicly mandated educational and disciplinary policies." 105 S. Ct. at 741. See also id. at 750 (Blackmun, J., concurring) ("Education 'is perhaps the most important function' of government"). Thus, T.L.O. reaffirmed that the Fourth Amendment applies only when the exercise of "sovereign authority" is involved, 105 S. Ct. at 740,[12] and, by implication, should not apply when the government is functioning in its proprietary capacity as an employer.[13]

Thus, as one recent case has noted in upholding an employer's drug testing program against Fourth Amendment challenge:

> [T]he government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties. Thus, a government employee's superiors might legitimately search her desk or her locker or her jacket where the purpose of the search is not to gather evidence of a crime unrelated to the employer's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effective its statutory responsibilities. Because the government as employer has the same rights to discover and prevent employee misconduct relevant to the employee's performance of her

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[12] See generally United States v. Jacobsen, 466 U.S. 109 (1984).

[13] Cf. Wyman v. James, 400 U.S. 309, 319 (1971) (upholding home visits in AFDC context by holding, inter alia, that public, in capacity as provider of welfare, "rightly expects the same" right as those who dispense purely private charity to know how it is spent).

> duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature.

Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (emphasis supplied). "Public employees are not basically different from private employees," Abood v. Board of Education, 431 U.S. 209, 229 (1977), yet placing Fourth Amendment restrictions on public employers not placed on private employers would treat differently otherwise similarly situated private and public employers, and make governmental service (at least comparatively) a safe haven for drug use. While "[g]overnment employees do not surrender their fourth amendment rights," Allen, supra, at 491, it by no means follows that they should acquire Fourth Amendment rights not available to employees in the private sector.[14]

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[14] While "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected," Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967) (emphasis supplied), "[a]t the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Thus, substantial restrictions on First Amendment rights enjoyed by private citizens have been validly made the price of accepting public employment. E.g., C.S.C. v. Letter Carriers, 413 U.S. 601 (1973) (upholding First Amendment restriction on federal employees); Snepp v. United States, 444 U.S. 507, 509 n.3 (government may serve substantial interests by imposing limits no employee speech); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Connick v. Myers, 461 U.S. 138 (1982) (First Amendment does not protect public employee's criticism of superiors due to needs of workplace). A conditioning of public employment on waiver of some Fourth Amendment rights simply puts public-sector employees on roughly the same footing as private-sector employees who do not enjoy any constitutional immunity from searches by their

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The Supreme Court has recognized that the Fourth Amendment does not prohibit the government from insisting, in its proprietary capacity, on obtaining information by conducting a search of its contractors. In Zap v. United States, 328 U.S. 624, 628 (1946), judgment vacated on unrelated issues, 330 U.S. 800 (1947),[15] the Court upheld a search an individual contractor agreed to "in order to obtain the Government's business." There is no difference of constitutional magnitude between the threat of loss of a job to an employee of the State, and the threat of loss of a contract to a contractor. Lefkowitz v. Turley, 414 U.S. 70, 83 (1973). Accordingly, governmental employers may likewise constitutionally condition public employment on the agreement of those seeking, or seeking to continue in, that employment to searches, e.g., Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976) (drug test of public employees); United States v. Donato, 269 F. Supp. 921, 924 (E.D. Pa.) (applying Zap in employment context), aff'd on the basis of opinion below, 379 F.2d 288 (3d Cir. 1967); Krolick v. Lowery, 32 App. Div. 2d 317, 302 N.Y.S.2d 109 (1969) (blood sample test of firemen for intoxication), aff'd, 26 N.Y.2d 723, 308 N.Y.S.2d 879, 257 N.E.2d

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[14](...continued)
employers in the first place, Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

[15] Despite vacating the judgment in Zap because of an intervening decision regarding jury composition, the Court continues to cite the opinion written by Justice Douglas for the Court in Zap as one of the leading Fourth Amendment cases. E.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

56, cert. denied, 397 U.S. 1075 (1970); see United States v. Sihler, 562 F.2d 349 (5th Cir. 1977) (Government may reasonably require consent to routine search of person as condition of employment as prison guard).

3. Finally, as explained in greater detail in the next section of this memorandum, there is no "intrusiveness" associated with the steps required for unobserved drug testing to warrant its characterization as either a "search" or a "seizure." Although this alone, as discussed infra, would warrant a finding that the Fourth Amendment in inapplicable, the reasonable, non-intrusive manner in which drug testing is carried out buttresses the conclusion that no Fourth Amendment concern is raised by the program conducted by the City of Boston.

* * * * *

In the employment context, there is no recognized right of privacy under the Fourth Amendment that precludes an employer from conducting reasonable inquiries into an employee's fitness for duty -- particularly where the employee has advance notice of the possibility of drug testing. The Fourth Amendment does not disable government employers from exercising the "power of the Government as . . . employer, to supervise and investigate the performance" of its employees. United States v. Collins, 349 F.2d 863, 868 (2d Cir. 1965), cert. denied, 383 U.S. 960 (1966). The City of Boston's decision to test its employees for drug use therefore does not violate the Fourth Amendment. See Allen v. City of Marietta, 610 F. Supp. 482 (N.D. Ga. 1985).

II. UNOBSERVED DRUG TESTING CONSTITUTES NEITHER A "SEARCH" NOR A "SEIZURE"

Even if the applicability of the Fourth Amendment is to be resolved from the narrow perspective of whether any of the governmental actions involved in drug testing constitute a "search" or a "seizure," drug testing as conducted by the City of Boston does not implicate the Fourth Amendment.[16] Whenever "physical evidence" is obtained "from a person," there is "a potential Fourth Amendment violation at two levels -- the 'seizure' of the 'person' necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence." United States v. Dionisio, 410 U.S. 1, 8 (1973) (emphasis supplied). In the case of unobserved drug testing as an employment screen, the first level of concern is entirely absent, and any second-level concerns raised by the mere taking of a urine sample produced in private are exiguous to the point of not reaching the threshold where the Fourth Amendment would be implicated.

First, there is no "seizure" of the person when a public employee, during paid working hours, is directed to report to a facility for the collection of a urine sample rather than to the employee's usual working station. See Biehunik v. Felicetta, 441

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[16] Addressing drug testing from this perspective turns the application of the Fourth Amendment on the metaphysical and somewhat ludicrous question of whether and to what extent an employee has a possessory interest in urine that is to be excreted. For this reason, the prior analysis examining privacy interests in the employment context provides a better structure for resolving the Fourth Amendment issue.

F.2d 228, 231 (2d Cir.) (lineup of police department employees "was to be conducted at a time and place that were well within the usual demands of a policeman's job"), cert. denied, 403 U.S. 932 (1971). Government workers are already "required to devote 'their complete services and undivided attention' to government service during working hours,'" Stone v. United States, 683 F.2d 449 (D.C. Cir. 1982), quoting Craft v. United States, 589 F.2d 1057, 1068 (Ct. Cl. 1978). When the government asks employees to take drug tests, the employee's freedom of movement is not appreciably greater or different than when an employee is directed to go and remain at his usual work site. "Ordinarily, when people are at work their freedom to move about has been meaningful restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." INS v. Delgado, 466 U.S. 210, 218 (1984).

Second, the requirement that an employee produce an unobserved urine sample is not intrusive:

> The collection of a urine sample has little in common with stomach pumping . . . (or even with the taking of a blood sample, which requires the infliction of an injury, albeit a small one). It is even less intrusive than a fingerprint which requires that one's fingers be smeared with grease and pressed against a paper. A urine sample calls for nothing more that a natural function performed by everyone several times a day -- the only difference being the collection of the sample in a jar.

Mack v. United States, No. 85 Civ 5764, slip op. at 7 (S.D.N.Y. April 21, 1986). Urine specimens are commonly drawn and examined with consent for numerous routine purposes, and, while that

factor is not itself decisive,[17] it has been given important weight in a context (blood tests) that is far more intrinsically invasive due to the required penetration of body tissues for collection of the fluid, Schmerber v. California, 384 U.S. 757, 771 & n.13 (1966).

Third, the collection of the urine itself should not be deemed a seizure:

> It is obvious that body waste is forever discarded upon release from the body. An individual cannot retain a privacy interest in a waste product that, once released, is flushed down the drain. . . . Once the officer urinates he cannot logically retain any possessory or privacy interest in it. In fact, in the interest of public health and safety, it is difficult to conceive of any possessory interest the officer should be allowed to retain in his urine. It would strain logic to conclude other than that a police officer cannot hold a subjective expectation of privacy in body waste that must pass from his system.

Turner v. Fraternal Order of Police, 500 A. 2d 1005, 1011 (D.C. 1985) (Nebeker, J., concurring). Since urine is a body waste customarily abandoned without concern, the collection of urine constitutes a seizure no more than the collection of hair clippings, voice exemplars or handwriting samples. Id. "Implicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned." United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972).

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[17] Cf. Winston v. Lee, 105 S. Ct. 1611, 1619 (1985) (contrasting surgery to search for evidence with surgery "conducted with the consent of the patient," which "carr[ies] out the patient's own will concerning the patient's body," and therefore "preserve[s]" the "patient's right to privacy").

Fourth, the analysis of the urine, limited under Rule 111 to revealing only the use of illicit substances, also fails to constitute a search within the Fourth Amendment. In United States v. Jacobsen, 466 U.S. 109, 113 (1984), the Court held that a field test conducted to determine whether a suspicious white powder was cocaine did not compromise any legitimate privacy interest and thus was not a search:

> A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative -- merely disclosing that the substance is something other than cocaine -- such a result reveals nothing of special interest. Congress has decided -- and there is no question about its power to do so -- to treat the interest in "privately" possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably "private" fact, compromises no legitimate privacy interest.

Thus, approaching drug testing on the basis of a step-by-step analysis, none of the activities constitute a "search" or a "seizure." For this reason, unobserved drug testing does not raise a Fourth Amendment issue.[18]

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[18] In asserting that there is no dispute that the proposed urinalysis is a search and seizure, plaintiff simply ignores both the Supreme Court's repeated admonition that whether a privacy interest has been invaded turns on the circumstances, and the particular attributes of the plan carefully tailored by the

(continued...)

III. OFFICERS WHO CHOOSE TO JOIN, OR REMAIN WITH, THE DEPARTMENT, HAVE, BY DOING SO, CONSENTED TO URINALYSIS

Boston has tailored its drug testing program so that, in all instances, only officers who in fact consent to the testing are to be tested. If an officer decides not to be tested, no criminal or other consequences attach to his refusal, except that, at most, the voluntary employment relationship either never begins, or merely ceases, as the case may be. See Wyman v. James, 400 U.S. 309, 317 (1971) ("If consent to visitation is withheld, no visitation takes place. The [AFDC] aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search."); see also Blackburn v. Snow, 771 F.2d 556, 568-69 n.10 (1st Cir. 1985).

Officers will clearly be made aware that they have the right to refuse to take the test, and face no criminal consequences.[19] This case is thus a far cry from such cases as Bumper v. North

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[18](...continued)
Boston police department to alleviate possible privacy concerns that have arisen in other cases. Thus, quoting McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), plaintiff observed that "urine can be analyzed to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs." Plaintiff's Memorandum at 10 (emphasis supplied). But Rule 111 provides on its face, section 10, that the only testing here will be "drug specific" so that no information, private, physiological, or otherwise, about a person will be revealed by the urinalysis, except whether one or more of the specific illegal drugs tested for is present.

[19] Cf. Wyman v. James, 400 U.S. 309, 317 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act.").

Carolina, 391 U.S. 543 (1968), where a supposed consent to search was a mere "acquiescence to a claim of lawful authority." 391 U.S. at 549. By contrast, here the Department makes no pretense of a claim that officers are required by law to take the test, and allows officers the option to terminate or avoid any employment relationship with the Department and likewise avoid the test.[20] Thus, any officer who decides to take the test and remain employed necessarily will be making that decision "voluntarily," and "not as the result of any duress or coercion, express or implied," Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

Indeed, one of the principal cases relied upon in Schneckloth involved a similar situation in which the individual's consent was found to be voluntarily given "in order to obtain the Government's business." Zap v. United States, 328 U.S. 628 (1946), judgment vacated on unrelated issues, 330 U.S. 800 (1947). Similarly, consent to search has been found in situations where persons made voluntary decisions whether to board a plane and submit to search, or to forgo boarding the plane and thereby avoid the search, e.g., United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973); or to decide whether to enter a courthouse in order to engage in one's profession as attorney, or to forgo entering courthouses and practicing law and thereby

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[20] Of course, whether there is valid consent does not turn on whether individual officers subjectively understand that they have the right to refuse. Schneckloth v. Bustamonte, 412 U.S. 218, 232-34 (1973).

avoid the searches, McMorris v. Alioto, 567 F.2d 897, 900-01 (9th Cir. 1978). As the McMorris court explained:

> The requirement that a person give this qualified consent to the search strictly circumscribes the state's authority and validates the limited intrusion at issue here. Air travel, for many persons today, is all but a necessity. Nevertheless, we have held that passengers must consent to a limited magnetometer search before boarding an airplane. This situation is not significantly different. Although an attorney's consent to a search is exacted as the price of entering the courthouse to discharge duties necessary to his profession, the search is nevertheless consensual in the same way as in the airport cases.

Similarly, it is also well recognized that anyone entering a military installation impliedly consents to be searched. E.g., United States v. Ellis, 547 F.2d 863 (5th Cir. 1977); United States v. Matthews, 431 F. Supp. 70 (W.D. Okla. 1976).

Here, as in Zap, Wyman, and McMorris, the officers and prospective officers have a free and voluntary choice whether to undergo any "search" that might otherwise be involved, and, in the event they choose to continue or begin the economic relationship and be subject to search, thereby consent to the urinalysis. Cf. Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1976) ("When jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the sport. . . . The jockeys were put on notice that after April 1,

1985 they would be subject to warrantless testing on days they were engaged to race.").

This conclusion should hardly come as a surprise. It is common-place for job aspirants and job holders to be required to take tests that help determine their fitness or continued fitness for employment, whether these be physical examinations or fitness tests for positions requiring some physical exertions, or tests that may reveal the applicant's or incumbent's mental acuity, or even tests that may reveal the applicant's or incumbent's thoughts on issues of public concern (for example, an interview with an elected official for a confidential policy-making position or even a bar examination). It seems strange that these common, every day, job tests should be thought to raise Fourth Amendment issues at all. But stranger still would be any conclusion that citizens who apply to be employed by their fellow citizens cannot consent to taking the tests needed to determine their suitability for the job.

IV. DRUG TESTING OF LAW ENFORCEMENT EMPLOYEES IS REASONABLE UNDER THE FOURTH AMENDMENT

Even if drug testing does implicate the Fourth Amendment, the "underlying command of the Fourth Amendment is always that searches and seizures be reasonable," and what is reasonable "requires 'balancing the need to search against the invasion which the search entails.'" New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985), quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). Reasonableness does not turn on whether the government could have used less intrusive means. Cady v.

Dombrowski, 413 U.S. 433, 447 (1973). Rather, whether a search conducted without a warrant is reasonable under the Fourth Amendment requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion." Tennessee v. Garner, 105 S. Ct. 1694, 1699 (1985), quoting United States v. Place, 462 U.S. 696, 703 (1983). The factors to be considered are "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The foregoing discussion largely answers each of these considerations. If drug testing triggers the Fourth Amendment, unobserved drug testing through urinalysis surely must be one of the most minimally intrusive searches in Fourth Amendment jurisprudence. Although "intrusiveness" is impossible to quantify, the intrusiveness associated with drug testing falls somewhere between the taking of hair clippings, which does not implicate the Fourth Amendment, United States v. Weir, 657 F.2d 1005 (8th Cir. 1981); In re Grand Jury Proceeding (Mills), 686 F.2d 135 (3d Cir.) cert. denied, 459 U.S. 1020 (1982), and the extraction of blood which is subject to the Fourth Amendment, Schmerber v. California, 384 U.S. 757, 767 (1966). Even within this range, however, drug testing plainly falls closer to the taking of hair samples, as drug testing does not require penetration of the body, and concerns a product that would

otherwise be abandoned without concern as waste, much like hair clippings which may normally be shed and swept away. See United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984). See also United States v. Mack, No. 85-5764, slip op. at 7 (S.D.N.Y. April 21, 1986) (urine testing less intrusive than blood sampling or fingerprinting as it "calls for nothing more than a natural function performed by everyone several times a day -- the only difference being the collection of the sample in a jar").

The objective and random selection of employees for the testing at issue here precludes any conduct that could be considered subjective and arbitrary harassment by administering officials. Random searches and seizures that have been held to violate the Fourth Amendment have left the discretion as to selected targets in the hands of a field officer with no limiting discretion. See, e.g., Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 882-84 (1975).[21] In contrast, where subjects are chosen on the basis of some neutral, nondiscretionary criterion, searches conducted in the absence of particularized suspicion have been upheld. United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976) (upholding use of fixed checkpoints to stop vehicles on a systematic basis). See also Donovan v. Dewey, 452 U.S. 594 (1981). Thus, a system

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[21] This factor is illustrated by Storms v. Coughlin, 600 F. Supp. 1214, 1223 (S.D.N.Y. 1984), in which the court unfavorably compared the state's then current system of having "[t]he watch commander stare[]at a board containing a card for each prisoner and pick[] several," which presented "the potential for abuse," with "computer-guided random selection procedures" that the state was moving toward adopting, and that are challenged in this case.

of testing based upon computer generated random numbers such as that to be employed by the City of Boston does not violate the Fourth Amendment. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3d Cir. 1986).[22]

Balanced against these considerations is the government's critical interest in precluding the use of illegal drugs, particularly by law enforcement personnel. Illegal drug use renders a law enforcement officer unfit for duty, as the officer's violation of the law undermines his ability to enforce and uphold the law on a fair and impartial basis. Illegal drug use, on or off duty, evidences an unreliability, an instability, and a lack of judgment that is inconsistent with the special trust reposed in law enforcement officers. See Masino v. United States, 589 F.2d 1048, 1056 (Ct. Cl. 1978) ("the use of the very contraband a law enforcement officer is sworn to interdict"

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[22] Plaintiff's discussion (Plaintiff's Memorandum 11-14) of the supposed necessity for probable cause, which relies principally on Winston v. Lee, 105 S. Ct. 1611 (1985), is inapt. Winston involved proposed surgery intruding into the person of a criminal suspect to extract a bullet; that is a far cry from the non-intrusive urinalysis Boston proposes to conduct here. Moreover, plaintiff places far too much weight on the Court's observation in Winston that the government's need in Fourth Amendment cases must "ordinarily" meet a probable cause standard, 105 S. Ct. at 1616. Winston does not purport to overrule the Court's many decisions applying a lesser standard, where, as here, the intrusion is relatively minor, and clear objective standards governing the occasions for, and scope of, possible searches adequately substitute for the safeguard of probable cause. Indeed, the Court reaffirmed in the very term it decided Winston: "Probable cause is not an irreducible requirement of a valid search." New Jersey v. T.L.O., 105 S. Ct. 733, 743 (1985) (emphasis supplied).

warrants removal of customs officer).[23] Law enforcement officers are sworn to uphold and enforce all the laws; illegal drug use by an officer violates that oath.

The use of illegal drugs also impairs an officer's ability to discharge his duties:

> The Department, like the transit authority in Suscy, has a paramount interest in protecting the public by ensuring that its employees are fit to perform their duties. Without a doubt, drug abuse can have an adverse effect upon a police officer's ability to execute his duties. Given the nature of the work and the fact that not only his life, but the lives of the public rest upon his alertness, the necessity of rational action and a clear head unbefuddled by narcotics becomes self-evident. Thus, the use of controlled substances by police officers creates a situation fraught with serious consequences to the public.

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[23] In the federal sector, "where an employee's misconduct is contrary to the agency's mission, the agency need not present proof of a direct effect on the employee's job performance" to remove the employee. Allred v. Department of Health & Human Services, 786 F.2d 1128, 1131 (Fed. Cir. 1986). Thus, a federal agency need not keep an employee "in a responsible position until it can prove, by the cumbersome methods of litigation, what ought to be obvious -- that the credibility and effectiveness of the department are undermined by the discordance between public duty and private conduct." Wild v. United States, 692 F.2d 1129, 1133 (7th Cir. 1982).

Other courts have similarly recognized that there should be no need to maintain an employee whose misconduct will impair public confidence in the employer even though the misconduct may not be reflected in the employee's work performance. Thus, for example, in Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986), the court upheld random testing of jockeys, noting "[i]t is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing."

Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. App. 1985). Police officers are armed with weapons of deadly force, and are expected to be able to make, without warning, life and death decisions. Illegal drug use is simply incompatible with fitness for duty.

Finally, the scandal of illegal drug use by law enforcement officers seriously undermines respect for the law, and public confidence in law enforcement generally. "Even a hint of police corruption endangers respect for the law." O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977). No confidence may be reposed in law enforcement personnel who demonstrate by their illegal conduct that they do not take their responsibilities seriously. Disclosure of illegal conduct destroys the confidence of the public in even-handed application of the law, adversely affecting the critical cooperation of the public with law enforcement which is essential for any possibility of effective enforcement of the law.

"A trustworthy police force is a precondition of minimal social stability in our imperfect society." Biehunik v. Felicetta, 441 F.2d 228, 230 (2d Cir.), cert. denied, 403 U.S. 932 (1971).[24] See also Barry v. City of New York, 712 F.2d 1554,

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[24] Biehunik also recognizes that law enforcement officers have a lesser expectation of privacy than other public employees. "It is a correlative of the public's right to minimize the chance of police misconduct that policemen, who voluntarily accept that unique status of watchman of the social order, may not reasonably expect the same freedom from governmental restraints which are designed to ensure his fitness for office as from similar governmental actions not so designed." 441 F.2d at 231. See (continued...)

1560 (2d Cir. 1983) (no Fourth Amendment issue implicated in requiring financial disclosure by officials). Just as "the FBI has a compelling interest in assuring that its agents are not involved in drugs," Mack v. United States, slip op. at 8,[25] so too does the City of Boston have a compelling interest in assuring the integrity and effectiveness of its employees associated with law enforcement. The City need not blind its eyes to a problem of illegal drug use that clearly exists throughout the country, nor should it be precluded from taking reasonable measures to address the problem.

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[24](...continued)
also O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976), cert. denied, 431 U.S. 914 (1977); Barry v. City of New York, 712 F.2d 1554, 1560 (2d Cir.), cert. denied, 464 U.S. 1057 (1983).

[25] As explained in Mack:

> While all private employers may have a generalized desire to know of their employees' drug use which could decrease efficiency, the FBI has far more urgent and compelling needs for such information. FBI agents are privy to highly classified information. Any involvement of an FBI agent with drugs, no matter how small, exposes him to risks of extortion that could jeopardize the national security. Also, since the FBI is charged with responsibility for enforcement of the federal drug laws, illegal drug use by agents risks to corrupt and compromise the agency's discharge of those duties. Furthermore, drug use by an agent could affect the success of an operation implicating important national security law enforcement objectives and could pose risk of injury to other agents working with him.

Slip. op. at 8.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss should be granted.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROBERT T. GUINEY, Plaintiff, v. FRANCIS M. ROACHE, Defendant.	)	Civil Action No. 86-1346-K

EXHIBITS TO MEMORANDUM OF POINTS AND AUTHORITIES OF AMICUS CURIAE UNITED STATES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS