No. 277 A02 Tenth District

SUPREME COURT OF NORTH CAROLINA

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YOLANDRA BEST and ROY HUDSON,	)	
	)	
Plaintiffs	)	From the Court of Appeals
	)	No. COA01-118
vs.	)	From Wake County
	)	No. 99 CVS 3415
DEPARTMENT OF HEALTH AND HUMAN SERVICES, JOHN UMSTEAD HOSPITAL	)	
	)	
Defendant.	)	

****

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INC. AND THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

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BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INC. AND THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS

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No one at John Umstead Hospital (JUH) had any reason to believe that either Ms. Best or Mr. Hudson was using drugs or was impaired on February 15, 1997. There was no evidence either of them had ever been impaired and, prior to February 15, 1997, no one at John Umstead Hospital believed Ms. Best or Mr. Hudson had any involvement whatsoever with drugs. (T Vol. I pp. 92-94, 98-99, IIB pp. 176-78) Ms. Best and Mr. Hudson had worked at JUH for ten and four years, respectively. (T Vol. IIB pp. 218, 257)

Ignoring their background and work history, on February 15, 1997, when employee Amanda Blanks saw a straw which she thought had white residue in one end of it in the chart room and the straw was gone after Mr. Hudson left the room, she immediately leapt to a series of unfounded conclusions: that the straw had drugs on it, that the drugs were illegal, that the straw belonged to Mr. Hudson and that Mr. Hudson was using illegal drugs. She also concluded that Ms. Best, who happened to leave the room with Mr. Hudson and later have lunch with him, was somehow also involved in illegal drugs.

Ms. Blanks reported her suspicions to a supervisor, who told the hospital director, setting off a chain of events, culminating in an embarrassing search of Mr. Hudson's body and car in the parking lot of the hospital and an even more embarrassing strip search of Ms. Best by two supervisors in the bathroom (during which one of them commented on her underwear) and, despite no finding of drugs on either Mr. Hudson or Ms. Best, an order that Ms. Best and Mr. Hudson submit to drug tests immediately and in the company of their supervisors. Ms. Best and Mr. Hudson both refused the test, citing fear and mistrust of their employers, and were then fired for their refusal. (T Vol. IIB pp. 245-46, 270-71, 273-74)

Both Ms. Best and Mr. Hudson had a fundamental right under the Fourth Amendment to be free from unreasonable searches and

seizures. On February 15, 1997, John Umstead Hospital flagrantly violated that principle several times, including the unreasonable demand that Ms. Best and Mr. Hudson submit to drug testing or forfeit their jobs.

In deciding this case, the Court of Appeals correctly determined that their employer, John Umstead Hospital ("JUH"), did not have reasonable suspicion under the Fourth Amendment to the United States Constitution to require plaintiffs to submit to drug testing. United States Supreme Court cases such as Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) and National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), that have allowed government employee drug testing, have set strict limitations on employers performing the tests. Id., at 677-79, 109 S.Ct. at 1397-98. JUH's failure to comply with these limitations violated Ms. Best's and Mr. Hudson's Fourth Amendment rights. Because of the importance of the fundamental rights involved to all governmental employees, it is critical that this Court uphold the decision of the Court of Appeals.

STATEMENT OF FACTS

On February 15, 1997, Amanda Blanks walked through the nurses' station and into the chart room at JUH. (T Vol. I p. 7) The chart room is a small but heavily trafficked room used for

storing a multitude of items ranging from patient charts and medications to employees' personal belongings, general food items and utensils. (T Vol. I pp. 61, 67-70, Vol. IIB pp. 219-20) As she approached the room, Ms. Blanks encountered Mr. Hudson leaving the room. Ms. Best left the chart room shortly after Mr. Hudson. There was also another employee who remained in the area. (T Vol. I p. 58, Vol. IIB pp. 219-20, 259)

While in the chart room, Ms. Blanks noticed keys, cigarettes and a cut straw on the counter. She believed the straw had a white powdery substance on it. (T Vo. I pp. 14-15) She did not touch the straw. While Ms. Blanks was in the chart room, she received a telephone call from another employee to discuss a matter concerning patients. (T Vol. I p. 60) Although the substance of the telephone call was not out of the ordinary, (T Vol. I p. 140) Ms. Blanks thought the telephone call was odd because she was working on her day off and did not think anyone would know she was there. She later made inconsistent statements about whether she was watching the door to the chart room while she was on the telephone. (T Vol. I pp. 107, 109-14, 128-30; R Ex. 24, ¶5) As Ms. Blanks was ending her telephone conversation, Mr. Hudson walked back into the chart room and came back out with his keys and cigarettes in his hand. (T Vol. I p. 18) There has been no testimony with respect to what

happened to the third employee who was in the area when Ms. Blanks first entered.

Based on those events, Ms. Blanks thought that the white substance she saw on the straw was an illegal drug, that Mr. Hudson owned the straw and left it sitting out on the counter in the busy chart room, that Ms. Best was connected to Mr. Hudson's straw because she left soon after him, and that the telephone call was a staged event designed to draw Ms. Blanks out of the chart room and to the nurses' station, a few feet away, so that Mr. Hudson would be free to retrieve his belongings, including the offending straw. (T Vol. I p. 16, 54-55)

When Ms. Blanks returned to the chart room, she did not look in the trash, or anywhere else in the chart room, for the straw. (T Vol. I p. 61, 136-37) She did, however, go to her supervisor, Ms. Schuchart, to report her suspicions. (T Vol. I p. 23, Vol. IIB p. 177) Ms. Schuchart called the hospital director, Dr. Christian, who called Mr. Brock, director of Human Resources. (T Vol. IIA p. 112, IIB p. 178) Mr. Brock left immediately for the hospital, stopping to pick up a couple of drug testing kits on his way. (T Vol. IIA pp. 49-50) During this time, Ms. Best and Mr. Hudson were working and tending to patients, until they left for lunch together. (T Vol. IIB p. 189)

While Mr. Brock was on his way to the hospital, the assembled group decided to call Butner police. (T Vol. IIB p. 189) Butner Police Officer Pendleton arrived, and, when Mr. Hudson and Ms. Best returned from lunch, Officer Pendleton searched Mr. Hudson's body, inside his clothes, and Mr. Hudson's car. (T Vol IIA pp. 4-5, 52, IIB pp. 222-24) He found no drugs and no evidence of drug use. (T Vol. IIB p. 224) He did find a piece of a straw, with an accordion section, in Mr. Hudson's pocket. (T Vol. IIA p. 5) Officer Pendleton later turned in the straw for testing, which proved the absence of any drugs. (T Vol. IIA p. 6) Ms. Blanks testified that the straw Officer Pendleton found was not the straw she had seen in the chart room.

Officer Pendleton also asked Ms. Blanks and Ms. Schuchart to search Ms. Best in the bathroom. (T Vol. IIB p. 200) They did so, making her remove each article of clothing, one by one. Ms. Best was humiliated, upset and crying. One of the searchers made a comment that Ms. Best's underwear was pretty. (T Vol. IIB pp. 264-65) No drugs or evidence of drug use was found. (T Vol. IIB p. 265)

After the body searches, the group called Ms. Best and Mr. Hudson into an office and confronted them with their suspicions. (T Vol. IIB pp. 226, 266) Ms. Best and Mr. Hudson said nothing in their defense nor did they admit to any wrongdoing. Mr.

Brock then told them he was ordering them to take a drug test, immediately and accompanied by him. (T Vol. IIA pp. 68, 86, IIB pp. 266-67) They both refused the tests. (T Vol. IIB pp. 182-83, 184, 225-26, 267) Mr. Hudson asked to see the directive governing employee drug testing at the hospital and his request was denied.

Because of their refusals to take the drug tests, JUH began termination proceedings against Mr. Hudson and Ms. Best and both were subsequently terminated. They appealed their terminations and, according to statute, a de novo hearing was held in the Office of Administrative Hearings (OAH). At the OAH hearing, Administrative Law Judge Sammie Chess, Jr. found in favor of Mr. Hudson and Ms. Best, finding them both to be credible witnesses and the employer's witnesses not credible. (Rec. Dec. ¶¶ 32, 85, 112, 135) The State Personnel Commission (SPC) reversed the OAH, including the credibility findings and Mr. Hudson and Ms. Best appealed to the Superior Court, which reversed the SPC. The North Carolina Court of Appeals, with Judge Tyson dissenting, upheld the Superior Court's ruling.[1]

[1] The remaining facts are incorporated by reference from the plaintiffs' briefs. However, it is important to note that, of four levels administrative and judicial of decision-making, listed above, only at the OAH hearing before Administrative Law Judge Sammie Chess, Jr. involved first-hand testimony of participants. In addition, three of four holdings were in favor of Ms. Best and Mr. Hudson, with only the SPC, which does not hear testimony, finding in favor of the employer.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT JUH COULD NOT REQUIRE MS. BEST AND MR. HUDSON TO SUBMIT TO DRUG TESTS WITHOUT REASONABLE SUSPICION.

The protection afforded by the Fourth Amendment against unreasonable searches and seizures is a fundamental right protected by the United States Constitution.[2] Garrison v. Department of Justice, 72 F.3d 1566, 1576 (Fed. Cir. 1996) ("obey now, grieve later" rule cannot incur on fundamental rights such as those implicated by drug testing); Marchwinski v. Howard, 113 F.Supp.2d 1134, 1143 (E.D.Mich. 2000) ("The right to be free from unreasonable searches is a fundamental right, and, accordingly, the possible violation of that right is alone sufficient to demonstrate irreparable harm."); American Federation of Government Employees, AFL-CIO, et al. v. Caspar Weinberger, 651 F.Supp. 726, 732 (S.D. Ga. 1986) (mandatory, periodic drug testing implicated fundamental Fourth Amendment protections). This protection applies to all searches and seizures conducted by the government, even when the government is acting as employer. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S.Ct. 1384, 1390, 103 L.E.2d 685

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[2] The right of an individual to be free from unreasonable searches and seizures as protected by the general warrants clause of the North Carolina Constitution is more expansive than under the Fourth Amendment. See e.g. State v. Carter, 322 N.C. 709, 714-23, 370 S.E.2d 553, 557-62 (1988) (refusing to adopt "good faith" exception to exclusionary rule).

(1989) (Fourth Amendment applied to drug testing program instituted by United States Customs Service.)

It is well established that "the taking of a urine specimen constitutes a search and seizure within the meaning of the Fourth Amendment." Skinner, 489 U.S. at 614, 109 S.Ct. at 1411 (breath and urine tests conducted on employees involved in certain accidents); Boesche v. Raleigh-Durham Airport Authority, 111 N.C. App. 149, 153, 432 S.E.2d 137, 140 (1993) (program for testing airport maintenance employees required to meet Fourth Amendment standards). Consequently, the government cannot require employees to submit to such testing unless the requirement complies with the Fourth Amendment. Skinner, 489 U.S. at 619, 109 S.Ct. at 1414.

The determination of whether a particular test complies with the Fourth Amendment involves a balancing of the individual's and the government's interests. Von Raab, 489 U.S. at 665-66, 109 S.Ct. at 1390-91. Unless the government is able to show a "special need" for random drug testing, such as for a safety sensitive position, it must have reasonable suspicion of unlawful drug activity prior to requiring an employee to submit to a drug test. Benavidez v. City of Alburquerque, 101 F.3d 620, 624 (10th Cir. 1996) (since no special need existed, employer was required to show reasonable suspicion in order to drug test); see also, Willis v. Anderson Community School Corp.,

158 F.3d 415, 420 (7th Cir. 1998) (mandatory drug testing not allowed because government did not show existence of special needs).

In order to drug test a government employee, therefore, in the absence of special needs, the government must have "individualized suspicion, i.e. a reasonable suspicion that the employee was engaging in unlawful activity involving controlled substances." Benavidez, 101 F.3d at 624. In applying this standard, courts have often looked to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and other criminal cases for guidance. See, e.g., Skinner, 489 U.S. at 638, FN 1, 109 S.Ct. at 1424. As in Terry, in determining whether the government acted reasonably, "due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts, in light of his experience." 392 U.S. at 27, 88 S.Ct. at 1883. See also, United States v. Thomas, 211 F.3d 1186 (9th Cir. 2000) (officer's hunch that illegal activity occurred was insufficient).

At the time of Ms. Best's and Mr. Hudson's dismissals, JUH had not established any program for random drug testing. Additionally, there has been no contention that Ms. Best or Mr. Hudson performed sensitive jobs that would meet the conditions for random drug testing set forth by Von Raab. JUH could only

legally require Ms. Best and Mr. Hudson to be tested if JUH had "specific, articulable facts which, together with objective and reasonable inferences, form[ed] a basis for suspecting" that Ms. Best and Mr. Hudson had drugs in their systems. Id., at 1189. At best, JUH was operating on a hunch.

II. THE COURT OF APPEALS CORRECTLY HELD THAT JUH DID NOT HAVE REASONABLE SUSPICION TO REQUIRE MS. BEST AND MR. HUDSON TO BE DRUG TESTED.

A government employer cannot establish reasonable suspicion to drug test an employee unless it can show a particular and objective basis for believing that the employee is involved with drugs. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (requiring particularized and objective basis for suspecting criminal activity in order to conduct stop); United States v. Thomas, 211 F.3d 1186, 1189 (9th Cir. 2000) (reasonable suspicion requires "specific articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that a particular person is engaged in criminal activity"); Ford v. Dowd, 931 F.2d 1286, 1289-90 (8th Cir. 1991) (Fourth Amendment "requires individualized suspicion, specifically directed to the person who is targeted for the urinalysis test").

Mere presence of an employee in an area where drugs are located does not create a reasonable suspicion. Fiorenza v. Gunn, 140 A.D.2d 295, 527 N.Y.S.2d 806 (1988). Nor does an

anonymous tip, without corroboration, Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 264 (2000); State v. Hughes, 353 N.C. 200, 539 S.E.2d 625 (2000); Roberts v. City of Newport News, 36 F.3d 1093, 1994 WL 520948 (4th Cir. 1994); Reeves v. Singleton, 994 S.W.2d 586 (Mo. 1999), or presence in a drug area with a person who has been tied to drugs. Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992). To establish reasonable suspicion for drug testing, officials must be able to demonstrate "specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience that the [employees] are inhibited from fully performing their duties because of drug or alcohol use." Dowd, 931 F.2d at 1292.

The requirement of individual, particularized suspicion means that even finding drugs in the vicinity of an employee, without an individual, particularized connection to the employee, does not give an employer reasonable suspicion to require a drug test. In Fiorenza, for example, petitioner's supervisor at the New York City Transit Authority watched petitioner sitting around for thirty minutes in the "grid area" even though petitioner had no duties in the grid area that day. 140 A.D.2d at 297, 527 N.Y.S.2d at 808. The supervisor was watching the grid area through a skylight because there had been reports of drug and alcohol activity there. Id. When the

supervisor entered the area, he heard a loud noise and the men in the area scattered in different directions. Id.

Upon searching the area, the supervisor found an almost empty bottle of vodka and a box containing a white powdery substance, razor blade and plastic tube. Id. Petitioner told his supervisor he had been in the grid area for five minutes. Id. Upon refusing his employer's demand for a drug test, petitioner was terminated. Id, at 295-96, 527 N.Y.S.2d at 807.

In holding that the employer did not have reasonable suspicion to require a drug test, the court relied heavily on the fact that no one had seen the petitioner drinking or doing drugs nor did he show any signs of intoxication. Id, at 299, 527 N.Y.S.2d at 809. Accepting that petitioner was not performing his job duties, that he was dishonest about the length of time he was in the grid area, that the grid area was known for drug and alcohol use and that drugs and alcohol were found in the area, the court nonetheless found there was insufficient evidence to connect petitioner to the drugs. Id, 299-300, 527 N.Y.S.2d at 809-810. See also, Exxon Shipping Company v. Exxon Seamen's Union, 73 F.3d 1287 (3rd Cir. 1996) (marijuana found in pumpman's room was insufficient cause to require drug testing, since pumpman was not on ship at the time and the room had been previously occupied by another person.)

JUH had even less evidence of reasonable suspicion than the government in Fiorenza when it required Ms. Best and Mr. Hudson to take drug tests. First of all, the government has never established the presence of any drugs in this case. Ms. Blanks saw a straw with a white powdery substance that could have been any white powdery substance, such as coffee creamer, body powder or medication. Common sense would have caused a reasonable person to doubt that an employee would bring a straw containing an illegal drug into a room where people were coming in and out to get patient charts, medications, and personal belongings or prepare food, then take the straw out of his pocket and set it casually on the counter with his keys and cigarettes.

The Fourth Amendment's common sense approach to determining reasonable suspicion also eliminates the need to resolve the extensive disputes over Ms. Blank's honesty and Dr. Christian's familiarity with Ms. Blank's honesty. The SPC and the dissent at the Court of Appeals relied heavily on Ms. Blank's reputation for honesty, despite the fact that she gave inconsistent statements about several material facts. The dissent also relied on Dr. Christian's knowledge of Ms. Blanks, even though Dr. Christian admitted she only knew Ms. Banks in a limited manner. The Fourth Amendment's common sense approach, however, dictates that without anything more than raw speculation that the white substance was an illegal drug, the government could

not require Mr. Hudson to be tested, even if Ms. Blanks had seen the straw in his hand as he walked out of the room, therefore making Ms. Blanks' honesty irrelevant. See, Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S.Ct. 2091, 2099, 80 L.Ed.2d 732 (1984) (Fourth Amendment prohibition against unreasonable searches and seizures requires common sense approach; therefore important factor to consider is gravity of offense.)

The doubt that there was anything illegal on the straw is magnified by the fact that all parties agree that neither Ms. Best nor Mr. Hudson appeared to be under the influence of a controlled substance. In fact, Ms. Schuchart told Mr. Brock that Ms. Best and Mr. Hudson were not impaired but Mr. Brock said Dr. Christian had already told him to demand the drug tests. (T Vol. IIB pp. 179-80) Without some corroborating evidence that each of them had some signs of drug use or impairment, JUH's claims to having reasonable suspicion should be automatically suspect. See, Stockett v. Muncie Ind. Transit Sys., 221 F.3d 997 (7th Cir. 2000) (anonymous tip sufficient only because it was corroborated by trained observer who noticed signs of impairment in plaintiff); Ford v. Dowd, (8th Cir. 1991) (no reasonable suspicion where no evidence supporting any reasonable inference that police officer was using drugs).

The "suspicious phone call," on which the dissent also relied heavily, adds nothing to the government's claim that

reasonable suspicion existed. At the time the decision to require drug tests was made, there were a number of possible innocent explanations for the phone call. For example, one of the people who had seen Ms. Blanks enter the chart room could have talked with someone who needed to speak with Ms. Blanks for some reason, at which point one of the people who had seen her could have said, "Oh, I just saw Ms. Blanks. She is at work today." Or, someone could have observed Ms. Blanks, unbeknownst to her, enter the building or walk through the building that day and known she was there. At the time they demanded the drug tests, the government had no additional information about the telephone call.

As in this case, the government in United States v. Thomas, 211 F.3d 1186 (9th Cir. 2000), attempted unsuccessfully to string together a series of hunches to support reasonable suspicion for a car search. An FBI tip to local law enforcement authorities to pay attention to a particular house "because there might be some narcotics there" was "devoid of specifics." The "equivocal and attenuated manner" of the information made it "entirely conjectural and conclusory." Thomas, at 1189-90. The fact that the officers then observed people coming and going from the residence added nothing to the calculation, since officers had no idea whether the individuals who came and went were residents, family members, frequent visitors or strangers.

Id., at 1190. All of these factors, along with the government's final argument, that the officer, who was experienced in "stash house" surveillance believed he heard people loading marijuana into the car that was eventually stopped, were insufficient to establish reasonable suspicion. Id., at 1192. "Viewing them in their totality, they still add up to zero" the court said. Id. The series of hunches and suppositions relied on by Mr. Brock or Dr. Christian – whoever ordered the testing – also add up to zero.

The state's reliance on what it claims was Ms. Best's and Mr. Hudson's behavior after being told they would be drug tested is similarly misplaced. It is well settled that "refusal to permit a search cannot be bootstrapped into providing reasonable suspicion needed to ask the person to undergo the search in the first instance." Reeves, 994 S.W.2d at 593 (employer argued petitioner was not terminated for his refusal but for his suspicious behavior after the request was made). See also, Roberts v. City of Newport News, 36 F.3d 1093, 1994 WL 520948 (4th Cir. 1994) (no reasonable suspicion based on anonymous tips about cocaine use, even when petitioner agreed to submit to breathalyzer test, but objected to blood test and stated that he would submit a urine sample only if it was tested for alcohol alone.)

Simple logic also excludes from consideration any statements made after the decision to drug test was made, since the determination is based upon what the decision maker knew at the time she made the decision. Therefore, the factual dispute concerning whether Mr. Hudson claimed he was afraid of drug testing because of his association with drug users (Hudson denied this comment and the government did not raise it until later in the proceedings) is not relevant to the determination of whether reasonable suspicion existed.

The most concrete evidence available to the hospital in making its decision about testing was the lack of any drugs found during the strip search of Ms. Best, the search of Mr. Hudson's clothing, and the search of Mr. Hudson's car, which contradicted the theory that either of them were involved with drugs. Thomas, at 1190. As to the straw portion in Mr. Hudson's pocket: first, it had nothing to do with Ms. Best, second, the testimony is inconsistent as to whether Ms. Blanks told the hospital it was the same or similar straw or not, and third, it was still just a straw. Tying the straw in Mr. Hudson's pocket to some inference of drug use requires the same leap in logic as the one done by Ms. Blanks in the chart room.

III. THE GOVERNMENT HAS THE BURDEN OF PROOF TO SHOW THAT REASONABLE SUSPICION EXISTED.

Although this Court has accepted that the employee has the burden of proving lack of "just cause" for his dismissal,[3] the Court should clarify that the government has the burden of proving that a search, such as a demand for drug testing, is reasonable. U.S. v. Sharpe, 470 U.S. 675, 709, 105 S.Ct. 1568,

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[3] In Peace v. Employment Security Commission, 349 N.C. 315, 507 S.E.2d 272 (1998), this Court looked to 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence, § 37 (4th ed. 1993) for guidance in allocating the burden of proof in "just cause" hearings. Referring to Broun's rationale that the burden of proof should "rest on the party who asserts the affirmative, in substance rather than form," this Court held that the employee is the party attempting to alter the status quo and therefore should carry the burden of proof. To the contrary, it is the employer who asserts the affirmative (that it had just cause for dismissal) and who is attempting to alter the status quo (the employee's employment) by instituting dismissal proceedings. The employee's appeal to the OAH is a de novo review of the employer's dismissal proceedings.

Most other states that have addressed this issue under similar circumstances have placed the burden of proof on the employer. See, e.g., Ellerbee-Pryer v. State Civil Service Commission, __ A.2d __, 2002 WL 1466506 (Pa.Cmwlth 2002) (when public employee claims lack of just cause for dismissal, employer has burden of proving prima facie case); Department of Institutions, et al. v. Kinchen, 886 P.2d 700 (Colo. 1994) (state agency has burden of proof in disciplinary hearings); Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990) (sheriff required to show just cause for dismissing deputy); Commonwealth, et al. v. Woodall, 735 S.W.2d 335 (Ky. 1987) (agency must prove just cause); In the matter of the grievance of O'Neill, 347 N.W.2d 887 (S.D. 1984) (In hearing employee's grievance over dismissal, department had burden of proof to show just cause.) The following states (23 of 26 that have addressed the issue) also place the burden on the employer in similar circumstances: California, Florida, Idaho, Missouri, Louisiana, New Jersey, District of Columbia, Nebraska, Iowa, Kansas, Utah, Washington, Georgia, Michigan, Oregon, Rhode Island, Wisconsin and New Hampshire.

1587, 84 L.Ed.2d 605 (1985) ("It is the Government's burden to prove facts justifying the duration of the investigative detention."); Florida v. Royer , 460 U.S. 491, 500, 103 S.Ct., 1319, 1325, 75 L.Ed.2d.229 (1983) (State's burden to prove seizure based on reasonable suspicion complied with requirements of limited scope and duration); Wu v. City of New York, 934 F.Supp. 581, 586 (S.D.N.Y. 1996) (warrantless search is presumptively invalid and government bears burden of proving probable cause).

Such a ruling would be consistent with the Court's holding in Peace v. Employment Security Commission, 349 N.C. 315, 507 S.E.2d 272 (1998), that "only in cases involving the deprivation of a fundamental right has the United States Supreme Court found a constitutionally protected right to a particular allocation of the burden of proof." Id., at 322, 507 S.E.2d at 279. The Fourth Amendment protection from unreasonable searches and seizures is a fundamental right of similar importance to those mentioned by the Court in Peace – parental rights, physical liberty from involuntary commitment and freedom of speech. Id. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and

unquestionable authority of law." Terry, 392 U.S. at 9, 88 S.Ct. at 1873.

Ms. Best's situation provides a particularly forceful demonstration of the need for placing this burden on the government. Had the State Personnel Commission properly allocated this burden, it is inconceivable that it could have found that JUH had reasonable suspicion to test a woman for associating with a man with a tenuous connection to a straw that may have touched drugs, or a number of other things, especially after her strip search confirmed the absence of anything other than her bra and underwear.

As the Supreme Court reasoned in Von Raab, Skinner, and their progeny, there are certain instances where it is necessary for employers to drug test employees – for the safety of the public or other employees or for the integrity of the office. Even in these cases, the Supreme Court has emphasized the importance of the Fourth Amendment and, recognizing that any type of mandatory drug test is an incursion on these fundamental principles, the Court has imposed strict limitations on government employers who drug test their employees. The Supreme Court cases allowing government employee drug testing do not give free reign to employers to test employees based on hunches or conjectures. If the employer seeks to require a drug test,

it has the burden of establishing the constitutionally-permissible justification.

CONCLUSION

For the reasons stated above, the Court should uphold the decision of the Court of Appeals.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document on counsel by mailing two copies of the same, by first-class mail, postage prepaid, addressed as follows:

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