

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. _____—Civ—(_____ / _____)

AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL
EMPLOYEES (AFSCME) COUNCIL 79,
and RICHARD FLAMM,

Plaintiffs,

vs.

RICK SCOTT, in his official capacity as
Governor of the State of Florida,

Defendant.

_____ /

COMPLAINT

Plaintiffs AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 79 and RICHARD FLAMM sue
Defendant RICK SCOTT and allege:

A. Nature of this Action

1. This is an action:
 - for a preliminary injunction and a permanent injunction against the Governor of the State of Florida, ordering him to cease, or not implement, all employee drug-testing mandated by his Executive Order Number 11-58;
 - for declaratory judgment declaring that the drug-testing regime mandated by Executive Order 11-58 violates the Fourth Amendment of the Constitution of the United States of America; and
 - for supplemental relief.

COMPLAINT

Page 2 of 7

B. Jurisdiction

2. Plaintiffs' claims arise under the Constitution and laws of the United States. This Court has jurisdiction over these claims under 28 U.S.C. §§ 1331, 1343(a)(3) (2006), and has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202 (2006) and Rules 57 and 65 of the Federal Rules of Civil Procedure. The federal rights asserted by Plaintiffs are enforceable under 42 U.S.C. § 1983 (2006).

C. Executive Order 11-58

3. Defendant Rick Scott is the Governor of the State of Florida; the Plaintiffs sue him in his official capacity.

4. On March 22, 2011, the Defendant issued Executive Order Number 11-58, a copy of the order being attached.

5. The order subjects all employees of all agencies within the purview of the Governor to random drug-testing, regardless of the employee's position, and the order subjects all applicants for employment at those agencies to pre-employment drug-testing, regardless of the position sought.

6. The order commands those state agencies to devise drug-testing regimes complying with the terms of the order by May 21, 2011.

7. The order does not limit how frequently an employee may be drug-tested, but it does set a baseline—it commands that each agency's drug-testing regime be rigorous enough to provide for the potential of testing an employee *at least* quarterly.

8. The order leaves it up to the various agencies to determine the manner and

COMPLAINT

Page 3 of 7

the level of intrusiveness of the evidence-collection process.

D. The Fourth Amendment's Prohibition of Unreasonable Governmental Searches

9. The Fourth Amendment of the Constitution of the United States of America commands that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated[.]”

10. Under well settled law, the drug-testing regime mandated by the Defendant's executive order is a governmental search implicating the Fourth Amendment. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989) (The personal intrusions involved in urinalysis “must be deemed searches under the Fourth Amendment.”).

11. The Supreme Court of the United States has held that suspicionless drug-testing by the government is an unreasonable search violative of the Fourth Amendment, except under certain special circumstances, such as those involving employees in safety-sensitive positions where there is a concrete danger of real harm. *See Chandler v. Miller*, 520 U.S. 305, 318-20 (1997) (holding that “hypothetical hazards” were not enough to justify the mandatory drug-testing of candidates for public office—the danger must be “concrete”); *Skinner*, 489 U.S. at 628 (holding that the extreme hazards involved in railroad operations justified the drug-testing of railroad employees involved in train accidents or found to have violated certain safety rules); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668-69 (1989) (companion case to *Skinner*, holding that the serious, concrete dangers faced by U.S. Customs employees who have direct involvement with drug interdiction or who carry firearms justified drug-testing);

COMPLAINT

Page 4 of 7

Wenzel v. Bankhead, 351 F. Supp. 2d 1316, 1325 (N.D. Fla. 2004) (ruling that the mere possibility of harm was not enough to justify the drug-testing of a planner in Florida's Department of Juvenile Justice: "There must be, instead, a concrete risk of real harm."). The Department of Juvenile Justice is a state agency covered by Defendant's Executive Order 11-58.

12. The constitutional prohibition of across-the-board, suspicionless testing applies to new applicants, as well as current employees. *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337 (S.D. Fla. 2000) (ruling that City's desire to foster public integrity was an insufficient rationale for drug-testing of all job applicants).

E. Executive Order 11-58 violates the U.S. Constitution.

13. Defendant's Executive Order 11-58 violates the Fourth Amendment of the U.S. Constitution because it commands state agencies to conduct random, suspicionless searches of all employees, without limiting the searches in any way to employees in safety-sensitive positions where there is a concrete danger of real harm.

14. In fact, in the executive order's recital clauses, the Defendant reveals that the overriding rationale for his new drug-testing regime isn't safety, but control—among the most prominent reasons given for the new regime are: to maintain discipline, to lessen absenteeism, to thwart workplace theft, and to improve employee morale. (To be sure, the order also makes passing reference to an unspecified "risk to public safety," but such concern is not paramount.)

COMPLAINT

Page 5 of 7

F. Executive Order 11-58 violates the Plaintiffs' constitutional rights.

15. Plaintiff American Federation of State, County and Municipal Employees (AFSCME), Council 79, is a labor union that represents more than 50,000 employees of the State of Florida who are now subject to the drug-testing regime mandated by Executive Order 11-58. In addition, employees represented by AFSCME who seek a promotion to another job are considered new employees, and are therefore subject to the mandatory drug-testing required for all prospective new hires under Executive Order 11-58. Thus, AFSCME represents both current state employees and prospective state employees who are subject to the drug-testing regime mandated by the Defendant's order.

16. Plaintiff AFSCME sues on its own behalf, and in its organizational capacity on behalf of those state employees it represents who are affected by Executive Order 11-58.

17. Plaintiff AFSCME does business and maintains a regional office in Miami Gardens, Florida, which is within the Southern District of Florida.

18. A large number of the more than 50,000 state employees represented by AFSCME who are subject to the new drug-testing regime live and work within the Southern District of Florida.

19. The drug-testing regime mandated by the order inflicts real harm upon state employees represented by AFSCME because it violates their constitutional right to be free from unreasonable governmental searches.

20. The drug-testing regime mandated by Executive Order 11-58 will cause AFSCME to waste scarce monetary and personnel resources. For example, because

COMPLAINT

Page 6 of 7

drug-testing is a matter subject to collective bargaining, AFSCME will have to spend considerable time in bargaining over the testing, and will have to expend considerable resources in representing state employees who are selected for testing.

21. Plaintiff Richard Flamm, PhD, works in Saint Petersburg, Florida, as a research scientist for the Florida Fish and Wildlife Conservation Commission, an agency subject to the Defendant's executive order.

22. Dr. Flamm has worked for the State of Florida for more than 17 years.

23. Dr. Flamm's job duties do not include anything that would permit the State of Florida, under established law, to subject him to suspicionless drug-testing.

24. The Defendant's order harms Dr. Flamm because it violates his constitutional right to be free from unreasonable governmental searches.

G. Request for Speedy Hearing

The Plaintiffs respectfully ask the Court to order a speedy hearing of this action under Rule 57 of the Federal Rules of Civil Procedure.

H. Relief Requested

The Plaintiffs demand judgment declaring:

- that the Defendant and all agencies and persons affected by Defendant's Executive Order 11-58 are enjoined from implementing the drug-testing regime mandated by the order until final judgment is entered in this action;
- that Defendant's Executive Order 11-58 is quashed because it violates the right of the people to be free from unreasonable searches, under the Fourth Amendment of the Constitution of the United States of America;

COMPLAINT

Page 7 of 7

- that the Defendant shall immediately direct all agencies and persons affected by Defendant's Executive Order 11-58 to cease all drug-testing implemented in compliance with the order; and
- that the Defendant shall pay the Plaintiffs' attorneys' fees and costs, as provided in 42 U.S.C. § 1988 (2006).

Dated: May 31, 2011

Respectfully submitted,

s/Peter G. Walsh

Peter G. Walsh (Fla. Bar No. 970417)
Attorney E-mail: pwalsh@stabinski-funt.com
Stabinski & Funt, PA
757 NW 27 Ave.
Miami, FL 33125
Tel: 305-643-3100
Fax: 305-643-1382
Attorney for Plaintiffs AFSCME and Richard Flamm
(Cooperating Attorney for the American Civil Liberties Union Foundation of Florida, Inc.)

s/Randall C. Marshall

Randall C. Marshall (Fla. Bar No. 181765)
Attorney E-mail: RMarshall@aclufl.org
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
Tel: 786-363-2700
Fax: 786-363-1108
Attorney for Plaintiffs AFSCME and Richard Flamm