UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

KAREN CABANAS VOSS

Plaintiff,

vs. No. 4:13-cv-10106

CITY OF KEY WEST, FLORIDA

Defendant.
_____/

PLAINTIFF VOSS'S MOTION FOR
PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

I. INTRODUCTION

Defendant City of Key West offered a job to Plaintiff Karen Voss as its Solid Waste Coordinator (hereinafter "Recycling Coordinator"). The Recycling Coordinator encourages those in the City to increase their participation in recycling programs through educational programming, community events, and the development of environmental action plans. In addition, the Recycling Coordinator occasionally relieves the Transfer Station manager when the manager is on leave. Although the Recycling Coordinator job is a marketing and planning position, the City subjected Voss—and applicants uniformly for all City jobs without regard to the nature of the position—to a suspicionless mandatory drug test ("Mandatory Drug Testing Policy"). When Voss was instructed to submit to the Mandatory Drug Testing Policy and provide a urine sample, she refused, citing her right to be free from unreasonable governmental searches. As a result, the City revoked her job offer. The blanket drug testing mandated by the City's Policy, and the City's consequent revocation of Voss's job offer, violate the Fourth Amendment to the U.S. Constitution.

Under Fourth Amendment case law, the government may not subject employees to drug testing without reasonable suspicion of drug use except in a narrow set of circumstances involving employees in or applicants to high-risk, safety sensitive jobs. *See Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search"); *Am. Fed'n of State, Cnty., & Mun. Emps. Council 79 v. Scott* ("*AFSCME*"), --- F.3d ----, 2013 WL 2321383, at *20 (11th Cir. May 29, 2013) ("The only employment-related rationales that the Supreme Court has endorsed as being sufficient to justify suspicionless drug testing are a 'substantial and real' risk to public safety or direct involvement in drug interdiction functions."). The City fails to properly limit its Mandatory Drug Testing Policy to applicants for safety sensitive positions who operate heavy machinery that poses grave risks to public safety. Instead, it subjects applicants for its entire workforce to suspicionless urinalysis. Because Plaintiff Voss would have performed no safety sensitive functions as Recycling Coordinator, the City's Mandatory Drug Testing Policy is unconstitutional as applied to her.

Plaintiff therefore moves the Court to enter partial summary judgment against the City declaring that the City's Mandatory Drug Testing Policy, which applies to applicants for all City jobs without regard to their position or tasks, violates the Fourth and Fourteenth Amendments as applied to her, and consequently the City's revocation of Voss's job offer was unconstitutional.

II. STATEMENT OF MATERIAL FACTS

Pursuant to S.D. Fla. Loc. R. 56.1(a), Voss submits the following statement of material facts—both as a separate document and reproduced here for the Court's convenience:

1. The City's Drug-Free Workplace Policy (hereinafter "Mandatory Drug Testing Policy"), adopted in June 1999, mandates various types of employee and applicant testing.

Compl., DE 1 ¶ 8; Policy, DE 1-3, at 1-5. Under the terms of the Mandatory Drug Testing Policy, the City requires drug testing of all applicants it hires. Compl., DE 1 ¶ 8; Policy, DE 1-3, at 2. All hired applicants, from those seeking desk jobs and communications positions to those who carry firearms, must submit to urinalysis without individualized suspicion of drug use. Refusal to submit to drug testing will result in the City revoking its job offer to the applicant. *Id.*

2. In addition to the testing of applicants, through its Mandatory Drug Testing Policy the City also requires ongoing mandatory random testing of three groups of employees: certified firefighters, sworn police officers, and commercial drivers. Compl., DE 1 ¶ 9; Policy, DE 1-3, at 4-5. The City tests these positions because it considers them safety sensitive. *Id.*; *see also* § 440.102(1)(p), Fla. Stat. The Recycling Coordinator position offered to Voss is not safety sensitive and does not fall within these categories providing for mandatory drug testing of employees. *Id.*

3. The purposes of the Mandatory Drug Testing Policy are to ensure "the safe, effective, and efficient delivery of public services." Policy, DE 1-3, at 2. More specifically, the City seeks: (1) to protect against "on-the-job accidents, motor vehicle accidents and personal injury to City employees and the public"; (2) to ensure that City employees do not engage in behavior "on or off-duty" that is "inconsistent with both the law-abiding behavior expected of all citizens and the special trust placed in City employees as public servants"; and (3) to improve efficiency by guarding against drug-using employees who are "less productive, less reliable, and prone to greater absenteeism." *Id.*

4. In December 2012, Voss applied for the position of Solid Waste Coordinator for the City. Compl., DE 1 ¶ 10; Voss Decl., Ex. 1 ¶ 5; 12/17/12 Voss Job Application, Ex. 3. The Solid Waste Coordinator (hereinafter "Recycling Coordinator") is a marketing and planning

position whose primary function is to encourage those in the City to increase their participation in recycling programs. Compl., DE 1 ¶ 10; Job Description, DE 1-4, at 2. According to the job description, "[e]xcellent communications skills are essential." Job Description, DE 1-4, at 2. The Recycling Coordinator creates and disseminates educational materials to the public, works with special events organizers to facilitate recycling participation, does presentations about recycling to civic groups, public organizations, individual businesses, and the community, participates in environmental education events, and maintains updated public information about recycling. *Id.* at 3. In addition, the Recycling Coordinator develops environmental action plans, collects and analyzes data about local recycling rates, and performs other planning and research tasks for the City's solid waste facility. *Id.* Apart from these responsibilities, the Recycling Coordinator occasionally relieves the Transfer Station Manager when the manager is on leave. *Id.* The City does not expect the Recycling Coordinator to operate a commercial motor vehicle pursuant to a commercial driver's license. *Id.* The City does not expect the Recycling Coordinator to engage in drug interdiction or carry a firearm. *Id.* The Recycling Coordinator position does not involve job duties presenting an extraordinary risk of immediate and direct threat to physical safety unrelated to the drug use itself. *Id.*

5. According to the job description, the equipment used by the Recycling Coordinator consists of general office equipment, including a personal computer and software, calculator, fax machine, copy machine, and other general office equipment. *Id.* at 2. The required skills for applicants to the position include knowledge of recycling and waste practices, public relations and marketing strategies, and data processing and computer software, as well as the ability to develop comprehensive program plans, experience in customer service, and the ability to operate an ordinary motor vehicle. *Id.* The City does not expect the Recycling

Coordinator to operate heavy machinery or possess the skills to do so and accordingly did not include any mention of this in its job description. *Id.*

6. Being a Recycling Coordinator is not highly regulated for safety, as the City does not license or regulate her/him. Regardless, any safety concerns relating to the position do not depend on the individual's physical fitness. Voss Decl., Ex. 1 ¶ 26.

7. The job posting contains no notice that drug testing is required for applicants. Job Description, DE 1-4. It is customary for employers to include this notice in job postings for safety sensitive positions. *See* § 440.102(3), Fla. Stat. (requiring notice before testing for employers seeking a discount on workers' compensation insurance pursuant to § 627.0915, Fla. Stat.).

8. On January 14, 2013, Voss interviewed for the Recycling Coordinator position with Utilities Director Jay Gewin and Assistant City Manager David Fernandez. Compl., DE 1 ¶ 13; Voss Decl., Ex. 1 ¶ 7; 1/10/13 email from D. Fernandez to J. Gewin, Ex. 4 (setting interview appointment). The interview focused almost entirely on Voss's communication skills, management experience, and general knowledge of trash and recycling collection and disposal. Compl., DE 1 ¶ 13; Voss Decl., Ex. 1 ¶ 7. As to filling in for the Transfer Station Manager, the interviewers mentioned no heavy equipment that the City would expect Recycling Coordinator would use. *Id.* Their only inquiry as to Voss's ability to manage the Transfer Station was to ask Voss if she was okay being around smelly garbage. Voss Decl., Ex. 1 ¶ 7. Voss indicated that, as the mother of small children, foul smells didn't bother her. *Id.*

9. On January 28, Utilities Director Gewin called Voss and offered her the job. Compl., DE 1 ¶ 14; Voss Decl., Ex. 1 ¶ 8. Voss accepted the position. Voss. Decl., Ex. 1 ¶ 8. He told her that Human Resources would contact her after completing her paperwork. Answer,

DE 4 ¶ 14. The same day, Gewin approved hiring Voss in a Recommendation for Personnel Action form. Ex. 5.

10. On January 29, 2013, Alice Parker from the Human Resources Department checked Voss's three references. Voss Reference Checks, Ex. 6; Agarwal Decl., Ex. 2 ¶ 7. The references provided positive recommendations that supported hiring Voss. *Id*.

11. Between January 30 and January 31, 2013, five other City officials approved hiring Voss as the Recycling Coordinator, including the Human Resources Director Sandy Gilbert, Budget Analyst Schavawn Yarber, Assistant City Manager Mark Finigan, Assistant City Manager David Fernandez, and City Manager Bogdan Vitas, Jr. Recommendation for Personnel Action, Ex. 5; Agarwal Decl. Ex. 2 ¶ 6. No further person's approval is required. Recommendation for Personnel Action, Ex. 5 (no spaces for approval signatures or initials left blank); 2/5/13 email from S. Johnson to J. Gewin, Ex. 7 (transmitting employee ID number for Voss and estimating start date the following Monday).

12. Human Resources called Voss to the City's office on or about February 5. Compl., DE 1 ¶ 15; Voss Decl., Ex. 1 ¶ 9. There, Human Resources Administrator Stephanie Johnson gave her a copy of the City's Mandatory Drug Testing Policy and asked her to sign a drug-testing ID form and an Employee Acknowledgement Agreement acknowledging receipt of the Mandatory Drug Testing Policy. Compl., DE 1 ¶ 15; Voss Decl., Ex. 1 ¶ 9; Employee Acknowledgement Agreement, Ex. 8; Drug-Testing ID Form, Ex. 9. Johnson then instructed Voss to take the drug test. Compl., DE 1 ¶ 15; Voss Decl., Ex. 1 ¶ 9; Drug-Testing ID Form, Ex. 9. Although Voss signed the Employee Acknowledgement Agreement, Ex. 8 at Voss 00071, she did so only because it was a condition of applying for employment with the City and her job

offer would otherwise be revoked pursuant to City Policy. Voss Decl., Ex. 1 ¶ 10; Policy, DE 1-3, at 2. She did not freely and voluntarily consent to the testing. Voss Decl., Ex. 1 ¶ 10.

13. The only reason the City requested Voss's urine sample was because of its Policy requiring all job applicants to submit to a drug test. Compl., DE 1 ¶ 16; Voss Decl., Ex. 1 ¶ 11; Employee Acknowledgement Agreement, Ex. 8 at Voss 00071. The City had no individualized suspicion that Voss was using drugs. *Id.*

14. Instead of taking the drug test, Voss immediately went to the City Attorney's Office to object that the City's Policy requiring testing of applicants for all positions is unconstitutional. Compl., DE 1 ¶ 17; Voss Decl., Ex. 1 ¶ 12. Chief Assistant City Attorney Larry Erskine asked Voss to send him any materials supporting her argument that the City's Policy was unconstitutional. *Id.* The next day, Voss emailed him a copy of the 2012 Drug Free Workplace Act, codified at § 440.102, Fla. Stat., which sets out standards that employers must adopt in order to receive a discount on their workers' compensation programs. Compl., DE 1 ¶ 18; Voss Decl., Ex. 1 ¶ 14; 2/6/13 email from K Voss to L. Erskine, Ex. 10. A couple of days later, Voss also emailed the City Attorney's office a citation to *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337 (S.D. Fla. 2000). Compl., DE 1 ¶ 19; Voss Decl., Ex. 1 ¶ 14; 2/8/13 email from K. Voss to L. Erskine, Ex. 11. The case holds that a city's across-the-board policy of drug testing all of its job applicants violates the Fourth Amendment. 93 F. Supp. 2d at 1342. After citing *Baron*, Voss expressed in her email, "I hope this helps resolve this issue, as I am very much looking forward to working for the City in this new position." 2/8/13 email from K. Voss to L. Erskine, Ex. 11. This did not resolve the issue, as the City did not change its Policy. Compl., DE 1 ¶ 19.

15. Notwithstanding Voss's objection and the supporting materials she supplied to the City, the City determined that the Recycling Coordinator position was a mandatory pre-employment testing position for varying reasons. Assistant City Manager David Fernandez justified the testing because the Recycling Coordinator advocates for recycling to various groups, including students at school, and at times interacts with other employees who operate heavy machinery. 2/12/13 email chain from S. Smith to D. Fernandez, Ex. 12 (containing 2/11/13 email from D. Fernandez stating that these "aspects of the job description . . . should require drug testing of a prospective hire"). On February 12, 2013, City Attorney Shawn Smith determined the City must drug test Voss because of the "required work with children as well as the occasional oversight of heavy or dangerous machinery as a fill in for the transfer station manager." *Id.*

16. After receiving no response from the City to her objections to the suspicionless drug testing, on or about February 13, Voss telephoned the City. Compl., DE 1 ¶ 20; Voss Decl., Ex. 1 ¶ 15. Human Resources Director Sandy Gilbert informed her that the City required she submit to the drug test. *Id.* Voss again objected, clarified that she still wanted the job, and stated she would contact the City Attorney to more specifically explain her objections. *Id.*

17. On February 15, 2013, Voss sent a legal memo to the City explaining why the Recycling Coordinator is not a mandatory testing position. Compl., DE 1 ¶ 21; Voss Decl., Ex. 1 ¶ 16. Voss Legal Memo, DE 1-5; 2/15/13 Email and attachments from K. Voss to T. Yaniz, Ex. 13. The City did not respond to her memo. Voss Decl., Ex. 1 ¶ 17.

18. Sometime between February 21 and February 26, the City offered the position to someone else it had already interviewed. 2/28/13 email from S. Gilbert to S. Smith, Ex. 14 (noting that Gilbert waited to hear back from Voss until February 21, when Gilbert then

contacted Jay Gewin, who offered the Recycling Coordinator position to another candidate); Thompson Recommendation for Personnel Action, Ex. 15 (approval signature of Jay Gewin on February 26, 2013); 1/10/13 email from D. Fernandez to J. Gewin, Ex. 16 (setting interview appointment). William C. Thompson accepted the Recycling Coordinator position on February 26, 2013. Recommendation for Personnel Action, Ex. 15.

19. Because she had heard nothing from the City, on February 22, Ms. Voss had attorney Ginny Stones contact the City Attorney's office on her behalf to find out whether the City would discontinue its Mandatory Drug Testing Policy. Voss Decl., Ex. 1 ¶ 18. Mr. Erskine was out of town, and Ms. Stones was unable to speak to anyone about the issue. *Id.*

20. Because Voss desperately wanted the job and while she was still waiting to for a response from the City to her memo, DE 1-5, Voss took a drug test on February 25 at the lab where the City sends job applicants. Voss Decl., Ex. 1 ¶ 20.

21. On February 27, before she received her drug test results, Voss contacted the City Attorney's office. Voss Decl., Ex. 1 ¶ 21; 2/28/13 email chain from L. Erskine to K. Voss, Ex. 17 (containing 2/27/13 email from K. Voss to L. Erskine explaining that she'd have her drug test results back in the next couple of days from the same lab used by the City and asking for a new start date of the following Monday). She was referred to Human Resources. *Id.*

22. The day after, on February 28, when Voss contacted Human Resources about her drug test, City officials informed her that because she earlier refused to take the drug test pursuant to its Mandatory Drug Testing Policy, the City had offered the position to another applicant. Voss Decl., Ex. 1 ¶ 22.

23. Voss was shocked to hear this as she had received no formal communication from the City making clear that it had made a final decision that the Recycling Coordinator is a

mandatory testing position and refusing to respond to her legal memo. *Id.* ¶ 23. Director Gilbert admitted to Voss that she probably should have sent a letter earlier explaining that City's determination was final that the Recycling Coordinator is a mandatory testing position. *Id.* Voss petitioned to City Commissioner Tony Yaniz to reverse the action. *Id.* ¶ 24; 3/1/13 email from K. Voss to T. Yaniz, Ex. 18.

24. No significant drug abuse problems exist among City employees or applicants for employment. Although Voss has heard of one incident involving a city employee using painkillers, she is otherwise unaware of any City employees or applicants who use drugs. Voss Decl., Ex. 1 ¶ 25.

III. MEMORANDUM OF LAW

A. Standard for Application

"Summary judgment is appropriate where the evidence shows 'that there is no genuine issue as to any material fact and that the [movant] is entitled to a judgment as a matter of law.'" *Ellis v. England,* 432 F.3d 1321, 1325 (11th Cir. 2005) (quoting *Comer v. City of Palm Bay, Fla.*, 265 F.3d 1186, 1192 (11th Cir. 2001)). In disputing a material fact, it is insufficient for the nonmoving party "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party must produce enough evidence to enable a jury to reasonably find for the nonmoving party on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

B. The City's Mandatory Drug Testing Policy Violates the Fourth Amendment as Applied to Voss because It Unnecessarily Invades the Privacy Interests of Job Applicants without Any Special Need.

The City's drug testing scheme of its job applicants constitutes a search subject to the Fourth Amendment of the U.S. Constitution. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989) ("There are few activities in our society more personal or private than the

passing of urine. . . . Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment."). For a search to be reasonable and thus constitutional, it generally must be based on individualized suspicion of wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 308 (1997). Yet, in "certain limited circumstances" "special needs" warrant "particularized exceptions" to the individual-suspicion requirement and would justify a suspicionless drug testing scheme of public employees. *Id.* at 308, 313 (quoting *Skinner*, 489 U.S. at 619). This special needs framework applies to the government even when it acts as an employer—there is no employer exception to the Fourth Amendment. *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) ("[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer[.]"). However, no "special need" justifies the City subjecting applicants for all City jobs—including the Recycling Coordinator job—to its Mandatory Drug Testing Policy. It therefore is unconstitutional as applied to Voss.

The "particularized exceptions" to the requirement for individualized suspicion are limited to a "closely guarded category" of cases. *Chandler*, 520 U.S. at 309. Only when three conditions are met will the suspicionless drug testing pass constitutional muster. First, the City must show[1] "an important governmental interest"—a special need "beyond the normal need for law enforcement"—justifying the drug testing scheme. *Id.* at 313-14. Critically, it is the

---

[1] The Eleventh Circuit has made clear that, after a plaintiff demonstrates that she was subjected to a suspicionless urinalysis, this creates "a presumption that the search was unconstitutional and shifts the burden of production" to the government, requiring it to show that it had "special needs sufficiently important to justify a suspicionless search." *AFSCME*, 2013 WL 2321383, at *24. Only if the government satisfies that threshold showing should the court move on to conducting the special needs balancing test.

government's burden to establish a "clear direct nexus" between the employee's job duties and feared danger the state seeks to prevent or to establish how the drug testing advances the asserted government interest. *See Baron v. City of Hollywood*, 93 F. Supp. 2d 1337, 1340 (S.D. Fla. 2000). Second, the City must show that "the privacy interests implicated by the search are minimal." *Chandler*, 520 U.S. at 314. Third, the City must show that a requirement of individualized suspicion would jeopardize its interests. *See Skinner*, 489 U.S. at 624 ("In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."); *Chandler*, 520 U.S. at 318 ("[T]he proffered special need for drug-testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."). Because the City cannot make any of these showings, let alone all of them, its broad Mandatory Drug Testing Policy does not qualify for a "particularized exception[]" and is therefore unconstitutional.[2]

---

[2] Because *Skinner*, *Von Raab*, and *Chandler*, involving suspicionless drug testing in the employment context, are directly on point, this analysis does not discuss the Supreme Court's decisions involving suspicionless drug testing in other contexts less relevant to the question here. These other cases involve suspicionless testing of public school students, where the Court has focused on the government's "custodial and tutelary responsibility" and emphasized students' limited privacy interests in this environment, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-57 (1995) (upholding suspicionless drug testing of public school athletes); *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-31 (2002) (upholding suspicionless drug testing of students in competitive extracurricular activities), and surreptitious testing of obstetrical patients that resulted in criminal prosecution, *see Ferguson v. City of Charleston*, 532 U.S. 67, 85-86 (2001) (holding such testing to be unconstitutional).

1. The City has no special need for a suspicionless across-the-board applicant drug testing scheme.

The U.S. Supreme Court held in two cases that the "special needs" exceptions to the requirement of individualized suspicion justified random drug testing in the employment context. Neither of those cases is comparable to the facts here.

In *Skinner v. Railway Labor Executives Ass'n*, in light of significant evidence of alcohol abuse by railroad employees on the job, the Court held that the government's "surpassing safety interests" in preventing train accidents were a special need justifying suspicionless drug testing of railroad employees involved in a major train accident or who violated certain safety rules. 489 U.S. at 606-08, 634 (1989). The Court explained that because railroad employees, like those with "routine access to dangerous nuclear power facilities," hold safety sensitive jobs, which involve extraordinary instrumentalities (railroads) that are "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences," the government has a compelling interest in testing them without a showing of individualized suspicion. *Id.* at 628. The *Skinner* safety sensitive special need in an endeavor that poses an extraordinary risk to public safety is inapplicable to Voss.

In *National Treasury Employees Union v. Von Raab*, a divided Court[3] held constitutional the drug testing of Customs Service employees who had applied for promotion to a position in which they were required to carry a firearm on the job or were directly involved in drug interdiction. 489 U.S. 656, 668-71 (1989). The Court reasoned that the government had a special need to ensure government agents who carry a firearm and "may use deadly force" were

[3] The four dissenters would have found drug testing of even these safety-sensitive employees unconstitutional, as "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681 (Scalia, J., dissenting).

sober because impaired perception and judgment when using an uncommon workplace instrumentality (a gun) could result in death. *Id*. at 670 (quoting *Skinner*, 489 U.S. at 428). Additionally, the government has a special need to ensure Customs agents who interdict drugs neither are indifferent to their assignment nor actively assist the criminals to import the drugs because the agents are using drugs themselves. *Id*. at 670. The Court focused on the unique mission of the Customs Service and the government's "compelling interests in safeguarding our borders and the public safety." *Id.* at 677. *Von Raab* is distinct from Voss as well.

Extraordinary activities like the operation of a train, being required to carry a firearm, or participating in drug interdictions stand in stark contrast to the marketing and planning functions of the Recycling Coordinator job. *See* Facts ¶ 4. A Recycling Coordinator is simply not what the Court was envisioning in *Skinner* or *Von Raab* when exempting safety sensitive positions involving unusual and significant risks to public safety from the general prohibition on suspicionless drug testing in the employment context.

In *Chandler v. Miller*, the Supreme Court clarified the special needs attendant in *Skinner* and *Von Raab* by rejecting as insufficient generalized interests in public safety and sober decision-making. 520 U.S. 305 (1997). *Chandler*, which considered whether Georgia could drug test candidates for Georgia's highest public offices—including governor, judges, and legislatures—concerns job responsibilities (desk work, policy considerations, speaking at public events, thoughtful professional judgments and calculations) that are more like the Recycling Coordinator's tasks. And in this context, the Court rejected any special need to drug test these policy professionals. The Court insisted upon a "concrete danger," one that is "real and not simply hypothetical," that animates the special need. *Id*. at 319. It rejected a general concern for "official's [sober] judgment and integrity" as insufficient to create a special need. *Id*. at 318;

see also id. at 312 (noting Judge Barkett's dissent that rejects suspicionless testing when "[t]here is nothing so special or immediate about the generalized governmental interests involved"). With no such real danger or extraordinary instrumentality necessitating the policy, it was unconstitutional. If the U.S. Supreme Court rejected suspiciousless drug testing of public officials to ensure their judgment was sound and sober, the Recycling Coordinator's marketing and planning work, along with the City's interest in "safe, effective, and efficient delivery of public services," likewise presents no special need. *See* Facts ¶ 3.

Following *Chandler*, other courts have struck down blanket policies requiring across-the-board testing in the employment context both for new hires and long-time employees. For example, in *Baron*, 93 F. Supp. 2d 1337 (S.D. Fla. 2000), where the City of Hollywood had a policy similar to Key West's, requiring universal pre-employment drug testing for all applicants for City employment in an effort to "provide tangible assurances that public funds are in good hands," this Court found these aims did not amount to a special need as they were essentially the same as the symbolic needs articulated in *Chandler*. *Id.* at 1341-42. Similarly, in *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150-51 (9th Cir. 2008), where a City drug tested all job applicants regardless of position, and sought to test a part-time library page based on its interest in protecting young patrons of the library from the influence of drug-users, the court affirmed a finding that the testing policy was unconstitutional as applied to the page. *See also Nat'l Fed'n of Fed. Emps. v. Vilsack*, 681 F.3d 483, 497-98 (D.C. Cir. 2012) (finding U.S. Forest Service Job Corps policy requiring random drug testing of *all* employees in order to maintain Zero Tolerance Policy among residential students at Job Corps Centers did not constitute special need because some employees subject to testing had limited or no contact with these students); *Wenzel v. Bankhead*, 351 F. Supp. 2d 1316, 1324-25 (N.D. Fla. 2004) (striking down suspicionless drug

testing of employees at Florida's Department of Juvenile Justice as applied to long-term strategic planner, even though DJJ has a law enforcement mission directed toward at-risk children); *Ga. Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990) (holding that generalized governmental interest in maintaining drug-free workplace could not justify state's suspicionless drug testing of all applicants for employment). *Accord AFSCME*, 2013 WL 2321383, at *21 (rejecting governor's interest in safe and efficient workplace as a basis for testing all employees and job applicants because "[s]ince the State's generic justifications could apply to all government employees in any context, there would be nothing left of the individualized suspicion requirement in any type of government employment, and no interests to balance"). As in *Baron*, *Lanier*, and these other cases, the City of Key West has only symbolic needs for its across-the-board testing of job applicants. Consequently, the Mandatory Testing Policy is unconstitutional.

Separate from the City's generic invocation of the "safe, effective, and efficient delivery of public services," as a reason for blanket testing, it has proffered two reasons for classifying the Recycling Coordinator position as a safety sensitive: (1) When the Recycling Coordinator substitutes for the Transfer Station manager, she must oversee others operating heavy equipment. (2) The Recycling Coordinator makes presentations to children at school. *See* Facts ¶¶ 4, 15. However, neither of these activities makes the job safety sensitive.

As to the first, the job description makes clear that substituting for the Transfer Station manager is infrequent and occasional—only when he or she goes on leave. *Id.* ¶ 4. Further, even during the limited periods when the Recycling Coordinator replaces the Transfer Station manager, she is only tasked with *supervising* or "interacting" with others who actually operate the heavy machinery. *Id.* ¶¶ 4, 15. Accordingly, neither the City's job description nor its

interview of Voss gave any indication that the position involved safety sensitive tasks like operating the front end loader that is on-site. *Id.* ¶¶ 4-5, 8. The job description lists only general office equipment to be used by the Recycling Coordinator. *Id.* ¶ 5. And no mention was made at Voss's job interview of her having to operate heavy machinery; instead, the only concern that her interviewers voiced about her role at the Transfer Station was whether she was okay with being surrounded by trash in the facility. *Id.* ¶ 8. While courts have categorized jobs requiring the regular operation of heavy machinery as safety sensitive, *see, e.g.*, *Krieg v. Seybold*, 481 F.3d 512, 518-19 (7th Cir. 2007) (holding that city employee who "regularly operated" heavy machinery was safety sensitive and could be subjected to suspicionless drug-testing), it strains credulity to think that the City expected the Recycling Coordinator who infrequently fills in for the Transfer Station manager to operate the front end loader during these periods. "The proper focus is the constant level of risk which adheres to and permeates the position on an everyday basis," *see Am. Fed'n of Teachers-W. Va., AFL-CIO v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 897 (S.D. W. Va. 2009), rather than speculating that the Recycling Coordinator would on the few days she was filling in for the manager, be required to operate the front loader, even though City officials made no mention of this in the job description or during Voss's job interview. *See id.* (striking down suspicionless testing of teachers because "[a] concrete danger must be an actual, threatened danger and not some perceived potential danger. To justify such a suspicionless search, I must not engage in a speculative exercise to find remote risks of horrible disasters. Rather, I should examine the normal course of a particular employee's duties to determine if there are concrete dangers inherent in those duties that are significant enough to override an individual's privacy interest."); *Wenzel*, 351 F. Supp. 2d at 1324-25 (striking down suspicionless drug testing of long-term planner at Department of Juvenile Justice because "[it is

not] enough that a far-fetched possibility can be conjured under which the employee at issue could, if under the influence of drugs, bring about some harm"); *cf. Am. Fed'n of Gov't Emps., AFL-CIO v. Sullivan*, 744 F. Supp. 294, 301 (D.D.C. 1990) (in challenge to suspicionless testing of motor vehicle operators, recognizing that some employees classified as motor vehicle operators did not, as their primary function, operate a vehicle, and asking parties to remove from random testing those employees whose jobs involve little driving). The attenuated link to occasionally being at a facility where others operate a front loader is nothing like the ever-present safety concerns that were central to the railroad operators' and customs agents' jobs in *Skinner* and *Von Raab*, and thus not enough to constitute a special need.

As to the second job responsibility cited by the City, interacting with children during presentations about recycling, this also is insufficient to create a special need. Although also not specified in the job description, according to the City, the Recycling Coordinator visits school children in order to make presentations about recycling. *See* Facts ¶¶ 4, 15. Unlike teachers, who some courts have found to be safety sensitive, *compare Knox County Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 375, 384 (6th Cir. 1998) (holding that teachers are safety sensitive as they have "unique *in loco parentis* obligations and . . . immense influence over students," and can be drug tested without individualized suspicion), *with Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d at 902 (holding that teachers are not safety sensitive because "it is not enough to show that the employee has *some* interest or role in safety" without also showing that "the ordinary course of [the employee's] job performance carries a concrete risk of massive property damage, personal injury, or death"), the Recycling Coordinator has no *in loco parentis* authority over the children, whose teachers or guardians are presumably present during presentations. Further, unlike teachers who spend long and continuous periods with children, the

Recycling Coordinator spends only the short time of the presentation with kids, and thus is highly unlikely to have much influence upon them. *See*, 518 F.3d at 1151 (rejecting suspicionless drug testing of library page applicant because "[a] page may staff a youth services desk for an hour or so when needed and children may be in the library unattended, but there is no indication . . . that children's safety and security is entrusted to a page, or that a page is in a position to exert influence over children by virtue of continuous interaction or supervision"). Nebulous concerns about limited interactions with children is not enough to make the Recycling Coordinator job safety sensitive and does not amount to a special need. Because the City cannot meet its threshold burden of showing a special need, the Mandatory Testing Policy is unconstitutional, and the Court need not go further in balancing the parties' interests. *See AFSCME*, 2013 WL 2321383, at *24

2. Plaintiff has a robust privacy interest in her bodily fluids.

Voss, like all applicants for City employment, has a significant privacy interest regarding in the collection and analysis of her bodily fluids. *See Skinner*, 489 U.S. at 602, 617 ("It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests."). Although job applicants are different from current employees, courts have used the same special needs test to conclude that job applicants cannot be required to submit to blanket suspicionless drug testing as a condition of employment. *See, e.g.*, *Baron*, 93 F. Supp. 2d at 1341-42; *Lanier*, 518 F.3d at 1150-51; *Harris*, 749 F. Supp. at 1114 (N.D. Ga. 1990). *Accord AFSCME*, 2013 WL 2321383, at *21.

Notably, unlike those applying to other government positions in which the nature of the job reduces the applicants' privacy interests, Voss's "expectations of privacy . . . are [not] diminished by reason of [her] participation" in a highly regulated industry or position. *See Skinner*, 489 U.S. at 627, 627 n. 8 (privacy diminished by the government's pervasive regulation of railroad safety, which depends on the fitness of railroad workers, and its "periodic physical examinations"); *Von Raab*, 489 U.S. at 677, 672 (privacy diminished by requisite background investigations, medical examinations, or other intrusions as well as job's demands for fitness and dexterity). Being a Recycling Coordinator is not highly regulated for safety; any safety concerns do not depend on the physical fitness of the Recycling Coordinator; the Recycling Coordinator is not subjected to medical examinations or other fitness tests. Facts ¶ 6. Voss's industry and job qualifications do not diminish her privacy interests.

3. The City's interests can be furthered notwithstanding a requirement for individualized suspicion before drug testing.

Even if the City's general interests in its employees' safety, effectiveness, and efficiency were sufficient to justify drug testing of some kind, the City would still have to show that these interests "would be placed in jeopardy by a requirement of individualized suspicion," *see Skinner*, 489 U.S. at 624, as to every single job applicant it seeks to test, including Voss. This the City cannot do. Here, the job description demonstrates that the Recycling Coordinator's day-to-day job functions involve either (1) planning, research, and analysis—tasks that take place in an office—or (2) highly visible environmental education events, work with special events organizers, and presentations to civic groups, public organizations, individual businesses, and the community—communications activities take place in the public arena. *See* Facts ¶ 6. Regarding the Recycling Coordinator's tasks performed in an office environment, as the Supreme Court suggests in *Chandler*, it is likely "feasible" in "more traditional office environments [where] day-

to-day scrutiny . . . is the norm" for supervisors to develop reasonable suspicion about an employee before ordering a drug test. 520 U.S. at 321 (citing *Von Raab*, 489 U.S. at 674 (upholding suspicionless testing of customs officers in part because it was not feasible to monitor them in the field)). For her planning, research, and analysis tasks performed in an office environment, the Recycling Coordinator would routinely interact with and be observed by co-workers and supervisors. And as to the Recycling Coordinator's communications activities, *Chandler* also suggests that drug use by individuals whose roles subject them to scrutiny from the public should also be detectable using ordinary individualized suspicion. *See* 520 U.S. at 321 (invalidating suspicionless drug testing of candidates for public office because, in part, they are "subject to relentless scrutiny—by their peers, the public, and the press"). In her public communications capacity, the Recycling Coordinator would routinely interact with and be observed by civic groups, public organizations, special events planners, businesses, and other community members. Because the City cannot show that drug testing based on individualized suspicion would be ineffective as applied to Voss, it has failed to establish a special need for suspicionless urinalysis.

C. Voss's Involuntary "Consent" Does Not Waive Her Privacy Rights Because Universal Applicant Testing by the Government Is an Unconstitutional Condition.

On February 5, 2013, when the City provided Voss with a copy of its Mandatory Drug Testing Policy, it required her to sign a form "freely and voluntarily agree[ing]" to a drug test, or else be "disqualif[ied]" from employment with the City. Facts ¶ 12. She signed the form only because it was a condition of applying for the Recycling Coordinator position. *Id.* Nevertheless, the City's attempted exaction of involuntary consent to an otherwise unconstitutional search in exchange for employment violates the doctrine of unconstitutional conditions. Accordingly, Voss did not waive any privacy rights to be free from unreasonable government searches.

Although an individual "has no 'right' to a valuable government benefit," the government may not "deny a benefit to a person on the basis that infringes on his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.") (citation omitted). *See also Bourgeois v. Peters*, 387 F.3d 1303, 1325 (11th Cir. 2004) ("The doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe.") (citation omitted); *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) (noting that waiver of Fourth Amendment rights is limited by unconstitutional conditions doctrine); *Pike v. Gallagher*, 829 F. Supp. 1254, 1263 (D.N.M. 1993) (finding no consent to drug testing even where employee had submitted to urinalysis upon transfer within employment, as "[e]mployment cannot be conditioned upon the waiver of a constitutional right"). The unconstitutional conditions doctrine is based primarily on the notion that the government may not accomplish indirectly—by coercively withholding a right or privilege—what it cannot do directly. *Elrod v. Burns*, 427 U.S. 347, 359 (1976).

Put another way, requiring applicants for employment to submit to mandatory testing on pain of otherwise being disqualified for the job is coercion, not voluntary consent. *See AFSCME*, 2013 WL 2321383, at *19 ("Surrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever else it is, is not the type of consent that automatically renders a search reasonable as a matter of law.") (citing *Lebron v. Sec'y, Fla. Dept. of Children & Families*, 710 F.3d 1202, 1214-15 (11th Cir. 2013) (holding that welfare applicants' "mandatory consent" is of no "constitutional significance" because it is a

"submission to authority rather than . . . an understanding and intentional wavier of a constitutional right") (citation omitted)); *McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987) (rejecting argument that employees who signed consent forms have waived their privacy interests); *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986) (where public employees participated in mandatory suspicionless urinalysis drug testing program out of fear that they would otherwise lose their jobs, holding their "consent to search was obviously not voluntary, but was the result of coercion"). *Accord Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 n.3 (6th Cir. 1998) (voluntary waiver of constitutional right does not foreclose constitutional claim of privacy rights); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir.1987) (same). Plaintiff and other applicants for City employment, therefore, cannot be deemed to have consented to suspicionless, across-the-board drug testing merely by seeking employment with the City.

IV. Conclusion

Based on the foregoing arguments and authorities, Plaintiff respectfully requests that this Court enter partial summary judgment on her behalf and rule that the City's Mandatory Drug Testing Policy as applied to Plaintiff and consequent revocation of her job offer violates her Fourth Amendment rights.

Dated: July 17, 2012

Respectfully Submitted,

/s/Shalini Goel Agarwal
Shalini Goel Agarwal (Fla. Bar No. 90843)
sagarwal@aclufl.org
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
Tel: 786-363-2708
Fax: 786-363-1448

/s/Benjamin James Stevenson
Benjamin James Stevenson (Fla. Bar No. 598909)
bstevenson@aclufl.org
ACLU Foundation of Florida, Inc.
P.O. Box 12723
Pensacola, FL 32591-2723
Tel: 786-363-2738
Fax: 786-363-1985
Attorneys for Plaintiff Voss

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by notice of electronic filing on July 17, 2013, on all counsel on the Service List below.

/s/Shalini Goel Agarwal

SERVICE LIST

Shalini Goel Agarwal
sagarwal@aclufl.org
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
Tel: 786-363-2708
Fax: 786-363-1448

Benjamin James Stevenson
bstevenson@aclufl.org
ACLU Foundation of Florida, Inc.
P.O. Box 12723
Pensacola, FL 32591-2723
Tel: 786-363-2738
Fax: 786-363-1985
Attorneys for Plaintiff Voss

Michael T. Burke, Esquire (338771)
Burke@jambg.com
Johnson, Anselmo, Murdoch, Burke,
Piper & Hochman, P.A.
2455 E. Sunrise Blvd., Suite 1000
Ft. Lauderdale, Florida 33304
Telephone: (954) 463-0100
Facsimile: (954) 463-2444
Attorney for Defendant City of Key West