UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

KAREN CABANAS VOSS

Plaintiff,

No. 4:13-cv-10106

vs.

CITY OF KEY WEST, FLORIDA

Defendant.
/

PLAINTIFF VOSS'S CORRECTED RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Voss responds to Defendant's Motion for Summary Judgment, DE 32, as follows:

I. Introduction

On the eve of hiring Karen Voss as its Recycling Coordinator—after the interview, reference-checks, and official clearance for hire—the City of Key West, Florida ("City"), demanded she submit to a drug test as required of all applicants. When Voss objected that the clear precedent from the U.S. Supreme Court prohibited government employers from subjecting employees to suspicionless drug testing absent a "special need," the City attempted to manufacture a special need. It posited that risks associated with the Recycling Coordinator educating students and occasionally filling in for the transfer station manager created a special need justifying the testing. It argued it could test Voss, not because it tests everyone, but because this specific position was "safety sensitive." It then gave the job to someone else.

Voss filed this lawsuit and questioned how these speculative risks could transform the marketing and public relations position into a job involving extraordinary and unusual risk to public safety, a like a train conductor or drug interdiction officer who carries a gun. She also questioned how the City could characterize the Recycling Coordinator as safety sensitive, yet not subject the position to continued random testing as it does for safety sensitive positions. The City claimed ignorance and again changed course.

Now, the City justifies its drug testing as a way to get to know Voss. However, this too fails. The U.S. Supreme Court permits only two exceptions for suspicionless drug testing in the employment context—a substantial and real risk to public safety and drug interdiction functions. Getting to know an employee better is not a recognized exception. And because the City is held to a different standard than private employers and had no need to conduct an invasive background investigation that would eviscerate Voss's privacy, the City's curiosity about the contents of Voss's urine cannot outweigh her robust privacy interests. Ultimately, the City's final posture fails to justify the initial drug test.

II. Argument

A. Legal Standard for Government Drug Testing in Employment Context

The Fourth Amendment generally requires a government actor to justify a drug test in the employment context with individualized suspicion. However, in "certain limited circumstances," "special needs" demand "particularized exceptions" to the individual-suspicion requirement. *Chandler v. Miller*, 520 U.S. at 308, 309. The special need must be animated by a "concrete danger," one that is "real and not simply hypothetical." *Id.* at 319. But these needs are few and restricted to a "closely guarded category of cases." *Id.* at 309. As the Eleventh Circuit has explained, "[t]he 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." *Am. Fed'n of State, County & Mun. Employees Council 79 v. Scott* ("*AFSCME*"), 717 F.3d 851, 876 (11th Cir. 2013). Here, no special need justifies the City subjecting applicants for all City jobs—including the Recycling Coordinator job—to its Drug-Free Workplace Policy ("Mandatory Drug Testing Policy"). It therefore is unconstitutional—both as applied to Voss and on its face.

Two corrections must be made to the City's recitation of this Fourth Amendment legal standard applicable to drug testing in the employment context. First, it should be underlined, the Court must find the City demonstrated a "special need" *before* the Court engages in any

balancing of it against an employee's privacy interests. *AFSCME*, 717 F.3d at 880. The Eleventh Circuit in *AFSCME* directs a precise, burden-shifting sequence for a district court to follow in resolving a government employment drug testing dispute. *Id.* In step one, once the employee establishes the drug test was a suspicionless search, it is presumptively unconstitutional. *Id.* This shifts the burden to the employer in step two to show a "special need" justifying the suspicionless testing. *Id.* "If the [government employer] fails … to produce a sufficient special-needs showing, then the plaintiff would prevail." *Id.* Only after the employer "demonstrate[es] that it had special needs sufficiently important to justify a suspicionless search, [does] the district court … conduct the special-needs balancing test," the third and final step. *Id.*; *see also Chandler*, 520 U.S. at 323 ("where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."). The City misunderstands this sequence and inappropriately jumps to the balancing test before establishing a special need. Following the sequence directed by *AFSCME*, this Court should first determine whether the City has a special need justifying the drug testing before weighting the need against the privacy interests.

Second, the City must show that a requirement of individualized suspicion would jeopardize its interests. *See Skinner v. Ry Labor Execs. Ass'n*, 489 U.S. 602, 624 (1989) ("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."). The City fails to explain why it cannot reserve judgment and test the Recycling Coordinator only after it has individualized suspicion that illicit drug use is adversely affecting work performance. The Court should deny the City's motion on this basis as well.

B. The City Fails to Satisfy Its Burden of Showing a Special Need to Subject Voss to Suspicionless Drug Testing.

1. No Special Need Justifies Drug Testing Applicants to the Recycling Coordinator Position Because the Position Is Not Safety Sensitive.

The Recycling Coordinator is not a safety sensitive job because the nature of the work presents no "concrete danger," *Chandler*, 520 U.S. at 318-19, and therefore no special need justifies the City's drug testing of applicants for this position. The City asserts the Recycling Coordinator is a safety sensitive position for two reasons: because he/she must (1) at times "be on the tipping floor of the transfer station," Def.'s Mot. for Summ. J., DE 32 at 12, and (2) give "presentations in schools to school age children," *id*. at 13. However, the City's characterizations fail to satisfy its burden of showing a special need. In practice, the Recycling Coordinator's work involves no significant risks to public safety or harm to children demanding a departure from the ordinary requirement of individualized suspicion.

The Recycling Coordinator position is a "marketing and planning position." City's Stmt. of Facts, DE 33 ("City's Facts") ¶ 10, Voss's Resp. Stmt. of Facts, DE 39 ("Voss Resp. Facts") ¶ 79. Its primary focus is "to develop, implement and expand the City's recycling program." City's Facts, DE 33 ¶ 10. "Ninety-nine percent of [the] position at first was marketing" changes to the residential recycling program; later it also included "public education through school programs and to addressing commercial recycling in the City." Voss Resp. Facts, DE 39 ¶ 79-80. This "marketing" position stands in stark contrast to the extraordinary job duties that courts consider safety sensitive, like operating a train, carrying a firearm, or participating in drug interdictions. 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. And the City's emphasis on the Recycling Coordinator's duties involving the tipping floor falls far short of a safety sensitive position for four reasons.

First, according to the job description, the Recycling Coordinator is supposed to relieve the transfer station manager only when the manager is on leave. City's Facts, DE 33 ¶ 11. However, because the manager does not in fact take leave, the current Recycling Coordinator has

never been asked to manage the transfer station in his stead. Voss Resp. Facts, DE 39 ¶ 11. "The proper focus is the constant level of risk which adheres to and permeates the position on an everyday basis." *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) (striking down suspicionless testing of teachers because "[a] concrete danger must be an actual, threatened danger and not some perceived potential danger); *see also Wenzel*, 351 F. Supp. 2d at 1324-25. Here, the Recycling Coordinator cannot be said to be at any risk as a result of the assumption of the duties of the transfer station manager because the manager "never" delegates those duties. Voss Resp. Facts, DE 39 ¶ 11.

Second, the transfer station is overseen and managed from the office, not the tipping floor, which is only a part of the entire station. *Id.* ¶ 15(a). Thus, if the Recycling Coordinator were ever called to relieve the transfer station manager, he would do as previous substitutes have done: sit at a desk in an office doing paperwork and occasionally monitoring the tipping floor through video feeds and radio. *Id.* The job duties require the Recycling Coordinator to merely "supervis[e] and oversee[]" the employees at the transfer station, not operate its equipment. City's Facts, DE 33 ¶ 12. Indeed, because the transfer station can be managed over the telephone from afar, the manager or his substitute need not even be "physically present" on the property, let alone on the tipping floor. Voss Resp. Facts, DE 39 ¶ 15(b).

Third, the Recycling Coordinator does not need to go to the tipping floor to "[c]ollect and analyze recycling data via spreadsheets and database management system." City's Facts, DE 33 ¶ 18. Instead, this data can be collected and analyzed from the Recycling Coordinator's downtown office. Voss Resp. Facts, DE 39 ¶ 18. The current Recycling Coordinator does not go and has never gone to the tipping floor to collect or analyze this data. *Id.*

Fourth, even if the Recycling Coordinator were to go to the tipping floor, he would be in little danger. The Recycling Coordinator is not expected to operate the heavy machinery on the tipping floor and should not because he lacks the training, licenses, and other qualifications. *Id.* ¶¶ 17, 81. Furthermore, the Recycling Coordinator neither has training nor is expected to spot for the operators of this machinery by directing the operator and others on the floor. *Id.* Like

members of the public ("self-haulers") who are permitted to routinely offload waste from their personal vehicles, he would be subject to the spotters' oversight and coordination of the tipping floor for the safety of all. *Id.* ¶¶ 16-17.

Ultimately, the City mischaracterizes the Recycling Coordinator as safety sensitive by raising the specter of the tipping floor. However, the Recycling Coordinator's assigned duties and actual work simply do not involve the dangers that may be present on the tipping floor.

The Recycling Coordinator's occasional education of public school children about recycling similarly fails to transform the position into a safety sensitive one. *See* City's Facts, DE 33 ¶ 19. The Recycling Coordinator is expected to address classrooms of students in the presence of their teacher and possibly another City employee. Voss Resp. Facts, DE 39 ¶ 19. However, the Recycling Coordinator will not be alone or directly supervising students. *Id.* This stands in contrast to the few instances in which courts have upheld drug testing for public school teachers. *See, e.g., Knox County Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 375, 384 (6th Cir. 1998).

Furthermore, because no one is suggesting the education of students about recycling involves the use of "dangerous machinery and hazardous substances" or that the Recycling Coordinator would have unfettered and consistent interactions with students to become an "open avenue" for drugs, the City's reliance on *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) is misplaced. *See* Def.'s Mot. for Summ. J., DE 32 at 13. The reasons supporting the finding that the janitor position in *Aubrey* was safety sensitive were not simply because he "interact[ed] with children." Instead, the Fifth Circuit pointed to two additional facts about the janitor position. First, the janitor handled "dangerous machinery and hazardous substances" around children. *Id.* at 564. Second, the janitor could become "an open avenue [for children] to obtain drugs." *Id.* Although there is serious question about the logic of *Aubrey*, *see id.* at 570 (Dennis, J., dissenting), neither of its reasons supports finding that the Recycling Coordinator is a safety sensitive position.

Given the Recycling Coordinator's hypothetical and tangential proximity to any dangers on the tipping floor and how the City offers no serious argument of a "concrete danger" from the Recycling Coordinator educating students, perhaps the City does not even believe the Recycling Coordinator position is safety sensitive. Two reasons suggest that this characterization is a post-hoc justification for insisting Voss take the drug test.

First, the City does not treat the Recycling Coordinator position as safety sensitive by subjecting it to random drug testing. The City subjects police officers, firefighters, and commercial drivers to random drug tests. Voss Resp. Facts, DE 39 ¶ 82. These employees are randomly drug tested because they work in safety sensitive positions. *Id.* However, the City does not randomly drug test the Recycling Coordinator once hired. *Id.* ¶ 83. In this way, the Recycling Coordinator is not treated like a safety sensitive position, which requires random drug testing to ensure competence at work. When asked to explain this inconsistency—why the City both contends the Recycling Coordinator position is "safety sensitive," yet does not subject it to random drug testing like a safety sensitive position—the City confesses ignorance. *Id.* ¶ 84. A fair inference from the City's inability to explain the inconsistency is simple: The Recycling Coordinator is not in fact safety sensitive and the City's contention to the contrary is merely a litigation posture.

Second, before Voss objected to taking the drug test, the City had never analyzed whether the Recycling Coordinator position was safety sensitive. *Id.* ¶ 92. Instead, the City only decided the position was safety sensitive once it had to defend its practice requiring drug testing.

2. No Special Need Warrants Drug Testing Employees or Applicants for Generalized Interests.

The City's stated purpose for its Mandatory Drug Testing Policy is to ensure its current workforce provides "safe, effective and efficient delivery of public services" and adheres to "the law-abiding behavior expected of all citizens and the special trust placed in City employees as public servants." City's Facts, DE 33 ¶ 5; Voss Resp. Facts, DE 39 ¶ 5. However, the City's desire to effectuate these generalized goals, no matter how laudable, does not create a special

need justifying suspicionless drug testing of employees. Courts have consistently rejected these reasons for the intrusions into privacy. So, the City turned to testing job applicants—who will ultimately join its workforce. Its purpose for these drug tests remains the same: to ensure a productive and law-abiding work force. But with employees or applicants, these generalized interests do not create a special need. Government employees and applicants for government employment are evaluated under the same special needs balancing test for purposes of drug testing. There is no bright-line rule between job applicants and employees. Just as for employees, job applicants cannot be subjected to suspicionless drug testing for symbolic reasons where there is no concrete danger that animates the special need. Neither the purposes expressed in the Mandatory Drug Testing Policy nor the fact that Voss was applying for City employment is a sufficiently compelling interest to justify suspicionless testing of job applicants.

The City's argument otherwise cannot be reconciled with the logic of *Chandler*. There, the Court held that candidates for Georgia's highest public offices—effectively "applicants" for the most important jobs in state government—including governor, judges, and legislators, could not be subject to drug testing without reasonable suspicion. The State wanted to drug test these candidates because "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials," 520 U.S. at 318. These rationales echo those offered by the City of Key West in safely, effectively, and efficiently delivering public services; reducing injury and unproductivity that undermines public confidence; and preventing conduct that is inconsistent with the special trust placed in City employees. The Supreme Court rejected the State's proffered interests as "symbolic," and insisted upon a "concrete danger," one that is "real and not simply hypothetical," in order to justify testing of candidates. *Id*. at 319. This Court should likewise reject the symbolic rationales offered by the City as insufficient to warrant testing of Voss.

Several other courts—including two in this Circuit—have similarly rejected such symbolic government interests to test job applicants and have resisted efforts to subject

applicants to a presumption of drug testing in the absence of reasonable suspicion. In *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337 (S.D. Fla. 2000), where the City of Hollywood had a policy like the Mandatory Drug Testing Policy at issue here, requiring universal pre-employment drug testing for all applicants for City employment, and applied it to an applicant to be a City accountant in an effort to "provide tangible assurances that public funds are in good hands and are not in jeopardy of being squandered by impaired employees," 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 (9th Cir. 2008), a City that drug tested all job applicants regardless of position sought to test a part-time library page based on the following interests: "drug abuse is one of the most serious problems confronting society today, drug use has an adverse impact on job performance, and children must be protected from those who use drugs or could influence children to use them." *Id.* at 1150. The court ignored the first two overly generalized interests and discounted the third as being too tenuous, as the library page had limited interactions with and little influence over youth library patrons. *Id.* at 1151. And in *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990), involving a statute requiring suspicionless drug testing of all applicants for state employment, the court expressly rejected the argument that job applicants are qualitatively different from employees and can be tested based on the "generalized government interest in a drug-free workplace"—the same argument that Defendant City makes here. *Id.* at 1114 & n.5. The special needs articulated by the City do not overcome the robust privacy interests of job applicants protected by the Fourth Amendment. As the Eleventh Circuit explained in *AFSCME*, "[s]ince the [government'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" 717 F.3d at 877. Here, the generic justifications offered by the City could apply to all applicants for government employment and do not amount to a special need.

The two main cases the City relies on in support of its argument that applicants are

entirely separate from employees and that the same guidelines about the special needs test do not apply—*Willner v. Thornburgh*, 928 F.2d 1183 (D.C. Cir. 1991), and *Loder v. City of Glendale*, 927 P. 2d 1200 (Cal. 1997)—are easily distinguishable. *Willner* is a noncontrolling case from the D.C. Circuit involving an unsuccessful challenge to pre-employment testing by an applicant to be an Assistant U.S. Attorney. *Willner* did not make any pronouncements about applicants for government employment writ large. Instead, its holding was limited to drug testing of "applicants for positions as attorneys at the Justice Department." 928 F.2d at 1194. And unlike the Department of Justice, the City is not principally a law enforcement agency tasked with enforcing drug laws. *Id.* at 1192.[1] Beyond that, within the Eleventh Circuit, *Willner* has been cited only twice—both times in *Chandler v. Miller*, 952 F. Supp. 2d 804, 806 (N.D. Ga. 1994), and 73 F.3d 1543, 1545 (11th Cir. 1996), which was reversed by the Supreme Court. *Chandler*, 520 U.S. 305 (1997).

As to *Loder*, a noncontrolling case from California involving an unsuccessful challenge to pre-employment drug testing, the state court explained that the particular applicants at issue had a "significantly diminished" privacy interest because the drug testing was part of a broader medical examination, likely including a medical history and bodily examination—something that had been required of job applicants for years prior to the addition of drug testing and that they would have had to undergo in any case, even absent the drug testing. 927 P. 2d at 1223-24 & n.16. Given that the plaintiff had not challenged the constitutionality of the medical examination itself, the court concluded that the additional invasion of privacy posed by drug testing in this

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[1] Moreover in discussing a goverment employer's investment into training a new employee, *Willner* draws an improperly sharp distinction between applicant and employee. In practice, an employee learns the ropes over weeks or months, not minutes or hours. Consequently, in terms of the employer's risk investment, there is a nominal difference between one hour before being hired (applicant) when *Willner* suggests the government may appropriately drug to protect its future investment in training and one hour after being hired (employee) when the U.S. Supreme Court generally prohibits it. The City's asserted interest in the government employer's risk investment for conditionally hired applicants and actually hired employees does not hold up to scrutiny.

context presented only an "*incremental* intrusion on privacy" that it characterized as "rather minor when viewed in the context of a complete medical examination." *Id.* at 1224. Unlike *Loder*, applicants to be the Recycling Coordinator are not subjected to other bodily intrusions, and certainly none that Voss would not object to. Because the City's pre-employment testing is a stand-alone search, *Loder* is inapplicable.[2]

As such, the City has not demonstrated a special need to test Ms. Voss—neither because she was applying to a safety sensitive position nor because of its generalized interests as an employer hiring applicants. The Court can deny summary judgment to the City on this basis and need not go on to the balancing test.

C. Job Applicants to the City Have No Diminished Expectation of Privacy.

Contrary to the City's characterization, Def.'s Mot. for Summ. J., DE 32 at 6, Voss has a robust expectation of privacy in her bodily fluids, even as an applicant for employment with the City to become the Recycling Coordinator. 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. 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

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[2] The other two California appellate cases cited by the City, *see* Def.'s Mot. for Summ. J., DE 32 at 6, 7, are entirely inapplicable here, as one involves a state constitutional challenge and not a Fourth Amendment analysis, *Wilkinson v. Times Mirror Corp.*, 215 App. 3d 1034 (Cal. App. 1st Dist. 1989), and the other involves no type of constitutional challenge but is wrongful discharge claim by a job applicant in the private sector, *Pilkington Barnes Hind v. Superior Court*, 66 Cal. App. 4th 28 (1998) (Cal. App. 1st Dist. 1998).

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 requires no professional licenses or safety certifications, and the Recycling Coordinator is not subjected to medical examinations or other fitness tests. Voss Resp. Facts, DE 39 ¶ 81. Voss's industry and job qualifications do not diminish her privacy interests.

The fundamental mistake made by the City is that it confuses a privacy interest under the Fourth Amendment with a property interest under the Due Process Clause. The City underplays the applicants' interest because they are not "faced with the same harsh decision to submit to the test or lose their employment as they have not yet to obtain employment." Def.'s Mot. for Summ. J., DE 32 at 7 (citing *Willner*, 928 F.2d at 1190). While it is true that an applicant is differently situated from an employee, that is a measure of damages, not of liability. The doctrine of unreasonable searches under the Fourth Amendment should not be confused with property interests in continued employment, which are the domain of the Due Process Clause. Plaintiff Voss has a *constitutional* interest in not being rejected from employment for an unconstitutional reason, even if she has no property right to continued employment. *See, e.g.*, *Whalen v. City of Atlanta*, 539 F. Supp. 1202, 1205 (N.D. Ga. 1982) ("even one without job security cannot legitimately be dismissed for constitutionally impermissible reasons"); *accord Garcetti v. Ceballos*, 547 U.S. 410 (2006) (ruling without consideration for whether employee had a Roth-type "property interest in employment"). Consistent with this analysis, in *Von Raab*, 489 U.S. at 660, when evaluating Customs employees who had no property right securing a transfer or promotion, *see Von Raab*, 816 F.2d 170, 173 (5th Cir. 1987), the Supreme Court did not describe these employee-applicants as having a diminished expectation of privacy on this basis. The same should be true here—that Voss has no diminished expectation of privacy where by refusing to submit to the test, she did not lose anything she already had, but instead lost an opportunity for a new position.

Second, the City incorrectly analogizes this case to *Willner* by arguing that Voss had advance notice of the testing requirement and that she nevertheless "voluntarily elected to apply." *See* Def.'s Mot. for Summ. J., DE 32 at 6. But in fact, the City failed to give Voss notice in the job posting or at any time thereafter until one hour before she was required to take the test. Voss Resp. Facts, DE 39 ¶ 44; Voss Decl., DE 9-1 ¶¶ 6-9. Voss saw the notation on the job posting that the City was a Drug-Free Workplace, and then looked through the City's website for its Drug-Free Workplace Policy. Voss Resp. Facts, DE 39 ¶ 28. The policy was not posted at any of the links in the human resources or job application section of the website. *Id.* Voss moved forward with her job application, under the impression that the City would comply with the U.S. Constitution and limit applicant testing to safety-sensitive positions. Voss Decl., DE 9-1 ¶ 6. Contrary to the City's suggestion otherwise, Def.'s Mot. for Summ. J., DE 32 at 8, Voss cannot be assumed to be "on notice" merely by the fact that she is an attorney, or a City resident who has never before applied for City employment, or that the City's Mandatory Drug Testing Policy is a public record. Based on previous job applications she'd submitted, Voss was generally aware that the City was required to provide notice of the drug testing requirement in its vacancy announcement for the Recycling Coordinator position in order to qualify for a workers' compensation discount, see Fla. Stat. § 440.102(3)(c)—notice it failed to provide here. Because Voss lacked notice of the drug testing requirement until after she was offered and accepted the job until just before being required to take the test, Voss Resp. Facts, DE 39 ¶ 44; Voss Decl., DE 9-1 ¶¶ 6-9, she could not meaningfully have diminished her own expectation of privacy by deciding to apply.

Third, the City argues that Voss had subjected herself to scrutiny by virtue of applying for a job and providing "all manner of personal information." Def.'s Mot. for Summ. J., DE 32 at 6. However, merely providing resume information, giving the names of a few professional references, answering a yes or no question about criminal convictions, and providing a copy of her driver's license for a cursory automated criminal background check does not diminish her expectation of bodily privacy. *See* Voss Application, DE 9-3. *Cf. Willner*, 928 F.2d at 1189

(explaining that assistant U.S. attorney applicant had "relinquish[ed] whatever privacy" interests through exhaustive disclosure of personal information, including "divulging" past drug use in the last five years under penalty of perjury and authorization of "an F.B.I. investigation in which his friends, neighbors, relatives and past and present business associates may be asked if he uses drugs"). In response to a similar argument in *AFSCME* that state employees had a diminished privacy interest because they were subject to financial disclosure and public records laws, the Eleventh Circuit explained that "[t]he logical leap from disclosure of financial information and work product to a diminished expectation of privacy in an employee's physical body is a substantial one." 717 F.3d at 879. So, too, here, the disclosures do not diminish Voss's bodily privacy interest. Indeed, if disclosure of background information were sufficient, then presumably *Chandler* would have turned out very differently, as candidates for political office disclose much more information and subject themselves to significantly greater scrutiny than Voss has here. Consequently, Voss retains a robust expectation of privacy.

Fourth, Voss never "consented" to the drug test. *See* Def.'s Mot. for Summ. J., DE 32 at 6. As she explained, one hour before she was required to take the test, she was asked to sign a form stating that she "freely and voluntarily" consented to the drug testing; if she refused to sign it, she would be "disqualif[ied]" her for employment with the City. Pl.'s Stmt. of Material Facts ("Facts"), DE 9 ¶ 12; Voss Decl., DE 9-1 ¶ 10. She signed the form only because it was a condition of applying for the Recycling Coordinator position. *Id.* Nevertheless, she intended to and in fact did immediately go next door to the City Attorney's office to voice her objection to the lawfulness of the policy, as she recognized that the Human Resources employee she was speaking with was not the proper individual with whom to raise her objection. Voss Resp. Facts, DE 39 ¶¶ 47-48. In this context, there was no true consent. The City's attempted exaction of involuntary consent to an otherwise unconstitutional search in exchange for employment violates the doctrine of unconstitutional conditions. As the Eleventh Circuit explained in *AFSCME*, "[s]urrendering 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." 717 F.3d at 875. *See also Lebron*, 710 F.3d at 1214-15 (noting that welfare applicant's signing of mandatory consent form was of "no constitutional significance because it was a "submission to authority rather than an . . . understanding and intentional waiver of a constitutional right").[3]

Neither did Voss consent or diminish her privacy interest by taking a drug test after the City had already decided not to offer her the job. Having not heard back from the City since she renewed her objection to the Mandatory Drug Testing Policy and sent a legal memo in support of her objections, Voss Resp. Facts, DE 39 ¶¶ 69, 77, Voss "felt compelled" to take a drug test because, as she said, "I needed the job," *id.* ¶ 71. She took the test on February 25, 2013. City's Facts, DE 33 ¶ 71. Voss contacted the City about sending it her results on February 27. Facts, DE 9 ¶ 21. She never sent her results because she was subsequently informed that the City had offered the position to another applicant. *Id.* ¶ 22. However, the City admits that it ceased processing Voss's application on February 21. Voss Resp. Facts, DE 39 ¶ 89. Voss's decision to take a drug test, *after* the time the City had already decided not to offer her the position, as well as the fact that she never transmitted any drug testing results to the City cannot lessen her privacy interest. What happens after the City revoked the job offer cannot weight on the constitutional question whether the City can demand a drug test in the first place.

Finally, the City's Mandatory Drug Testing Policy rests on the faulty premise that the City is as free to act as a private-sector employer in drug testing its employees. *See* Def.'s Mot. for Summ. J., DE 32 at 8-9. Because the Fourth Amendment standard of reasonableness limits

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[3] Although the City cites *Bolden v. Se. Penn. Trans. Auth.*, 953 F.2d 807 (3d Cir. 1991) (en banc), *see* Def.'s Mot. for Summ. J., DE 32 at 7, that case strongly supports Voss's position, as it concludes that "silent submission to an otherwise unconstitutional search on pain of dismissal from employment" is not "consent as a matter of law." 953 F.2d at 824-25. The other case cited by the City, *United States v. Sihler*, 562 F.2d 349, is easily distinguishable, as the case involved a less intrusive search (a lunch bag), based on reasonable suspicion that a correctional officer was dealing drugs (not suspicionless) in a correctional facility with signs warning entrants that they were subject to search. *Id.* at 530. Neither supports the City's argument that Voss consented to suspicionless urinalysis by signing a mandatory form.

only government actors, any comparison to what the constitution leaves private actors free to do is irrelevant. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (Bill of Rights intended to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials"); *Am. Fed'n of Gov't Emps. v. Weinberger*, 651 F. Supp. 726, 737 (S.D. Ga. 1986) (rejecting government's argument that suspicionless drug testing merely puts public-sector employees on the same footing as private-sector employees; "[i]t will be a dark day indeed when the United States government finds it appropriate to abandon the strictures of the Constitution in favor of a less burdensome "private-sector" set of rules that can allow for infringement of constitutional rights."). As the Eleventh Circuit explained in *AFSCME*, "the proper baseline [for the special needs balancing test in the employment context] is the ordinary government worker's expectation of privacy." 717 F.3d at 878. Here, the baseline is the expectation of privacy for the ordinary government job applicant.[4]

The Supreme Court has never mentioned the prevalence of drug testing by private employers as a factor in determining the reasonableness of government drug testing of employees. The only case that the City can cite in support of its theory that private sector drug-testing practices should define what is reasonable under the Fourth Amendment is *Willner*. 928

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[4] Consequently, this Court should disregard five of the City's exhibits as irrelevant to the legal issues in this case. In lieu of moving to strike, Voss objects to DE 34-3 through DE 34-7 as irrelevant and respectfully requests that this Court disregard them. *See, e.g., Wells v. XPEDX, No. 8:05-cv-2193-T-EAJ*, 2007 WL 2696566 at *1 (M.D. Fla. Sept. 11, 2007) (construing a motion to strike as an objection and stating that "[t]o properly challenge the admissibility of evidence submitted in support of a summary judgment motion, a party should object rather than move to strike") (citation omitted), *aff'd on other grounds*, 319 Fed. Appx. 798 (11th Cir. 2009) (per curiam). The first three exhibits are poll results (DE 34-3) and studies based on surveys (DE 34-4, 34-5) relating to drug use and drug-testing in the private sector that are not specific to Florida or the City of Key West, are not relevant to employment in the public sector, and do not address drug use or drug-testing in the City. The other two (DE 33-6 and DE 33-7) are outdated compendiums of state laws, many of which relate to drug testing in the private sector. Voss. Resp. Facts ¶ 7. What is permissible in the private sector is irrelevant to whether the City may, consistent with the Fourth Amendment, require Voss to submit to suspicionless testing as a condition of employment.

F.2d 1185. Although the case did reference drug testing in the private sector, it placed greater weight on other factors, including the FBI background check and the "extraordinarily intrusive" background questionnaire required for applicants to become Assistant U.S. Attorneys. *Id.* at 1191. To the extent that *Willner* references private sector practices at all in connection with reasonable expectations of privacy, it appears to be an outlier, as reflected in the vehement dissenting opinion,[5] and a subsequent D.C. Circuit decision striking down suspicionless workplace drug testing without mentioning private employer drug testing. *See Nat'l Fed'n of Fed. Emps. v. Vilsack*, 681 F.3d 483, 483 (D.C. Cir. 2012).

In sum, Voss retains a robust privacy interest in the contents of her urine, despite her decision to apply for City employment.

D. The City's Interests Can Be Furthered Notwithstanding a Requirement of Individualized Suspicion Before Drug Testing.

Even if the general needs articulated by the City—the alleged safety-sensitive nature of the Recycling Coordinator position and as an employer in the hiring process interested in the safety, productivity, and efficiency of its work force—were enough to constitute a special need, and even if these interests outweighed Voss's significant privacy interest, the City would still have to show that its interests "would be placed in jeopardy by a requirement of individualized suspicion." *See Skinner*, 489 U.S. at 624. The City cannot make this showing.

The facts clearly indicate that the Recycling Coordinator's day-to-day job functions

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[5] *See id.* at 1198-99 (Henderson, J., dissenting) ("[P]rivate employers' practices cannot, and until today have not, become the yardstick by which we measure the government's compliance with constitutional mandates. The government is unique in being subject to the dictates of the Constitution; private entities are bound by no such strictures. It is therefore wholly inappropriate for the majority to import into a fourth amendment analysis consideration of private sector practice. . . . In spite of the prevalence of mandatory urinalysis for private employees, however, neither this court nor the Supreme Court relied on the practice to justify such a government program. The reasons for this omission seemed obvious before today. The protections the Constitution provides against arbitrary government action will quickly evaporate if courts adopt, as the benchmark of fourth amendment reasonableness, the conduct of private entities.") (citations omitted).

involve either office work, or highly public work of marketing the City's residential recycling program and conducting public education through school programs and encouraging commercial recycling. Voss Resp. Facts, DE 39 ¶¶ 18, 79-80; Facts, DE 9 ¶ 4. 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. 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 be detectable using ordinary individualized suspicion. *See id.* 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, classrooms of students, 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.

As to the City's asserted special interest as an employer to whom Voss was "an unknown quantity" and for whom it "could not review . . . work records or performance evaluations to see if she had a history of absenteeism, tardiness, or poor performance," Def.'s Mot. for Summ. J., DE 32 at 4, the City could obtain this information simply by contacting Voss's previous employers and references, all of whom were listed on her job application. Voss's most recent position was as an attorney on behalf of the County, an office job in which she would have been subject day-to-day scrutiny over a period of seven years, Voss Application, DE 9-3, and from

whom the City could have learned a wealth of information. That it chose not to do so in a significant way is not a basis for testing without individualized suspicion.[6]

III. Conclusion

Based on the foregoing arguments and authorities, Plaintiff respectfully requests that this Court deny summary judgment for the City.

Dated: March 17, 2014

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

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

[6] Further, although the City argues that its Policy is effective based on positive pre-employment drug tests conducted since the Policy was instituted in 1999, *see* Def.'s Mot. for Summ. J., DE 32 at10-11, this information should be disregarded, as the City objected to producing this information because it contended any history drug use among job applicants for City employment is irrelevant to the subject matter of this action and did not cite the declaration or exhibit with the drug test results in its Statement of Facts. Voss Resp. Facts, DE 39 ¶ 90 & n.2. In any event the results don't shore up any special need to test the Recycling Coordinator, as they don't show how many applicants in total were tested since the Policy was instituted 15 years ago, and apparently only one of the employees with a positive result is listed in the Utilities Department.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by notice of electronic filing on March 17, 2014, 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
Attorneys for Defendant City of Key West