REPLY TO COUNTERSTATEMENT OF FACTS

The defendant's brief concedes that when the plaintiff was hired the drug testing program in place required individualized suspicion, not random testing. The reason the defendant offers for imposing on its employees' privacy interests and implementing a warrantless and random drug testing policy is that it was in response to "anonymous verbal reports of drug and alcohol use at the facility…". (Db 12). It concedes, by its silence, that the facility had no documented drug problem, that injuries among its non administrative work force were not problematic, and that it hired no experts to evaluate what it now contends was its concern. Its claim that, "The plant can be extraordinarily dangerous to the unwary or inattentive employee", (Db 4), is totally unsupported by any citation, by any expert report or opinion, any case law or governmental finding, is mere argument, and belied by the objective facts. Although the defendant cites OSHA as its main regulator which "visits the facility on a regular basis", it fails to note that OSHA does not require drug testing of the defendant's employees. (Db 25).

Although the defendant claims that the plaintiff is more than a mere "weed whacker", his job description emphasizes he is essentially to "perform manual and unskilled labor". (172a). When the defendant explains what a landscaper actually does, as opposed to his written job description,

the defendant limits that description to grounds maintenance, grass cutting and snow removal. (Db10-11). The defendant makes no factual claim that the plaintiff was a fire fighter, was responsible to fight fires, an emergency responder, or responsible for the safety of the public, the plant, or indeed, other than in the most general sense, other employees. It does not deny that it specifically employs others to perform those tasks. It cites no instances when the defendant, or even his co-landscapers, actually ever did anything but cut grass, garden, or remove snow.

The defendant characterizes the stipulation it forced the plaintiff into as a "last chance" stipulation". (Db 13). In reality it was a "no chance" stipulation, as written and construed, because it required drug testing before completion of the program, and in this case, as the plaintiff testified, two days after he entered it. (210a, T.:8-25). Plaintiff failing a drug test two days after starting rehab was virtually assured, even though he tested clean the next day and throughout the program. Although the defendant attempts to denigrate the plaintiff by arguing that there was one other positive test during rehab, it does not inform the Court that the plaintiff did not concede the accuracy of that test, surrounded by days of negative testing, and believes it to be a false positive.

As set forth hereafter, a perusal of the defendant's arguments make it clear that the random drug testing here is violative of both the State and Federal constitutions.

ARGUMENT

I. THE DEFENDANT HAS BEEN UNABLE TO SHOW THAT IT IS A PERVASIVELY REGULATED BUSINESS OR THAT THE TOTALITY OF CIRCUMSTANCES CONSTITUTES A SPECIAL NEED CAUSING A DIMINSHED EXPECTANCY OF PRIVACY.

A diminished expectancy of privacy is a threshold requirement prior to determining, in the totality of the circumstances, whether there are special needs permitting the constitutional intrusion. *New Jersey Transit PBA Local 304 v. New Jersey Transit Corporation*, 151 N.J. 531, 549 (1996). Nowhere in its brief does the defendant grapple with the plaintiff's arguments that the history of the PVSC, the lack of problems, and the terms under which the plaintiff were hired are proof that the plaintiff did not have a diminished expectancy of privacy.

The defendant does attempt to argue that it is a pervasively regulated business, but, other than claiming it experiences general oversight by OSHA and the EPA, and that it is a large facility, can't actually cite to any pervasive regulation. Such general oversight, common to all industrial plants, is not a basis to find that an employer is in a pervasively regulated

industry. cf. *Bolden v. Se Pennsylvania Transp. Auth.*, 953 F.2d 808, 823-824 (3rd Cir. 1991). The fact that the PVSC regulates others regarding waste water does not make it a pervasively regulated business. It is not a business with a "long tradition of close government supervision". *PBA Local 304* at 545; *Marshall v. Barlow*, *Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 1821 (1978).

Conspicuous by its absence is any proof that other sewerage commissions require random drug testing, for any reason, let alone as part of a regulatory scheme, as an industry standard, or as participants in a regulated industry. No case law, finding such, is cited. Instead, reliance is placed almost exclusively on cases involving police officers, correction officers, bridge operators, and the like, hardly the equivalent of the unskilled manual laborer before the Court.

The sheer inadequacy of the defendant's arguments and inability to cite to legal authority that it is a pervasively regulated business is enough to merit reversal of the summary judgment on the basis that plaintiff did not have a diminished expectancy of privacy.

In its opposition, the defendant miscites the opinions of numerous cases. It cites *Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 628 (1989) for the proposition that a momentary lapse of attention can have

disastrous consequences, but those consequences, as explained by the case law if not the defendant, are those that must be immediate and to the general public, not attenuated, to oneself or, indeed, even other employees. *Chandler v. Miller*, 520 U.S. 305, 323 (1997); see *Harmon v. Thornburgh*, 878 F.2d 484, 491 (D.C. Cir. 1989). In its brief the defendant repeatedly cites the need for drug testing because of danger to the employee, not the public. Whether a landscaper misreads a meter and subjects himself to poisonous gas, makes physical contact with an exposed wire or electrified fence, or falls into a clarifier, the harm is to him, not the public. Of all the dangers cited, only one, exposure to oxygen in a cryogenic plant, is even claimed to create the potential for damage to the plant and, defendant argues, ultimately interruption of service. That proffer is unsupported by any expert opinion and is so hypothetical and vague, as to support the conclusion that there is no real danger. Even taken on face value, interruption in service, the fact, duration and nature of which is not even speculated to, is not the kind of disastrous consequences justifying the constitutional imposition.

The defendant writes that the Appellate Division in *International Federation of Professional and Technical Engineers, Local 194 v. Burlington County*, 240 N. J. Super. 9, 16 (App. Div. 1990), held, "it appears insignificant that when the initial May 1996 drug screen may be deemed

random', 'The governing balancing test now appears to be the same for random as well as post-accident (Skinner) or 'pre-ascension(Von Raab)'. (Db 28). That holding simply summarized the federal constitutional requirement, not New Jersey's.[1] The Appellate Division made clear in *Local 194* it was upholding the drug testing before it because it was part of an annual physical and not random:

> "Our holding is based on the totality of the circumstances presented, including the nature of the work performed, the non-random nature of the test, and the fact it is to be conducted as part of the employee's annual physical examination. Id at 11. (emphasis supplied).

The Supreme Court in *New Jersey Transit PBA Local 304 v. New Jersey Transit Corporation,* 151 N.J. 531, 549 (1996) cited Burlington County with approval.

II. THERE CLEARLY WERE FACTUAL ISSUES WHICH PRECLUDED SUMMARY JUDGMENT IN DEFENDANT'S FAVOR.

The defendant concedes that the three individuals whose certifications it presented to support the motion were never disclosed in the written discovery. The inadvertent and cryptic revelation of their existence, two years into the case, just as the summary motion was to be filed, reflects either a flagrant contempt for the rules of discovery or an inference that

[1] That case was miscited as 240 N.J. Super. 9, 23 (App. Div. 1990).

these individuals were not considered by the defendant to have any relevant knowledge at the point when disclosures were required. They are not experts, nor were they listed or presented as such. They are merely employees of the defendants, and their certifications as lay persons had to be weighed against the objective facts, the plaintiff's own certification, and the fact that they were never identified as persons with relevant information. The motion judge failed to do so, and accepted their assertions whole hog without any critical analysis.[2]

CONCLUSION

For the foregoing reasons, and those asserted in the initial brief, it is respectfully requested that plaintiff's appeal be granted in all respects.

Respectfully Submitted,

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/s/
By: _____
Andrew Rubin

[2] Contrary to the defendant's assertion, the plaintiff's certification was "s" slashed, not unsigned. The motion Judge specifically noted during oral argument it was unnecessary to file the signature in plaintiff's counsel's file and cited to the certification in his opinion.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the within brief is in compliance with Rule 32 (a) (7) (c) of the Rules of Appellate Procedure as the brief is less than 10 pages.

/s/ Andrew Rubin
Andrew Rubin

Dated: August 31, 2010