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Constitutional Law - Bargaining Away Fourth Amendment Rights in Labor Dispute Resolution

Andrew M. Souder

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CONSTITUTIONAL LAW—Bargaining Away Fourth Amendment Rights in Labor Dispute Resolution

Bolden v. SEPTA (1991)

I. Introduction

In Bolden v. Southeastern Pennsylvania Transit Authority,1 the United States Court of Appeals for the Third Circuit held that public employee unions, functioning as the exclusive bargaining agent for union members, could consent to future drug testing of member employees2 even if

2. Id. at 825-29. For a further discussion of the Third Circuit’s reasoning, see infra notes 79-105 and accompanying text.

In Bolden, the Third Circuit decided four additional issues raised during and after the district court trial. First, the court held that the Southeastern Pennsylvania Transit Authority (SEPTA) was not entitled to sovereign immunity under the Eleventh Amendment to the United States Constitution even though the Commonwealth of Pennsylvania created SEPTA. Id. at 812-21. The Eleventh Amendment provides: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens of subjects of any Foreign State.” U.S. CONST. amend. XI. In determining whether SEPTA was a “state” for purposes of the Eleventh Amendment, the Bolden court relied on Fitchik v. New Jersey Transit Rail Operations, 873 F.2d 655 (3d Cir.), cert. denied, 493 U.S. 850 (1989), which denied Eleventh Amendment immunity to a transportation entity similar to SEPTA. Bolden, 953 F.2d at 818-21.

In Fitchik, the Third Circuit utilized three factors to determine whether an agency like New Jersey Transit (NJT) qualified as the “state” for immunity purposes: 1) source of payment for a judgment against the agency, 2) status of the agency under state law and 3) the agency’s autonomy from the state. Fitchik, 873 F.2d at 659-63. The Bolden court applied the three factors set forth in Fitchik to determine if SEPTA qualified as the “state” for Eleventh Amendment immunity purposes. Bolden, 953 F.2d at 818-21. According to the first factor, if a legal judgment against the agency in question would necessarily be paid from the state treasury, this fact would be a strong indication that the agency sued was an “alter ego” of the state. Fitchik, 873 F.2d at 659-60. Applying the first factor, the Third Circuit in Bolden found that SEPTA, like NJT, could pay legal damages by raising fares. Bolden, 953 F.2d at 819. Therefore, SEPTA would not necessarily have to tap state treasuries to pay for adverse judgments, a factor weighing heavily against Eleventh Amendment protection for SEPTA. Id. at 819-20. Addressing the second Fitchik factor, the agency’s state law status, the Bolden court found that SEPTA, like NJT, possesses attributes associated with state sovereignty. Id. at 820. These attributes include: 1) exemption from state property taxes, 2) certain powers of eminent domain and 3) state-like treatment under state tort law because SEPTA is subject to the Pennsylvania Sovereign Immunity statute. Id. Therefore, SEPTA’s status under Pennsylvania law weighs slightly in favor of Eleventh Amendment immunity. Id. Applying the last Fitchik factor, the Bolden court found that SEPTA enjoys more autonomy from the state than NJT—SEPTA’s actions are not subject to gubernatorial veto and the state has less representation on SEPTA’s board of directors. Id. Therefore, SEPTA is slightly more autonomous than NJT, and the autonomy factor weighs against
the drug testing constituted an unreasonable search.³ The Bolden court
immunity. Id. Because the totality of the Fitchik factors weighs at least as heavily
against immunity for SEPTA as it does for NJT, the Third Circuit held that
SEPTA is not protected by the Eleventh Amendment. Id. at 821.

In addition to determining that SEPTA was not entitled to Eleventh Amendment immunity from lawsuit, the Third Circuit held that SEPTA's drug
testing of Bolden was unreasonable. Id. at 821-24. For a discussion of the
Bolden court's decision concerning this issue, see infra note 3.

Next, the Bolden court rejected SEPTA's assertion that Bolden consented to
the search by knowingly submitting to the drug test. Id. at 824-25. The court
rejected SEPTA's consent argument because "the evidence showed that Bolden
submitted to drug testing without voicing any objection, not because he was
truly willing to undergo the test, but because he understood that the test was
compulsory and that the alternative to submission was loss of his job." Id. at
825.

Finally, the Third Circuit held that the trial court correctly dismissed
Bolden's request for punitive damages. Id. at 829-31. The Third Circuit relied
on the United States Supreme Court's holding in City of Newport v. Fact Con-
the Court analyzed the history and policy of 42 U.S.C. § 1983 (the statute under
which Bolden was suing SEPTA for violation of his constitutional rights). 453
U.S. at 263-70. The Court reasoned that when the predecessor statute of
§ 1983's was enacted in 1871, punitive damages against municipalities were vir-
tually unanimously denied. Id. at 263. According to the Court, if Congress
wanted to allow punitive damages under the predecessor to § 1983, it would
have specifically provided for punitive damages. Id. However, Congress did not
abolish this immunity. Id. at 263-64.

In addition, the Court held that policy considerations weighed against al-
lowing punitive damages. Id. at 267-70. The Court reasoned that punitive dam-
ages serve to deter future wrongdoing. Id. at 267. However, the Court stated
that punitive damages against municipalities would not deter wrongdoing be-
because the damages would be paid by the public, not the wrongdoer. Id.

Based on City of Newport, the Bolden court extended municipal immunity to
SEPTA by reasoning that: 1) entities like SEPTA were considered immune from
punitive damages and 2) punitive damages against SEPTA would not necessarily
deter future wrongdoing by SEPTA officials. Bolden, at 830-31. In addition,
other means of deterring violations against SEPTA officials existed, including
personal suits against the officials. Id. at 831.

3. The Third Circuit held that SEPTA's drug testing of Bolden was unrea-
sonable. Bolden, 953 F.2d at 821-24. The Bolden court followed the holdings of
two recent United States Supreme Court cases, Skinner v. Railway Labor Execu-
tives Ass'n, 489 U.S. 602 (1989), and its companion case, National Treasury Em-
Skinner, the Court held that drug testing of railroad employees was reasonable
and therefore not violative of the Fourth Amendment for two reasons. 489 U.S.
at 627-28. First, the employees' privacy interests were diminished by their in-
volvelement in a regulated industry. Id. Second, the government had a compelling
interest in ensuring safety. Id. In Von Raab, the Court used the Skinner
balancing test to determine that drug testing of federal agents involved in drug
interdiction was also reasonable. 489 U.S. at 670-72. Using the Skinner balanc-
ing test, the Third Circuit rejected SEPTA's claim that it had a compelling inter-
ests in drug testing Bolden to ensure his safety and the safety of others. Bolden,
953 F.2d at 823-24. The court found that Bolden's custodial duties did not im-
plicate anyone's safety. Id. Therefore, SEPTA lacked a compelling interest that
would make its testing of Bolden reasonable and non-violative of the Fourth
Amendment. Id.
based its decision on United States Supreme Court cases that recognized a third party's ability (in limited contexts) to consent to a search of another individual.\textsuperscript{4} The \textit{Bolden} court further supported its decision by holding: \textbf{1)} a union's ability to consent to drug testing of union members stems from the union's position as sole bargaining agent in contractual matters involving union members,\textsuperscript{5} and \textbf{2)} a union's consent to searches under the Fourth Amendment to the United States Constitution of union members through drug testing parallels the interferences with the First Amendment rights of individuals that are inherent in organized labor.\textsuperscript{6} As authority for these holdings, the \textit{Bolden} court drew upon cases from the United States Courts of Appeals for the First, Sixth and Ninth Circuits to establish the ability of unions to consent to Fourth Amendment searches through collective bargaining agreements.\textsuperscript{7} The Third Circuit then extended unions' consent powers beyond the actual collective bargaining agreement to dispute resolution situations.\textsuperscript{8} The court reasoned that even if a collective bargaining agreement lacked express drug testing provisions, the union had the power, through established procedures of interpreting the agreement,\textsuperscript{9} to determine whether the agreement impliedly permitted drug testing.\textsuperscript{10}

Section II of this Casebrief provides a background on the law concerning: \textbf{1)} the applicability of the Fourth Amendment to employee drug testing,\textsuperscript{11} \textbf{2)} unions' ability to consent to Fourth Amendment

\textsuperscript{4} The Supreme Court has recognized the constitutionality of third party consent to the search of another individual's property when the third party is an agent of the individual or has authority over the place searched. For a discussion of these Supreme Court cases, see infra notes 25-28 and accompanying text. For a further discussion of the Third Circuit's application of these cases in \textit{Bolden}, see infra notes 83-86 and accompanying text.

\textsuperscript{5} For a discussion of the power of unions to negotiate contracts on behalf of its members, see infra note 30 and accompanying text. For a discussion of the Third Circuit's application of this concept to the \textit{Bolden} case, see infra note 86 and accompanying text.

\textsuperscript{6} For a discussion of the ability of unions to interfere with their members' First Amendment rights, see infra notes 31-33 and accompanying text. For a more detailed discussion of the Third Circuit's analysis of this issue, see infra notes 87-89 and accompanying text.

\textsuperscript{7} For a more detailed analysis of the First, Sixth and Ninth Circuit cases concerning drug testing, see infra notes 34-53 and accompanying text. For a further discussion of the Third Circuit's application of these cases in \textit{Bolden}, see infra notes 90-94 and accompanying text.

\textsuperscript{8} \textit{Bolden}, 953 F.2d at 828-29.

\textsuperscript{9} These interpretive procedures include arbitration and grievance settlements on behalf of the union's employee member. \textit{Id}.

\textsuperscript{10} For a more detailed discussion of the Third Circuit's analysis of the power of unions to interpret collective bargaining agreements in dispute settlements, see infra notes 97-102 and accompanying text.

\textsuperscript{11} For a discussion of the applicability of the Fourth Amendment prohibition against unreasonable searches to employee drug testing, see infra notes 19-23 and accompanying text.
II. Background

A. Drug Testing as a Fourth Amendment Search

The Fourth Amendment of the United States Constitution guarantees an individual's right to be free from unreasonable searches. In general, courts consider searches without either the consent of the individual or a valid search warrant to be unreasonable. Courts have recognized, however, a narrow class of exceptions under which a search is reasonable when the importance of the government interest in conducting the search outweighs the intrusion upon the individual's rights.

Generally, courts have recognized that employee drug tests are searches implicating the employee's Fourth Amendment rights. Nev-

12. For a discussion of the ability to consent to Fourth Amendment searches, see infra notes 24-28 and accompanying text.
13. For a discussion of the ability of unions to consent to Fourth Amendment searches of their members, see infra notes 29-53 and accompanying text.
14. For a summary of the procedural setting and facts of Bolden, see infra notes 54-78 and accompanying text.
15. For an analysis of the Third Circuit's holding and reasoning in Bolden concerning the ability of unions to consent to the drug testing of their members, see infra notes 79-105 and accompanying text.
16. The Fourth Amendment states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the Place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.
17. O'Connor v. Ortega, 480 U.S. 709, 720 (1987) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."
18. See O'Connor, 480 U.S. at 719-20; New Jersey v. T.L.O., 469 U.S. 325, 341 (1985); United States v. Place, 462 U.S. 696, 703 (1983); Camara, 387 U.S. at 536-37. The Court created "special needs" exceptions to deal with situations in which the warrant requirement is unsuitable. O'Connor, 480 U.S. at 720. For example, the Fourth Amendment does not require a search warrant when obtaining the warrant would likely frustrate the purpose of the search. Camara, 387 U.S. at 533. In T.L.O., the Court held that obtaining a warrant for administrative searches of school property would interfere with the swift discipline procedures needed in schools. 469 U.S. at 340.
19. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989). The Supreme Court held: "Because it is clear that the collection and testing of
ertheless, several courts have held that employee drug tests are constitutional when the employee has a diminished expectation of privacy and the government has a significant interest in testing the individual.20 The Third Circuit has limited the application of this balancing test to administrative searches,21 but has retained a similar analytical approach for determining the reasonableness of random drug testing plans.22 If a search is reasonable under this analytical approach, it does not implicate
the Fourth Amendment rights of the individual.\textsuperscript{23}

B. Consent to Fourth Amendment Searches

Although the Fourth Amendment protects an individual from unreasonable searches by the government, an individual can waive this protection by voluntarily consenting to a search.\textsuperscript{24} In addition, courts have recognized the ability of third parties to consent to the search of another individual if the third party is an agent of the searched individual\textsuperscript{25} or has a substantial interest in the search.\textsuperscript{26} Even if the third-party agent lacks actual authority to consent, a search is constitutionally permissible if the searching party had a reasonable belief that the third party possessed actual authority.\textsuperscript{27} However, the Supreme Court has held that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'"\textsuperscript{28}

C. Union Consent to Member Drug Testing

The law addressing the ability of an employee union to consent to search of governmental and private interests.'" 863 F.2d at 1117 (quoting O'Connor v. Ortega, 480 U.S. 709, 722-23 (1987) (plurality opinion)).

23. United States v. Sharpe, 470 U.S. 675, 682 (1985) ("[T]he Fourth Amendment is not, of course, a guarantee against all searches and seizures, but only against unreasonable searches and seizures.").


25. See, e.g., Stoner v. California, 376 U.S. 483, reh'g denied, 377 U.S. 940 (1964) (recognizing ability of agent to consent on behalf of principal); United States v. House, 524 F.2d 1035 (3d Cir. 1975) (recognizing tax accountant as agent of taxpayer who could consent to search of taxpayer's records by Internal Revenue Service).


27. Illinois v. Rodriguez, 497 U.S. 177, 182-89 (1990). The belief that a third party had authority to consent can be reasonable even if such belief is not factually accurate. Id. at 185-86. The Rodriguez Court further stated:

As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief ' that the consenting party had authority over the premises?"

Id. at 188 (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

28. Stoner, 376 U.S. at 488. In Stoner, the Supreme Court held that the search of the defendant's hotel room was unconstitutional because the police were unreasonable in their belief that the hotel clerk had authority to consent to a search of the room. Id. at 489-90.
Fourth Amendment searches of its members is unclear.\(^\text{29}\) Generally, state labor statutes define a union's role as exclusive bargaining agent for its members, giving the union power to bind its members through contractual agreements.\(^\text{30}\) Several cases recognize that union membership may permissively impinge upon members' rights under the First Amendment to the United States Constitution, particularly freedom of association.\(^\text{31}\) However, these cases limit permissible impingement upon First Amendment rights to situations in which the union and employer are addressing labor-management issues.\(^\text{32}\) Therefore, a union cannot interfere with its members' rights to freely associate in contexts

\(^{29}\) Several cases suggest that a union may consent to the drug testing and other searches of its members through collective bargaining agreements. See Stikes v. Chevron USA, Inc., 914 F.2d 1265 (9th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 2015 (1991); American Postal Workers Union v. United States Postal Serv., 871 F.2d 556 (6th Cir. 1989); Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988), \textit{cert. denied}, 490 U.S. 1107 (1989); Utility Workers of Am. v. Southern Cal. Edison, 852 F.2d 1083 (9th Cir. 1988), \textit{cert. denied}, 489 U.S. 1078 (1989). The searches consented to in these cases, however, may not implicate the employees' Fourth Amendment rights because the searches were reasonable due to the following factors: 1) the searches promoted a legitimate state interest, 2) the employees had a diminished expectation of privacy because the collective bargaining agreement clearly established the employers' bargained right to conduct employee searches or 3) the employees had a diminished expectation of privacy because the consent to the searches was clearly defined as a condition of employment. For an analysis of these cases, see \textit{infra} notes 34-53 and accompanying text.

\(^{30}\) The Pennsylvania Public Employee Relations Act (PERA) states:
Representatives selected by public employs in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employees in such unit to bargain on wages, hours, terms and conditions of employment: Provided, That any individual employe or a group of employes shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect

\(^{43}\) PA. CONS. STAT. ANN. § 1101.606 (1991); see Vaca v. Sipes, 386 U.S. 171, 177 (1967) (stating that "[i]t is now well established that, as the exclusive bargaining representative of the employes . . . the Union had a statutory duty fairly to represent all of those employes . . . in its collective bargaining . . . ").

\(^{31}\) Abood v. Detroit Bd. of Educ., 431 U.S. 209, \textit{reh'g denied}, 433 U.S. 915 (1977). In \textit{Abood}, the Supreme Court held that union membership entailed some restriction on the constitutional rights of employees and in particular may "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." \textit{Id.} at 222. The Court permitted this interference because the principle of exclusive union representation as a means of promoting labor peace was an important state interest. \textit{Id.} at 219-20.

\(^{32}\) Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984) ("[T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of . . . exclusive representation of the employes in dealing with the employer on labor-management issues."). In Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), the Supreme Court also held that a union's interference with employee rights must be narrowly tailored. \textit{Id.} at 303.
outside the traditional scope of the union/employer/employee relationship.33

The First, Sixth and Ninth Circuits have suggested that labor unions may consent to drug testing (or similar searches) of their members through collective bargaining. In Jackson v. Liquid Carbonic Corp.,34 the First Circuit held that neither the Massachusetts Constitution nor the United States Constitution granted an employee the absolute right to be free from employer drug testing.35 As part of biennial medical examinations given to truck drivers in compliance with federal highway safety regulations, Liquid Carbonic began drug testing employee truck drivers.36 In February, 1986, Liquid Carbonic dismissed Jackson, its employee, after traces of marijuana had been detected in Jackson's urine sample.37

The First Circuit dismissed Jackson's state privacy claims,38 holding that section 301 of the Labor Relations Act of 194739 preempted the suit because resolution of the state-law claims required interpretation of the collective bargaining agreement.40 The court stated that “the dimensions of [Jackson’s] cognizable expectation of privacy depend to a great extent upon the concessions the union made regarding working condi-

33. *Abood*, 431 U.S. at 235. In *Abood*, the Supreme Court held that unions cannot permissibly interfere with member's constitutional rights for such purposes as support of political candidates or ideological causes. *Id.*

34. 863 F.2d 111 (1st Cir. 1988).

35. *Id.* at 115-16. The Liquid Carbonic court noted that Massachusetts privacy law, both constitutional and statutory, parallels federal constitutional law. *Id.* at 115. The First Circuit stated "we find [the U.S. Constitution] does not secure an absolute right to be free from employer drug testing. Rather, the ordinary case requires that a court attempt to calibrate the proper balance between an employee's privacy rights and an employer's legitimate concerns." *Id.*

36. *Id.* at 112. Liquid Carbonic Corp. employed Jackson as a truck driver, responsible for hauling pressurized gases that were volatile and often hazardous. *Id.* During the time period in question, Jackson was a member of Local 49, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (Local 49), a party to a collective bargaining agreement with Liquid Carbonic Corp. *Id.* Liquid Carbonic added the drug testing procedure to the biennial medical examinations only after announcing the new drug testing program to its employees, distributing consent forms and notifying the drivers that "permitting these tests to be performed was a condition of employment." *Id.* Jackson signed the consent form. *Id.* at 112-13. Neither Jackson nor Local 49 challenged the drug testing when the corporation announced it. *Id.* at 112.

37. *Id.* at 119.

38. *Id.* Jackson alleged that the drug testing: 1) violated his state and federal constitutional right to be free from unreasonable searches, 2) violated state privacy law and 3) comprised a wrongful discharge under state law because it was contrary to public policy. *Id.* The district court granted Liquid Carbonic's motion to dismiss the suit for failure to state any cognizable claim. *Id.* Jackson appealed the dismissal to the First Circuit. *Id.*


40. *Liquid Carbonic*, 863 F.2d at 122.
While the Liquid Carbonic court did not balance Jackson's privacy interests against Liquid Carbonic's safety concerns, the court clearly stated that the terms of collective bargaining agreements bear heavily on such a balancing.\textsuperscript{42}

The Sixth Circuit, in\textit{American Postal Workers Union v. United States Postal Service},\textsuperscript{43} held that unannounced employee locker searches did not violate the Fourth Amendment.\textsuperscript{44} The Sixth Circuit based its holding on the language of the collective bargaining agreement between the postal workers' union and the United States Postal Service (USPS).\textsuperscript{45} The agreement expressly permitted locker searches under certain conditions.\textsuperscript{46} In addition, before renting lockers, employees signed a waiver permitting random, unannounced searches.\textsuperscript{47} Therefore, the court concluded that the employee had a diminished expectation of privacy in the locker, rendering the search outside the boundaries of the Fourth Amendment.\textsuperscript{48}

The Ninth Circuit decided two cases that addressed the union con-
sent issue. In *Utility Workers of America v. Southern California Edison*, the Ninth Circuit recognized that the constitutionality of random drug testing plans would be determined in part by a concession made by the union in the collective bargaining agreement. In *Stikes v. Chevron USA, Inc.*, the court again noted that the collective bargaining agreement would be a determinative factor in whether the searches conducted by the company were constitutional. It was against the backdrop of the plaintiffs had no reasonable expectation of privacy in their respective lockers that was protected by the Fourth Amendment”).

49. See *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990); *Utility Workers of Am. v. Southern Cal. Edison*, 852 F.2d 1083 (9th Cir. 1988). In both Ninth Circuit cases, the plaintiffs brought state-law claims for violation of state constitutional rights. *Stikes*, 914 F.2d at 1266; *Utility Workers of Am.*, 852 F.2d at 1085. Both plaintiffs were attempting to avoid removal to federal court under § 301 of the Labor Management Relations Act because their claims would be barred for not exhausting available grievance procedures. *Stikes*, 914 F.2d at 1266-67; *Utility Workers of Am.*, 852 F.2d at 1085. In both cases, the Ninth Circuit held that § 301 preempted the plaintiffs’ claims because the drug testing was authorized under the collective bargaining agreement. *Stikes*, 914 F.2d at 1266-70; *Utility Workers of Am.*, 852 F.2d 1085-87. For a more specific discussion of these cases, see infra notes 50-53 and accompanying text.

50. 852 F.2d 1083. In September, 1984, Southern California Edison (SCE) instituted annual drug testing for all employees “seeking ‘unescorted access’ into the security area encompassing the San Onofre plant’s nuclear reactors.” *Id.* at 1084. In December, 1986, SCE modified its drug testing procedures to include random testing of all plant employees. *Id.* at 1085. SCE implemented the original drug testing program and the 1986 modification without first bargaining with the Utility Workers of America, Local 246. *Id.* at 1084-85. Local 246 and two plant employees filed a suit against SCE “alleging that the drug testing program violated rights guaranteed under the California Constitution to privacy and freedom from unreasonable searches and seizures.” *Id.* at 1085.

51. *Id.* at 1086. The Ninth Circuit stated:

Resolution of the issue whether Local 246 has bargained away its members’ claimed constitutional rights must rest upon Articles VI and X.N of the collective bargaining agreement, which recognize SCE’s right to manage the plant, to direct the working force, and to implement reasonable safety rules and require their observance. Thus, we find that Local 246’s state-law claims cannot be resolved without reference to the collective bargaining agreement... *Id.*

The Ninth Circuit also acknowledged that no courts have recognized freedom from drug testing as a right that cannot be negotiated away. *Id.*

52. 914 F.2d 1265. In September, 1984, Chevron instituted, as part of its safety program, a policy requiring employees to submit to random searches of their persons and property. *Id.* at 1266. Stikes, an employee of Chevron, was dismissed after refusing to permit Chevron representatives to search his car that was parked in the company lot. *Id.* Stikes filed suit in state court alleging, among other things, that Chevron’s search policy infringed upon his right to privacy in violation of the California Constitution. *Id.*

53. *Id.* at 1269. The Ninth Circuit stated:

Stikes’ right to privacy claim is inextricably intertwined with the collective bargaining agreement... *Id.*

Here, the district court could not ascertain Stikes’ expectations of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement... *Id.* By the same token, it could not assess whether Chevron’s search of the car
First, Sixth and Ninth Circuit cases that the Third Circuit rendered its decision in *Bolden*.

III. FACTS

Russell Bolden worked for the Southeastern Pennsylvania Transit Authority (SEPTA) from 1981 to 1986 as a maintenance custodian. In August of 1986, Bolden was discharged for conduct unbecoming a SEPTA employee after an altercation with a fellow worker. Bolden was a member of the Transportation Workers’ Union, Local 234 (Local 234). Local 234 filed a grievance on behalf of Bolden, which was eventually submitted for arbitration pursuant to the collective bargaining agreement.

In June of 1987, SEPTA reinstated Bolden with one-half back pay. During Bolden’s absence, SEPTA unilaterally promulgated two orders relating to employee drug testing. Order No. 87-1 called for the random drug testing of certain employees. Order No. 87-2 authorized drug testing of employees returning from certain absences, including absences for disciplinary reasons and absences of more than thirty days. In February 1987, the unions representing SEPTA’s employees constituted an unreasonable intrusion without understanding the scope of Chevron’s powers provided for in the collective bargaining agreement.

Id.

54. *Bolden*, 953 F.2d at 810.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* The arbitration panel ordered Bolden’s reinstatement; reinstatement was not the result of a settlement with SEPTA. *Id.*

59. *Id.*


61. *Bolden*, 953 F.2d at 810. Orders 87-1 and 87-2 revised the drug testing program SEPTA had established in September, 1985 under Order No. 85-1. *Transportation Workers*, 678 F. Supp. at 545-46. Order No. 85-1 had “called for urine or blood testing of employees suspected of being in ‘possession of intoxicants or controlled substances,’ and which described such possession as ‘a dischargeable offense.’ ” *Id.* at 545. Orders No. 87-1 and 87-2 proposed “surprise testing” designed to combat increasing drug-related transit accidents. *Id.* at 545-46.

Order No. 87-2, the relevant regulation in *Bolden*, provided:

Any employee returning to work under the following circumstances may be subject to a medical examination, including body fluid testing: 1. Absences due to physical problems such as injury occurring on or off duty, and illness; 2. A rehabilitation program for substance abuse which lasted for any length of time; 3. [A] disciplinary suspension; 4. Any other approved absence from duty in excess of 30 days.
petitioned for an injunction against the enforcement of Order No. 87-1, which the United States District Court for the Eastern District of Pennsylvania granted, but the court made no ruling concerning Order No. 87-2. In January 1988, the district court upheld the constitutionality of a revised version of Order No. 87-1 but held Order No. 87-2 unconstitutional. Because Bolden's reinstatement occurred six months

[ sic] (excluding a five-week vacation period). Refusal to submit to the aforementioned medical examination will subject employees to . . . disciplinary measures . . .

Bolden, 953 F.2d at 810 n.2.

62. Bolden, 953 F.2d at 810. SEPTA Order 87-1 was preliminarily enjoined "because the program, as evidenced, was excessively intrusive and did not carry out its objectives. A Fourth Amendment violation appeared, therefore, to be likely." Transportation Workers', 678 F. Supp. at 546. Although the district court opinion stated that Order 87-2 was also enjoined earlier, the preliminary injunction applied only to Order 87-1. Bolden, 953 F.2d at 810 n.3.

63. After the preliminary injunction of Order No. 87-1, SEPTA consulted with experts to revise the drug testing plan to a form that would pass judicial scrutiny. Transportation Workers', 678 F. Supp. at 546. The experts considered such issues as the accuracy of the testing procedures, the positive thresholds, the randomness of the testing and the existence and functioning of an employee assistance program. Id. The district court found the revisions sufficient to make the random testing program under Order No. 87-1 constitutionally permissible. Id. at 548. Specifically, the district court found that the revised plan ensured accuracy, minimized privacy interference and was logically related to the purpose of promoting safety through correction and deterrence. Id. The district court restated the purpose of the testing program: "As set forth in the revised proposal, the purpose of the program is to enforce a fitness for duty standard. This standard is applied to a class known as 'operating employees' and is defined as the absence from one's system of alcohol, drugs and drug metabolites above specified thresholds." Id. at 546. "Operating employees" are employees in safety sensitive positions. Id. Specifically, the district court noted that the following positions comprised the class, "operating employees":

1. Engineer, Bus Person, Surface Train Person, Subway-Elevated Trainperson
2. Conductors and Passenger Attendants
3. Construction Equipment Operators
4. Superintendents of Operations, Towerpersons, Train Dispatchers, and Power Dispatchers
5. Signal Maintainers
6. Power Distribution Maintainers
7. Vehicle, Mechanical, Track and Structural Inspectors
8. Welders
9. Sworn SEPTA police officers
10. Any employee authorized to carry a firearm on duty
11. Instructors and supervisors of the foregoing.

Id. at 547 n.9. Although the district court held the random drug testing program under Order No. 87-1 constitutional, the court held the return to work drug testing program under Order No. 87-2 unconstitutional. Id. at 551. "With random testing in place, the need for return to work testing would substantially be eliminated." Id.

The Third Circuit affirmed both of the district court's holdings. Transportation Workers Local 234 v. Southeastern Pa. Transit Auth., 863 F.2d 1110 (3d Cir. 1988), vacated, 492 U.S. 902 (1989). The Supreme Court vacated the circuit court decision and remanded for reconsideration in light of the Court's deci-
before the final enjoinment of Order No. 87-2, SEPTA subjected Bolden to a blood test and urinalysis as part of the medical examination required under Order No. 87-2. The tests indicated that Bolden had recently used marijuana. As a result, SEPTA dismissed Bolden for drug use. Subsequently, Bolden's union, Local 234, filed a grievance. The union's counsel represented Bolden through three levels of grievance proceedings that culminated in a request for arbitration.

Before final arbitration and after Order 87-2 was finally enjoined, SEPTA and the union settled Bolden's discharge grievance. The settlement gave Bolden full back pay for the drug-related discharge period, but required him to comply with one of two options, both of which required drug testing. Bolden refused to comply with either option and consequently did not return to work. Bolden then filed a complaint against SEPTA under 42 U.S.C. § 1983, seeking compensatory damages for lost wages and punitive damages from SEPTA. Bolden claimed


64. Bolden, 953 F.2d at 810-11. Bolden submitted to the drug test without voicing an objection and later testified that taking the test did not create any problems for him. Id. at 824. SEPTA viewed Bolden's knowing submission as consent. Id. However, the Third Circuit rejected SEPTA's argument that Bolden had consented to the drug test. Id. at 825. Rather, the court held that Bolden's fear of losing his job compelled him to submit to the drug test. Id. For a more detailed discussion of the Third Circuit's analysis of this issue, see supra note 2.


67. Id.

68. Id.

69. Id.

70. Id. The two options that the settlement gave Bolden were to:
1) enter SEPTA's Employee Assistance Program and present evidence of successful substance abuse treatment, agree to an "aftercare program," submit to a body fluids test before returning to work, and remain subject to unannounced follow-up tests or 2) submit to a body fluids test and, if he passed, meet with a substance abuse counsellor and remain subject to unannounced follow-up testing for six months.

71. Id.

72. Id. The relevant statute, entitled "Civil action for deprivation of rights," provides in part:
that SEPTA violated his constitutional rights by subjecting him to an unreasonable search and seizure and by discharging him without a prior hearing. Bolden subsequently amended his complaint, adding Local 234 as a defendant.

After the district court denied SEPTA's and Bolden's motions for summary judgment on liability and dismissed Bolden's claim for punitive damages, Bolden's case was tried before a jury. The jury found that SEPTA had violated Bolden's right to protection from unreasonable searches and awarded damages of $285,000. A panel of the Third Circuit reversed the district court judgment and remanded for entry of

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


In its answer to Bolden's complaint, SEPTA denied the unconstitutionality of the drug test and asserted an affirmative defense of accord and satisfaction based on the settlement of the drug test grievance. Id. In addition, SEPTA filed a third party complaint against Local 234. Id. SEPTA asserted that the union was liable for any judgment Bolden obtained against SEPTA because the union negotiated the settlement. Id.

In his amended complaint, Bolden asserted that '[i]f ... Local 234 ... had any obligation to represent plaintiff in connection with this illegal drug testing and illegal discharge, which obligation is denied by plaintiff, then Local 234 participated in a conspiracy with [SEPTA] to deprive plaintiff of his XIVth Amendment rights.' Id.

In dismissing the motions for summary judgment, the district court held that issues of material fact existed regarding the reasonableness of the drug test, whether Bolden consented to the test and whether SEPTA obtained accord and satisfaction through the settlement. Bolden, 1989 WL 126239, at *1. Regarding liability, the district court specifically stated "it is not clear that the drug test performed on the plaintiff was a Fourth Amendment violation. The opinion of this court in [Transportation Workers'- Union v. SEPTA] leaves open the constitutionality of governmental return-to-work testing in the absence of a program of random drug testing." Id. (citation omitted). For a discussion of the district court's holding in Transportation Workers', see supra note 63 and accompanying text. The district court granted SEPTA's motion for summary judgment on the issue of punitive damages. Bolden v. Southeastern Pa. Transit Auth., No. CIV.A.88-9156, 1989 WL 29237, at *1 (E.D. Pa. March 29, 1989). The court dismissed Bolden's punitive damage claims, holding that SEPTA was a commonwealth entity, and therefore immune to punitive damages judgments. Id. For a discussion of the Third Circuit's holding regarding this issue, see supra note 2.

The district court also granted Local 234's motion for summary judgment on SEPTA's third-party complaint. Bolden, 953 F.2d at 811.

Bolden, 953 F.2d at 813-14. However, "[t]he jury found that SEPTA had not violated Bolden's right to procedural due process and that Local 234 had not violated Bolden's constitutional rights by conspiring with SEPTA." Id. at 814. The court denied SEPTA's motion for judgment notwithstanding the verdict and SEPTA appealed. Id. Bolden also appealed the dismissal of his claim for punitive damages. Id.
judgment in favor of SEPTA. Bolden’s petition for rehearing was subsequently granted and the judgment of the panel was vacated. These facts prompted the Third Circuit’s reasoning and decision concerning unions’ ability to consent to the drug testing of union members. The Bolden court’s reasoning and decision are analyzed in the following section.

IV. Analysis

The Third Circuit first considered whether the settlement agreement between SEPTA and Local 234 precluded Bolden from subsequently bringing a claim under 42 U.S.C. § 1983. The court focused on two questions:

(a) the res judicata or collateral estoppel effect of an arbitration award or grievance settlement with respect to a subsequent claim under 42 U.S.C. section 1983 and (b) the effect for Fourth Amendment purposes of the union’s consent to drug testing, either during negotiation of a new collective bargaining agreement or in resolving disputes about the meaning or application of an existing agreement.

Relying on United States Supreme Court decisions, the Third Circuit agreed with Bolden that the grievance settlement did not preclude his section 1983 claim under the doctrines of res judicata or collateral estoppel. The Third Circuit noted, however, that the Supreme Court cases controlling the res judicata and collateral estoppel questions in Bolden did not “resolve the question whether, for Fourth Amendment purposes, a public employee union may consent to future drug testing of the employees it represents.”

77. Id. SEPTA based its position on three arguments: 1) the drug test given to Bolden was reasonable because his duties were safety sensitive and because Bolden consented to the drug test; 2) SEPTA relied on the settlement agreement it reached with Local 234 as consent to the test; and 3) the $285,000 judgment was contrary to law, excessive and unconscionable. Id.

78. Id.

79. Id. at 825-26.

80. Id. at 825.


82. Bolden, 953 F.2d at 826. The court noted that Alexander, Barrentine and McDonald did not address the issue of whether a union could affect an employee’s constitutional right by consenting to an employer’s action. Id.
After establishing that Bolden could properly bring a section 1983 action, the Third Circuit then reviewed the circumstances under which a third party can validly consent to a search without violating the searched individual's Fourth Amendment rights. Specifically, the court considered circumstances in which the government obtained valid consent from persons in agency relationships with the searched parties or from third parties with substantial interests related to the searches. The Bolden court concluded that these principles supported the position that a union can validly consent to searches that would otherwise interfere with an employee's Fourth Amendment rights. The court's review of the statutory authority of unions to negotiate contractual commitments binding upon their members further supported this conclusion.

Next, the Third Circuit considered Supreme Court precedent recognizing that a union's role as exclusive bargaining agent leads to certain permissible restrictions of union members' First Amendment rights. The Supreme Court has limited these restrictions to matters regarding labor-management issues. The Third Circuit reasoned that if unions could restrict the First Amendment rights of their members through collective bargaining, unions could also consent to terms implicating union members' Fourth Amendment rights.

In addition, the Third Circuit considered cases from other circuits that addressed the ability of unions to consent to drug testing or similar searches on behalf of their members. The First Circuit held that the reasonableness of an employee's expectation of privacy largely de-

83. Id.
84. Id. The Third Circuit stated: 
[T]here are a variety of circumstances in which a third party may validly consent to a search or seizure. Such consent may be provided by an agent to whom such authority has been conferred. In addition, consent may be provided by certain other third parties with substantial interests or responsibilities related to the search or seizure. These third parties include . . . a party with common authority over the premises or item to be searched . . . .

Id. (citation omitted). For a discussion of the cases cited by the Third Circuit, see supra notes 25-28 and accompanying text.

85. Bolden, 953 F.2d at 826 ("[W]e believe that a union such as Bolden's may validly consent to terms and conditions of employment, such as submission to drug testing, that implicate employees' Fourth Amendment rights.").
86. Id. For a further discussion of the rights and obligations of unions in Pennsylvania, see supra note 30.
88. For a more detailed discussion on the limited ability of unions to impinge on their members' First Amendment rights, see supra notes 31-33 and accompanying text.
89. Bolden, 953 F.2d at 827 ("We see no reason why similar principles should not be employed in determining whether a union, in its capacity as exclusive bargaining representative, may consent to terms and conditions of employment implicating Fourth Amendment interests.").
90. Id. ("Several courts of appeals in recent years have suggested that un-
pended upon the terms of the collective bargaining agreement.\textsuperscript{91} The Sixth Circuit also placed significant weight on the collective bargaining agreement when determining whether the employee consented to locker searches.\textsuperscript{92} The Ninth Circuit stated that no precedent exists that forbids unions from negotiating away an employee's right to be free from drug testing.\textsuperscript{93} The \textit{Bolden} court further argued that the power of unions to consent to the drug testing of their members promotes efficiency.\textsuperscript{94}

The Third Circuit next discussed the contexts in which unions can consent to drug testing.\textsuperscript{95} The \textit{Bolden} court stated that a union could expressly consent to drug testing through a collective bargaining agreement or such an agreement could implicitly permit drug testing.\textsuperscript{96} The \textit{Bolden} court further stated that any interpretation of a collective bargaining agreement must be done in accordance with established procedures.\textsuperscript{97} If the procedures require arbitration or grievance proceedings, those proceedings must be utilized.\textsuperscript{98} Through these proceedings a union could conclude that the collective bargaining agreement implicitly permits employee drug testing.\textsuperscript{99} Courts are bound by that determination unless the employee can prove that the union breached its duty of fair representation.\textsuperscript{100} The \textit{Bolden} court held that Local 234, acting in its

\begin{itemize}
    \item \textsuperscript{91} Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 119 (1st Cir. 1988) ("[T]he dimensions of . . . cognizable expectation of privacy depend to a great extent upon the concessions the union made regarding working conditions during collective bargaining.").
    \item \textsuperscript{92} American Postal Workers Union v. United States Postal Serv., 871 F.2d 556, 567 (6th Cir. 1989).
    \item \textsuperscript{93} \textit{Bolden}, 953 F.2d at 827 ("To the best of our knowledge, . . . no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here." (quoting Utility Workers of America v. Southern California Edison, 852 F.2d 1083, 1086 (9th Cir. 1988))).
    \item \textsuperscript{94} \textit{Id.} at 828 ("If individual public employees may litigate such questions despite the resolution reached through collective bargaining, the utility of collective bargaining . . . would be greatly diminished.").
    \item \textsuperscript{95} \textit{Id.} at 828-29.
    \item \textsuperscript{96} \textit{Id.} at 828. The court based its determination on the Supreme Court's holding in Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299, 311-12 (1989), holding that if a collective bargaining agreement lacked an express provision permitting drug testing, it may implicitly allow for such tests based on industry custom. \textit{Bolden}, 953 F.2d at 828.
    \item \textsuperscript{97} \textit{Bolden}, 953 F.2d at 828.
    \item \textsuperscript{98} \textit{Id.} (citing DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 163 (1983)).
    \item \textsuperscript{99} \textit{Bolden}, 953 F.2d at 828 ("The result of this process may be a settlement or arbitration decision that the collective bargaining agreement implicitly permits drug testing of some or all employees.").
    \item \textsuperscript{100} \textit{Id.} (citing Chauffeurs, Teamsters and Helpers, Local 391 v. Terry, 494 U.S. 558 (1990)).
\end{itemize}
role as exclusive bargaining agent for its members, represented Bolden in a grievance proceeding and negotiated a settlement that permitted future drug testing. The Bolden court held that this settlement had the same effect as a consent to the drug testing by Bolden himself. The court also concluded that a claim of unfair union representation was not available to Bolden because he had not previously asserted that claim at trial or on appeal. The Bolden court remanded the case to determine the amount of damages representing lost wages and emotional distress arising after the grievance settlement. These damages were unavailable to Bolden because he refused to return to work.

V. Conclusion

The Third Circuit's holding that labor unions can waive their members' Fourth Amendment rights is confusing given the court's position on drug testing as announced in the Bolden opinion and other cases. The Third Circuit has applied painstaking analysis to determine which drug testing plans constitute unreasonable searches violative of the Fourth Amendment. Yet, after determining that a drug testing plan was unreasonable (specifically, SEPTA Order 87-2), the court stretched the law of third-party consent so that an otherwise unconstitutional drug test became mandatory for an unwilling individual.

The cases cited by the Third Circuit majority in support of its position are distinguishable from Bolden. Those cases involved drug test-
ing programs and other searches that arguably promoted compelling state interests not present in Bolden. More importantly, the employees in those cases had a diminished expectation of privacy because they received prior express notice of the testing programs through their collective bargaining agreements. The respective circuit courts suggested that the searches were reasonable because the compelling state interests outweighed the employees' diminished expectation of privacy. Because the searches were reasonable, they did not implicate Fourth Amendment rights. Consequently, the unions did not consent to Fourth Amendment searches. Rather, they consented to searches that did not implicate the constitutional rights of their members.

The Third Circuit held that the drug testing of Bolden was unreasonable. Therefore, the test implicated Bolden's Fourth Amendment right to be free from unreasonable searches. Based on precedent that

110. In Liquid Carbonic, the drug testing plan was instituted under a program to promote safety in interstate trucking, an industry with considerable safety requirements. Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 116-17 (1st Cir. 1989). In American Postal Workers Union v. United States Postal Service, USPS searched postal property to deter theft of mail items and to promote safety. 871 F.2d 556, 557-58 (6th Cir. 1989). In Utility Workers of America v. Southern California Edison, the utility instituted employee drug testing to ensure the safety of nuclear power plants and the Ninth Circuit recognized the utility's right to promulgate safety rules. 852 F.2d 1083, 1086 (9th Cir. 1990). In Stikes v. Chevron USA, Inc., Chevron instituted its employee search plan as part of an overall safety program. 914 F.2d 1265, 1266 (9th Cir. 1990).

111. For a discussion of the circuit courts' findings regarding the notice provided through the collective bargaining agreements, see supra notes 34-53 and accompanying text.

112. For a discussion of circuit courts' analyses of the reasonableness of the respective searches, see supra notes 34-53 and accompanying text.

113. Judge Nygaard expounded this argument in his dissent from the Third Circuit's finding that Local 234 could waive Bolden's constitutional rights. Bolden, 953 F.2d at 832-34 (Nygaard, J., dissenting). Nygaard criticized the majority holding as confusing the distinction between reasonable and unreasonable searches. Id. at 833 (Nygaard, J., dissenting). He further stated that "the majority thinks terms and conditions of employment embodied in collective bargaining agreements with public employers commonly restrict 'rights' that unionized public employees would otherwise enjoy under the Fourth Amendment." Id. (Nygaard, J., dissenting).

114. In his dissent, Judge Nygaard agreed with the majority that unions possess the authority to consent to drug testing of their members through collectively-ratified bargaining agreements. Id. at 833 (Nygaard, J., dissenting). Nygaard stated that the unions had this authority "not because the union has omnipotent authority under labor law, but because such medical incursions into individual liberty are reasonable under the circumstances and hence do not violate the Fourth Amendment." Id. (Nygaard, J., dissenting).

115. Judge Nygaard further stated "the 'rights' properly restricted by collective bargaining agreements do not have constitutional dimensions, but rather are in the nature of contractual entitlements." Id. (Nygaard, J., dissenting).

116. For a discussion of the Third Circuit's analysis of this issue, see supra note 3.
held that unions could consent to *reasonable* searches, the Third Circuit held that Local 234 had the power to consent to an *unreasonable* search of Bolden. Bolden did not consent to the drug test he underwent upon his return to work and did not personally consent to drug testing as a requirement for re-employment after his drug-related dismissal.

Under the Third Circuit's holding in *Bolden*, an individual can unknowingly waive his constitutional rights by joining a labor union. The individual might not receive express notice of potential Fourth Amendment searches through the collective bargaining agreement or any other form of official communication. After the employer unilaterally institutes a drug testing program that implicates the individual's Fourth Amendment rights, the individual is denied an opportunity to withhold consent to the program by asserting his constitutional rights. Instead, the union becomes the governor of the individual's constitutional rights, despite any of his or her contrary intentions.

*Andrew M. Souder*

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117. For a more detailed discussion of the Third Circuit's analysis and holding, see supra notes 83-102 and accompanying text.

118. For a discussion of the Third Circuit's finding that Bolden did not consent to drug testing, see supra note 2.

119. For a discussion of Bolden's refusal to submit to a second drug test, and his subsequent legal proceedings against SEPTA, see supra notes 71-78 and accompanying text.