

*Verdict Search*

Volume 22 Issue 29 January 17, 2005

**FOURTH AMENDMENT**

Search and Seizure — Employment — Wrongful Termination

**Flight attendant claimed drug tests not randomly scheduled**

**Verdict \$2,500,000**

*Drake v. Delta Airlines Inc.*

U.S. District Court, Eastern District

**Verdict (P) \$2,500,000**

**Case** Richard W. Drake v. Delta Airlines, Inc., No. 94 Civ 5944

**Court** U.S. District Court, Eastern District

**Judge** Frederic Block

**Date** 10/12/2004

**Plaintiff**

**Attorney(s)** Samuel O. Maduegbuna, Maduegbuna Cooper LLP,  
New York, NY

**Kenechukwu C. Okoli**, Law Office of K.C. Okoli,  
New York, NY

**Defense**

**Attorney(s)** Ira Rosenstein, Orrick, Herrington & Sutcliffe, New York, NY

**Facts & Allegations** In 1963, plaintiff Richard Drake, a man in his early 20s, was hired by Pan American Airlines. Drake served as a flight attendant, but he was also active in union matters. During the late 1970s, he served as a strike marshal. In that capacity, he planned and executed a worldwide shutdown of Pan Am's operations, thus forcing the airline's ratification of its first independent union contract. During the early 1980s, Drake served as a union grievance chairman, and in that capacity he presented more than 200 cases. He was also instrumental in the creation of the Independent Union of Flight Attendants and was a chairman of that union. In 1991, Delta Airlines Inc., Atlanta, acquired Pan Am. Pursuant to the acquisition agreement, Delta retained the top 10% of Pan Am's flight attendants, based on seniority. Drake was one of the flight attendants who were retained. He was still active in the flight-attendant union, but he no longer held a leadership position. However, Delta's flight attendants were not unionized.

In April 1993, flight attendants held an open meeting in the Delta terminal building at John F. Kennedy International Airport in Queens. The meeting's purpose was to provide an opportunity for flight attendants to voice concerns regarding Delta's New York operations. Of the flight attendants present, some 99% were former Pan Am employees. Delta was represented by its director of in-flight services, Vicki Escarra, and Delta managers who were former Pan Am flight attendants and were aware of Drake's active union history.

At the meeting, Drake, the chief flight attendant of a crew that had returned from Italy, criticized the airline's procedure for recertifying Italian-speaking flight attendants. He demanded a change in the practice. Escarra refused, absent a witness and evidence that the practice was being abused in its implementation. Drake produced a witness and evidence and requested immediate action, but Escarra dismissed the topic, and the practice remained unchanged.

During the ensuing six months, Drake was thrice subjected to Delta-imposed random drug tests. During his prior 30 years, he had only been asked to take one drug test.

The first test was performed in April and produced negative results. The second test was scheduled for July, but Drake missed it. It was performed in August and produced negative results. The third test was performed in October and allegedly revealed the presence of an adulterant—a substance introduced into a person’s urine, for the purpose of concealing the presence of drugs. The adulterant was considered tantamount to a refusal to take the test. In December 1993, Drake, then 51, was terminated.

Drake sued Delta. He presented causes of action based on wrongful termination and violation of his Fourth Amendment rights regarding search and seizure laws and the federal parameters of random drug testing.

In 1996, Drake’s case was dismissed by the U.S. District Court for the Eastern District of New York. The court determined that Drake was an at-will employee, and thus, that he could not present a wrongful-termination suit, given the circumstances.

Drake appealed. The Second Circuit Court of Appeals affirmed the denial of Drake’s wrongful-termination claim, but the case was remanded for resolution of his Fourth Amendment– based claim.

During discovery, Drake’s data-collection expert attempted to procure the formula that Delta used to select drug-test subjects. Delta claimed that its secure system would be breached by revelation of the formula, and it moved for an order of protection. The motion was granted.

Drake alleged that his drug tests were not the product of random selection—that he was purposefully targeted as a means of eliminating a well-known union leader and organizer. He contended that the April 1993 meeting inspired Delta’s managers to investigate his union-leadership background and that they were concerned about his past success in mobilizing flight attendants. His counsel noted that Delta’s flight attendants had sustained a 7.5% pay cut.

Drake further alleged that Delta did not want to fire him without reason because mere termination would not have ended his ability to organize union activities, though he admitted that he did not act as a union activist while at Delta. His counsel opined that Delta used the drug-test results as a means of creating the appearance that he had cheated on his drug test and was fired as a result. Judge Frederic Block barred testimony regarding the drug-test results.

Drake subpoenaed Delta’s drug-test manager, who testified that an immediate supervisor and another management-level employee had asked her to add employees’ names to the list of random drug tests. She contended that such requests were made twice and that she refused both requests. She testified that she was not sure that the two managers understood the meaning of random drug testing.

Delta contended that its drug-test subjects were randomly chosen by computer. It presented a flight-attendant supervisor, who testified that she was also thrice selected within one year. Delta also presented the employee who received the list of drugtest subjects and was in charge of providing notice of scheduled tests. The employee testified that computerized selections were completed quarterly in Delta's Atlanta headquarters. He contended that the test volume increased or decreased each quarter, though he could not explain why. He added that he merely followed headquarters' instructions. Delta produced its roster of fourth-quarter 1993 drug tests, which were originally the only tests addressed in Drake's claim. It contended that it could no longer produce the earlier rosters because too much time had elapsed. Delta also argued that the April 1993 meeting could not have inspired Drake's selection for the April drug test. It contended that the April 1993 test subjects had been selected prior to the meeting. Delta added that the Federal Aviation Administration had reviewed and approved its drug-testing process.

### **Injuries/Damages** *emotional distress*

Drake claimed that his drug tests were not the product of random selection—that he was purposefully targeted as a means of eliminating a well-known union leader and organizer. He alleged that the tests caused him to experience emotional distress, damage to his reputation, personal humiliation, mental anguish and suffering, and deprivation of liberty.

**Result:** The jury was charged with a special interrogatory for each of the three drug tests. It found that Drake's April 1993 drug test was a product of random selection, but that the subsequent tests were not. It awarded Drake \$2.5 million.

**RICHARD DRAKE** \$300,000 comp. damages, August 1993 test  
\$500,000 comp. damages, October 1993 test  
\$700,000 punitive damages, August 1993 test  
\$1,000,000 punitive damages, August 1993 test  
\$2,500,000

### **TRIALDETAILS**

Trial Length: 5 days  
Jury Deliberations: 2.5 hours  
Jury Poll: 8-0  
Jury Composition: 4 male, 4 female

### **Plaintiff**

**Expert(s)** **Charles R. Mann**, data collection & analysis,  
Washington, DC

### **Defense**

**Expert(s)** None reported

**POST -TRIAL** There is a pending defense motion for judgment notwithstanding the verdict, or, alternatively, a new trial.

—Amy Bourne