

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. \_\_\_\_\_, Courtroom \_\_\_\_

---

**COMPLAINT**

---

GARY WAYNE TIMM and CYNTHIA JEAN TIMM,

Plaintiffs,

v.

DAVID REITZ, in his official capacity as Director of the Colorado Department of Revenue Division of Racing Events, an administrative agency of the State of Colorado, and Irving S. Hook, W. Gale Davey, Michael B. Johnson, Gene Naugle and Arnold L. Mackley, in their official capacities as members of the Colorado Racing Commission.

Defendants.

---

Gary Wayne Timm and Cynthia Jean Timm (the "Timms") complain against defendants as follows:

**SUMMARY OF ACTION**

1. Pursuant to U.S.C. Section 1983 and the Colorado Constitution, plaintiffs seek declaratory and injunctive relief from a policy of the Colorado Racing Commission that requires participants in the greyhound racing industry to provide samples of their urine, which defendants test for the presence of illicit drugs, without reasonable cause or suspicion of drug use. Plaintiffs seek this Court's ruling that such random drug testing constitutes an unreasonable search in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article II, Section 7 of the Colorado Constitution.

2. This action seeks a declaration that the Timms, as current or former licensees in the Colorado greyhound dog racing industry, have the right, under the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution, not to be required to submit to random and suspicionless drug testing.

3. The Timms, as current and former greyhound racing licensees, do not fit into the narrow categories of persons who may lawfully be subject to drug testing without reasonable suspicion: they have no law enforcement responsibilities, they do not carry firearms, and their

actions do not affect their safety or the safety of other persons; nor have they done anything to diminish their expectation of privacy.

4. The random, suspicionless drug testing regulations at issue in this case were adopted and implemented by defendants or their delegees without any evidence of a pervasive drug abuse problem among licensees in the greyhound racing industry in Colorado.

5. Greyhound racing licensees who refuse to submit to random, suspicionless drug testing automatically lose their licenses and can no longer participate in greyhound racing.

## **GENERAL ALLEGATIONS**

### **A. Parties, Jurisdiction and Venue**

1. The Timms are citizens of Colorado and residents of El Paso County.

2. Gary Timm holds, and since September 1977 has held, a trainer license and an authorized agent license that allow him to participate in greyhound racing in the State of Colorado.

3. Cynthia Timm has held a trainer license that allowed her to participate in greyhound racing in the State of Colorado, until she was unconstitutionally deprived of her license, as further alleged in this complaint.

4. The Division of Racing Events (the "Division") exists within the Department of Revenue and performs its statutory duties and functions under the Department of Revenue, as provided in C.R.S. 12-60-201(1).

5. Defendant Reitz ("Mr. Reitz") is and at all times pertinent has been Director of the Division, and is being sued only in his official capacity.

6. The Colorado Racing Commission (the "Commission") is a five-member body appointed by the Governor and, like the Division, performs its statutory duties and functions under the Department of Revenue, as provided in C.R.S. 12-60-201(1).

7. Defendants Hook, Davey, Johnson, Nougale and Mackley are the current members of the Commission (the "Commissioners"), and are being sued only in their official capacities.

8. The Commission has full and exclusive authority to promulgate rules relating to racing, including rules governing greyhound racing in Colorado.

9. The Division has the power to make investigations prosecute enforcement actions as necessary to carry out its functions.

10. At each racing venue, the Division has created a Board of Judges, which enforces rules promulgated by the Commission.

11. Mr. Reitz and the Commissioners have acted, and threaten to continue to act, in their official capacities and under color of state law concerning the drug testing rules and regulations, and license revocation, at issue in this case.

12. Venue is proper under Rule 98(b)(2) Colo.R.Civ.P..

**B. Unconstitutional Actions of the Division and the Commission**

13. Within Colorado, all aspects of greyhound racing are regulated by the Department of Revenue, which acts through the Division and the Commission.

14. To participate in greyhound racing, a person must hold a license issued by the Division, exercising authority delegated by the Commission.

15. The Division issues various categories of licenses to participants at greyhound tracks, including on-site kennel operators, trainers, assistant trainers, on-site owners and kennel helpers (collectively, "Kennel Licensees").

16. Kennel Licensees only train and care for their dogs at kennel facilities, which they lease within greyhound race tracks; they have no role in handling wagers, conducting race meets or judging results.

17. The Division also issues other categories of licenses, i.e., racing officials, track security officials and lead-outs, persons who have exclusive control to conduct greyhound race meets. The Timms do not hold and never held licenses in this category; they do not conduct and never have conducted race meets.

18. On June 9, 1998, acting pursuant to C.R.S. 12-60-503 (1998), the Commission adopted Rule 3.437, 1 CCR 208.1, which authorizes the Division or the Board of Judges to conduct random drug testing, i.e., testing without reasonable cause or suspicion of all licensees, based on a urine sample, following procedures established by the Division and approved by the Commission in both horse racing and greyhound racing.

19. Rule 3.437 further provides that "Any licensee who refuses to submit to an alcohol test or drug (controlled substance) test shall be presumed to have tested positive and shall be summarily suspended."

20. Under Rule 3.437, to resume participation in racing, a licensee who is presumed to have tested positive by refusing to be tested must, at a time designated by the Division or a Board of Judges, "produce a negative test result" and "agree to further testing to verify continued unimpairment."

21. On January 15, 1999, the Division, acting at the express direction of the Commission, issued Policy R-512 concerning "Random Drug Testing (Human)," which describes a supposedly random procedure for determining whether testing will occur on any given race day and, if so, how licensees will be randomly selected for testing, all without regard to reasonable cause or suspicion.

22. The Commission and the Division do not require physical examinations of, or in any other way regulate, the physical or medical condition of Kennel Licensees.

23. Mr. Reitz's duties include carrying out suspicionless drug testing pursuant to Rule 3.437 and Policy R-512, which remain in full force and effect.

24. The Commission adopted Rule 3.437 and the Division issued policy R-512 without any evidence of a pervasive problem of drug abuse among Kennel Licensees.

25. Kennel Licensees subject to Rule 3.437 and Policy R-512 do not carry firearms and have no law enforcement responsibilities.

26. The activities engaged in by Kennel Licensees do not implicate either their own safety or the safety of other persons.

27. Categories of licensees other than Kennel Licensees conduct race meets after Kennel Licensees have turned their dogs over to those other licensees.

28. No special need or concrete danger exists to support random drug testing of Kennel Licensees.

### **C. Impact on the Timms**

29. The Timms have been married since August 14, 1991.

30. For the last three and one-half years, the Timms have owned and run dogs in the greyhound racing industry, working as partners.

31. The Timms have been licensed to work in the greyhound racing industry in Wisconsin prior to their licensure in Colorado. None of their other licenses has been subject to revocation or suspension.

32. In 1997, the Timms moved to Colorado and began doing business as Tony Mills Kennel using dogs that they had purchased or leased.

33. In September of 1997, the Division issued a trainer license and an authorized agent license to Gary Timm and a trainer license to Cynthia Timm, making them "Kennel Licensees," as defined in paragraph 15 of this complaint.

34. Working together, the Timms began training, caring for and running greyhounds in the southern region at race tracks in Pueblo and Colorado Springs.

35. Under rules adopted by the Division, at the direction of the Commission, greyhounds to be raced must be kept in a kennel facility at a race track, to which only Kennel Licensees can obtain access.

36. During 1999, the Timms kept their dogs at the Rocky Mountain Greyhound Park kennel facilities in Colorado Springs, where they went daily to feed, water, exercise, train and otherwise care for their dogs.

37. As dog owners and kennel operators, the Timms played no role in actual race meet operations, nor did they handle wagers.

38. On July 30, 1999, Roy W. Mitze, a Compliance Officer for the Commission, informed Cynthia Timm that pursuant to Rule 3.437 and Policy R-512, she had been randomly chosen, without reasonable cause or suspicion, and that she would be required immediately to submit a urine sample for purposes of a drug test. Cynthia Timm had done nothing to create reasonable suspicion that she had used or was under the influence of drugs.

39. On the basis of her constitutional rights, Cynthia Timm refused to provide a urine sample. Sylvia Laurence, a Racing Coordinator for the Commission, then physically took Cynthia Timm's license and informed her that she would have to leave the race track kennel area immediately, which she did.

40. On August 1, 1999, Cynthia Timm was notified in written Ruling No. 99-14 by a Board of Judges, (Craig Mondragon, Jack Riggio and Susan K. Gross), acting on behalf of the Division and at the direction of the Commission pursuant to Commission Rule 6.122, that her license had been summarily suspended under C.R.S. 12-60-507(1)(a) for violation of a racing rule, and she was directed to appear before the Board of Judges at a hearing on August 4, 1999.

41. At the August 4, 1999 hearing before the Board of Judges, which Cynthia Timm attended, no evidence was produced concerning reasonable suspicion that Cynthia Timm had used or been under the influence of drugs. On the basis of her constitutional rights, Cynthia Timm again refused to be tested on a random basis, without reasonable cause or suspicion.

42. By letter dated August 4, 1999, the Commission notified Cynthia Timm that her license had been revoked. Her license remains revoked.

43. Prior to the August 1, 1999 suspension, Cynthia Timm had never been subject to any disciplinary or similar proceeding concerning her Colorado trainer license.

44. Without a license, Cynthia Timm cannot obtain access to race track kennel facilities.

45. As a consequence of revocation of her license, Cynthia Timm has been forced to obtain employment outside of the greyhound racing industry, the Timms have had to hire an employee who holds a trainer license to care for their dogs, and the Timms can no longer work together as partners in the greyhound racing industry.

46. ~~As a licensee, Gary Timm is subject to being picked for a random drug test, without reasonable cause or suspicion, and to suspension and revocation of his license, if he refuses to provide a urine sample.~~ In November of 1999, Gary Timm was informed that pursuant to Rule 3.437 and Policy R-512, he had been randomly chosen, without reasonable cause or suspicion, and that he would be required immediately to submit a urine sample for purposes of a drug test. Gary Timm had done nothing to create reasonable suspicion that he had used or was under the influence of drugs. The paperwork indicates he submitted under duress and the test showed no drugs present.

## CAUSES OF ACTION

### A. First Claim - Declaratory Judgment

47. The Timms incorporate by reference the General Allegations.

48. This claim seeks a declaratory judgment under Rule 57, Colo. R. Civ. P.

49. An actual controversy exists between the Timms, on the one hand, and Mr. Reitz and the Commissioners, on the other hand, concerning the validity and application to them of Rule 3.437 and Policy R-512.

50. As applied to the Timms, Rule 3.437 and Policy R-512 violate the Fourth and Fourteenth Amendments to the United States Constitution and Article II, Section 7, of the Colorado Constitution, by authorizing warrantless and unreasonable searches.

51. Pursuant to 42 U.S.C. §1983 and Rule 57, Colo.R.Civ.P., the Timms are entitled to a declaration that Rule 3.437 and Policy A-512 are invalid, to the extent of subjecting them to suspicionless drug testing as a condition of their licensure.

### B. Second Claim - Prohibitory Injunction

52. The Timms incorporate by reference all prior allegations.

53. In light of the licensure requirements to participate in greyhound racing in Colorado, without injunctive relief, Cynthia Timm will continue to suffer, and Gary Timm is at risk of suffering, irreparable injury, in violation of their rights to be free from unreasonable searches under the fourth and fourteenth Amendments to the United States Constitution and Article II, Section 7 of the Colorado Constitution, for which they have no adequate legal remedy.

54. Pursuant to 42 U.S.C. §1983 and Rule 65, Colo.R.Civ.P., the Timms are entitled to a permanent injunction prohibiting Mr. Reitz from enforcing, or allowing the Division to enforce, Rule 3.437, Policy R-512 or any other rule, regulation, policy or procedure that would subject the Timms to suspicionless drug testing.

**C. Third Claim - Mandatory Injunction**

55. Cynthia Timm incorporates by reference all prior allegations.

56. The suspension and revocation of Cynthia Timm's trainer license by the Commission violated her rights to be free from unreasonable searches under the Fourth and Fourteenth Amendments to the United States Constitution and Article II, Section 7, of the Colorado Constitution.

57. Without injunctive relief, Cynthia Timm will continue to suffer irreparable injury, for which she has no adequate legal remedy.

58. Pursuant to 42 U.S.C. §1983 and Rule 65, Colo.R.Civ.P., Cynthia Timm is entitled to a mandatory injunction ordering that the Commissioners restore her trainer license.

**D. Fourth Claim - Attorney Fees**

59. The Timms incorporate all prior allegations.

60. The unconstitutional actions of defendants violated 42 U.S.C. § 1983.

61. The Timms are entitled to an award of reasonable attorneys' fees incurred in this action under 42 U.S.C. § 1988.

WHEREFORE, plaintiffs Gary Wayne Timm and Cynthia Jean Timm pray for entry of judgment in their favor and against Mr. Reitz and the Commissioners, in their official capacities, as follows:

- A. for a declaration that Rule 3.437 and Policy R-512 are void as concern the Timms;
- B. for a permanent, prohibitory injunction against the enforcement of Rule 3.437 and Policy R-512 against the Timms;
- C. for a mandatory injunction restoring the trainer license of Cynthia Timm;
- D. for attorneys' fees, expert witness fees and costs; and
- E. for such other relief as the court deems proper.