# IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ; TOM GALLAGHER; HUGO D. MENENDEZ; GERALD A. LEWIS; ASSOCIATED INDUSTRIES OF FLORIDA; FLORIDA CHAMBER OF COMMERCE; NATIONAL COUNCIL ON COMPENSATION INSURANCE; and EMPLOYERS INSURANCE OF WAUSAU,

Appellants/Cross-Appellees

CASE NO. 77,179

v.

MARK SCANLAN; PROFESSIONAL FIRE FIGHTERS OF FLORIDA, INC.; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 606; FLORIDA AFL-CIO; and COMMUNICATION WORKERS OF AMERICA, and FLORIDA POLICE BENEVOLENT ASSOCIATION,

Appellees/Cross-Appellants

_____/

## BRIEF OF CROSS-APPELLANTS COMMUNICATION WORKERS OF AMERICA

FLETCHER N. BALDWIN, JR.
UNIVERSITY OF FLORIDA
COLLEGE OF LAW
Gainesville, Florida 32611
(904) 392-2211

JEROLD FEUER, ESQ.
402 N.E. 36th Street
Miami, Florida 33137
(305) 573-2282
Fla. Bar # 198948

STEPHEN MARC SLEPIN, ESQ.
1114 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5200

ATTORNEYS FOR CROSS-APPELLANTS
COMMUNICATION
WORKERS OF AMERICA

# IN THE SUPREME COURT OF FLORIDA

BOB MARTINEZ; TOM GALLAGHER; HUGO D. MENENDEZ; GERALD A. LEWIS; ASSOCIATED INDUSTRIES OF FLORIDA; FLORIDA CHAMBER OF COMMERCE; NATIONAL COUNCIL ON COMPENSATION INSURANCE; and EMPLOYERS INSURANCE OF WAUSAU,

Appellants/Cross-Appellees

CASE NO. 77,179

v.

MARK SCANLAN; PROFESSIONAL FIRE FIGHTERS OF FLORIDA, INC.; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 606; FLORIDA AFL-CIO; and COMMUNICATION WORKERS OF AMERICA, and FLORIDA POLICE BENEVOLENT ASSOCIATION,

Appellees/Cross-Appellants

_____/

BRIEF OF CROSS-APPELLANTS COMMUNICATION WORKERS OF AMERICA

## TABLE OF AUTHORITIES

CASES

STATUTES



CONSTITUTIONAL PROVISIONS



SECONDARY SOURCES

STATUTES



CONSTITUTIONAL PROVISIONS



SECONDARY SOURCES

## STATEMENT OF THE CASE AND THE FACTS

Brief of Cross-Appellants Communication Workers of America adopts the Statement of the Case submitted to this Court by Cross-Appellants Scanlan, PFFF, Stanfill, Ortega & Davis. Richard A. Sicking, Esq. Attorney; and the Statement of the facts submitted to this Court by Cross-Appellants IBEW & AFL-CIO. Jerold Feuer, Esq., Attorney.

## SUMMARY OF THE ARGUMENT

I

Florida statute 440.15(3)(b)(4)(d) is in violation of the Equal Protection Clause of both the state and federal constitutions. First as required by this court's holding in Schreiner v. McKenzie Tank lines, 432 So.2d 567 (Fla.1983) state action is present. The infringement that is fairly attributable to the state, SASSO v. Ram Property Management, 431 So.2d 204 (Fla 1st D.C.A. 1983) is found on the face of the legislation. It is a legislatively created discrimination and as such suffers under Schreiner as well federal precedent. See, e.g., Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d. 830 (1967).

Since it is facial discrimination that is at issue the standard of review is an elevated one which is a stricter level of scrutiny that rationality, because the discrimination in question is 'legislatively-sponsored'. This conclusion is based upon a clear reading of Article 1, Section 2 of the Florida Constitution. Since Section 440.15(3)(b)(4)(d) discriminates on the basis of whether workers are handicapped, it triggers a strict scrutiny review which results in its unconstitutionality. See also, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). However, if this court is unwilling to elevate the review in question to a higher than rational standard, the provision in question still falls in that it does not even meet the test by rationality. Acton v. Fort Lauderdale Hosp., 440 So.2d 1282 (Fla. 1983).

Since there is absolutely no justification presented by the legislature for the facial discrimination, that is, requiring some permanently impaired workers and not others to bear the burden of proving wage loss and negating inferences that such loss is due to the economy or personal misconduct, it falls under the weight of the reasoning in Acton.

## II

### A. SEARCH AND SEIZURE

The provisions of the Comprehensive Economic Act of 1990 pertaining to "drug free workplace" violates Article 1, Section 12 and Article 1, Section 23 of the Florida constitution as well as the Fourteenth Amendment to the United States Constitution.

The Drug Free Workplace provisions of this act prescribe drug testing for job applicants, "reasonably suspicious" workers, routine fitness for duty testing, and follow-up testing. The all inclusive nature of the testing requirements result in an unlawful search and seizure of the body, City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 4th D.C.A. 1985) and Skinner v. Railway Laborers Executive Ass'n, - U.S. - , 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

As mandated by Article 1, Section 12 of the Florida Constitution, an examination of federal case law reveals that:

(1) Drug testing in the workplace implicates the Fourth Amendment.

(2) The state is an actor

(3) The review standard for determining that a search or seizure has taken place is only the first step in determining if a constitutional violation has occurred;

(4) The court must look to the circumstances surrounding the search, "because the fourth amendment proscribes only searches and seizures that are unreasonable . . . ." O'Conner v. Ortega, 480 U.S. 709, 107 S.Ct. 1492, 94 L. Ed. 2d. 714 (1987).

A. The test of reasonableness requires:

A precise balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Bell v. Wolfish, 441 U.S. 557, 559, 99 S.Ct. 1861, 60 L. Ed. 2d. 447 (1979).

Here the scope is excessive, the intrusion complete and no legislative offer of any interest to justify abridging the workers' right to be free from illegal search and seizure, as well as invasion of privacy.

**B. INVASION OF PRIVACY**

Drug testing involves a personal invasion of privacy and therefore implicates the individual's privacy interest in avoiding disclosure of personal matters.

The bodily intrusion inflicted in drug tests is similar to that of compulsory immunizations, which have long been upheld by the

courts. But unlike a vaccination, a drug test program implicates the most personal and deep-rooted expectations of privacy, and this court must recognize that under a constitutional concept of a right to privacy, a discerning inquiry into the facts and circumstances is required in order to determine whether the invasion was within one criteria of valid governmental goals or whether the invasion indiscriminately interfered with the workers' valid expectation of privacy. The drug testing program in the present case, as drafted, invades the valid expectation of privacy of the worker. C.f. Rasmussen v. South Florida Blood Service, 500 So.2d 533, (Fla. 1987).

## ARGUMENT

## I

**THE PROVISION FOR WAGE-LOSS BENEFITS FOR PERMANENTLY IMPAIRED WORKERS CODIFIED IN THE COMPREHENSIVE ECONOMIC DEVELOPMENT ACT OF 1990 VIOLATES THE CONSTITUTIONAL RIGHTS OF INJURED WORKERS TO EQUAL PROTECTION UNDER ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION.**

### INTRODUCTION

Section 20 of The Comprehensive Economic Act of 1990 (hereinafter:the Act) entitled Permanent Impairment and Wage-Loss Benefits, amends Section 440.15(3)(b)4(d), Florida Statutes, which now states:

> **(b) Wage-loss benefits.-**
>
> *** * ***
>
> **4. The right to wage-loss benefits shall terminate upon the occurrence of the earliest of the following :**
>
> **a. As of the end of any 2-year period commencing at any time subsequent to the month when the injured employee reaches the date of maximum medical improvement, unless during such 2-year period wage-loss benefits shall have been payable during at least 3 consecutive months. This limitations period shall not be tolled or extended by the incarceration of the employee or by virtue of the employee becoming an inmate of a penal institution.**
>
> **b. For injuries occurring on or before July 1, 1980, 350 weeks after the injured employee reaches the date of maximum medical improvement.**
>
> **c. For injuries occurring after July 1, 1980, but before July 1, 1990, 525 weeks after the injured employee reaches maximum medical improvement.**
>
> **d. For injuries occurring after June 30, 1990, the employee's eligibility for wage-loss benefits shall be determined according to the following schedule:**
>
> **(I) Twenty-six weeks of eligibility for permanent impairment ratings up to and including 3 percent;**
>
> **(II) Fifty-two weeks of eligibility for permanent impairment ratings greater than 3 and up to and including 6 percent;**
>
> **(III) Seventy-eight weeks of eligibility for permanent impairment ratings greater than 6 and up to and including**

9 percent;

(IV) One hundred four weeks of eligibility for permanent impairment ratings greater than 9 and up to and including 12 percent; and

(V) One hundred twenty weeks of eligibility for permanent impairment ratings greater than 12 percent and up to and including 13 percent; 135 weeks of eligibility for permanent impairment ratings greater than 13 percent and up to and including 14 percent; 150 weeks of eligibility for permanent impairment ratings greater than 14 and up to and including 15 percent; 170 weeks of eligibility for permanent impairment ratings greater than 15 percent and up to and including 16 percent; 190 weeks of eligibility for permanent impairment ratings greater than 16 percent and up to and including 17 percent; 210 weeks of eligibility for permanent impairment ratings greater than 17 percent and up to and including 18 percent; 230 weeks of eligibility for permanent impairment ratings greater than 18 percent and up to and including 19 percent; 250 weeks of eligibility for permanent impairment ratings greater than 19 percent and up to and including 20 percent; 275 weeks of eligibility for permanent impairment ratings greater than 20 percent and up to and including 21 percent; 300 weeks of eligibility for permanent impairment ratings greater than 21 percent and up to and including 22 percent; 325 weeks of eligibility for permanent impairment ratings greater than 22 percent and up to and including 23 percent; 350 weeks of eligibility for permanent impairment ratings greater than 23 percent and up to and including 24 percent; 364 weeks of eligibility for permanent impairment ratings greater than 24 percent.

The workers compensation statute is to be "interpreted and administered liberally, in order to give employees the greatest possible protection consistent with the act's purposes." De Ayala v. Florida Farm Bureau Cas. Ins., 543 So.2d 204 (Fla. 1989). On the basis of both Florida and federal court precedent addressing the rights of all persons to be guaranteed equal protection of the law, the Permanent Impairment and Wage-Loss Benefits provision of Florida Statute section 440.15(3)(b)(4)(d) is unconstitutional.

A

SECTION 440.15(3)(b)(4)(d) DISCRIMINATES AGAINST WORKERS SOLELY BY REASON OF HANDICAP.

Florida Statute section 440.15(3)(b)4. sets forth the criteria for the recovery of wage-loss benefits by permanently impaired workers. Section 440.15(3)(b)(4) establishes conditions which may result in the termination of the workers' rights to these benefits.

Section 440.15(3)(b)(4)(d) pertains only to permanently impaired workers and sets out periods of entitlement to benefits dependant on the level of impairment as opposed to disability. Under both Florida and federal caselaw and legislation, these workers are considered to be handicapped. Given the strong state and federal mandate to eliminate handicap discrimination, the standard that legislatures have used to define the class of handicapped workers is appropriate for purposes of Florida constitutional analysis.

In 1973, Congress began a comprehensive program aimed at addressing employment problems long suffered by the disabled. Pub. L. No. 93-112, 87 Stat. 355. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against handicapped individuals by any program receiving Federal financial assistance. 29 U.S.C. § 794. Section 706(7)(B) defines "handicapped individual" to mean any person who:

> (i) has a physical ... impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

Department of Health and Human Services regulations define

"major life activities" to include working. It defines "physical impairment" to mean:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.

It is obvious that workers considered permanently impaired under Florida Statute section 440.15 would clearly suffer from a "physical impairment" and thus would be considered "handicapped" under the Rehabilitation Act. Further evidence supporting finding permanently impaired workers to be "handicapped" is found in the United States Supreme Court decision in School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 107 S.Ct. 1123 94 L.Ed.2d 307 (1987).

In Arline, the United States Supreme Court held that individuals with contagious diseases such as tuberculosis are handicapped within the meaning of § 504 of the Rehabilitation Act. Id. at 1132. The Court concluded that a school teacher who developed tuberculosis could not be discriminated against on the basis of having acquired the disease. Therefore, under federal legislation, a worker who acquires a handicap is not distinguishable from one who always was afflicted. Thus, workers who sustain injuries rendering them permanently disabled are held to be handicapped under federal law.

In Florida, the Human Rights Act of 1977 protects handicapped persons from hiring discrimination. Fla. Stat. secs. 760.01-.10

(1989). However, the definitional section of the Act fails to define "handicap." Other Florida statutes provide definitions. For example, the Florida Fair Housing Act provides that a handicapped person has:

> a physical or mental impairment which substantially limits one or more major life activities, or he has a record of having, or he is regarded as having, such physical or mental impairment...

Fla. Stat. sec. 760.22(7)(a) (1989).

This language tracks that of the Rehabilitation Act of 1973. For the same reasons that permanently impaired workers are deemed to be handicapped under federal law, permanently impaired workers are considered handicapped under specific Florida laws. Additionally, the Florida Commission on Human Relations (Commission) has demonstrated that it will liberally define the term "handicap." In Shuttleworth v. Broward County Office of Budget and Management Policy, FCHR No. 85-0624 (Fla. Comm'n on Human Relations, Dec. 11, 1985), the Commission, relying on the Florida Human Rights Act of 1977 held that AIDS constituted a handicap. In reaching this conclusion, the Commission applied the "common usage" of the term "handicap," and determined that it meant: "a disadvantage that makes achievement unusually difficult; esp: a physical disability that limits the capacity to work[.]" Further, the Commission repeatedly has chosen to define the term broadly and specifically has rejected the narrow definition utilized in the Florida Fair Housing Act. Given that the permanently impaired worker easily falls into either the more restrictive definition of "handicap" found in various federal and

state legislation or the very liberal definition utilized by the Florida Commission on Human Relations, it is clear that such workers are "handicapped" under the Florida constitution. This is particularly so, given the rule that words contained in the constitution should be accorded a broader construction than those in a statute. Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n., 489 So.2d 1118, 1119 (Fla. 1986). Therefore, section 440.15 classifies workers on the basis of handicap.

B

SECTION 440.15(3)(b)(4)(d) AS AMENDED IN SECTION 20 OF THE COMPREHENSIVE ECONOMIC DEVELOPMENT ACT OF 1990 VIOLATES THE RIGHTS OF INJURED WORKERS UNDER THE EQUAL PROTECTION CLAUSE OF THE FLORIDA CONSTITUTION.

1. Section 440.15 Evolves From State Action

The first step toward demonstrating that Fla. Stat. sec. 440.15(3)(b)(4)(d) is violative of Florida's equal protection clause requires the determination that the provision evolves from state action. Schreiner v. McKenzie Tank Lines, 4431 So.2d 567 (Fla. 1983). In Sasso v. Ram Property Management, 431 So.2d 204 (Fla. 1st D.C.A. 1983) the court answered this question by asking whether "the alleged infringement of federal [or Florida constitutional] rights [was] fairly attributable to the state." Id. at 211. Additionally, the Sasso court noted that United States Supreme Court precedent implicitly supported finding that "state action exists in instances involving effectuation of state workers' compensation laws." Id. Thus, Section 440.15 clearly stems from state action as the provision was enacted by the state legislature and it alters the Florida workers' compensation statute.

2. Legislation discriminating against handicapped persons must be subjected to an elevated degree of constitutional scrutiny.

The legislature possesses authority to dictate the procedure a worker must follow to obtain workers' compensation. Nonetheless, it may not attach conditions that discriminate against persons based on constitutionally impermissible grounds. De Ayala v.

Florida Farm Bureau Casualty Ins. Co., 543 So.2d 204, 206 (Fla. 1989). Florida law clearly ensures that all similarly situated persons are equal before the law. McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283 13 L.Ed. 2d 222 (1964). The language of the Florida constitution strongly suggests that the physically handicapped are to be treated as a "suspect" classification. See Fla. Const. art. I, sec. 2. Florida courts have not yet decided whether this requires applying strict scrutiny or an attenuated middle-level scrutiny to test legislation. Nonetheless, express language in Article I, section 2 of the Florida constitution supports holding legislation discriminating against handicapped persons to rigid constitutional scrutiny.

Article I of the Florida Constitution is entitled Declaration of Rights. This bill of rights sets forth certain fundamental rights and privileges of the people. Section 2, entitled, "Basic rights" provides:

> All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property ... No person shall be deprived of any right because of race, religion or **physical handicap**. (emphasis added).

The phrase "physical handicap" was absent from the Declaration of Rights of the 1968 Florida Constitution. In 1974, a proposal to add protection of the handicapped to Florida's Declaration of Basic Rights was successful. Thus, the Florida constitution, unlike its federal counterpart expressly provides that the physically handicapped are entitled to the same equal protection

as racial and religious minorities.

No Florida court has yet addressed the specific question of the degree of scrutiny that is warranted when examining legislation discriminating against the handicapped. However, several Florida court decisions have dealt with this question and have suggested that such legislation is to receive heightened scrutiny. Scavella v. School Bd. of Dade County, 363 So.2d 1095 (Fla. 1978); Sasso, 431 So.2d 204, supra.

In Scavella, the Florida Supreme Court was faced with the question of whether physically handicapped children were members of a "suspect class" for equal protection purposes. 363 So.2d at 1097. Specifically, legislation was being challenged that placed a cap on the amount of money a school district was required to pay to a private school for the education of a physically handicapped child. Id. The court looked to the specific provision in Article I, section 2 of the Florida constitution providing that "No person shall be deprived of any right because of race, religion or physical handicap." (emphasis in original). Testing the legislation under review against "this more stringent constitutional requirement," the court held that the challenged cap must not deprive the appellants of "any right," not just their right to be treated equally under the law. Id. at 1097-8. In so holding, the Florida Supreme Court clearly communicated that legislation involving handicapped persons would be subjected to increased scrutiny.

Additional support for subjecting legislation that discriminates against handicapped persons to heightened judicial scrutiny is found in Sasso v. Ram Property Management, 431 So.2d 204 (1st D.C.A. 1983). The Sasso court held that legislation discriminating on the basis of age would be subject to a mere-rationality standard of judicial review. Id. at 221. In arriving at this conclusion, the court recognized that textual differences between state and federal constitutions indicated that the state would provide more rigorous constitutional guards than offered by the federal Bill of Rights. Id. at 222. In light of this, the court acknowledged that the Florida constitution "affords greater protections to explicit classes of persons, based on considerations of race, religion and the physically handicapped." Id. The court was not persuaded that "the framers' inclusion of the three suspect classes" under the Florida constitution necessitated the conclusion that legislation creating age-based distinctions was to receive heightened scrutiny. Id. Presumably, had Article I, section 2 included reference to the "aged," then that group would have been found to be deserving of such scrutiny. Thus, the court relied on the constitution's express reference to the physically handicapped to deny to the aged the kind of treatment that the physically handicapped are accorded.

In addition to Florida's express constitutional protection of the physically handicapped in Article I, section 2, the United States Supreme Court's analysis of the federal equal protection clause warrants the same conclusion. The fourteenth amendment of

the United State's Constitution forbids a state to deny to any person within its jurisdiction equal protection of the laws. U.S. Const. amend. XIV, sec. 1. The Florida Supreme Court approved of following federal guidelines to aid in determining whether a class is to be considered suspect. See Bailey v. Ponce de Leon Port Auth., 398 So.2d 812 (Fla. 1981). In Bailey, the court stated that it was the intention of the drafters of Florida's equal protection clause that it operate in a manner similar to that of its federal prototype. Id. at 814. Additionally, the Florida Supreme Court asserted in Osterndorf v. Turner, 426 So.2d 539, 543 (Fla. 1982) that federal precedent was "relevant and persuasive to the consideration of whether Florida's equal protection clause has been violated." To date, the United States Supreme Court has not expressed a clear test for determining whether a class is suspect. Nonetheless, its historical treatment of the suspect classification provides ample support for the application of middle level scrutiny to the class of handicapped individuals.

The source from which the theory of constitutionally suspect classes was derived is a footnote in United States v. Carolene Products Co., 304 U.S. 144 58 S.Ct. 778 82 L.Ed. 1234 (1938). In Carolene, Chief Justice Stone wrote, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Id. at 783-4 n.4.

The "discrete and insular minorities" category focuses on three characteristics of a class, including: (1) immutable characteristics; (2) historical disadvantage, and; (3) lack of political representation. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1333-4 36 L.Ed. 2d 16 (1973) (discussing the traditional "indicia of suspectness."). Additionally, three other factors are relevant. Sasso, 431 So.2d at 221. These include:

(4) legislative attention through anti-discrimination statutes;

(5) class members have involuntarily entered the class; and,

(6) class members usually have physically,

identifiable characteristics distinguishing them from the rest of society. Id. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090, (1982) the Supreme Court held that although women as a class do not satisfy all of these factors, they are nonetheless deserving of heightened judicial scrutiny. 102 S.Ct. 3331, at 3336 n.9 Thus, to the extent that the class of physically handicapped persons succeeds in meeting many of these criteria, it is reasonable to expect that the Supreme Court would recognize the need to carefully examine legislation discriminating against it.

In applying these criteria to the class of physically handicapped persons, it is apparent that handicapped persons possess most of the indicia of suspectness thus far enumerated by the Court. As a rule, the physically handicapped endure immutable attributes, have historically been subject to widespread

discriminatory treatment, and have not been adequately represented politically. Additionally, there has been much recent legislation aimed at remedying this discrimination, the handicapped clearly have not chosen their disability, and often they have easily identifiable characteristics. While the applicability of these factors will vary, it is clear that as a whole, they are fairly descriptive of the physically handicapped. The Florida Supreme Court has asserted that under conditions as these, legislation will be subject to stricter review. In De Ayala, the court stated that "a statute will be regarded as inherently 'suspect' and subject to 'heightened' judicial scrutiny . . . if it primarily burdens certain groups that have been the traditional targets of irrational, unfair, and unlawful discrimination. 543 So.2d at 206.

More recently, the Supreme Court decided a case that many commentators have argued implicitly endorsed classifying the handicapped as akin to "quasi-suspect." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 105, S.Ct. 3249 87 L.Ed.2d 313 (1985). In Cleburne, the Supreme Court examined the constitutionality of a Texas municipal zoning ordinance requiring a special use permit for a proposed group home for the mentally retarded. 105 S.Ct. 3249. The ordinance discriminated against the mentally retarded by not requiring a permit for other care and multiple-dwelling facilities. The Court held that because there was no rational basis for believing that the proposed home would pose a special threat to the city's legitimate interests, the ordinance violated the equal protection clause of the fourteenth

amendment. Id. at 3258. Thus, the court appeared to apply low level scrutiny to legislation targeted at the mentally retarded.

However, Justice Marshall, joined by Justices Brennan and Blackmun suggested that the Court had implicitly applied heightened judicial scrutiny. They argued that "Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation." Id. at 3262. Indeed, Professor Laurence Tribe suggests that "[d]iscriminations against handicapped persons should ... be susceptible to [a] kind of semi-suspect treatment..." L. Tribe, American Constitutional Law, sec. 16-31 1594 (1988).

While Cleburne expressly applied the "rational basis" test, Florida courts should interpret it to provide heightened scrutiny to physically handicapped persons. First, the specific handicap in Cleburne was mental retardation, a mental handicap. Therefore, the Court was not directly addressing the physically handicapped. If it was, a more straightforward analysis might have been issued. Specifically, the court declined to label the mentally retarded as "quasi-suspect" on the grounds that "real and undeniable differences between the retarded and others" exist rendering judicial oversight of legislative decisions inappropriate. Id. at 3256. Such differences include the "reduced ability to cope with and function in the everyday world." Id. at 3255. The Court found that treatment of this type of handicap was a task for legislators guided by qualified professionals. Id. at 3256. In this regard, the physically handicapped stand in sharp contrast to the mentally

handicapped. It appears then, that the Supreme Court was reserving the right to oversee the legislature by artfully applying the "mere rationality" standard while at the same time providing deference to the legislature, perhaps to avoid discouraging legislation beneficial this group.

Second, while Bailey authorizes Florida courts to look to federal precedent for assistance, it does not mandate its adoption. 398 So.2d 812, 814. Indeed, Florida courts have stated that the Florida Constitution provides more rigorous protections than does the United States Constitution. Sasso, 431 So.2d at 222. Because Cleburne can be interpreted in accordance with Florida's treatment of the physically handicapped, Florida courts should draw on its implicit message.

Therefore, in looking to the Florida constitution for express approval or in drawing from federal precedent, a strong argument exists for treating legislation involving physically handicapped persons with heightened judicial scrutiny. Under this approach, discriminating legislation will be upheld only if it is substantially related to the achievement of an important governmental objective. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976).

It is clear that section 440.15(3)(b)(4)(d) does not pass this intermediate hurdle. This provision shifts onto permanently impaired workers whose injuries amount to less than twenty-one percent of their body as a whole the burden of proving that their post-injury earning capacity is less than their pre-injury average

weekly wage and is not due to economic factors or personal misconduct. For those permanently impaired workers whose injuries amount to more than 20 percent of their body as a whole, this burden is on the employer. Significantly, this dichotomous procedure applies only to workers who sustain permanent impairment and not to workers whose suffer temporary impairment. Whereas this statutory scheme clearly discriminates against workers on the basis of physical handicap, there is no reason to believe that it is substantially related to an important government objective. The very fact that the legislature failed to provide any reason whatsoever for imposing this hardship on the handicapped suggests that the differential treatment is without significance and the twenty percent demarcation, arbitrary. Because the statute fails to clear the intermediate hurdle, it must be found unconstitutional.

In Acton v. Fort Lauderdale Hosp., 440 So.2d 1282 (Fla. 1983), the Florida Supreme Court upheld portions of the Workers' Compensation Law against allegations that it violated the constitutional rights of injured workers to equal protection. One of the challenged provisions distinguished between injured employees who suffered wage loss and those who did not. The court held that because no suspect classification was involved, the statute had only to bear a reasonable relationship to a legitimate state interest. Id. at 1284. This case is easily distinguished from the one at bar. Unlike the legislation in Acton which discriminated between workers on the basis of whether they suffered

wage loss, section 440.15(3)(b)(4)(d) discriminates on the basis of whether workers were handicapped. Because a higher level of scrutiny is evoked, the provision must be found unconstitutional.

Even if the physically handicapped were not accorded a heightened degree of judicial scrutiny, the proposed provision would still fail to pass constitutional muster. The rational basis test is employed by use of the "some reasonable basis" standard. Sasso, 431 So.2d at 216. Under this standard, the legislation will survive constitutional attack as long as the classification scheme chosen by the legislature rationally advances a legitimate state objective. Id., Acton, 440 So.2d 1282. Under an analysis similar to that utilized above, it is clear that the proposed provision does not pass this hurdle. The legislature has articulated absolutely no justification for requiring some permanently impaired workers and not others to bear the burden of proving wage loss and negating inferences that such loss is due to the economy or to personal misconduct. Thus, there is no legitimate state interest in imposing this unilateral burden shift. Without any rational basis for the legislature's arbitrary line-drawing, the provision must be held to violate the equal protection clause of the Florida constitution, Smith v. Dept. of Ins., 507 So.2d 1080 (Fla. 1987), and the Fourteenth Amendment to the Constitution of the United States.

## II

## THE PROVISIONS FOR A DRUG FREE WORKPLACE CODIFIED IN THE COMPREHENSIVE ECONOMIC DEVELOPMENT ACT OF 1990 VIOLATE THE WORKERS' CONSTITUTIONAL RIGHTS UNDER ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION TO BE FREE FROM ILLEGAL SEARCHES AND SEIZURES, THEREBY CONSTITUTING AN INVASION OF PRIVACY UNDER ARTICLE I,SECTION 23 OF THE FLORIDA CONSTITUTION.

The Comprehensive Economic Act of 1990 (hereinafter: the Act) contains several provisions related to the warrantless drug testing of workers. See Fla. Stat. sec. 440.02. These provisions require employers to implement a drug testing program to qualify for discounts in insurance rates offered by the Department of Insurance. Fla. Stat. sec. 440.102. These discounts, found in Florida Statute section 627.0915 provide in relevant part:

> The Department of Insurance shall approve a rating plan for workers' compensation insurance that gives specific identifiable consideration in the setting of rates to employers that implement a drug-free workplace program...

Pursuant to this section, the Drug Free Workplace provisions of the Act prescribe the following types of drug testing:

1) job applicant testing

2) reasonable suspicion testing

3) routine fitness for duty testing,

4) follow-up testing.

Fla. Stat. sec. 440.102(4)(a)-(d).

Based upon the United States Supreme Court and the Florida

state court precedent addressing the search and seizure and privacy elements of workplace drug testing, the Drug Free Workplace provisions of the Act, Fla. Stat. sec. 440.102, are unconstitutional under both the Florida and federal Constitutions.

Article I, section 12 of the Florida constitution expressly provides that Florida courts shall construe search and seizure claims in conformity with the United States Supreme Court precedent on this issue. Fla. Const. art. I, sec. 12. Therefore, although based upon the reasoning of federal and state decisions, cross-appellants expressly base their claim of the Act's unconstitutionality on the state constitution of Florida.

**A**

SECTIONS 440.102(4)(A), (C), AND (D), AUTHORIZING JOB APPLICANT, ROUTINE FITNESS FOR DUTY AND FOLLOW-UP DRUG TESTING, ARE UNCONSTITUTIONAL, AS THE GOVERNMENT HAS FAILED TO SPECIFY ANY LEGITIMATE, RECOGNIZED INTEREST SUFFICIENT TO OVERRIDE THE WORKERS' EXPRESS RIGHT TO PRIVACY.

1. An Overview of Federal Law on Drug Testing

In 1986, President Reagan promulgated Executive Order No. 12,564. The goal of this order was to create a "a drug-free Federal workplace." 51 Fed. Reg. 32, 889 (Sept. 17, 1986). Pursuant to the order, various federal agencies and departments instituted drug-testing program. Predictably, these programs produced claims from workers that the drug-testing programs violated their privacy rights and were unconstitutional under the Fourth Amendment.

The United States Supreme Court has delivered two seminal opinions addressing the constitutionality of workplace drug testing. In Skinner v. Railway Laborers Executive Ass'n, __U.S.__, 109 S.Ct 1402, 103 L.Ed. 2d 639 (1989), the Court considered the Federal Railway Administration's (FRA) drug testing program. The FRA's program mandated drug testing for any employee who had been involved in a "major train accident" or who had violated certain rules. 109 S.Ct at 1408, 1410. According to the program, drug testing under the circumstances of such "triggering events" would not require a warrant. See id. at 1414.

Appellant, a railway labor organization filed suit to enjoin the drug testing as an illegal search and seizure and therefore violative of the workers' constitutional privacy rights. Id. at 1410. Addressing the appellant's claim, the Supreme Court made several preliminary findings relevant to the issue of the constitutionality of drug testing in the workplace. First, the Court recognized that an employer acting under the regulation of a government agency is a state actor for Fourth Amendment purposes. Id. at 1411. Elaborating on this finding, the Court explained that by requiring such testing, the government had taken more than a passive attitude toward the challenged conduct of drug testing. Id. Rather, the government had, in effect, instigated it. Under such circumstances, the Court found that the government would be held accountable as a state actor. Id.

Second, the Court, quoting from its earlier opinions, reaffirmed the rule that a "'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search." Id. at 1412 (emphasis added) (quoting Schmerber v. California, 384 U.S. 757, 86 S.Ct.1826, 16 L.Ed.2d 908 (1966)). Furthermore, the Court found that the ensuing chemical analysis of the sample constituted an invasion of privacy. Id. Based upon society's concern for bodily integrity, the Skinner Court, following the majority of the Circuit Courts of Appeal, extended these principles to include both breath testing and urinalysis, as well as blood testing. Id. at 1412-1413. (citing, inter alia, Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1542 (6th Cir. 1988); Copeland v. Philadelphia Police Dept., 840 F.2d 1139, 1143 (3d Cir. 1988); Everett v. Napper, 833 F.2d 1507, 1511 (11th Cir. 1987); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987)).

After determining that all forms of workplace drug testing are subject to review, the Skinner Court stressed that the Fourth Amendment does not proscribe all searches and seizures. Id. at 1414. Instead, the Fourth Amendment prohibits only unreasonable searches and seizures. Id. The Fourth Amendment reasonableness standard focuses on the circumstances surrounding the search or seizure and the nature of the search or seizure itself. Id. (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed 2d. 381 (1985)). Under this reasonableness analysis, courts must balance the intrusions upon an individual's

privacy with the promotion of a legitimate government interest. Id. (citing Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979)).

Examining the circumstances and nature of workplace drug testing, the Skinner Court recognized the general rule that in criminal cases, a search or seizure usually requires a judicial warrant issued upon probable cause. Id. (citing Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980)). However, the Court also emphasized that the "special needs" exception served to weigh in the government's favor when the situation deems the warrant and probable cause requirements impracticable. Id. Addressing itself to the facts before it, the Court went on to recognize that employees engaged in safety-sensitive positions presented the type of special need required to lower the threshold requirements for a legal search and seizure. Id. The Court found that the government's interest in reducing the dangers associated with railway travel to both persons and property were sufficiently compelling to overcome the workers' privacy rights. Id. at 1417. Moreover, the FRA's program of notifying employees that they would be tested upon the occasion of a "triggering event" reduced the employees' privacy expectations. Id. at 1420.

The linchpin of the Skinner Court's decision was the nature of the tested employee's work. The Court noted that workers in safety sensitive tasks, which posed a potentially grave risk to the public, have reduced privacy expectations. Id. at 1418. Thus, the

employee's participation in an industry regulated pervasively to ensure safety, a goal dependent in substantial part on the health and fitness of covered employees, necessarily diminishes those employee's privacy expectations. Id. Moreover, the Court found that in the balance of interests, a workers' interest in bodily integrity was outweighed only by the competing interest of public safety. Id. at 1410. Thus, the dispositive factor in Skinner justifying departure from probable cause was the special need presented by the safety concern with preventing train accidents. Id. at 1415.

On the same day that it decided Skinner, the Supreme Court addressed the issue of workplace drug testing again in Nat'l Treasury Employees Union v. Von Raab, __U.S.__, 109 S.Ct 1384, 103 L.Ed.2d 685 (1989). The Von Raab case considered drug testing in a slightly different context than the Skinner case presented. In Von Raab, an employees' union challenged the Customs Services' drug-testing program. 109 S.Ct at 1388. This program mandated urine analysis for employees seeking positions which involved the interdiction of illegal drugs or which required them to carry firearms or to handle classified information. Id. Thus, unlike Skinner, the testing program in Von Raab was not triggered any specific event, like a "major accident."

In analyzing the Custom Services' drug testing program, the Von Raab Court separately considered three governmental interest: public safety, integrity of the workforce, and protection of sensitive information. Id. at 1390. The Court separately

evaluated the positions that were subject to testing under each of these governmental interests. Utilizing this framework, the Court concluded that the integrity of employees with the responsibility of guarding national borders against drug trafficking and the necessity of such employees to exercise complete safety in discharging duties which require them to carry firearms were interests sufficient enough to outweigh the privacy expectations of employees applying for such positions. Id. at 1396. Thus, the Court held that drug testing of these employees was reasonable under the Fourth Amendment. Id.

Importantly, however, the Court distinguished the testing of employees required to handle classified material. Id. The Court found that the employees falling within the sensitive information category included those who would be unlikely to have access to such information. Id. Therefore, the government interest in protecting national security was not sufficient to justify the gross abridgement of privacy rights that drug testing entails. Id. Thus, the court refused to find the testing of such employees reasonable. Id.

Clearly, as in Skinner, the dispositive factor in Von Raab was the nature of the employee's work. The Von Raab Court required a significant government interest, such as the integrity of the nation's borders and the prevention of drug trafficking and firearm accidents, to justify abandonment of the probable cause requirements. Id. at 1393. Where the government could not prove conclusively that such a special need existed in the case of all

employees who handled classified information, the Von Raab Court would not find warrantless drug-testing constitutional. Id. at 1396-97. These requirements demonstrate how the Supreme Court narrowly has limited the instances when workplace drug-testing will meet constitutional standards.

Subsequent to Von Raab, the federal courts have refined the contours of the categories of government interest that the Supreme Court identified in that case. In Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), Department of Justice employees challenged the constitutionality of random drug testing by urinalysis. The Harmon court, in its appraisal of the governments asserted interests, discussed and embellished the requirements of Von Raab. 878 F.2d, at 490-493.

In its discussion of the integrity interest, the Harmon court noted that this interest was the broadest justification for random drug testing. Id. at 490. The court found that the integrity of the government's workforce was compromised only when a

> "clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation"

existed. Id. Thus, the Harmon court explained, only workers who by the nature of their position would be tempted to compromise important duties, such as duties involving drug enforcement, fall within the parameters of the integrity category. Id. Therefore, the court recognized only a very limited circumstance when the government may invoke its interest in the integrity of its workforce to legitimize warrantless drug testing of workers. See

id.

Next, the Harmon court addressed the safety interest which the Supreme Court recognized in both Skinner and Von Raab. Id. at 491. The Harmon court found that employees presenting only an indirect risk to public safety are distinguishable entirely from employees who either carry a gun (Von Raab) or who operate a train (Skinner). Id. To support this finding, the Harmon court quoted language contained in both Skinner and Von Raab: employees in positions

> "fraught with such risks of injuries to others that even a momentary lapse of attention can have disastrous consequences..."

are those employees whose safety-related positions permit a standard lower than probable cause. Id. Based upon this Supreme Court language, the Harmon court found that the public safety rationale focused on the immediacy of the threat. Id. (emphasis in original). Thus, the court found that situations where the chain of causation between misconduct and injury is attenuated provide no basis for extending the public safety exception to probable cause. Id.

"Sensitive information" was the final government interest that the Harmon court considered. The court sought to define the scope of "truly sensitive" information. Id. at 490-491. The Von Raab court had used such language to describe information that would justify a lower Fourth Amendment standard. Id. The Harmon court found that top secret national security information constituted "truly sensitive" information. Id. at 490. Beyond this certainty,

however, the court could not precisely indicate what other information it would include in the "truly sensitive" category. Id. at 491.

In attempting to articulate a definition for "truly sensitive" information, the Harmon court additionally considered as relevant the probability of a worker's access to such information. Id. Describing this additional factor, the court stated:

> "[W]hatever the precise contours of 'truly sensitive' information...the term cannot include all information...closed to public view."

Id. at 492. (emphasis in original). Thus, in weighing the individual's interest, the court must consider the nature of the information and also the likelihood that the employee actually will have access to the information. Id.

In each instance of discussing the three governmental interests initially delineated in Von Raab, the Harmon court added additional considerations and requirements that parties must meet before warrantless drug-testing will satisfy Fourth Amendment concerns. These extra factors specify the specialized conditions which must exist before a court may abandon the probable cause requirement. Thus, the Harmon case further constricts the circumstances under which warrantless drug testing in the workplace is constitutionally permissible.

Other federal courts have relied upon the specific guidelines of Harmon when evaluating the constitutionality of various drug

testing schemes. Consistently, the courts have upheld the constitutionality of drug testing when a definite and immediate risk to public safety exists. These types of jobs usually involve protecting the public or entail the use of potentially dangerous instrumentalities or materials. In upholding drug testing for Department of Transportation Employees engaged in hazardous liquid pipeline operations, the D.C. circuit, citing many supporting cases, remarked that

> "the concern for public safety animates the general acceptance of drug testing."

IBEW, Local 1245 v. Skinner, 913 F.2d 1454, 1462 (D.C. Cir. 1990).

A synopsis of post-Skinner and -Von Raab cases supports the IBEW court's contention that employees holding jobs which directly implicate public safety may be subject to warrantless drug testing. Such jobs include: airline employees engaged in any aspect of commercial flight (Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990) (pet. for cert. filed Nov. 7, 1990); air traffic controllers (American Federation of Gov. Employees v. Skinner, 885 F.2d 884 (D.C. 1989) (cert. denied 110 S.Ct 1960 (1990)); Agricultural Department employees whose duties include the operation of motor vehicles (Nat'l Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990)).

Other cases demonstrate that not just any job possibly involving public safety will justify warrantless drug testing. The courts have required a sufficient nexus between the nature of an

employee's job and public safety. For example, absence probable cause, a police department may test officers with regular access to inmate population or firearms, but not those officers having access to neither. Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989), Cf. Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990). Similarly, the Army randomly may test its civilian employees occupying chemical and nuclear surety positions, but may not test employees whose jobs only are related peripherally to surety materials, such as secretaries, research biologists, and animal caretakers within the department. Nat'l Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) (cert. denied 110 S.Ct 864 (1990)). Thus, the courts are requiring drug testing programs to be narrowly tailored to the legitimate goal of public safety.

The federal courts also have required a high security risk in order to justify warrantless drug testing under the government integrity and sensitive information interests. The clarification of these categories in Harmon actually produced an overlap in these interests. Specifically, the Harmon court found that the government's generic interest in the integrity of its workforce did not justify warrantless drug testing. 878 F.2d at 491. Therefore, the integrity interest often must rise to the level of national security to be cognizable. Thus, the integrity and sensitive information justifications often arise under similar circumstances.

An illustration of this overlap of interests is found in the Cheney case. In Cheney, the court found that the government could test randomly only employees whose jobs exposed them to temptations that may defeat the goal of drug enforcement or national security. 884 F.2d at 614. Thus, the Cheney court found that Army drug counsellors, who themselves had overcome addictions, could be subject to warrantless testing. Id. However, lab technicians working within the same department could not be tested absent probable cause because they did not present a significant risk to national security or to drug enforcement. Id. As a point of contrast, the same circuit has found that the government may test randomly all federal employees with "secret" national security clearances. Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990). The Hartness court cited both governmental integrity and national security interests for justifying the warrantless searches of federal employees having access to secret information which could jeopardize national security. Id.

This overview of the federal precedent addressing workplace drug testing makes it abundantly clear that the federal government only will uphold warrantless, random drug testing in very limited, specialized circumstances. Florida follows this trend, recognizing that the government must present a special need to justify warrantless testing. Furthermore, Florida law requires that a drug testing program itself be narrowly tailored to achieve the government interest.

2. The Florida State Law of Workplace Drug Testing

In Florida state courts, only once has the issue of workplace drug testing reached the appellate court level. In City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. 4th DCA 1985), the court considered the constitutionality of a drug testing program for fire fighters. In declaring the program to be unconstitutional, the Palm Bay court heavily relied upon the lower court's program findings regarding public safety. 475 So.2d at 1326. While the lower court had found the program unconstitutional under a probable cause standard, the appellate court on review applied a more lenient standard. Id. at 1325-1326. Under this lower standard, the court balanced the privacy interest of the fire fighters with the government interest in public safety. Id. at 1326. Based upon the overriding public safety concerns, the court upheld the program. Id. at 1327.

Although the Palm Bay case is four years prior to the United States Supreme Court's decisions in Skinner and Von Raab, the Palm Bay court did rely upon federal precedent in determining the constitutionality of the drug testing. Id. at 1325-1326. Furthermore, the Palm Bay decision is in consonance with subsequent federal precedent. See supra. Thus, because the Florida constitution mandates that Florida courts follow the federal precedent on search and seizure, Fla. Const. art. I, sec. 12, Palm Bay and the subsequent federal precedent on workplace drug testing constitute the law of Florida on this issue.

3. Based Upon Florida Law and the Relevant Federal Precedent, Portions of The Comprehensive Economic Development Act Providing for Illegal Search and Seizures Violate the Workers' Express Constitutional Right to Privacy.

Section 440.102(4), Fla. Stats., dictates that an employer must require all workers to submit to drug testing under certain circumstances if the employer is to qualify for a discounted rate in workers' compensation insurance. These circumstances include:

1) job applicant testing,

2) routine fitness for duty testing, and

3) follow-up testing.

Fla. Stat. sec. 440.102(4)(a),(c),(d). By requiring all employers to test all employees, the state's Drug Free Workplace program violates the Florida constitution.

First, the United States Supreme Court has held that all forms of drug testing, including those contained in the Drug Free Workplace provisions of the Act, are searches under the Fourth Amendment. 109 S.Ct 1412-13. Second, according to the Supreme Court's decision in Skinner, the legislature, through the Drug Free Workplace provisions, clearly is operating as a state actor for Fourth Amendment purposes. Specifically, by ordering comprehensive drug testing as a prerequisite for discounts in workers' compensation rates, the state makes itself culpable for the constitutionality of the practice which it is promoting. Having unequivocally established that the legislation at issue constitutes state action, cross-appellants challenge the substantive constitutionality of the Act's Drug Free Workplace provisions.

The Palm Bay case and applicable federal law recognize only specific instances in which an employer may force employees to submit to a drug test. See supra. The courts consider only three specific government interests sufficient to overcome the employees right to privacy, which in Florida the constitution expressly embodies. Fla. Const. art. I, sec. 23. These three interests are public safety, integrity of the workforce, and protection of national security. See Von Raab, supra. Moreover, the courts have identified several additional requirements under each of these interests that an employer must satisfy before the courts will tolerate warrantless drug searches of employees. See e.g. Harmon, 878 F.2d 484 (generic government interest in integrity of its workforce and indirect threat to public safety insufficient).

In the Act, the government has failed to offer any interest that it has which would justify abridging the workers' rights against illegal searches and seizures and their rights to privacy. In the absence of any express interest, the government could not imply that it has a legitimate interest in the general integrity of all work environments within the state, because the courts have found this reason to be entirely insufficient to justify warrantless drug testing. See Harmon, supra. It would be impossible for the government to prove that all employees within the state of Florida hold jobs entailing one of the three recognized government interests, with the additional requirements described above. Surely, not every job involves a direct link to public safety or state or national integrity or security. In fact,

considering all of the workers in the state of Florida, the majority probably occupy positions not directly implicating any of the three interests. Therefore, because the government has failed to propose any reason to justify its extensive drug testing program, and because not every worker would fall within any of the three recognized categories, those portions of the Act dealing with drug testing, namely the provisions for a Drug Free Workplace, are unconstitutional on their face as a violation of the workers' right to be free from unreasonable searches and seizures and invasions of privacy.

## CONCLUSION

For the foregoing reasons, cross-appellants respectfully request this court to affirm the trial court's holding and declare the Drug Free Workplace provisions of the Comprehensive Economic Development Act of 1990 unconstitutional.

Respectfully Submitted,
Communication Workers of America

Fletcher N. Baldwin, Jr.
University of Florida
College of Law
Gainesville, Florida 32611
(904) 392-2211

Jerold Feuer, Esq.
402 N.E. 36th Street
Miami, Florida 33137
(305) 573-2282

Stephen Marc Slepin, Esq.
Slepin & Schwartz
1114 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5200

## Certificate of Service

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand this January 28, 1991, on all counsel of record on the attached service list.

Respectfully submitted,

Communication Workers of America

FLETCHER N. BALDWIN, JR.
University of Florida
College of Law
2500 S.W. Second Avenue
Gainesville, Florida 32611
(904) 392-2211

JEROLD FEUER, ESQ.
402 N.E. 36th Street
Miami, Florida 33137
(305) 573-2282

STEPHEN MARC SLEPIN, ESQ.
Slepin & Schwartz
1114 East Park Avenue
Tallahassee, Florida 32301
(904) 224-5200

By _____
Jerold Feuer

## SERVICE LIST

KELLY OVERSTREET JOHNSON, ESQ.
(Plaintiff/Intervenor Fla. PBA)
Broad & Cassel
P.O. Box 11300
Tallahassee, Florida 32302-0671
(904) 681-6810

TALBOT D'ALEMBERTE, ESQ.
(State Defendants)
Steel, Hector & Davis
200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131
(305) 577-2816
(mail service)

RAYFORD H. TAYLOR, ESQ.
MARY ANN STILES, ESQ.
(Defendant/Intervenor AIF)
Stiles, Allen & Taylor, P.A.
108 Jefferson Street, Suite B
Tallahassee, Florida 32301
(904) 222-2229

DANIEL C. BROWN, ESQ.
MARGUERITE H. DAVIS, ESQ.
(Defendants/Intervenors NCCI
and Employers Insurance of Wausau)
Katz, Kutter, Haigler,
Alderman, Davis, Marks & Rutledge, P.A.
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301
(904) 224-9634

H. LEE MOFFITT, ESQ.
MARK HERRON, ESQ.
KIRBY C. RAINSBERGER, ESQ.
(Defendants/Intervenors
Tampa Bay Area NFL, Inc. and
South Fla. Sports Corp.)
Moffitt, Hart & Herron, P.A.
216 South Monroe Street
Suite 300
Tallahassee, Florida 32301

C. GARY WILLIAMS, ESQ.
STEPHEN C. EMMANUEL, ESQ.
(Defendant/Intervenors Fla. Chamber of Commerce)
Ausley, McMullen, McGehee, Carrothers
& Proctor
P.O. Box 391
Tallahassee, Florida 32302
(904) 224-9115

THOMAS J. MAIDA, ESQ.
(Defendants' Amicus AIA)
McConnaughhay, Roland, Maida
Cherr & McCrainie, P.A.
101 North Monroe Street, Suite 950
Tallahassee, Florida 32302

KATHLEEN E. MOORE
HARRY F. CHILES
MITCHELL D. FRANKS
(State Defendants)
Assistant Attorneys General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

STEPHAN D. BARRON, ESQ.
(Defendant Menendez)
Dept. of Labor & Employment
Security
Hartman Bldg., Room 307
2012 Capitol Circle, S.E.
Tallahassee, Fla. 32399-0657
(904) 488-6498

DANIEL SUMNER, DIRECTOR
(Defendant Gallagher)
Dept. of Insurance, Division
of Legal Services
412 Larson Bldg.
200 West Gaines Street
Tallahassee, Florida 32399-0300
(904) 488-4540

JOEL S. PERWIN
ACADEMY OF FLORIDA
Trial Lawyers
218 South Monroe Street
Tallahassee, Florida 32301
(904) 224-9403
(mail service)

## TABLE OF CONTENTS