IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

v.

ARLENE KURTZ,

Respondent.

On Petition For Discretionary Review
Of An Order Of The Third District Court Of Appeal of Florida
Case No. 92-2038

ANSWER BRIEF OF RESPONDENT

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II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does Article I, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for, employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

The petitioner City of North Miami (hereinafter "the City") suggests that, despite the Third District Court of Appeal's certification of the above question, the issue is actually one of whether a government employer should be compelled to "subsidize" the costs of smoking. This suggestion mischaracterizes the factual and legal issues in this case. The fact that an employee may use part of his or her wages to buy a carton of cigarettes does not mean that the employer is "subsidizing" that employee's smoking, any more than the employer is "subsidizing" the employee's purchase of clothing, food or shelter. The City would like to characterize a paycheck as a subsidy of its employees' personal activities, however, in order to justify controlling the private lives of its employees and prospective employees by refusing to "subsidize," i.e., to pay a paycheck to, those persons of whose private activities the City disapproves.

In fact, this case does not involve any claim of entitlement to a subsidy or any form of special treatment for smokers. Rather, this case is about whether certain City job applicants should be deprived of *equal* treatment on the basis of private, lawful, off-

duty conduct such as smoking, where such conduct does not relate to the job functions of the position applied for. The Third District Court of Appeal has therefore properly and succinctly stated the question of great public importance involved in this case.

III. STATEMENT OF THE FACTS

The statement of the case and facts in the City's initial brief contains certain misstatements and mischaracterizations of the record, and the respondent includes this statement of the facts in order to respond to and rebut those inaccuracies.

On September 29, 1988, respondent Arlene Kurtz (hereinafter referred to as "Kurtz") submitted an employment application to the City of North Miami. [Resp. App. G, exhibit 1].[1] In December 1989, the Kurtz took and passed a written examination required for all prospective applicants for employment by the City of North Miami (hereinafter referred to as "the City"). [Resp. App. B].

In May 1990, the City notified Kurtz that there was an opening for a clerk-typist, and made an appointment to interview her for that position. [Id.]. When Kurtz arrived for the interview on May 31, 1990, she was informed by the interviewer that in order to be hired for any job with the City, she would have to sign an affidavit stating that she did not smoke or use tobacco products and that she had not done so within the past twelve months. [Id.]. Kurtz told the interviewer that she could not truthfully sign such an affidavit, and the interview was terminated. [Id.].

Since that terminated interview, Kurtz has not been notified of any other job openings with the City of North Miami. [Id.]. As a smoker, Kurtz is disqualified from reapplying for any job with the City so long as she is a smoker.

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[1] References to the Appendix to Respondent's Answer Brief shall be indicated herein as [Resp. App. _____].

Kurtz was in May 1990 and is now qualified for the job of clerk-typist. [Id.]. Kurtz would be willing to abide by a reasonable restriction on smoking while on duty or where smoking would affect her fellow employees or others, as a condition of employment by the City. [Id.]. While Kurtz challenges the City's right to regulate pre-hiring and off-duty smoking, she concedes that the City could constitutionally prohibit all smoking by employees while on duty or while on City premises.

Kurtz has smoked for 30 years, and has been unsuccessful in trying to quit. [Resp. App. G, pp.5-8, 25].

In March 1990, the City of North adopted Administrative Regulation 1-46, which provides, in pertinent part: "All applicants must be a nonuser [sic] of tobacco or tobacco products for at least one year immediately preceding application, as evidence [sic] by the sworn affidavit of the application [sic]." [Pet. App. C].[2]

Any person who refuses to sign such an affidavit will not be considered for employment by the City in any capacity or position. (Resp. App. C & D). The effect of the regulation is such that, in order even to be considered for any City job, a prospective applicant must forbear to smoke or use tobacco for a period of one year prior to the date of application.

Persons who get past the application and interview stages are given physical examinations before being hired, in order to

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[2] References to the Petitioner's Appendix to its Initial Brief shall be indicated herein as [Pet. App. _____].

determine whether they have any preexisting conditions that would be excluded by the City's insurance program, and to determine if they are physically capable of doing the jobs for which they are being considered. [Resp. App. H, pp. 47-51]. However, since smokers are automatically screened out at the initial application stage, they alone are never given the opportunity to demonstrate whether they in fact have any preexisting health conditions (related to smoking or otherwise) that may cost the City money in insurance benefits, or whether they are, smoking notwithstanding, physically capable of performing their job functions.

City job applicants who are smokers or tobacco users are not individually screened or examined to determine their actual health conditions or medical histories. [Resp. App. C & D]. As to Kurtz, for example, the City admits that it has no knowledge as to Kurtz's actual health condition, and Kurtz's sworn testimony that she is qualified for the position of clerk/typist is unrefuted. [Resp. App. H, p. 68].

The City does not offer job applicants who are smokers or tobacco users the option of waiving insurance coverage. [Resp. App. C & D]. The City also does not give smokers the option of paying for any increased insurance costs that may result from their smoking. [Id.]. In the case of Kurtz, she already has her own health insurance coverage. [Resp. App. G, p. 19].

The City does not impose a similar hiring ban on persons with other health conditions (such as obesity, diabetes, hypertension, cancer, etc.) that may result in even greater costs to the City.

[Resp. App. H, pp. 93, 103-04]. The City also does not deny hiring opportunities to other persons whose lawful, off-duty conduct (such as "unsafe sex," skydiving, alligator wrestling, or excessive television watching) might result in adverse health consequences to themselves or higher insurance costs to the City. [Resp. App. C & D].

The City's regulation against hiring smokers and persons who have smoked within the past twelve months applies to all job positions, regardless of whether any particular degree of physical fitness is required for the job. The regulation prohibits such persons from applying for City jobs, regardless of whether the persons are otherwise qualified for any particular jobs. [Resp. App. C & D]. The effect of the regulation is thus that a less-qualified non-smoker may be hired by the City, while a more-qualified smoker would not even be allowed to apply.

While the City's asserted justification for its regulation is the reduction of health care costs and increasing worker productivity by eliminating smokers from its work force, [Resp. App. H, pp. 72-73], the City does not bar its present employees from smoking and does not bar new employees, once hired, from beginning to smoke or resuming smoking. [Resp. App. C & D]. Persons already employed by the City prior to the adoption of the regulation were not required to execute affidavits regarding their present or past smoking or tobacco use as a condition of their continued employment by the City. [Id.].

At no time, before of after implementing Administrative

Regulation 1-46, did the City investigate actual health costs or productivity data in order to determine whether off-duty smoking had any real effect on the City's health insurance costs or worker productivity. [Resp. App. H, pp. 45-46, 64, 78].

After the fact, in connection with this litigation, the City retained an expert witness, who prepared an affidavit stating, essentially, that smoking causes various diseases and is highly addictive. [Pet. App. E]. That affidavit, which was not based on any actual health, productivity or insurance cost data supplied by the City, in fact revealed that from 57 to over 90 percent of the excess costs [such as lost productivity due to cigarette breaks and second-hand smoke] attributed to employee smoking would be eliminated by prohibiting smoking on the job. Significantly, the expert stated that *all* of an employer's lost productivity costs related to employee smoking could be eliminated by a prohibition against on-the-job smoking. [Pet. App. E, pp. 17-19]. The affidavit did not address the cost effectiveness, if any, of restricting off-duty or pre-hiring smoking.

The expert affidavit offered by the City in justification of its regulation does not analyze or address the potential effectiveness, if any, of the City's no-smoking hiring regulation as a cost-saving device. It compares average medical expenditures of smokers and "neversmokers," [Pet. App. E, p. 20], but does not address the cost-saving impact, if any, of hiring only persons who have not smoked for one year, as required by the City's regulation.

The only data provided by the City to its expert was a list of

the average hourly wages of its employees in different job descriptions, and a listing of the number and ages of the employees, by sex. [Pet. App. F, exhs. G & H; Resp. App. H, p. 85]. No information regarding the number of smoking workers or applicants, insurance costs or claims history was obtained or provided by the City. Based only on the information provided by the City, the expert stated that, if a smoking worker making the average wage of $14.82 per hour missed an average of 12 hours of work a year due to smoking-related absenteeism, the cost to the City would be $178.[3] However, Feldman also testified that all City employees accrue 8 to 10 days of paid sick leave per year, [Resp. App. H, p. 56], and that taking time off from work other than for a paid sick or vacation day would be grounds for discipline of that employee. [Resp. App. H, p. 96].

Assistant City Manager Feldman, who admits he is not a statistics or employment cost expert [Resp. App. H, p.74], nonetheless prepared and attached to his affidavit in this case several "calculations" purporting to show the savings to the City through implementation of its program through the year 2050. [Pet. App. F, exhibits B-F]. However, as Feldman admitted at his deposition, the numbers used as the basis for these calculations were not based on any actual cost data derived from the City's records or experience. [Resp. App. H, pp.87-88]. Feldman in fact produced five different, and wholly inconsistent, sets of

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[3] The job of clerk-typist, for which Kurtz applied, paid less than $10 per hour. [Resp. App. H, p. 64].

projections, and was unable to express an opinion as to which, if any of them, was in fact accurate. [Resp. App. H, pp. 73-74]. Feldman never had his "calculations" reviewed by a statistician or other expert to determine the correctness of his assumptions, methodology, or results. [Resp. App. H, p.88].

In fact, while Feldman testified that he obtained some of his figures for his costs "calculations" from the expert's affidavit [Resp. App. H, pp. 71-75], it is apparent from a review of the expert affidavit itself that the vast majority of the costs associated with employee smoking are due to on-the-job smoking, and thus have no bearing on the City's regulation, which bans only pre-hiring, off-duty smoking. These costs would not be saved as a result of the City's administrative regulation, and Feldman's "calculations" have no relationship to any cost-savings potentially generated by that regulation.

Feldman's "calculations" are patently defective in several other respects. The cost-savings for future years are not stated in terms of present dollars. In fact, Feldman irrationally applies a four-percent per year "inflation rate" to his projections for future years, making the year to year "savings" figures incomparable to one another. Moreover, Feldman's "calculations" assume that the only factor which will have any impact on the percentage of smokers in the work force is the no-smoking hiring regulation. Feldman in effect assumes that the City's voluntary smoking cessation program has and will have a zero percent effectiveness rate, while even the City's own expert notes that

such programs, properly implemented, can have up to a 40 percent effectiveness rate. [Pet. App. E, p.22]. Feldman also assumes that no one hired under the no-smoking hiring regulation will ever commence or resume smoking after being hired.

All of the many factual and logical defects in the City's after-the-fact documentation of its cost-saving rationale show that this rationale is in fact a pretext for the attempt by the City's administration to impose its own values on the private, legal conduct of its employees and prospective employees.

The City, while barring all *off-duty* smokers from hiring opportunities based on an undocumented cost-saving rationale, has failed to take the clearly effective (according to the City's own expert) cost-saving step of prohibiting *on-the-job* smoking. In fact, Assistant City Manager Lee Feldman, who originated the no-smoking hiring ban [Resp. App. H, pp. 91-92], has never even considered a complete ban on on-the-job and on-premises smoking. [Resp. App. H, p. 18]. Moreover, Feldman never attempted to find out whether the City's voluntary smoking cessation program, which was already in place prior to the no-smoking hiring regulation, was successful or could be used to achieve the cost-savings allegedly sought by the City. [Resp. App. H, pp. 31-32].

In fact, the City's own evidence demonstrates that most of the costs associated with employee smoking (lost productivity, secondhand smoke, ventilation and maintenance costs for segregation of smokers) can only be eliminated by a prohibition on on-the-job smoking. An off-duty smoking ban has no bearing on these costs.

The remainder of the costs that are associated with off-duty smoking (increased medical and life insurance premiums, and absenteeism by smokers) could be eliminated by requiring off-duty smokers to pay increased insurance premiums and by enforcing absenteeism policies, as well as by its already existing voluntary smoking cessation program.

The City also produced numerous articles and studies relating to reducing the cost to employers of employee smoking. It is crucial to note that not one of these writers recommended a hiring ban on smokers as a means to achieving this end. Rather, they recommend restrictions or prohibitions on worksite smoking, participation in cessation programs, and requiring off-duty smokers to pay increased insurance premiums. [Pet. App. G].

The number of people affected by the no-smoking hiring regulation is far greater than the number of persons currently employed by the City. The City's work force numbers about 489. [Resp. App. H, p.8]. However, for one meter-reader opening, the City had over 500 applicants. [Resp. App. H, pp. 90-91]. Because the City requires that the no-smoking affidavit be executed at the time of the initial application, which may then remain on file for two years before the applicant is called in for an interview, [Resp. App. H, pp. 60-64], the impact of this regulation is that a citizen desiring to seek employment by his City government must stop smoking up to three years in advance in order to even be considered for a City job. And then, given the high number of applicants for each position, the chance is remote that the

applicant will even get a job. Thus, it is obvious that the vast majority of people affected by this regulation, i.e., all applicants for City jobs, will never be employed by the City. These applicants' smoking or not smoking cannot have the remotest possible bearing on the City's health insurance or productivity costs, and yet their private lives are indirectly regulated by hiring requirements pertaining to jobs they will never get.

Finally, the City's completely incorrect statement that "the ACLU . . . received substantial financial backing from the tobacco industry," and the City's implication that this was the motivation behind the respondent's and the undersigned counsel's involvement in this case, are an insult to Kurtz and to her undersigned counsel, and a violation of the City's counsels' obligation of candor towards this Court. There is no conceivable, and certainly no record, basis for such a statement, which could only have been made for the purpose of improperly influencing the Court's attitude towards Mrs. Kurtz, her counsel, or her arguments in this case. What is a fact is that the undersigned counsel undertook this case on a no-fee, *pro bono* basis, with no expectation of ever receiving a fee for her services unless fees were awarded by the Court. Respondent's counsel has received *no* compensation, either from the "tobacco industry" or from any other source, for her work in this case.

IV. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The complaint in this case seeks an injunction against the enforcement of Administrative Regulation 1-46, and a declaratory judgment finding that the regulation is violative of the privacy clause of the Florida Constitution and the due process and equal protection provisions of the Florida and United States Constitutions. No damages sought. [Resp. App. A].

The plaintiff moved for summary judgment, and the City filed a cross-motion for summary judgment. After three hearings on the cross-motions for summary judgment, [Resp. App. F, I, J], Judge Shapiro entered a final order denying the plaintiff's motion for summary judgment and granting the City's cross-motion for summary judgment. [Pet. App. B].

The plaintiff appealed from that final order, and the Third District Court of Appeals reversed, on the grounds that Administrative Regulation 1-46 violates article I, section 23, of the Florida Constitution. [Pet. App. A]. The Third District also certified to this Court the question whether article I, section 23 prohibits a municipality from requiring job applicants to refrain from using tobacco for one year before applying for, and as a condition of being considered for, employment, even where the use of tobacco is not related to job function in the position sought by the applicant. [Id.]. The City petitioned this Court for discretionary review of the Third District's decision.

V. SUMMARY OF ARGUMENT

The Third District correctly ruled that Administrative Regulation 1-46 is unconstitutional under article I, section 23 of the Florida Constitution.

The decision whether or not to engage in lawful conduct, such as smoking, in one's own free time, is a matter of personal autonomy and privacy protected by article I, section 23, of the Florida Constitution. The City's Administrative Regulation 1-46 intrudes into the private lives of its employees and prospective employees, including Kurtz, by requiring all job applicants to refrain from this lawful, private conduct for a year as a condition of applying for any City job, regardless of whether or not smoking is related to job functions or performance. In order to justify such an intrusion, the City would have to demonstrate that the regulation serves a compelling governmental interest, and that the regulation is the least intrusive means of achieving that goal.

The City's asserted interest in reducing its smoking-related medical and productivity costs cannot be deemed compelling where most or all of these costs are associated with on-the-job smoking, not with the pre-hiring and off-duty smoking prohibited by Administrative Regulation 1-46. Even if the City could establish a compelling interest in reducing such costs, its regulation is not the least intrusive means of achieving this goal. Rather, because the regulation applies to all City job applicants, regardless of their qualifications and regardless of whether or not smoking is relevant to the functions of the job sought, Administrative

Regulation 1-46 is the *most* intrusive means the City could use to obtain its asserted objective of reducing smoking-related costs.

Even if the Court were to hold that the City need not demonstrate a compelling interest to justify its no-smoking hiring regulation, Administrative Regulation 1-46 would still be violative of article I, section 23, because that regulation is not rationally related to any legitimate governmental interest of the City. The regulation is irrational as a means of achieving reductions in medical and productivity costs, because the regulation applies to all smokers, whether or not they are healthy, and whether or not they are qualified for, and perform satisfactorily at, any particular City job.

Regardless of whether the "compelling state interest" or "rational relationship" standard applies in this case, Administrative Regulation 1-46 is unconstitutional under article I, section 23 of the Florida Constitution.

VI. ARGUMENT

A. The City's regulation violates the privacy guarantee of the Florida Constitution, in that it constitutes governmental intrusion into private, off-duty conduct unrelated to any compelling interest of the City

The City's no-smoking hiring regulation constitutes governmental intrusion into the private lives of citizens for the purpose of regulating lawful, off-duty conduct unrelated to any compelling governmental interest. For citizens, such as the plaintiff, who refuse to submit to this indirect regulation, the penalty is a denial of all opportunity to seek or obtain employment in City government.

Kurtz has not asserted, as the City suggests, that she has a constitutional "right to smoke." Rather, she has a constitutionally protected right not to be subjected to the City's regulation of her private, off-duty life and lawful, off-duty conduct as a condition of seeking and obtaining the same government employment opportunities available to other citizens.

Article I, section 23, of the Florida Constitution provides, "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein." This explicit constitutional right of privacy is far broader than that provided by the general due process language of the U.S. Constitution. In re T.W., 551 So.2d 1186, 1192 & n.5 (Fla. 1989); Shaktman v. State, 553 So.2d 148, 151 n.9 (Fla. 1989); Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). In cases involving violations of the privacy guarantee, the government has the burden of demonstrating a "compelling state

interest" justifying the intrusion, and that the "least intrusive means" have been used to accomplish that goal. Shaktman, 553 So.2d at 151-52; In re T.W., 551 So.2d at 1192; Winfield, 477 So.2d at 547.

The decision whether or not to engage in the completely legal use of tobacco products in one's own home and on one's own time is a matter which should be left to the individual. Before the City is allowed to condition the right to seek employment on the relinquishment of personal autonomy by its citizens, it must demonstrate a compelling state interest justifying that action.

The City's asserted justifications for the regulation are that it will eventually will reduce insurance costs and increase productivity. As admitted by the City, however, it has engaged in no inquiry whatsoever to determine what, if any, actual impact the regulation will have on costs or productivity. None of the so-called cost-saving calculations referred to by City Manager Feldman or the City's expert were based on actual medical or productivity costs experience of the City. The affidavits of these witnesses do reveal, however, that most if not all of the costs associated with employee smoking could be eliminated by a ban on on-the-job smoking and by shifting the additional insurance costs to the smokers themselves in the form of premium increases. The City admits that it has not seen fit to take steps to thus eliminate the bulk of smoking-related costs. Given this state of the facts, as attested to by the City's own evidence, it is difficult to understand how the City could assert that it has a "compelling" interest in

realizing the minimal or marginal additional savings through its pre-hiring smoking ban.

Likewise, the City's asserted interest in increasing productivity of its workforce is shown to be less than compelling where its own expert stated that the additional cost-per-smoker as a result of excess absenteeism was only $178 per year.[4] Kurtz does not, however, suggest that the City should be required to tolerate *any* additional absenteeism on the part of certain employees simply because they are smokers. Indeed, the entire premise of Kurtz's claim is that all persons should be given the same access to government jobs, and that the same standards of productivity and performance should be applied to all. Additionally, the City's regulation could hardly serve the goal of increasing productivity where it may have the effect of removing more-qualified workers from the applicant pool simply because they are smokers.

However, even if the City's interest were deemed to be "compelling," the City has clearly not employed the "least intrusive means" of furthering that interest. As demonstrated by the City's own evidence, the vast majority of the costs and productivity losses associated with employee smoking could be avoided by imposing a ban on-the-job smoking. Such a ban would be unquestionably effective, and would not intrude into the private, off-duty lives of its citizens. As for insurance costs associated

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[4] And even this figure is not in fact based on actual data from the City.

specifically with off-duty smoking, this reduction could be achieved by limiting insurance benefits for smoking-related illnesses or by requiring that higher premiums be paid by employees with particular health risks. The City admits that it does not give smoking employees these options, which would be less intrusive than the regulation of prehiring, off-duty smoking imposed by Administrative Regulation 1-46. As for any additional absenteeism by smokers (as to which there is no evidence from the City), this cost factor is already taken care of by the City's limitation on paid sick leave available to workers.[5]

That the means chosen are not the least intrusive is obvious when it is noted that the City's regulation requires all prospective job applicants to refrain from smoking for a year, in order even to be considered for a City job. Most of those applicants will probably not ever be hired, but they are nonetheless constrained by the regulation to give up this lawful conduct in order to have even an opportunity for consideration. Clearly, the City can have no interest in precluding smoking by all of the hundreds of applicants that it will ultimately *not* hire.

In short, the City could achieve its goal by any number of approaches tailored to the actual health risks and costs presented by individual employees, without resorting to intrusive regulation

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[5] See also Kramer & Calder, "The Emergence of Employees' Privacy Rights: Smoking and the Workplace," 8 The Labor Lawyer 313 (1992); Note, "The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?" 43 Vanderbilt Law Review 491 (1990); Rothstein, "Refusing to Employ Smokers: Good Public Health or Bad Public Policy?" 62 Notre Dame Law Review 940 (1987).

of employees' private, lawful, off-duty conduct. The City has chosen, however, to use instead the most intrusive means available--requiring absolute abstinence for a year prior to even being considered for a City job.

The City has attempted to characterize this case as a claim by Kurtz of a "right to smoke" or a "right to a City job." This case is about neither. Rather, it is about the right to freedom from governmental intrusion into one's private, lawful activities (which in this case happen to include off-duty smoking). The City has attempted to characterize this case as a claim for special treatment for smokers. It is not. If a job applicant, who may happen to be a smoker, is unqualified, that person should not be hired. If an employee, who may happen to be a smoker, fails to perform satisfactorily or is absent, that person should be disciplined or fired. However, an individual should be considered for hiring, retention or promotion on the basis of his or her qualifications and performance on the job, and not on the basis of that individual's private, off-duty conduct.

The City raises the specter of a flood of litigation by smokers, asserting the right to smoke anywhere and anytime, if Kurtz prevails in this case. That suggestion is absurd. Kurtz has never disputed that smoking can be taken into consideration in hiring decisions where it is indeed relevant to the job functions, as in the case of firefighters, or that smoking can be prohibited on the job site or on the City's property. What *is* at issue is whether private, lawful, off-duty conduct, unrelated to job

functions, can be the basis for denial of government employment opportunities.

The more real danger presented by this case is that a decision in favor of the City would open up virtually every aspect of a person's private life to intrusive governmental regulation in the supposed interest of cost-cutting. The City's position is that, unless the private activity is one previously recognized by federal privacy law as a fundamental right, such as reproductive, religious and family matters, then it can be regulated by the state if it bears any conceivable relationship to an increase in governmental expenditures. Thus, under the City's analysis, it could regulate when its employees or prospective employees go to bed at night, what they eat for breakfast, what kind of cars they drive, where they take their vacations and what hobbies they engage in, all in the interest of making sure that those employees meet some ideal of health and fitness and thus cost the City less money to insure. *This* is the City's position, and this is the very real danger presented by this case.

That the City presumes to dictate the private lives of many hundreds of persons outside its actual or probable employee pool, suggests that the City's asserted cost justifications are merely pretexts for imposing a no-smoking value judgment on its citizens.

The City asserted that because Kurtz makes no secret of the fact that she smokes, that she has no protectible privacy interest in this particular form of conduct. The City's position mischaracterizes the purpose and scope of the constitutional

privacy guarantee. The right of privacy is not only a right of secrecy or confidentiality. The constitutional right of privacy is more basically the right "to be let alone" and extends to many areas where the individual's interest is not in secrecy but in personal autonomy. See, Winfield, 477 So.2d at 546; In re T.W., 551 So.2d at 1192; In re Guardianship of Browning, 568 So.2d 4, 9-12 (Fla. 1990).

The City cites a number of cases involving nonconsensual medical procedures, which the City recognizes hold that "individuals have a privacy right to decide what happens to their own bodies." [City's Initial Brief at 19]. See, e.g., Public Health Trust v. Wons, 541 So.2d 96 (Fla. 1989); Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980) (approving 362 So.2d 160 (Fla. 4th DCA 1978)); Corbett v. D'Alessandro, 487 So.2d 368 (Fla. 2d DCA 1986); St. Mary's Hospital v. Ramsey, 465 So.2d 666 (Fla. 4th DCA 1985); In re Guardianship of Barry, 445 So.2d 365 (Fla. 2d DCA 1984). However, the City dismisses these cases as having "no relevance" to this case. In fact, these cases are quite relevant, in that the City, by its regulation, is attempting to enforce its model of a healthy and wholesome lifestyle by making that lifestyle a condition of seeking government employment. As the City notes, the courts have uniformly upheld the right of personal autonomy in these cases, even when balanced against strong governmental interests in protecting and preserving life. The state interests rejected in those cases as not sufficiently compelling are unquestionably nonetheless far more weighty than the City's

spurious cost-saving interest asserted in this case.

The City also dismisses as irrelevant those cases where the government has been required to prove a compelling state interest before it may obtain certain private information for use in criminal investigations or otherwise. See, e.g., Shaktman v. State, 553 So.2d 148 (Fla. 1989); Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544 (Fla. 1985). However these cases are relevant in that they illustrate the courts' proper reluctance to permit government intrusion into the private lives of citizens, even where important governmental interests of criminal investigation are involved. That such intrusive means as pen-registers, wiretaps, and access to bank records are often allowed to be employed in achieving the goal of crime-fighting does not, however, support the intrusion advocated by the City in this case. Here, Kurtz is not alleged to have engaged in any unlawful activity whatsoever. By effectively controlling her private activities and her use of her personal time and resources, however, the City is intruding into the protected realm of privacy to which Kurtz is constitutionally entitled.

The City also cites several cases which the City characterizes as "informational privacy" cases, and argues that none of these cases protect against the disclosure of personal information to the government. That may be an accurate, if over-simplified, summary of the holdings of those particular cases, but the City's argument does not address the real issues in *this* case. Here, the issue is not whether or not a person may be required to reveal certain

information as a requirement of applying for a City job. Rather, the issue is whether a person may be required to do or refrain from doing certain activities on his own time and in his own home, as a requirement of applying for a City job.

Moreover, it should be pointed out that the case Florida Board of Bar Examiners re: Applicant, 443 So.2d 71 (Fla. 1983), relied upon by the City, in fact holds that the Bar's inquiry into the applicant's history of psychological and medical treatment is only justified because this information was related to the applicant's fitness to practice law, and because the Bar has a compelling interest in ensuring that only fit individuals are admitted to practice law in this state. Id. at 76. In this case, by contrast, the City's regulation applies to all job applicants, regardless of whether or not smoking is related to job functions or the individual's performance. The City therefore can have no interest, compelling or otherwise, in preventing smokers from applying for or filling such positions.

While the City takes pains to point out that no previous case has held explicitly that there is any right of privacy as to tobacco use, that lack of precedent clearly does not mean that such a privacy interest is implicated by the City's regulation. This is a case of first impression, in that prior to the Third District's decision, there was no published opinion of any court, state or federal, addressing the constitutionality of a blanket no-smoking hiring policy unrelated to job functions.

The only previous case in which the constitutionality of more

limited no-smoking hiring policy was addressed is Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987). In that case, a fire department's rule prohibited firefighter trainees from smoking on or off duty for one year after hiring, and required new hirees to sign an agreement to that effect as a condition of employment. Id. at 540. The court, however, clearly recognized that the rule infringed upon protected privacy interest, stating:

> It can hardly be disputed that the Oklahoma City Fire Department's non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees. The regulation reaches well beyond the work place and well beyond the hours for which they receive pay. It burdens them after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes.

Id. at 541.

While the Tenth Circuit acknowledged that the liberty and privacy interests at issue in the case of a no-smoking rule may not rise to the level of a fundamental right, the Court also emphasized that even non-fundamental rights are entitled to meaningful protection against governmental infringement. The court stated:

> Nor are we inclined to accept the defendants' contention that, since cigarette smoking has not been recognized as a fundamental right, no balancing test nor rationale of any kind whatsoever is needed to justify the restriction. This reasoning would seem to suggest that the state can, arbitrarily and for no reason, condition employment upon an agreement to refrain from a nearly limitless number of innocent, private and personal activities. We would be reluctant to go this far even if the law would tolerate such a venture.

Id. at 542.

In Grusendorf the court upheld the no-smoking rule, but only upon finding a "rational connection between the non-smoking

regulation and the promotion of the health and safety of the firefighter trainees." The court noted that good health and physical conditioning are essential requirements for firefighters who "are frequently exposed to smoke inhalation," where "it might reasonably be feared that smoking increases this health risk." Id. at 543.

Unlike the rule upheld in Grusendorf, the City's regulation is totally unrelated to job functions. For example, the City does not even pretend that all smokers are per se unfit for all City jobs, but the effect of the regulation is to place all smokers in the category of unhireables, regardless of the functions of the jobs they seek.

The decision whether or not to engage in lawful conduct, such as smoking, in one's own free time, is a matter of personal autonomy and privacy protected by article I, section 23, of the Florida Constitution. The City's Administrative Regulation 1-46 intrudes into the private lives of its employees and prospective employees, including Kurtz, by requiring all job applicants to refrain from this lawful, private conduct for a year as a condition of applying for any City job, regardless of whether or not smoking is related to job functions or performance. In order to justify such an intrusion, the City would have to demonstrate that the regulation serves a compelling governmental interest, and that the regulation is the least intrusive means of achieving that goal.

The City's asserted interest in reducing its smoking-related medical and productivity costs cannot be deemed compelling where

most or all of these costs are associated with on-the-job smoking, not with the pre-hiring and off-duty smoking prohibited by Administrative Regulation 1-46. Even if the City could establish a compelling interest in reducing such costs, its regulation is not the least intrusive means of achieving this goal. Rather, because the regulation applies to all City job applicants, regardless of their qualifications and regardless of whether or not smoking is relevant to the functions of the job sought, Administrative Regulation 1-46 is the *most* intrusive means the City could use to obtain its asserted objective of reducing smoking-related costs.

B. **Administrative Regulation 1-46 is not rationally related to the City's asserted goals of reducing health costs and increasing productivity**

The City apparently concedes that if the "compelling state interest" standard applies, then the no-smoking hiring policy must be defeated. Moreover, even if the less stringent "rational relationship" test applies, the City's policy cannot survive.

The City justifies its regulation as an attempt to reduce health insurance costs and increase productivity. Even if those goals are, in the abstract, legitimate, the means chosen by the City is not rationally related to those goals. The regulation takes effect at the point at which an applicant initially seeks a job. That is not the point at which the City's health insurance or productivity interests are jeopardized or effected. At the point of hiring, the City's only relevant and legitimate interest is in evaluating a candidates skills and qualifications to perform a particular job. However, the City's regulation precludes the consideration of qualified workers on the basis of smoking alone, before any issues of health or productivity have arisen.

The City incorrectly asserts that Kurtz conceded below that the City's no-smoking hiring policy was rationally related to the legitimate goals of reducing insurance costs and increasing productivity. In fact, Kurtz's position has consistently been that, while reducing costs and increasing productivity may be legitimate goals, the no-smoking hiring policy is a discriminatory, irrational, intrusive, and unconstitutional means of achieving those goals.

Smoking becomes relevant (and "rationally related") to the City's interest in reducing health costs not at the time of application or even or hiring, but at the time those health benefits are provided or paid. This is why, as Kurtz concedes, the City could constitutionally distinguish between smokers and non-smokers on the basis of insurance premiums or benefits.

Likewise, smoking becomes relevant (and "rationally related") to the City's interest in increasing productivity at the point when the employee is actually working. Thus, if a smoking employee, or any employee, abused or exceeded the City's sick-leave policy or took too many breaks, that would be grounds for disciplining or terminating the smoking or other non-productive employee. Likewise, if a smoking employee violated the rules on designated smoking areas or on-duty smoking, that would be a valid basis for firing that employee.

Thus, there are rational ways in which the City could achieve its goals of reducing health costs or increasing productivity, but a complete ban on hiring smokers, regardless of there qualifications, is not one of them. Thus, the City's regulation does not pass muster even under the less stringent rational relationship test.

The case of State v. Powell, 497 So.2d 1188 (Fla. 1986), cited by the City, is not on point. In that case, the court held that the next of kin had no privacy right in the body of his deceased relative, basing its decision on the fact that plaintiff had only a limited, property right in the body itself. Id. at 1192-93.

That case has no bearing on this one, which involves the personal rights of a living individual to be free from governmental intrusion into her private life.

The City also cites a number of cases holding that the private use of marijuana is not a constitutionally protected activity. Kurtz has no quarrel with these cases, but they are distinguishable from this case in that this case involves not only the private use of a legal substance, but the denial of employment rights on the basis of that lawful conduct. It should be noted that even the private use of marijuana has been held not to be a valid basis for the denial of governmental employment, where the marijuana use was not related to the on-duty requirements of the job. Osterman v. Paulk, 387 F.Supp. 669, 670-71 (S.D. Fla. 1974) (holding based on federal due process analysis).

The City admits that its no-smoking hiring regulation has no relationship to the qualifications of the applicant or the requirements of the job sought. The City concedes that its regulation is unrelated to job qualifications, but asserts that its goal of reducing health insurance costs and increasing productivity justifies the regulation. Even if that objective were a legitimate goal of government when it results in the turning-away of qualified applicants, the no-smoking hiring rule is not a "rational" way of achieving that goal.

If the regulation were actually and rationally to serve the goal of reducing the City's health insurance and medical costs, it would focus on its employees' health and medical histories, rather

than on the fact that a job applicant engages in or has engaged in one type of off-duty conduct, smoking. And if the City were interested in increasing employee productivity, it would prohibit on-the-job smoking, and not concentrate on off-duty, prehiring smoking activity.

If in fact the City's regulation were really designed to reduce smoking-related health costs and increase productivity among its employees, it would forbid smoking by persons after, rather than before, they were hired. Under the City's regulation, a person hoping to get a job with the City must give up smoking a year in advance in the mere hope of getting a City job, and only persons who have done so are deemed worthy of employment by the municipality. However, once employed, the City does not require that a person continue to abstain from smoking. Also, those employed prior to the adoption of the no-smoking hiring regulation can continue their smoking unabated, notwithstanding any additional health costs that may result. Clearly, if the City's real interest were in health and productivity costs, it would focus its regulatory activity at its actual employees rather than on creating artificial, irrational requirements for all job applicants.

In the present case, the application of the no-smoking regulation to new employees but not to existing employees completely undercuts and negates the City's purported cost-saving rationale. Even if smoking indeed creates additional costs to the City, the regulation prohibiting some but not all employees from smoking is not a rational method for achieving that goal.

Even if smoking is, in some cases, an indicant of potential health problems, the rational way of addressing that issue would be in connection with the decision of whether or under what terms to provide health insurance, not in the decision of whether or not to hire in the first place. Refusing to hire smokers at all is not a rational way to achieve the goal of controlling health costs. Rather, the City could limit coverage for smoking related illnesses or require smokers to pay higher insurance premiums.

The irrational effect of this regulation is that the City would deny employment even to a smoker who would not be covered under the City's group health plan, and who would thus cost the City nothing in insurance costs. For example, some job applicants may not wish or intend to join the City's health plan, because they have coverage under their spouses' employers' group plans. The City's health-cost justification is clearly specious as applied to these individuals, and yet the City's no-smoking regulation would deny these individuals employment.

Moreover, the City has admitted that it will not permit smoking employees to waive or pay an extra premium for their insurance coverage in order to obviate or defray the supposed added health care costs. In light of this admission, in particular, it is clear that the City's no-smoking hiring regulation is not really or rationally aimed at curtailing health costs. Rather, it is blatant discrimination against persons who engage in a particular type of conduct of which the City government disapproves.

The City incorrectly states that this case is one to require

the City to "subsidize" smoking or to "coddle" smokers. That is a blatant misstatement of the claims in this case. Kurtz has not sought a determination that smokers should be allowed any special privileges whatsoever. Indeed, Kurtz has conceded that the City is not required to do so. Rather this case is merely about hiring, and whether hiring decisions can be based on an across-the-board ban on a particular lawful, off-duty conduct.

The City's citation of Picou v. Gillum, 874 F.2d 1519 (11th Cir. 1989), is off-target. Kurtz's smoking in the privacy of her own home is not analogous to a motorcyclist riding without a helmet the public roadways. Kurtz's off-duty smoking does not imperil the City's other employees, and Kurtz has conceded that she would be willing to comply with the City's on-the-job smoking regulations and rules regarding absenteeism, which regulations could even include a complete ban on smoking on City premises or while on-duty.

Thus, even if the Court were to hold that the City need not demonstrate a compelling interest to justify its no-smoking hiring regulation, Administrative Regulation 1-46 would still be violative of article I, section 23, because that regulation is not rationally related to any legitimate governmental interest of the City. The regulation is irrational as a means of achieving reductions in medical and productivity costs, because the regulation applies to all smokers, whether or not they are healthy, and whether or not they are qualified for, and perform satisfactorily at, any particular City job.

VII. CONCLUSION

On the basis of the arguments and authorities set forth above, the respondent requests that the question certified by the Third District Court of Appeal be answered in the affirmative, and that the decision of the Third District in this case be approved.

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VIII. CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this Answer Brief of Respondent was served by mail this 4th day of April, 1994 upon Pedro P. Echarte, Jr., Esq., Centrust Financial Center, 21st Floor, 100 S.E. 2nd St., Miami FL 33131, and on Thomas M. Pflaum, Esq., Route 2, Box 838, Micanopy FL 32667.