IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,011
(First DCA No. 94-2714)

RECCHI AMERICA INC. and
FTBA-FUND,

Appellants,

vs.

ASTLEY HALL,

Appellee.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA.

# INITIAL BRIEF OF APPELLANTS

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## PRELIMINARY STATEMENT

Appellants, RECCHI AMERICA, INC. and FTBA-FUND (formerly PALMER & CAY CARSWELL), were the Employer/Carrier, and Appellee, ASTLEY HALL, was the Claimant, in workers' compensation proceedings held before the Honorable Judge of Compensation Claims Joseph Hand, District "J". By order entered August 3, 1994, Judge Hand denied compensability of Mr. HALL's claim for benefits, based upon the Drug-Free Workplace provisions of §440.09(3) Fla. Stat. (1991). The case was ultimately reviewed by the First District Court of Appeal, Hall v. Recchi America Inc., 671 So.2d 197 (Fla. 1st DCA 1996), which found §440.09(3) Fla. Stat. (1991) to be unconstitutional. This effort at Supreme Court review timely followed. Fla.R.App.P. 9.030(a)(1)(A)(ii) and Fla.R.App.P. 9.110(a)(1).

The parties will be referred to as they appeared below, and the letter "R", followed by a numeral, shall be used to designate references to the 4-volume, 637-page, Record on Appeal.

## STATEMENT OF THE CASE AND THE FACTS

On April 1, 1991, RECCHI AMERICA, INC., established within its employment structure a Drug-Free Workplace program whereby it provided, in accordance with the applicable Florida Statutes, a system which included notice, education, and testing for drug abuse (R.61-62, 65, 71-72, 254-255). In implementing that particular program, RECCHI AMERICA promulgated an Employment Package, with an Acknowledgement and Acceptance Statement, which provided prospective employees with a comprehensive discussion of the obligations and duties that existed under the program (R.52-53, 65-70, 72, 329-338). Specifically, the Employment Package included a general policy statement as to the purpose and intent behind the program (R.330-333), specific prohibitions and consequences under the policy (R.333-334), educational requirements (R.334), drug/alcohol screening policies and procedures (R.335-336), and specimen testing and search requirements (R.337-338). The accompanying Acknowledgement and Acceptance Statement verified the applicant/employee's understanding of the program, and the ramifications thereof (R.329).

In May of 1991, the Claimant, ASTLEY HALL, commenced employment with RECCHI AMERICA (R.41). In his application process, and in accordance with the established Drug-Free Workplace program, Mr. HALL was provided with the Employment Package and the Acknowledgement and Acceptance Statement, which



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he, in fact, signed (R.52-53, 72, 329). Mr. HALL, as well, voluntarily submitted to a pre-employment urine/drug test (R.51), and conceded that he was fully aware of RECCHI AMERICA's drug testing requirements and of their drug-use prohibitions (R.51-52). As testified by Mr. HALL below:

Q. Now before you were hired by Recchi America, you had to take a drug test, right?

A. Yeah.

Q. And you knew that you had to test clean?

A. Yes.

Q. Right?

A. Yeah.

Q. So you knew that they didn't want you to work there if you were doing drugs, right?

A. Yeah.

Q. Now you have already admitted that you smoked marijuana before your accident, right?

A. Before my accident?

Q. Right, that Saturday before your accident was five days before your accident?

A. Yeah.

Q. You smoked marijuana, didn't you?

A. Yeah.

Q. Now, when you went to the Workers' Comp Medical Center, which was an hour after your accident, they made you have another drug test, right?

A. Yeah.

Q. And you tested positive, right?

A. Yeah.



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Q. Okay. On the day that you were hired by Recchi America, they asked you to sign this form. It's called Acknowledgment and Acceptance Statement, and it has the name Astley L. Hall on that. That is your signature, right?

A. Yeah.

Q. And then with this package, there's a huge package here, a statement from your employer. On the back of the statement, there's a form called Employees Consent Form.

And I want you to look at this form and tell me if that is your signature stating that you are agreeing to submit to a drug test before you were hired by Recchi America. Is that your signature?

A. Yeah. (R.51-53).

On the morning of June 13, 1991, three weeks after commencing work, Mr. HALL suffered a work-related injury when he was struck on the head at a work site (R.41-42). Mr. HALL was immediately taken to the Workers' Compensation Medical Center for treatment, and, approximately one hour after the accident, a urine specimen was taken from him for testing purposes (R.45, 52).

Dr. Alan Yurkiewicz, a physician with the Workers' Compensation Medical Center, testified below that he had examined Mr. HALL on the morning of June 13, 1991, and was aware that a urine specimen had been taken from Mr. HALL in accordance with the Employer's Drug-Screen Consent Form (R.254-255). The urine sample was physically obtained by Mr. Randy Rafferty, a licensed practical nurse (R.256, 264, 346). Mr. Rafferty was no longer an employee of the Workers' Compensation Medical Center at the time of the proceedings in this matter, but testimony as to his actual



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role in the custodial chain was adduced through Dr. Yurkiewicz and through Ms. Sandy Bucklew, the Medical Center's records custodian (R.105-116, 177-200, 257-259, 265-270, 346-350). Both Dr. Yurkiewicz and Ms. Bucklew testified that Mr. Rafferty's handling of the subject sample was in full accord with established procedure, and that the integrity of the chain was not compromised during Mr. Rafferty's custody (R.265-270, 346-350).

The evidence further revealed that Mr. Rafferty, as the collector of the specimen, released the urine sample that day to a courier from National Health Laboratories, Inc., for transmittal to that H.R.S.-approved testing facility (R.258, 266-270, 285, 288, 307-308, 471-480, 545-546). Both the urine sample cup, and the requisition form, were sent with matching requisition numbers (R.552-554).

Once the urine sample reached the confines of National Health Laboratories, it came under the custody and control of Mr. Manuel Valle, an assistant technician and the accessioner in charge of testing (R.285, 288, 310, 461, 471-480, 552-553, 557-558, 561). At that facility, an (internal) Chain of Custodial Requisition Form was followed for purposes of tracking the handling of the particular specimen (R.270, 284-285, 287, 311, 324-327). The subject sample was assigned an accession or identification number that was used for tracking purposes throughout the testing process, and the sample itself was kept stringently secured within the accessioning and storage areas



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(R.287, 461, 471, 545, 555, 557-558). Immuno assay testing was then performed on the sample by Mr. Valle, and by Ms. Julie Schall, a toxicologist, which ultimately resulted in a "positive" finding for marijuana (R.289-290, 312, 470-480, 561-564). Confirming GC/MS tests were then performed by Mr. Mukesh Vakharia, verifying that positive finding (R.290, 315).[1] [Mr. HALL had freely conceded that he smoked marijuana on June 8, 1991 - several days prior to the subject accident, and clearly within the time frame of his Drug-Free employment tenure (R.46).]

As the result of the "positive" finding for marijuana in Mr. HALL's urine - existent at the time of his work-related accident - Mr. HALL was terminated from his employment and denied all workers' compensation benefits (R.67, 78, 233, 329, 333).

A Claim for Benefits was filed in the matter on September 21, 1991, wherein Mr. HALL sought "TTD from 6/13/91 and continuing to date" and "medical treatment as is refused by the employer/carrier" (R. 231-135, 243). The cause proceeded to trial on March 17, 1994, before the Honorable Judge of Compensation Claims Joseph Hand (R.1-116). By order entered August 3, 1994, Judge Hand denied the entire claim "based upon Florida Statute 440.09(3)" (R.608-633). In his analysis, Judge Hand recognized a probable lack of causation between Mr. HALL's accident and his positive test result for marijuana, but deemed

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[1] It is undisputed in this Record that there was absolutely "no" indication of any impropriety, tampering, irregularities, or alteration, with regard to the subject urine sample within the custodial chain (R.285, 288, 290, 294, 350, 478, 481, 555-557, 562-563).



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the provisions of §440.09(3) to create a irrebuttable presumption of causation which would, necessarily, preclude a finding of compensability (R.631-632). As stated by Judge Hand: "the Legislature intended to deny workers' compensation benefits to any employee who chooses to engage in drug use where their employer has implemented a drug free workplace" (R.632).

Mr. HALL then appealed this order of denial to the First District Court of Appeal (R.118). On March 19, 1996, the First District issued its opinion in the cause, Hall v. Recchi America Inc., 671 So.2d 197 (Fla. 1st DCA 1996), holding that the irrebuttable or conclusive presumption of causation created by §440.09(3) deprived injured employees of due process, and was, therefore, unconstitutional. In making that determination, the First District analyzed the three-pronged test for evaluating such conclusive presumptions and concluded that, although the legislative enactment was "reasonable" and had a "reasonable basis," it could not overcome the "high potential for inaccuracy". As such, the First District determined that factual proof of a causal relationship, on an individualized basis, was necessary. The First District ultimately concluded that, although the irrebuttable presumption provisions of §440.09(3) would be deemed unconstitutional, the remainder of the drug-free workplace provisions were severable, and would survive and adequately fulfill the intended legislative goals.



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The Employer/Carrier moved for a rehearing of the cause, which was denied on April 24, 1996. This appeal then timely followed. Fla.R.App.P. 9.110(b).



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## ISSUES ON APPEAL

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT THE IRREBUTTABLE PRESUMPTION OF CAUSATION CREATED BY FLORIDA STATUTE §440.09(3) WAS UNCONSTITUTIONAL, AS VIOLATIVE OF DUE PROCESS.



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## SUMMARY OF THE ARGUMENT

Appellants, RECCHI AMERICA INC. and FTBA-FUND, would submit herein that the First District Court of Appeal erred in determining that the Drug-Free Workplace provisions of §440.09(3) were violative of due process in the creation of an irrebuttable presumption of causation. In the absence of the implication of any suspect class or fundamental interest, the dispositive inquiry on constitutional review focuses solely upon whether the legislative enactment is reasonable, and whether it is rationally related to a permissible or legitimate governmental objective. Where, as here, it is so reasonably and rationally based, and comprises a legitimate legislative effort to deter reckless conduct in the workplace, the statute's irrebuttable presumption should properly survive a constitutional challenge.



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## ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT THE IRREBUTTABLE PRESUMPTION OF CAUSATION CREATED BY FLORIDA STATUTE §440.09(3) WAS UNCONSTITUTIONAL, AS VIOLATIVE OF DUE PROCESS.

Appellants, RECCHI AMERICA INC. and FTBA-FUND, would submit herein that the First District Court of Appeal erred in determining that §440.09(3) Fla. Stat. (1991) was unconstitutional and violative of due process in the creation of an "irrebuttable presumption" that the presence of drugs or alcohol in an employee's system at the time of an industrial accident is to be construed as the primary cause of any ensuing injury. As discussed below, this enactment is rationally and reasonably related to a legitimate governmental objective and, as such, should properly have been upheld by the First District.[2]

The essential facts of this case reveal that RECCHI AMERICA had established a Drug-Free Workplace structure, as formally delineated under §440.09(3) and implemented through §§440.101 and 440.102 Fla. Stat. (1991). Within that framework, ASTLEY HALL applied for employment, was provided notice of the statutory criteria, he acceded thereto, and was ultimately hired. A couple of weeks later, and while at home, Mr. HALL smoked marijuana. Several days after that act, Mr. HALL was involved in an

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[2] This Court very recently addressed the merits of §440.09(3), and fully recognized that statute's creation of a "statutory presumption of causation". Domino's Pizza v. Gibson, 668 So.2d 593 (Fla. 1996). The constitutionality of that statute was, apparently, not deemed to be an issue. See e.g. Trushin v. State, 425 So.2d 1126 (Fla. 1982).



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industrial accident and was injured. Urine tests proved positive for marijuana in Mr. HALL's system, and RECCHI AMERICA, as a result, refused to provide workers' compensation benefits for Mr. HALL and terminated his employment. A claim for workers' compensation benefits was then filed, but was eventually denied by the Judge of Compensation Claims based upon the statutory mandates of §440.09(3). An appeal to the First District Court of Appeal ensued.

The First District Court of Appeal determined that the irrebuttable or conclusive presumption of causation established by §440.09(3) was unconstitutional, as violative of due process. The First District held that, although the enactment was reasonably based, its failure to allow for individualized proof of causation rendered it inequitable due to the "high potential for inaccuracy". Hall, supra at 201. Appellants would submit that the First District erred in that assessment, and that the enactment, with its irrebuttable presumption, is constitutionally sound.

At the outset, §440.09(3) delineates, inter alia, as follows:

> No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician, which affected the employee to such an extent that the employee's normal faculties were impaired; . . . If there was at the time of the injury 0.10 percent or more by weight of alcohol in the employee's blood, or if the employee has a positive confirmation of a drug as defined in this



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> act, **it shall be presumed** that the injury was occasioned primarily by the intoxication of, or by the influence of the drug upon, the employee. **In the absence of a drug-free workplace program, this presumption may be rebutted** [. . .].

It is clear from the express terms of this enactment that, under the framework of a "drug-free workplace", an irrebuttable presumption of causation will exist in situations where an injured worker is determined to have residual drugs or alcohol in his or her system at the time of an industrial accident. The legislative intent behind this enactment has been expressly stated under the provisions of §440.101 Fla. Stat. (1991), which states, inter alia, as follows:

> It is the intent of the Legislature to promote drug-free workplaces in order that employers in the state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug abuse by employees. **It is further the intent of the Legislature that drug abuse be discouraged and that employees who choose to engage in drug abuse face the risk of unemployment and the forfeiture of workers' compensation benefits.** If an employer implements a drug-free workplace program which includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the division, the employer may require the employee to submit to a test for the presence of drugs or alcohol and, if a drug or alcohol is found to be present in the employee's system at a level prescribed by rule adopted pursuant to this act, the employee may be terminated and shall forfeit his eligibility for medical and indemnity benefits upon exhaustion of the procedures prescribed in s.440.102(5). However, a



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> drug-free workplace program shall require the employer to notify all employees that **it is a condition of employment to refrain from taking drugs on or off the job**[3] and if the injured worker refuses to submit to a test for drugs or alcohol, he forfeits his eligibility for medical and indemnity benefits.

As such, it is the clear and explicit intent of the Florida Legislature to promote drug-free workplaces, and to, thereby, prevent drug abuse by employees and preclude those who engage in drug abuse from attending the workplace.

It is axiomatic that legislative acts, such as these, are presumed to be valid and constitutional, and that this presumption imposes a heavy burden of proof upon those attacking the validity of such statutes. Peoples Bank, Etc. v. State, Dept. of B. & F., 395 So.2d 521 (Fla. 1981) . When construing a statute, the courts must assume that the Legislature intended to enact an effective law, and are therefore obligated to construe the act in a manner that will uphold it rather than invalidate it, if there is any reasonable basis for so doing. A.B.A. Industries v. City of Pinellas Park, 366 So.2d 761 (Fla. 1979); Sarasota County v. Barg, 302 So.2d 737 (Fla. 1974). If there is any reasonable way that a statute can be construed as not to

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[3] This particular provision was amended, effective 1994, to state that:

> "it is a condition of employment **for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body ...**".

§440.101(2) Fla. Stat. (Supp. 1994).



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conflict with the constitution, it must be so construed. Firestone v. News-Press Pub. Co., Inc., 538 So.2d 457 (Fla. 1989). Every reasonable doubt should be resolved in favor of the constitutionality of the legislative act, since the presumption of constitutionality continues until the contrary is proven beyond all reasonable doubt. State v. Kinner, 398 So.2d 1360 (Fla. 1981).

Initially, and with regard to basic due process concerns, it is quite evident that the statutory provisions of §§440.09(3), 440.101, and 440.102 are rationally or "reasonably" based, and are, to that extent, constitutionally permissible. This was fully acknowledged and conceded by the First District Court of Appeal in its opinion. Hall, supra at 200-201. With that in mind, the Constitution allows the government a certain measure of flexibility in establishing irrebuttable or conclusive presumptions when those presumptions do not involve suspect classifications or fundamental rights. Gallie v. Wainwright, 362 So.2d 936 (Fla. 1978); Weinberger v. Salfi, 422 U.S. 749, 768-769, 776-777, 45 L.Ed.2d 522 (1975); Malis v. Hills, 588 F.2d 545, 549 (6th Cir. 1978). Such legislative acts are to be viewed under a "reasonableness" standard, focusing on a determination of whether the statute is rationally related to a legitimate governmental objective. See Gallie, supra; see also Dorfman v. Allan, 434 N.E.2d 1012 (Mass. 1982); Malis, supra.

The statutory provisions at issue in this case do not involve such extraordinary classifications or rights, and thereby



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warrant only a "rational" analysis. In that light, it is entirely rational (as recognized by the First District) for the Florida Legislature to promote the maximization of business productivity by addressing accidents in the workplace that result from drug abuse by employees. Appellant would further submit, though, that it is equally rational for the Legislature to conclusively "presume" that an employee, under the notice and education mandates of a Drug-Free Workplace framework, who, nonetheless, chooses to indulge in illicit drugs and then report to work, would be deemed unqualified per se for both employment and workers' compensation benefits if found to have such drugs in his or her system during such employment.

Also under this due process analysis, each and every employee within a Drug-Free Workplace Program receives full and complete notice, prior to employment, of the ramifications of drug use and the implications of the presence of such drugs in an employee's system. See §440.102(3). Employees are also provided with strict testing procedures and have the clear right to rebut such test results. See §440.102. In this particular case, such notice occurred by way of RECCHI AMERICA's Employment Package and the Acknowledgement and Acceptance Statement, each of which fully and fairly informed employees of the consequences of drug use. It is undisputed that Mr. HALL, in this case, signed the acknowledgement statement, and was fully cognizant of this Employer's policy and expectations at the time of his employment. See e.g. Johnson v. Department of Employment Security, 782 P.2d



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965 (Utah App. 1989). Mr. HALL was, as well, afforded a full opportunity to rebut the test results in proceedings held before the lower tribunal (R.98-105, 145-161).

With regard to the actual application of the statute to this case, it is certainly evident that Mr. HALL fell squarely within the statutory preclusion. Mr. HALL knowingly availed himself of employment within a Drug-Free Workplace structure and, during the course of his employment tenure, took an illicit drug and reported to work. This (Drug-Free) employment situation was volitional, and constituted a bargain or understanding between Mr. HALL and his employer which bound Mr. HALL both to the terms of the statute and to the presumption of impairment upon which causation would necessarily lie. In choosing to partake in marijuana within such an employment structure, and within his employment tenure, Mr. HALL knowingly forfeited his rights under Chapter 440. By such actions, this Claimant had no fundamental right to work or to enjoy the "fruits" of his labor.

In the First District's decision, the Court determined that the irrebuttable or conclusive presumption of §440.09(3), Fla. Stat. (1991), vis-a-vis the implementation of a drug-free workplace, §§440.101 and 440.102, was violative of due process. In making that determination, the Court noted the "high potential for inaccuracy" with the statutory presumption, and thereby severed or "excised" the irrebuttable presumption and replaced it with "the constitutionally legitimate rebuttable presumption." Hall, supra at 201-202. Appellants would submit that the First



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District has misconstrued the legislative intent behind the statute, as well as the volitional bargain that is entered into between an employer and employee under such a drug-free workplace framework.

First, the lack of any causal connection is at the very heart of the enactment. The explicit intent behind the enactment is to preclude those who choose to engage in drug abuse "on or off the job," or those who would report to work with "the presence" of drugs in their systems, from availing themselves of employment and from obtaining the benefits of the Workers' Compensation Act. §440.101 Fla. Stat. (1991). The irrebuttable presumption is pivotal to that intent. As alluded to above, under this enactment a volitional and knowing bargain is entered into between a prospective employee and the prospective employer whereby the employee promises to refrain from engaging in drug abuse "on or off the job", or from showing up at work with "the presence" of drugs in his system, in exchange for employment and compensation benefits. In this particular case, Mr. HALL, with such knowledge, fully and freely admitted to having smoked marijuana five days prior to the subject accident, and to then reporting to work. In accordance with this enactment, and under these facts, an employer should certainly be permitted to presumptively discharge such an individual, irrespective of causation.

Where the intent of the Florida Legislature is to preclude drug abuse by employees "on or off the job" and prevent employees



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from reporting to work "with the presence of drugs" in their systems, if it is ultimately demonstrated that an employee has, nonetheless, chosen to partake in illicit drugs and report to work then causation must be deemed irrelevant - the employee has breached his employment promise.[4] How such drugs may or may not have actually impaired the employee is not at issue; if the employee simply chooses to use illicit drugs and report to work, he is deemed to be in breach of his employment agreement and will have lost the right to avail himself of the benefits of Chapter 440. It is an employer's clear right, under this overall legislative intent, to terminate the employment of such a reckless individual -irrespective of causation.

Such "strict liability" statutes, which impose liability irrespective of any causal relationship, have been upheld by this Court. See Baker v. State, 377 So.2d 17 (Fla. 1979) (which construed the pre-1986 version of Florida Statute §860.01); Tamiami Gun Shop v. Klein, 116 So.2d 421 (Fla. 1959) (which construed Florida Statute §790.18); and K.C. Sloan v. Coit International, Inc., 292 So.2d 15 (Fla. 1974) (which construed the pre-1981 version of §450.111). It is within the Legislature's clear prerogative to intend for a statute to have

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[4] Such an employment agreement is analogous to the provisions of 542.33(2)(a), whereby an "employee may agree with his employer to refrain from" detrimental conduct towards his employer (i.e. engaging in a competing business). This kind of statutory promise has been upheld as constitutional by this Court. See Capelouto v. Orkin Exterminating Co. of Fla., 183 So.2d 532 (Fla. 1966); Standard Newspapers, Inc. v. Woods, 110 So.2d 397 (Fla. 1959).



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strict liability consequences, particularly where the enactment is - as recognized by this Court - rationally related to a legitimate governmental objective. This is particularly true where the legislative enactment can be justified on deterrence grounds. See Baker, supra. As in Baker, if it can be assumed that the use of illicit drugs, and the subsequent reporting to work with the presence of such drugs in one's system, is a "reckless" and culpable act, then it is entirely reasonable for the Legislature to conclude that a strict liability statute would be a rational response, and deterrent, to such conduct. See also Johnson, supra.

Secondly, the First District's sole basis for invalidating the irrebuttable presumption, the "third prong" of Markham v. Fogg, 458 So.2d 1122, 1125 (Fla. 1984),[5] should not properly

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[5] We have stated that the test to determine the constitutionality of a mandatory presumption is three-fold:

> [c]onstitutionality ... under the Due Process Clause must be measured by determining (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) **whether the expense and other difficulties of individual determinations justify the inherent imprecision of a**

(continued...)



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justify the determination made in the opinion. The First District based its decision, relative to this particular facet of proof, on the asserted "imprecision of the presumption" and the resultant need for individual determinations as to causation. Hall, supra at 201. Appellant would submit, however, as indicated by this Court in Gallie v. Wainwright,[6] that a legislative body may properly find that "the expense and other difficulties of individual determinations justif[y] the inherent imprecision of a prophylactic rule". Gallie, supra at 944, citing to Weinberger, supra at 777. Moreover, "the Constitution does not invariably require, and practical considerations do not always realistically permit, such absolute precision to be demanded of the legislature." Gallie, supra at 944. As with Gallie, it cannot be said that the Legislature, in this particular case, was "unreasonable" in determining that the inherent risks associated with an employee who uses illicit drugs, and then reports to work, would warrant the need for a prophylactic rule of causation. Such a rule outweighs the

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[5] (...continued)
**conclusive presumption.**

Bass v. General Development Corp., 374 So.2d 479, 484 (Fla. 1979). See also Gallie v. Wainwright, 362 So.2d 936 (Fla. 1978).

[6] Gallie is the seminal decision of this Court dealing with the propriety of irrebuttable presumptions, and it is upon that case which the subsequent decisions in Markham v. Fogg, supra, and Bass v. General Dev. Corp., 374 So.2d 479 (Fla. 1979), are based.



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limited detrimental consequences that may exist for those employees who have positive test results but prove to be "more tolerant" to the presence of drugs in their system,[7] and it, more importantly, acts as a legitimate legislative deterrent to such reckless conduct by an employee. See Baker, supra.

Finally, Appellants would submit that the First District's "excision" of the irrebuttable presumption has removed any incentive or benefit to an employer to create a drug-free workplace as envisioned under §440.102 Fla. Stat. (1991). The intended "teeth" behind the enactment would no longer exist. A rebuttable presumption had previously existed, §440.09(3) Fla. Stat. (1989), and still exists, in the absence of such a stringent and complex statutory structure.

In sum, the Drug-Free Workplace statute is rationally related to a legitimate governmental concern, and properly imposes the conclusive presumption of impairment upon those individuals who recklessly choose, despite notice and education,

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[7] In that regard, Appellant would respectfully acknowledge, yet distinguish, the rebuttable presumption established by §316.1934(2)(c) Fla. Stat. (1993) (the D.U.I. statute). Pursuant to §316.1934(2)(c), the Legislature has afforded intoxicated drivers the opportunity to rebut the presumption of impairment through the introduction of competent evidence addressing the extent to which the driver's normal faculties were impaired. Appellant would submit, however, that the Legislature had an equal ability to preclude the opportunity for such rebuttal under the Drug-Free Workplace statutes. Arguably, greater hazards may exist to an employee, and to others, from impairment in the workplace as opposed to on the roadway, see e.g. Johnson, supra, and this determination, and demarcation, falls squarely within the legislative function. See Dutton Phosphate v. Priest, 67 Fla. 370, 65 So. 282 (Fla. 1914) (the wisdom, necessity, and policy of a statute are authoritatively determined by the Legislature, not the Courts).



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to indulge in illicit drugs and then report to work. All employers and employees are entitled to a drug-free workplace, Johnson, supra, and the Florida Legislature has, by this enactment, appropriately addressed a legitimate societal and economic problem.



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## CONCLUSION

Based upon the foregoing argument and authorities cited therein, Appellants would submit that the First District Court of Appeal erred in determining that Florida's Drug-Free Workplace statute, §440.09(3), was unconstitutional, and that, as such, the decision of the First District should properly be quashed.

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of May, 1996 to: RANDY D. ELLISON, Esq., 1645 Palm Beach Lakes Boulevard, Suite #350, West Palm Beach, Florida 33401-2289; and JACK J. WEISS, ESQ., 701 S.W. 27th Avenue, Suite #1000, Miami, Florida 33135.

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