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.

[CONSOLIDATED]
REPLY BRIEF OF APPELLANTS

WALTON LANTAFF SCHROEDER & CARSON
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TABLE OF CONTENTS

WALTON LANTAFF SCHROEDER & CARSON
TWENTY-FIFTH FLOOR, ONE BISCAYNE TOWER, 2 SOUTH BISCAYNE BOULEVARD, MIAMI, FLORIDA 33131
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TABLE OF AUTHORITIES

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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.

By order entered July 23, 1996, this Court has permitted the American Civil Liberties Union Foundation of Florida, Inc. (A.C.L.U.) to appear in this proceeding as amicus curiae in support of the Appellee/Claimant, ASTLEY HALL.

ISSUES ON APPEAL

POINT I

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.

POINT II

WHETHER THE DRUG-FREE WORKPLACE PROVISIONS ARE VIOLATIVE OF CONSTITUTIONAL CONCERNS BY ENCOURAGING INDISCRIMINATE, SUSPICIONLESS SEARCHES. (Consolidated and Restated)

POINT III

WHETHER THE JUDGE OF COMPENSATION CLAIMS ERRED IN CONCLUDING THAT THE EMPLOYER HAD ESTABLISHED A DRUG-FREE WORKPLACE WHICH COMPORTED WITH THE STATUTORY PROVISIONS. (Restated)

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ARGUMENT

POINT I

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 would continue to maintain their position as taken on this point in the Initial Brief, but would respond to Appellee's various assertions as follows:

1. With regard to Appellee's "strict scrutiny" analysis, Appellant would submit that no suspect class or fundamental interest is implicated by the Drug-Free Workplace statutes. Quite contrary to Appellee's assertions, "Employees", in and of themselves, are not deemed to be a suspect class, see e.g. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); Oklahoma Educ. Assoc. v. Alcoholic Beverage Laws Enforcement Comm., 889 F.2d 929 (10th Cir. 1989); Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984); Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989); Guess v. Workmen's Comp. Appeal Bd., 466 A.2d 1098 (Penn. App. 1983) (a workers' compensation case), and employees, such as those within the purview of the subject statute who have indications of illicit drugs or alcohol in their systems, do not constitute any category of individuals such as that based upon race, national

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origin, religion, alienage, and gender.[1] See e.g. Shoemaker v. Handel, 619 F.Supp. 1089 (D.C.N.J. 1985).

Further, the right to work is not a fundamental right, see Murgia, supra, and freedom from a blood or urine test is, as well, not deemed to be a fundamental right. See Skinner v. Railway Labor Exec. Assn., 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State v. Olivas, 856 P.2d 1076 (Wash. 1993).

As for the case of De Ayala v. Florida Farm Bureau Cas. Inc. Co., 543 So.2d 204 (Fla. 1989), it is quite evident that this decision was premised upon the "suspect" classification of "alienage", and that such classification was the sole basis for the heightened scrutiny. Contrary to Appellee's implications, there is no fundamental right to take illicit drugs (at work or at home), or to work and enjoy the "fruits" of one's labor after having done so.

2. With regard to Appellee's assertion that the Drug-Free Workplace statutes infringe upon the right of access to the courts, Appellant would maintain that it does not. If an injured employee is disqualified from workers' compensation benefits under the mandates of the Drug-Free Workplace provisions, a "reasonable alternative" certainly exists for that individual, to wit: a civil action. See e.g. Eller v. Shova, 630 So.2d 537 (Fla. 1993); Kluger v. White, 281 So.2d 1 (Fla. 1973).

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[1] A "suspect class" is any group that has been the traditional target of irrational, unfair, and unlawful discrimination. Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 943 (Fla. 1992).

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3. In response to Appellee's argument contesting the asserted "contractual" relationship between the parties, Appellants would continue to submit that an individual has the clear choice to work for an employer that avails itself of the provisions of Chapter 440, see §440.02(15)(b), and has, as well, the clear choice to work for an employer that has instituted a Drug-Free Workplace under that Chapter. By entering into such employment, the individual employee must be deemed to be cognizant of both the rights and obligations that accompany Chapter 440.

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POINT II

THE DRUG-FREE WORKPLACE PROVISIONS ARE NOT VIOLATIVE OF CONSTITUTIONAL CONCERNS BY ENCOURAGING INDISCRIMINATE, SUSPICIONLESS SEARCHES. (Consolidated and Restated)

Appellants would maintain, quite contrary to both Appellee's and amicus' assertions, that the Drug-Free Workplace provisions do not infringe upon an employee's Fourth Amendment right against unlawful search and seizure, or an employee's constitutional right to privacy.[2]

At the very outset, the Drug-Free Workplace statutes at issue in this matter are clearly permissive in nature, see §440.101, Fla. Stat. (1991), and do not, therefore, constitute any form of "state action". See Atkinson v. B.C.C. Associates, Inc., 829 F.Supp. 637 (S.D.N.Y. 1993). An employer that falls within the realm of Chapter 440 has the clear choice to implement a Drug-Free Workplace structure if it so desires, and is not, in any sense, compelled to do so. The conduct of a private employer (such as the Appellant herein), that chooses to invoke such provisions within its employment manual, comprises nothing more than "private action" which is outside the reach of the Fourth Amendment. See Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); Stevenson v. Panhandle Eastern Pipe Line Co., 680 F.Supp. 859 (S.D. Tex., 1987).

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[2] As recognized by both Appellee and amicus, this issue was not addressed by the First District Court of Appeal.

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Alternatively, and on the merits, this constitutional analysis requires the balancing of two discrete interests: an assessment must be made as to the individual employee's reasonable expectation of privacy with regard to the taking of the drug test; and the countervailing governmental interests in mandating such tests must then be evaluated. As for the first such prong, the Claimant in this case not only had a "diminished" expectation of privacy, but he, in fact, had every expectation - at the time he first applied for work with this Employer - that he could be subjected to drug testing. The decision to avail oneself of employment within a Drug-Free Workplace structure is, quite obviously, a voluntary one, which necessarily encompasses full and fair notice to prospective employees of what is to be expected of them in terms of drug or alcohol use - including the consensual testing of blood or urine prior to employment (which this Claimant acceded to), during employment, and at the time of an industrial accident (R.51). See §440.101. This mutual agreement and understanding is a condition precedent to employment within such a workplace structure. See §440.101. With this advance notice and informed consent at the time of the employment application process, the testing requirement would certainly come as no "surprise" to an employee, and it would, in its effect, provide the basis for a diminished expectation of privacy. See Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir. 1991); see also Loder v. City of Glendale, 34 Cal.Rptr.2d 94 (Cal. App. 1994); American Federation of Labor v. Unemployment

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Insurance Appeals Board, 28 Cal. Rptr. 210 (Cal. App. 1994); Alverado v. Wash. Public Power Supply, 759 P.2d 427 (Wash. 1988). Ergo, when performed under adequate procedural and privacy safeguards,[3] the testing process does not abrogate an individual employee's "reasonable" expectations of privacy. See Loder, supra.

Further, the particular testing mandated by the Drug-Free Workplace statutes encompasses the right to test based upon specific indicators of "reasonable suspicion", including the involvement in a work-related accident. See §440.102(1)(j). As such, the testing is not indiscriminate or suspicionless in nature.

Finally, when balanced against the government's legitimate and compelling interests in requiring such testing, to wit: the maximization of business productivity by the reduction of work-related accidents that result from drug or alcohol abuse by employees, the constitutional propriety of the testing becomes clearer. The Florida Legislature, by this enactment, has attempted to address, and stem, the rampant occurrence of industrial accidents resulting from substance abuse by workers, which, by their very nature, affect business productivity. This particular workplace hazard not only endangers the individual worker, but it also endangers fellow employees and/or non-employee bystanders, as well as property interests, and carries with it the costs associated with such resulting damage. This

[3] See 440.102(5)(a).

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strong safety concern is intended to foster business productivity (particularly when applied to the inherently hazardous construction industry of this Employer), and it, as such, provides the compelling foundation and need for such legislation. See Willner, supra; see also American Federation of Labor, supra.

Therefore, when balancing the [diminished] privacy interests of an employee within a Drug-Free Workplace structure with the compelling governmental interest in reducing drug or alcohol induced accidents in the workplace, it is clear that the subject statutory provisions do not infringe upon the individual/ employee's state or federal right against unlawful searches and seizure, or privacy interests.

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POINT III

THE JUDGE OF COMPENSATION CLAIMS DID NOT ERR IN CONCLUDING THAT THE EMPLOYER HAD ESTABLISHED A DRUG-FREE WORKPLACE WHICH COMPORTED WITH THE STATUTORY PROVISIONS. (Restated)

Quite contrary to Appellee's assertions, the Drug-Free Workplace Program, as established and implemented by this Employer, fully comported with the statutory provisions.[4] The written policy statement as provided by RECCHI AMERICA (R.329-338) certainly fulfilled the statutory notice requirements of §440.102(3), even as it pertained to the forfeiture of eligibility for medical and indemnity benefits (R.337). Therefore, the program as implemented by this Employer was in full accord with the applicable statutory provisions.

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[4] This issue was, as well, not addressed by the First District Court of Appeal in its decision.

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CONCLUSION

Based upon the foregoing responsive argument and authorities cited therein, Appellants would continue to 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 15th day of August, 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.

_____
ROBERT L. TEITLER

RLT/bj
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