



FPHRA E-News

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Voss v. City of Key West



FOX, WACKEEN, DUNGEY, BEARD,
BUSH, GOLDMAN, KILBRIDE
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Letter of Opinion

Robert Kilbride

At the request of FPHRA, Mr. Kilbride has supplied us with an opinion letter regarding the federal court decision in *Voss* issued on May 9, 2014. Mr. Kilbride represents and defends local governments in many areas of the law and can be contacted for help on any labor, employment, code enforcement or litigation matters for your agency.

Background:

The City of Key West had a policy which required "drug testing of all applicants for employment with the City, with refusal to submit to testing resulting in rejection of any application for employment." The Plaintiff applied for the position of Solid Waste Coordinator. The position primarily involved marketing and planning to develop, implement and expand the City's recycling programs. The Plaintiff was conditionally offered the job, but when she refused to take the test, the City rejected her application and hired another person.

The Ruling:

The trial court restated the general law that a urine test constitutes a search which intrudes on a person's reasonable expectation of privacy. To be lawful, such a search must generally be based on individualized suspicion of wrongdoing. However, the judge recognized that there is an exception to this rule if the government can show a "special need" or "important governmental interest", which is protected by the drug testing.

The Trial judge noted that the initial burden falls upon the City to prove the special need or important governmental interest. If that initial showing is made, the court must undertake a context-specific inquiry and closely examine the competing private and public interests advanced by the parties.

The federal district court judge rejected the City's position that it had a "special need". Essentially, the court concluded two things. The court noted that the City's stated purpose and reason for the drug testing was outlined in the policy. While the stated purpose of the policy was commendable, it was generic and only "symbolic". The court cited a prior U.S. Supreme Court case that reflected symbolic justification as not sufficient to justify suspicion less drug testing. In my opinion, the outcome of the *Voss* case may have been quite different if the City had presented experiential or statistical evidence to show that it was experiencing drug problems with new applicants and the policy was created to address that problem.

Secondly, the Court determined that the Solid Waste Coordinator position was simply not "safety-sensitive". It contrasted this case with cases where pre-employment drug testing was upheld for safety-sensitive positions. (For instance, railroad conductors, school janitors who handle dangerous machinery and hazardous substances around children, and teachers who act as parents and are charged to protect the health, safety and welfare of the students.)

Conclusion:

I think the lesson to be learned from the *Voss* Case is that cities and counties may use pre-employment drug testing, but they must (1) articulate and prove a "special need" based on historical or statistical data concerning a specific and present problem the pre-employment drug testing policy is designed to address. Simply stating generic health, safety and welfare concerns in the policy are only "symbolic" and will not be sufficient. (2) Cities and counties should limit pre-employment drug testing to truly "safety-sensitive"

positions.

Keep in mind that this is a lower court opinion and there is a strong likelihood that the City will appeal the ruling to the 11th Circuit Court of Appeals.

If Mr. Kilbride can be of any legal assistance, please contact him at (772) 287-4444.

www.foxwackeen.com.

For more information on Guidance issued by the EEOC on Pregnancy Discrimination, click here to check out up to date news and alerts:

[Enforcement Guidance on Pregnancy Discrimination and Related Issues](#)

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2014 Conference Recap

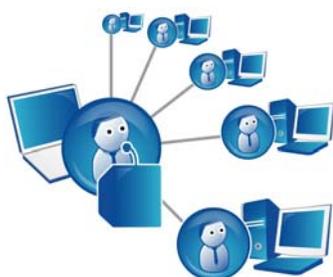
Keynote Speaker, Candy Whirley was a BLAST. She delivered exactly what we needed. An energized Keynote Session that made all of us examine who we are and how we communicate with each other. Visit the FPHRA website to see Candy's Handouts, and all the presentations from our guest speakers. We thank all our speakers and are currently taking requests and suggestions for next year's conference in Ft. Lauderdale.



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