Florida Law Review

Volume 47 | Issue 2 Article 4

March 1995

Constitutional Law: Is the Expectation of Privacy Under the Florida Constitution Broader in Scope than it is Under the Federal Constitution?

Joseph Beatty

CASE COMMENTS

CONSTITUTIONAL LAW: IS THE EXPECTATION OF PRIVACY UNDER THE FLORIDA CONSTITUTION BROADER IN SCOPE THAN IT IS UNDER THE FEDERAL CONSTITUTION?

City of North Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995)

*Joseph Beatty**

Respondent, Arlene Kurtz,[1] applied for a job with the City of North Miami as a clerk-typist.[2] During her interview for the position, she was informed that a City regulation required all prospective City employees to sign a sworn affidavit stating that they had not used any tobacco products for a year or more.[3] Respondent disclosed to the interviewer that she smoked and therefore could not truthfully sign the affidavit in compliance with the regulation.[4] The City then informed her that she would not be considered for the job.[5] Respondent filed suit,[6] asking the court to enjoin enforcement of the regulation and to declare that it violated Respondent's right of privacy under the Florida Constitution.[7] The trial court granted summary judgment in favor of the City.[8] On

---

* Dedicated to William G. Clause.

1. City of North Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995).

2. *Id.* at 1027.

3. *Id.* The regulation at issue was the City of North Miami's Regulation 1-46, promulgated in March 1990. *See* Kurtz v. City of North Miami, 625 So. 2d 899, 900 (Fla. 3d DCA 1993). The regulation 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]." Answer Brief of Respondent at 4, *Kurtz*, 653 So. 2d at 1025 (No. 92-2038). The City adopted the regulation in an effort to reduce costs and increase worker productivity. *See id.* at 1027. The regulation applied only to job applicants and did not affect current City employees. *See id.*

4. *Kurtz*, 653 So. 2d at 1027. Kurtz had smoked for more than 30 years and alleged that she had tried, but was unable to stop. Answer Brief of Respondent at 4, *id.* (No. 92-2038).

5. *Kurtz*, 653 So. 2d at 1027.

6. *Id.* Respondent sought injunctive and declaratory relief. *Id.*

7. *Id.* Respondent also claimed other constitutional violations. Answer Brief of Respondent at 13, *id.* (No. 92-2038). Respondent sought no damages. *Id.* She did not seek a court order directing the City to hire her for the clerk-typist job or directing the City to fairly consider her for the job. Petitioner's Initial Brief at 3 n.2, *id.* (No. 92-2038).

8. *Kurtz*, 653 So. 2d at 1027.

appeal, the Florida Third District Court of Appeal reversed,[9] and in a separate order certified to the Florida Supreme Court the question of whether the City had violated Respondent's right of privacy under the Florida Constitution.[10] When an individual seeks government employment, the court concluded, any expectation of privacy as to the disclosure of whether the individual smokes is not reasonable.[11] Thus, the Florida Supreme Court reversed the appellate court and HELD, that requiring job applicants to abstain from using tobacco for one year as a prerequisite to government employment does not violate the applicants' right of privacy under the Florida Constitution.[12]

Before 1980, the privacy interests of Floridians were only protected by the right of privacy under the Federal Constitution, which serves as the minimum guarantee in all states.[13] In 1980, Florida expressly guaranteed its citizens a right of privacy when article I, section 23, was added to the Florida Constitution.[14] In *Florida Board of Bar Examiners Re: Applicant*,[15] the Florida Supreme Court began to define the scope

---

9. *Kurtz*, 625 So. 2d at 903.

10. *See Kurtz*, 653 So. 2d at 1026. The certified question was:

> 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?

Id. The Florida Supreme Court had jurisdiction under article V, section 3(b)(4) of the Florida Constitution. *Id.*

11. *Id.* at 1028. The court concluded "that individuals have no reasonable expectation of privacy in the disclosure of [whether one smokes] when applying for a government job and, consequently, that Florida's right of privacy is not implicated under these unique circumstances." *Id.*

12. *Id.* The case was remanded to the Third District Court of Appeal with directions to affirm the trial court's decision. *Id.* at 1029.

13. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1.6, at 19 (5th ed. 1995).

14. 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 section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23. Article I, section 23 was added to the Florida Constitution by general election on November 4, 1980. *See* Jerry L. McDaniel, III, Comment, *Constitutional Law: Florida's Privacy Protection for Obscenity*, 43 FLA. L. REV. 405, 409 (1991).

15. 443 So. 2d 71 (Fla. 1983).

of this new right.[16] In *Board Examiners*, Applicant sought admission to The Florida Bar.[17] However, because he refused to respond to a question on The Florida Bar application that asked him to disclose any and all regular treatment for mental illness, his application was rejected.[18]

Stating that Florida's right of privacy is not an absolute guarantee against all intrusions by the state into an individual's private life, the Florida Supreme Court reasoned that the scope of the new right was within its discretion to define.[19] The *Board Examiners* court held that Applicant's right of privacy was clearly implicated by the application question.[20] The court also concluded that the legitimate interest of the state in regulating lawyers meets any standard of review and declined to articulate a standard for future assertions of constitutional privacy protection in Florida.[21]

The standard of review applicable to Florida's right of privacy was announced two years after *Board Examiners* in *Winfield v. Division of Pari-Mutuel Wagering*.[22] In *Winfield*, the petitioners' bank records were subpoenaed by Florida governmental agencies.[23] The petitioners asked that the bank be enjoined from complying with the subpoenas and that the subpoenas be declared an unconstitutional violation of petitioners'

---

16. *See id.*; McDaniel, *supra* note 14, at 409 n.38.

17. *Board Examiners*, 443 So. 2d at 72.

18. *Id.* at 72-73. Applicant refused to answer question 28(b) on the application on the grounds that it violated his constitutional rights. The question asked:

> Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? . . . If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more that two times within any 12 month period.)

Id. at 73. Applicant was notified by letter that the number of visits to a psychologist, psychiatrist, or other medical practitioner was raised to four times in any 12-month period. *Id.* at n.1. Applicant also modified a release form that was required by the Bar so that the release was ineffective as to his medical records. *Id.* at 72.

19. *Id.* at 74; *see* McDaniel, *supra* note 14, at 409, 416.

20. *Board Examiners*, 443 So. 2d at 74. However, the court concluded that the state had a compelling interest in the selection of only those who are fit for the practice of law. *Id.* at 75. It held that this intrusion was, therefore, constitutional. *Id.* at 74.

21. *Id.*

22. 477 So. 2d 544, 547 (Fla. 1985).

23. *Id.* at 546. These agencies were the Department of Business Regulation and the Division of Pari-Mutuel Wagering. *Id.*

right of privacy.[24] Describing the right of privacy as a fundamental right, the Florida Supreme Court announced a two-part test.[25]

Under the *Winfield* test, the threshold inquiry is whether the individual asserting the right has an expectation of privacy as to the alleged intrusion into the individual's private life.[26] Only if the court finds that such an expectation exists, will the court then apply the compelling state interest standard.[27] In *Winfield*, the court recognized an expectation of privacy in an individual's bank records.[28]

The *Winfield* court announced that the explicit right of privacy in the Florida Constitution[29] is broader than the correlative implied right[30] in the Federal Constitution.[31] The federal right of privacy is implicated only when the individual's expectation of privacy is legitimate and the intrusion is unreasonable.[32] Under the Florida Constitution, the *Winfield* court explained, the expectation of privacy analysis is subjective.[33] This analysis depends upon the expectation of the specific individual asserting the right and not the expectation of a reasonable person.[34]

In *Winfield*, however, the court did not make clear in its analysis whether it actually applied a subjective standard. The court, referring in general terms to the expectation of "an individual," appeared to apply

---

24. *Id.* The petitioners alleged not only that the subpoenas violated their privacy rights, but that any conversion of their bank records into public records subsequent to the bank's compliance with the subpoena also was unconstitutional. *Id.*

25. *Id.* at 547.

26. *Id.*

27. *Id.* The compelling state interest standard requires that the state prove it has a compelling interest at stake and that it chose the least intrusive means to serve that interest. *Id.*

28. *Id.* at 548. However, as in *Board Examiners*, although the right of privacy was implicated, the intrusion met the compelling state interest standard and was therefore upheld. *Id.*

29. *See* FLA. CONST. art. I, § 23.

30. *See* Roe v. Wade, 410 U.S. 113, 152 (1973) (observing that the right of privacy has been implied under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the Federal Constitution and "in the penumbras of the Bill of Rights").

31. *Winfield*, 477 So. 2d at 548.

32. *See* Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2391 (1995). In *Vernonia*, the United States Supreme Court stated that the federal right of privacy "does not protect all subjective expectations of privacy." *Id.* The Court then discussed "the 'reasonableness' inquiry" as to the intrusion. *Id.* at 2392-93; *see also* Shaktman v. State, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlich, C.J., concurring) (comparing "the federal standard of 'reasonable expectation of privacy,' which protects an individual's expectation of privacy only when society recognizes that it is reasonable to do so" with the subjective standard in Florida).

33. *Winfield*, 477 So. 2d at 548. The court looked at the legislative history behind article I, section 23 of the Florida Constitution, noting that "[t]he drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible." *Id.*

34. *Id.*

an objective standard.[35] No reference was made to evidence of the petitioners' subjective expectations of privacy as to their bank records.

The Florida Supreme Court more emphatically endorsed a subjective standard for the expectation inquiry in *Shaktman v. State*.[36] *Shaktman* involved the question of whether a law enforcement agency violated an individual's right of privacy when it installed a device to capture the telephone numbers dialed by the individual in his home.[37] The surveillance device was installed after the petitioner,[38] a probationer from a prior bookmaking conviction, was overheard by the police discussing an illegal gambling operation.[39]

The court determined that an individual's privacy rights were implicated when the government collects information on the numbers dialed by that individual.[40] The court recognized that the numbers individuals dial will become known to the telephone company.[41] However, the court concluded that this "disclosure" was only incidental to the individuals' use of the telephone company's services and had no effect on their expectation of privacy from the government.[42]

The *Shaktman* court announced that the right of privacy protects the inviolable power of individuals to make independent choices, for their

---

35. *Id.*

36. 553 So. 2d 148, 150-51 (Fla. 1989). The Florida Supreme Court stated: " 'A fundamental aspect of personhood's integrity is the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.' " *Id.* at 150-51 (quoting Bryon, Harless, Schaffer, Reid & Assocs., Inc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 92 (1st DCA 1978), *quashed and remanded on other grounds,* 379 So. 2d 633 (Fla. 1980)). Expanding on this statement, the court added, "[b]ecause this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated *only by that individual.*" *Id.* at 151 (emphasis added).

37. *Id.* at 149.

38. Shaktman was not the only petitioner. Shaktman was joined in the gambling operation at issue by Mart, a known bookmaker, and Norman Rothman, a known felon. *Id.* at 150.

39. *Id.* at 149-50. The police received a tip from an unidentified informant that Shaktman was engaging in illegal activities. *Id.* After observing him conversing with Mart, a known gambler and bookmaker, the police extended surveillance to Mart. *Id.* at 150. The circuit court approved the State's motion for permission to intercept outgoing phone numbers through the use of a pen register operation on the telephones in Mart's Miami Beach apartment. *See id.*

40. *Id.* at 151.

41. *Id.*

42. *Id.* The court reasoned that " '[t]he concomitant disclosure to the telephone company, for internal business purposes, of the numbers dialed by the telephone subscriber does not alter the caller's expectation of privacy and transpose it into an assumed risk of disclosure to the government. . . . [I]t is somewhat idle to speak of assuming risks in a context [sic] where, as a practical matter, the telephone subscriber has no reasonable alternative.' " *Id.* (quoting People v. Sporleder, 666 P.2d 135, 141 (Colo. 1983)). However, as in *Board Examiners* and *Winfield*, the court found that the intrusion was constitutional because it satisfied the compelling state interest standard. *Id.* at 151-52.

own reasons and purposes, about whether to disclose personal information and to whom.[43] As in *Winfield*, although the court articulated a subjective standard for the individual's expectation, the court did not appear to actually apply a subjective standard.[44] The court failed to consider any evidence of the independent and personal expectations of the petitioner.[45] Referring to "the individual" or "the telephone subscriber," the determination was couched in the language of an objective standard.[46] Chief Justice Ehrlich's concurring opinion in *Shaktman* emphasized[47] that the expectation of privacy inquiry in Florida is a determination of the subjective expectation of the specific individual asserting the right.[48] Although there is a requirement that the individual's expectation not be falsely or spuriously asserted, Chief Justice Ehrlich's concurrence explained there is no requirement that the expectation be reasonable.[49]

In the instant case, the Florida Supreme Court quoted a phrase from this discussion in the concurring opinion.[50] Although the phrase refers

---

43. *Id.* at 150. The court stated that "[t]his right [of privacy] ensures that individuals are able 'to determine for themselves when, how and to what extent information about them is communicated to others.' " *Id.* (quoting A. WESTIN, PRIVACY AND FREEDOM 7 (1967)). The court further explained that "[t]he central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over 'majoritarian sentiment' and thus cannot be universally defined by consensus." *Id.* at 151 (footnote omitted).

44. *See id.* at 151-52.

45. *See id.* at 151.

46. *Id.*

47. *Id.* at 152-53 (Ehrlich, C.J., concurring). Chief Justice Ehrlich explained that he wrote his concurring opinion "only to emphasize the method by which we determine the applicability of article I, section 23, of the Florida Constitution." *Id.*

48. *Id.* at 153 (Ehrlich, C.J., concurring).

49. *Id.* (Ehrlich, C.J., concurring).

50. *See* City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995). The discussion in *Shaktman*'s concurring opinion surrounding the language quoted by the *Kurtz* court included the following observations:

> The words "unreasonable" or "unwarranted" harken back to the federal standard of "reasonable expectation of privacy," which protects an individual's expectation of privacy only when society recognizes that it is reasonable to do so. The deliberate omission of such words from article I, section 23, makes it clear that the Florida right of privacy was intended to protect an individual's expectation of privacy *regardless of whether society recognizes that expectation as reasonable*. . . . [T]he zone of privacy covered by article I, section 23, can be determined only by reference to *the expectations of each individual*. . . .

Shaktman, 553 So. 2d at 153 (Ehrlich, C.J., concurring) (emphasis added).

to "objective manifestations"[51] as a way to ascertain the specific individual's subjective expectation of privacy, the *Kurtz* court did not rely upon any evidence of Respondent's own personal expectation in reaching its decision.[52] Instead, the *Kurtz* court considered evidence of common experience,[53] speaking only generally of "smokers" and "individuals."[54] The phrase "in today's society" was used twice in the only paragraph that discussed evidence of an expectation of privacy.[55] No phrase comparable to "in Respondent's life" appeared anywhere in that paragraph.[56]

In reaching its holding in *Kurtz*, the Florida Supreme Court concluded that Respondent's expectation of privacy as to whether or not she smoked was not reasonable.[57] Therefore, the court held her right of privacy was not implicated.[58] By its own express terms, this holding suggests that in practice the Florida Supreme Court will not protect an expectation of privacy unless it considers it to be reasonable. After *Kurtz*, the court's announcements of a subjective standard for the individual's expectation of privacy in *Winfield* and *Shaktman* must be viewed, as a practical matter, with extreme caution.

In *Shaktman*, the court noted that an individual may disclose information to a commercial entity incidental to a service the entity provides to the individual.[59] The court held that this fact did not defeat the individual's expectation of privacy as to the disclosure of the same information to the government.[60] The *Shaktman* evidence consisted of an individual's "disclosure" to the telephone company of the telephone

---

51. *Kurtz*, 653 So. 2d at 1028.

52. *See id.* At least some evidence of the specific subjective expectation of Ms. Kurtz appears to have been available for the court's consideration. *See* Petitioner's Initial Brief at 15, *id.* (No. 92-2038).

53. *See id.* at 1028.

54. *Id.*; *see infra* note 57.

55. *Kurtz*, 653 So. 2d at 1028; *see infra* note 57.

56. *Kurtz*, 653 So. 2d at 1028.

57. *Id.* The court stated:

> [G]iven that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida's right of privacy is not implicated under these unique circumstances.

Id.

58. *Id.*

59. *Shaktman*, 553 So. 2d at 151; *see supra* note 42 and accompanying text.

60. *Shaktman*, 553 So. 2d at 151; *see supra* note 42 and accompanying text.

numbers the individual dialed from his home.[61] This disclosure was only incidental to the individual's use of the telephone company's services.[62]

Similarly, the instant court relied upon evidence of individuals' disclosures to commercial entities in determining whether the City regulation violated Respondent's right of privacy.[63] These disclosures were incidental to securing services from those entities.[64] Specifically, the disclosures consisted of expressions of a preference for special accommodations set aside for either "smokers" or "non-smokers," chiefly by restaurants, hotels, and car rental agencies.[65] Yet, contrary to its own finding in *Shaktman*, the court in *Kurtz* found that this type of evidence *does* defeat the individual's expectation of privacy.[66]

The key to the *Kurtz* decision may be found in a single phrase, limiting the holding to those situations "when [individuals are] applying for a government job."[67] The reason for this limitation is not discussed

---

61. *Shaktman*, 553 So. 2d at 151; *see supra* note 42 and accompanying text.

62. *Shaktman*, 553 So. 2d at 151; *see supra* note 42 and accompanying text.

63. *See Kurtz*, 653 So. 2d at 1028.

64. *Id.*

65. *Id.* The court also listed an example related to employment: "[E]mployers generally provide smoke-free areas for non-smokers, and employees are often prohibited from smoking in certain areas." *Id.* It is problematic, however, to infer that, by their conduct with reference to a smoke-free area in the work place, employees necessarily disclose their private smoking conduct outside the work place and outside work hours.

66. *See id.* In fact, the *Kurtz* evidence is far less probative of the private conduct it was offered to prove than is the *Shaktman* evidence as to the private conduct it was offered to prove. The *Shaktman* evidence consisted of disclosures to the telephone company of the numbers that an individual dialed on a telephone at home. *Shaktman*, 553 So. 2d at 149 n.3, 150. These disclosures were offered as evidence of private telephone use. Such disclosures are *unavoidably* incidental to the individual's use of telephone company services. They are, therefore, highly probative evidence of private telephone use. The *Kurtz* evidence, on the other hand, consisted of presumed disclosures of the individual's preference for special smoking accommodations in restaurants, hotels, and car rental agencies. *Kurtz*, 653 So. 2d at 1028. The court presumed that these disclosures occurred based on the court's observation that smokers are "constantly *required* to reveal" their private smoking conduct as an incident to the use of these services. *Id.* However, unlike the *Shaktman* disclosures, these disclosures are not, in fact, *unavoidably* incidental to the individual's use of these services. The existence of "first available" and "no preference" options demonstrates that such disclosures are only *optionally* incidental to the use of these services. Therefore, the *Kurtz* disclosures were presumed to have occurred based on a requirement that does not, in fact, exist. Even when the individual chooses to express a preference as to a smoking accommodation, such an expression is highly ambiguous as evidence of private smoking conduct. The expressed preference may be based on attributes of the accommodation unrelated to the individual's smoking conduct, such as availability or location, or it may be based on a desire to accommodate the preference of a companion.

67. *Kurtz*, 653 So. 2d at 1028. The Florida Supreme Court concluded "that individuals have no reasonable expectation of privacy in the disclosure of that information when applying

in the decision. The court, other than in this limitation of its holding, does not suggest the fact that Respondent sought employment with the government made any difference to its analysis. Yet, this fact may explain why the same type of evidence that left the expectation of privacy unaltered in *Shaktman* defeated the expectation of privacy in *Kurtz*. In *Shaktman*, the state came to the individual, while in *Kurtz*, the individual came to the state.[68]

In both *Kurtz* and *Board Examiners*, an individual voluntarily came to the state to avail himself of a government privilege or opportunity[69] to which the individual had no constitutional right.[70] Despite their similarities, the court reached opposite conclusions on the expectation of privacy issue.[71] Applicant in *Board Examiners* put his own fitness at issue by coming to the state for a license to practice law.[72] Respondent in *Kurtz* also put her fitness at issue by coming to the state for a job.[73] Yet in *Board Examiners*, the court held that the individual's privacy interests were implicated[74] while in *Kurtz*, the court held that they were not.[75] The critical difference between the two cases is that *Board Examiners* was decided before the *Winfield* test was formulated while *Kurtz* was decided afterward.[76] For the *Board Examiners* court, there was no explicit threshold test for determining an individual's expectation of privacy.

---

for a government job and, consequently, that Florida's right of privacy is not implicated under these unique circumstances." *Id.*

68. *See supra* note 2 and accompanying text.

69. *See Kurtz*, 653 So. 2d at 1027; *Board Examiners*, 443 So. 2d at 72.

70. *See Kurtz*, 625 So. 2d at 902 (holding that "[a]n applicant does not have a constitutional right to government employment"); *see also* Farmer v. City of Fort Lauderdale, 427 So. 2d 187, 191 (Fla. 1983) (stating that "an individual does not have a constitutional right to be hired by the government"); Headley v. Baron, 228 So. 2d 281, 284 (Fla. 1969) (stating that "an individual has no constitutional right to be hired by the government"); Jones v. Board of Control, 131 So. 2d 713, 717 (Fla. 1961) (holding that a police officer has no constitutional right to be a police officer).

71. *See Kurtz*, 653 So. 2d at 1028; *Board Examiners*, 443 So. 2d at 74.

72. *Board Examiners*, 443 So. 2d at 74, 77. The court explained that "[b]y making application to the Bar, [the applicant] has assumed the burden of demonstrating his fitness for admission into the Bar." *Id.* at 74. Furthermore, the court explained, "it is applicant himself who placed his mental and emotional fitness as well as his moral and educational fitness in issue." *Id.* at 77.

73. *Kurtz*, 653 So. 2d at 1027.

74. *Board Examiners*, 443 So. 2d at 74.

75. *Kurtz*, 653 So. 2d at 1028.

76. *Board Examiners* was decided in 1983, *Winfield* was decided in 1985, and *Kurtz* was decided in 1995. *See Kurtz*, 653 So. 2d at 1025; *Winfield*, 477 So. 2d at 544; *Board Examiners*, 443 So. 2d at 71.

Just two months after *Kurtz*, the United States Supreme Court, in *Vernonia School District v. Acton*,[77] also suggested that the expectation of privacy may be reduced when the individual voluntarily comes to the state.[78] The *Vernonia* Court held that suspicionless drug testing of student athletes did not violate their right of privacy under the Federal Constitution.[79] Student athletes, the Court concluded, have a reduced expectation of privacy once they "go out for the team."[80] Analogously, an individual who applies for a government job naturally expects greater governmental intrusion into his life than does the individual who stays at home or seeks only private employment.

The federal right of privacy requires that the individual's expectation of privacy must be legitimate and that the intrusion must be reasonable.[81] The Florida Supreme Court has pronounced that Florida's right of privacy offers broader protection than the federal right because it has no reasonableness requirement as to the governmental intrusion.[82] However, the fact that the implicit rationale in *Kurtz* is analogous to the explicit rationale in *Vernonia* suggests that the Florida Supreme Court has, in practice, contracted Florida's expectation of privacy threshold down to the minimum limit as defined by the federal standard.

In *Kurtz*, the court found the Florida right of privacy to be more expansive than it actually is by characterizing the federal right as more constricted than it actually is. The court cited *Carey v. Population Services International*[83] for the proposition that federal privacy protection extends only to interests related to marriage, procreation, and children.[84] The *Carey* Court, however, expressly cautioned against the

---

77. 115 S. Ct. 2386 (1995).

78. *Id.* at 2393. The court stated:

> [S]chool athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. . . . Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

Id.

79. *Id.* at 2397.

80. *Id.* at 2393.

81. *Id.* at 2391-92.

82. *Winfield*, 477 So. 2d at 548; *see supra* notes 30-33 and accompanying text.

83. 431 U.S. 678 (1977).

84. *Kurtz*, 653 So. 2d at 1027-28.

use of these limited interests to mark the "outer limits" of the federal right of privacy.[85]

The *Kurtz* court also offered as dispositive on the issue of federal privacy protection that a "right to smoke" is not recognized by the federal courts.[86] In *Grusendorf v. City of Oklahoma City*,[87] the Tenth Circuit Court of Appeals held that there is no per se constitutional right to smoke.[88] However, the *Grusendorf* court emphatically rejected the notion that the holding was dispositive as to the implication of privacy interests when a non-smoking regulation restricts private conduct.[89] In fact, the court reasoned that "[i]t can hardly be disputed" that a regulation that restricts smoking outside the work place and beyond paid work hours implicates an employee's right of privacy.[90]

When the *Kurtz* court used *Carey* and *Grusendorf* to characterize the federal right as extending less protection than it actually does, it simultaneously characterized the Florida right of privacy as extending more protection than the Florida right actually does. After *Kurtz*, however, it is apparent that the state constitutional right of privacy in Florida extends protection no greater in scope than the minimum federal guarantee. Even if the Florida Constitution had contained no express right of privacy, the Florida Supreme Court could not have narrowed any further the scope of the privacy protection extended to Floridians.

---

85. *Carey*, 431 U.S. at 684-85. The Court cautioned that "the outer limits of this aspect of privacy have not been marked by the Court." *Id.* at 684.

86. *Kurtz*, 653 So. 2d at 1028 (citing Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987)).

87. 816 F.2d 539 (10th Cir. 1987).

88. *Id.* at 541.

89. *Id.* at 542. The court refused "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." *Id.*

90. *Id.* at 541. The court stated:

> 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. Nonetheless, the court upheld the non-smoking regulation because the state has a heightened interest in the regulation of firefighters, and the regulation was rationally connected to this interest. *Id.* at 543.