IN THE SUPREME COURT OF FLORIDA

Case No. 83,212

CITY OF MIAMI,

Petitioner,

vs.

JAMES P. GILBERT,

Respondent.

ANSWER BRIEF OF RESPONDENT, JAMES P. GILBERT

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STATEMENT OF THE CASE AND FACTS

This is a case in which the City of Miami asks that the decision of the First District Court of Appeal in the present case be changed to conform to this Court's decision in *City of Miami v. Bell,* 19 FLW S108 (March 30, 1994). For the reasons stated in this brief, the Respondent, James P. Gilbert, requests that the Court not do so. Rather, he asks that the decision of the District Court be affirmed.

The Statement of the Case and Facts given by the Petitioner, City, should be modified by the following:

James P. Gilbert suffered a compensable accident on May 13, 1976, when he injured his neck and back "while trying to lift a cardiac arrest victim from a bathtub". (R. 250) In the opinion of Dr. Michael S. Gordon, Professor of Medicine at the University of Miami, Mr. Gilbert was permanently totally disabled as a firefighter as of December 6, 1976:

> In addition, he is currently disabled for even sedentary activities and faces a possible additional spinal operation. The duration of his disability is indeterminate and is likely to be permanent. It is also our feeling that his neurologic problems are related to an accident which occurred on 5/13/76 while in the line of duty. (R. 251)

The Respondent was awarded his service-connected disability pension on December 18, 1976. (R. 238)

The Respondent was accepted by the City as being permanently totally disabled from December 17, 1976. (R. 40) From that time until August 1, 1989, the City deducted the Respondent's workers' compensation payments for permanent total disability from his service-connected disability pension, which was paid from a fund to which he, himself, contributed. (R. 6, 40)

The record shows that beginning in fiscal year 1973/1974, the City of Miami not only deducted the workers' compensation payments from the disabled employees' pensions, but at the end of the fiscal year, withdrew money from the pension trust fund to reimburse the City for the workers' compensation payments that were made, so that at the end of the year all payments had come from the pension trust fund and the City had paid nothing. (R. 77-78) The taking of money by the City from the employees' pension trust fund to pay workers' compensation continued for the years thereafter. (R. 166-168, *City of Miami v. Arostegui,* Fla. Sup. Ct. Case No. 80,560.)

The employees brought suit against the City for this taking of money from their pension trust fund, and the Third District Court of Appeal held in *City of Miami v. Gates,* 393 So. 2d 586 (Fla. 3rd DCA 1981) that the City had illegally taken money from the employees' pension trust fund to pay workers' compensation.

In that case, the City contended that it was permissible to pay the City's workers' compensation obligations from the employees' pension trust fund because both were intended for payment to the employees. *City of Miami v. Gates,* supra, at 588.

The Third District Court of Appeal said of the City's contention:

> This claim amounts to the suggestion that, while one may not rob Peter to pay Paul, it is permissible to take from Paul himself in order to do so. It need hardly be stated that we thoroughly disagree with such a proposition. *City of Miami v. Gates,* supra, at 588.

In *Barragan v. City of Miami,* 545 So. 2d 252 (Fla. 1989), this Court held that the City's offsetting workers' compensation against the employees' disability pensions was unlawful.[1]

The City filed a motion for rehearing in *Barragan.* (R. 116) In that motion for rehearing, the City argued that there were other retirees to whom the *Barragan* decision would apply. (R. 21, 150) In the motion, the City argued there would be over 100. (R. 121)[2]

In the *Barragan* case, the City's advocacy was most peculiar. The City attached as an exhibit to its motion for rehearing, a draft of a complaint of a suit for declaratory decree, which the City threatened to file if it did not win the motion for rehearing. (R. 121, 147) This was a proposed complaint for a suit for declaratory judgment in which the City contended that the *Barragan* decision should be limited to prospective application only with respect to other retirees. (R. 121, 150) The complaint was never filed. Importantly, the City argued to the Supreme Court on rehearing in *Barragan:*

> The City contends ...that *Barragan* should have prospective effect only. (R. 150)

The Supreme Court denied the City's motion for rehearing. (R. 152)

In the proceedings below, the City raised no defense of detrimental reliance upon its ordinance or upon any case decision. (Pretrial Stipulation dated August 2, 1991. R. 40)

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[1] Barragan and Giordano, the petitioners in that case, had received workers' compensation awards to repay them for the money that had been illegally offset not just from the date of the decision, but from the date of their retirement. (R. 100-110)

[2] The number was exaggerated since now five years after *Barragan,* there were the six people who received their awards following this Court's post-*Barragan* order in *City of Miami v. Ogle,* Fla. Sup. Ct. Case No. 80,055 (October 14, 1992) and the 11 people involved in *Bell,* plus Mr. Gilbert.

In the proceedings below, the City raised no defense of an inability to pay. (Pretrial Stipulation dated August 2, 1991. R. 40)

At the hearing of May 18, 1992, the City called no witnesses.

The documentary evidence offered into evidence by the City consists of the pension fund file on James Gilbert and the City's pension ordinance. It contains no documents relating to any inability of the City to pay. It contains no documents relating to any detrimental reliance by the City upon its ordinance or upon any case in taking the offset.

SUMMARY OF ARGUMENT

The City asks that the decision of the District Court below be modified by this Court's decision in *City of Miami v. Bell,* 19 FLW S108 (March 30, 1994). In *Bell,* this Court held:

> We conclude that our decision in *Barragan* has no effect on the amount of disability payments owed by the City to pensioners except for those payments accruing after the effective date of that decision. *Bell,* at 109.

The Court reasoned:

> Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations. ...Present and future benefits required by *Barragan* can be adjusted without serious financial consequences for City taxpayers; but to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami. *Bell,* at 109.

The Respondent, James Gilbert, is permanently totally disabled such that he has a "physical handicap" by any definition. Section 2 of Article I of the Florida Constitution provides that no person shall be deprived of any right because of race, religion, or physical handicap. Section 9 of Article I of the Florida Constitution guarantees due process of law. Section 2 of Article I of the Florida Constitution guarantees due process of law and equal

protection of the laws. §760.10(1)(a), Fla. Stat., provides that it is an unlawful employment practice for an employer "...to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's ...handicap." The government of the United States has adopted the Americans with Disabilities Act of 1990 (the "ADA"). 42 U.S.C. §12112(a)[3] . It prohibits discrimination against the disabled[4] in regard to rates of pay or any other form of compensation and changes in compensation. 29 C.F.R. §1630.4, 56 Fed. Reg. 35,726; 35,736 (1991).

Further, it prohibits discrimination against disabled employees in regard to access to benefits 29 C.F.R. Ap §1630.5, 56 Fed. Reg. 35,726; 35,746 (1991).

The Constitution of the United States provides that the laws of the United States are the supreme law of the land. Art. VI, U. S. Const. It further guarantees due process of law and equal protection of the laws. Amendment XIV, U. S. Const.

In *Bell,* the Court recognized, as it did in *Barragan,* that the City had unlawfully deducted workers' compensation payments from the employees' service-connected disability pensions. However, in *Bell,* this Court modified *Barragan* to provide that the *Barragan* decision is prospective only, for the reason that it would be unfair to the City's taxpayers of today to require them to pay for yesterday's fiscal obligations. *Bell,* at 109. Having

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[3] The purpose of the Act stated by Congress is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities". 42 U.S.C. §12101. Congress found "individuals with disabilities are a discrete and insular minority." 42 U.S.C. §12101(a)(7).

[4] An individual is disabled if the person is limited in the major life activity of working because of a physical or mental impairment. 29 C.F.R. App. §1630.2(j), 56 Fed. Reg. 35,726; 35,741 (1991). Permanent total disability under workers' compensation would certainly fit this definition.

recognized that the disabled employees, such as the Petitioner, were entitled to payment on account of the repeal by the State Legislature of §440.09(4), Fla. Stat., in 1973, and that the City's deduction after repeal was illegal, nonetheless the Court, in essence, balanced the harm to the disabled as against the harm to the taxpayers. This Court concluded that the harm to the taxpayers was greater, and therefore, the disabled employees should not be paid what they would otherwise have been entitled to receive. The addition of the physically handicapped to the declaration of rights in the Florida Constitution as well as the passage of the ADA by the federal government, clearly identifies the physically handicapped as a suspect class. They are a discrete and insular minority. The Constitutional guarantees of equal protection of the law provide that a suspect class, a discrete and insular minority, may not be required to bear the financial burden of government programs when compared to taxpayers generally. This is true even for programs for the benefit of the suspect class. The physically handicapped are a suspect class.

In summary, when this Court, in *Bell,* chose to balance the interests of the taxpayers against the interests of the disabled employees in favor of the taxpayers, the Court made a choice, which is forbidden by the Florida and the federal Constitutions.

In the present case, since the City did not claim in the proceedings below, and presented no evidence of, any financial hardship, it would a denial of procedural due process of law to the Respondent, Gilbert, to modify *Barragan* to a prospective only application, since thereby he would have been denied any opportunity to be heard or to present any evidence that such contention was not true.

Since there was no contention in the proceedings below, and the City presented no evidence of it, the Respondent, Gilbert, would be denied procedural due process of law with respect to any application of *Bell* that the City had detrimentally relied upon its own ordinance or any case decision in offsetting his benefits. This is particularly true since this Court determined in *Bell* that the City had relied upon *Hoffkins* in taking the offset. *Bell,* at 109. This could not apply to Mr. Gilbert, since in Hoffkins' case, Mr. Hoffkins was injured before repeal and in the present case, Mr. Gilbert was injured after repeal. This is a significant difference.

As to the award of penalties and interest, the District Court of Appeal was correct. *Bell,* at 109.

ARGUMENT

POINT I

THE JUDGE OF COMPENSATION CLAIMS ERRED IN APPLYING *BARRAGAN v. CITY OF MIAMI,* 545 So. 2d 252 (FLA. 1989) RETROACTIVELY WHERE SAID DECISION OVERRULED NUMEROUS APPELLATE PRECEDENTS UPON WHICH THE CITY RELIED TO ITS DETRIMENT.

[Petitioner's Point I]

On this point, the City begs the question of whether the City relied to its detriment on numerous overruled appellate precedents, because it did not do so as to Mr. Gilbert.

In the present case, Gilbert was awarded his disability retirement by the City on December 16, 1976. At that time the City began offsetting his benefits in the same manner as had been determined in *City of Miami v. Gates,* supra, to have been an illegal taking by the City from the employees' pension trust fund. At that point in time, there was no case that applied to Mr. Gilbert upon which the City could have relied.

The first case of any kind was that of *Hoffkins v. City of Miami,* 339 So. 2d 1145 (Fla. Third DCA 1976), which was initially decided by the Third District Court of Appeal on December 1, 1976, 15 days before Mr. Gilbert received his retirement, but rehearing was not denied until December 21, 1976, which was five days afterwards.

However, there is a very significant point about the *Hoffkins* case which clearly shows that it could not have been relied upon to offset Mr. Gilbert's benefits, because Lawrence Hoffkins was injured on July 10, 1972. (A. 1-6, *City of Miami v. King,* Fla. Sup. Ct. Case No. 80,999) This was before the repeal of the offset statute by the Florida Legislature. Therefore, his case could not have been relied upon by the City of Miami to offset Mr. Gilbert's benefits when he was injured three years after repeal.

Furthermore, in the proceedings below, at the pretrial, the City made no announcement of any defense that it detrimentally relied upon any case, or even upon its own ordinance, and at the trial it presented no evidence of any such detrimental reliance. Therefore, in the case of James Gilbert, those contentions cannot possibly be true. For the rest of its argument, the City simply relies on *Bell.* (Petitioner's brief 6-7) The City makes no contention that the record supports any conclusion that it is financially hard pressed to pay Mr. Gilbert. Indeed, in the present case, the City made no contention in the pretrial stipulation that it had any hardship in paying Mr. Gilbert or anyone else. The City presented no evidence at the hearing that it would be any hardship to the City to pay Mr. Gilbert. There is no way to tell from the record whether it is a large sum, or a small sum, or a medium sum, or even a very small sum. Therefore, it would have to be concluded that Mr. Gilbert has not been afforded the opportunity at a fair hearing to present any evidence that it would not be a hardship to the City to

pay him. Therefore, the City's reliance on *Bell* in this regard is inappropriate with respect to Mr. Gilbert.

There is still another reason why the City's reliance upon *Bell* is inappropriate to Mr. Gilbert's case. The City admits that Mr. Gilbert is permanently totally disabled. He would fit any definition of physically handicapped anywhere in the world. The Florida Constitution in Article I, §2, guarantees equal protection of the laws to the physically handicapped as well as persons on account of race, and persons on account of religion. The effect of the people of Florida naming these three classifications in §2 of Article I, race, religion or physical handicap, with respect to equal protection of the law, is to identify each one as a suspect class. A suspect class is one which historically has been picked on by the government. The people of Florida wished to make it clear in their Constitution that they would no longer tolerate their government picking on anyone because of their race, their religion, or their physical handicap. A suspect class constitutes a discrete and insular minority.[5] This discrete and insular minority may not be picked upon to bear the financial burden of a government program, as contrasted with taxpayers generally, even for programs for their own benefit. 42 U.S.C. §12101(a)(5) and (7); 42 U.S.C. §12101(b)(4); 42 U.S.C. §12131 and 42 U.S.C. §12132.

In *Bell*, the Court recognized that the obligation of the City to pay the pension and the workers' compensation benefit existed ever since repeal of the offset statute by the Florida Legislature on June 1, 1973. However, in making *Barragan* prospective only, the Court reasoned:

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[5] *U. S. v. Carolene Products Co.*, 304 U.S. 144, 82 L. Ed 1234, 58 S. Ct. 778, at 783-784 (1938).

> Holding the City liable for past offsets would require a reallocation of municipal services and subject today's taxpayers to yesterday's fiscal obligations. *Bell,* at S. 109.
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> * * * * * * * * * * * * * * * *
>
> Present and future benefits requires by *Barragan* can be adjusted without serious financial consequences for City taxpayers; but to require back benefits for prior years would be fiscally unjust to the taxpayers of the City of Miami. *Bell,* at S. 109.

To put it plainly, the Court balanced the interest of today's taxpayers with those of the physically handicapped to receive the benefits which the Legislature had provided for in 1973, but which the City had denied to them. It was a balancing act. The problem, however, is given the Florida Constitution guarantees of equal protection of the laws identifying the physically handicapped as a suspect class, that is a choice which the Court cannot make under the Florida Constitution. The Court may not choose between taxpayers and the physically handicapped. To do so is to breach the compact between the people of Florida and their government. Nor can we consider that this provision in the Florida Constitution is a mere historical anomaly. The Florida Legislature has implemented this constitutional right by §760.10(1)(a), Fla. Stat. More importantly, the federal government has passed the Americans with Disabilities Act, which is a comprehensive act dealing with discrimination against the physically handicapped, including those by employers and by the states and by local government. The federal statute prohibits discrimination against the physically handicapped by employers with respect to wages and conditions of employment and other benefits including health benefits and pension benefits. 42 U.S.C. §12112. The federal statute prohibits discrimination against the physically handicapped by the states and local government with respect to government programs. 42 U.S.C. §12131 and 42 U.S.C. §12132. The

Court in *Bell* balanced the interest of the City of Miami taxpayers with the interest of the permanently totally disabled police officers and firefighters who were injured in the line of duty,[6] in favor of the taxpayers. The Court did this notwithstanding that the disabled employees are clearly within a federally protected status as physically handicapped individuals under the ADA. The Americans with Disabilities Act prohibits the states and local government from such action.

For these reasons, the Respondent, Gilbert, contends that the decision in *Bell* does not apply to him. He was not afforded a fair hearing with respect to any contention that the City had relied on *Hoffkins* offsetting his benefits. It, of course, would be impossible for the City to have done so in his case. Furthermore, he was afforded no opportunity of a fair hearing with respect to any claim by the City that it would be a financial hardship for today's taxpayers to pay him what he admittedly was otherwise entitled to receive.

More importantly, since it is acknowledged that he is permanently totally disabled, he is among the physically handicapped. Therefore, the Court would have violated both federal law and state constitutional provisions by permitting the City of Miami not to pay him from the date of his retirement to the date of the *Barragan* decision because it would be a hardship to today's taxpayers to do so.

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[6] The two people in *Barragan;* the six people in *Ogle;* the 11 people in *Bell,* plus Mr. Gilbert in the five years since *Barragan* was decided. Of these, *Barragan* and *Giordano* and the six people in *Ogle* have been paid since the date of their retirement, not just prospectively from the date of the *Barragan* decision.

POINT II

THE CITY SHOULD NOT BE SUBJECTED TO THE 10% PENALTY FOR ITS FAILURE TO PAY A COMPENSATION CLAIM WHERE A RETROACTIVE *"BARRAGAN"* PAYMENT DOES NOT CONSTITUTE "COMPENSATION" OR "AN INSTALLMENT OF COMPENSATION" FOR PURPOSES OF SECTION 440.20, FLA. STAT.

[Petitioner's Point II]

POINT III

THE CITY SHOULD NOT BE SUBJECTED TO PAY PREJUDGMENT INTEREST FOR ITS FAILURE TO PAY A COMPENSATION CLAIM WHERE A RETROACTIVE *"BARRAGAN"* PAYMENT DOES NOT CONSTITUTE "COMPENSATION" FOR PURPOSES OF SECTION 440.20, FLA. STAT.

[Petitioner's Point III]

Points II and III by the City are really the same point, arguing that the payment of the benefits awarded by the Judge of Compensation Claims and affirmed by the Court of Appeals are not compensation. However, the City acknowledges that this Court, in *Bell,* did decide that the penalty provisions and the interest provisions of the Florida Workers' Compensation Law did apply. [In Bell's case, to the two weeks of benefits that were not paid from the date of the *Barragan* decision becoming final to August 1, 1989, when the City began making payment.]

The penalty was imposed by the Judge of Compensation Claims because the City did not file a notice to controvert, as required by statute, as of August 1, 1989, when it accepted responsibility to pay prospectively, but denied benefits from the date of retirement to that date. Yet, the City did not complete a notice to controvert until November 30, 1989, some four months later.

Under §440.20, Fla. Stat. (1975), this was late, and the penalty for being late is the imposition of the 10% penalty awarded by the Judge. Clearly, this was correct.

As to the award of interest, it was similarly correct. Interest is payable on any unpaid benefits according to this Court's decision in *Parker v. Brinson Construction Company,* 78 So. 2d 873 (Fla. 1955), which applies the interest statute, §687.01, Fla. Stat., to workers' compensation benefits.

CONCLUSION

For the foregoing reasons, the decision of the First District Court of Appeal in the present case should be affirmed.

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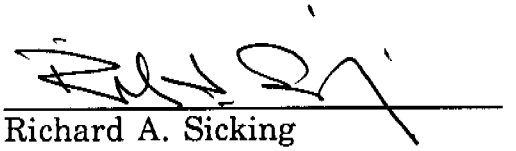
Certificate of Service

I certify that a copy of the foregoing has been furnished by mail this 17th day of May, 1994, to Kathryn S. Pecko, Assistant City Attorney, Attorney for Petitioner, 300 Dupont Plaza Center, 300 Biscayne Boulevard Way, Miami, Florida 33131, and to Arthur J. England, Jr., Esquire, Attorney for Petitioner, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131.



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