

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF
PUBLIC HEALTH, DIVISION OF
RISK MANAGEMENT,

Petitioners,

vs.

MURIEL WILCOX,

Respondent.

CASE NO. : 70,498

FILED
J. WHITE
MAY 20 1987

SUPREME COURT

Deputy Clerk

BRIEF OF PETITIONERS ON JURISDICTION

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INTRODUCTION

This petition for review involves a Rule Nisi proceeding pursuant to Sec. 440.24(1), Florida Statutes to enforce a Workers' Compensation Order against the State of Florida for the amount of the Social Security offset that the State of Florida had taken. The State of Florida maintained that it was taking the Social Security Offset unilaterally as a matter of right, while Muriel Wilcox through her attorney maintains that the allowance of the offset is discretionary with the Court and her acquiescence. The Third District agreed that the offset could not be taken until the order of the deputy commissioner was modified pursuant to the provisions of Section 440.28, Florida Statutes and further that levy and execution were a matter of right against the State. The parties shall be referred to as:

MURIEL WILCOX as: Wilcox, employee, claimant and respondent.

THE STATE OF FLORIDA, DEPARTMENT OF PUBLIC HEALTH, DIVISION OF RISK MANAGEMENT as: State, employer/servicing agent, and petitioners.

The following symbols will be used:

(AP-) for appendix of petitioner and page number.

All emphasis has been added by the respondents unless noted otherwise.

JURISDICIONAL STATEMENT

This petition for review has been instituted and the jurisdiction of this Court invoked pursuant to Art. V, Sec. 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(2). The petitioners maintain that the decision of the Third District in the present case is in express and direct conflict with the decisions of the First District in Colonel's Table v. Malena, 412 So.2d 64 (Fla. 1st DCA 1982), Lister v. Walker, 409 So.2d 1153 (Fla. 1st DCA 1982), Harrell v. Florida State University, 427 So.2d 1089 (Fla. 1st DCA 1983), Sherrod Drywall v. Reeves, 378 So.2d 301 (Fla. 1st DCA 1980), Borden, Inc. v. Butler, 377 So.2d 795 (Fla. 1st DCA 1979), and Florida Power & Light Co. v. Adkins, 377 So.2d 57 (Fla. 1st DCA 1979) and in addition to the opinion of this Court in Meriwether v. Kilbee, 18 So.2d 534 (Fla. 1944).

The opinion of the Third District also expressly declares valid Sections 440.02 and 440.24, Florida Statutes as to the State of Florida and thereby expressly affects a class of constitutional and state officers, the executive branch of the state government.

STATEMENT OF THE CASE AND OF THE FACTS

Since this brief is only directed to jurisdiction, the facts shall be limited to those contained in the decisions of the Third District and the order of the trial court.

On April 2, the circuit court of the 11th circuit

issued a Rule Nisi to show cause why a final judgment should not be entered to enforce the orders entered by Deputy Commissioner Alan Kuker on February 5, 1985 and the First District Court of Appeal for workers' compensation benefits awarded. (Ap-1) On May 8, 1986, the circuit court entered a final judgment with execution against the State of Florida, Department of Public Health, Division of Risk Management holding that:

"...should the Employer/Defendant in this cause desire to avail themselves of the set-off to which they may be entitled under Florida Statute 440.15(3)b (sic), then the matter should be brought before the administrative agency that has jurisdiction over this matter..." (Ap-2 & 3)

Appeal was taken to the Third District. (Ap-4)

The Third District affirmed the trial court in State of Florida, Department of Public Health, Division of Risk Management v. Wilcox, No. 86-1390 (Fla. 3rd DCA March 3, 1987) stating that the Final Judgment enforces a workers' compensation order for the full amount of medical and compensation benefits awarded. (Ap-5) The Third District correctly stated the position of the Petitioners:

The state maintains that it properly deducted social security payments from Mrs. Wilcox's awards, that the circuit lacked jurisdiction to authorize execution and levy against the state, and that, like any other employer, the state may unilaterally modify the deputy commissioner's order by taking a social security

off-set pursuant to section 440.15(9), Florida Statutes (1985). We disagree and affirm. (Ap-5 & 6)

The Third District held that an employer may not take the social security set-off unilaterally but must apply for modification under Section 440.28, Florida Statutes. (Ap-6) The Third District did admit that the decision of the First District in Colonel's Table v. Malena, was to the contrary but they refused to certify this conflict. (Ap-5, 8, & 9)

The Third District went on to hold that Section 440.02, Florida Statutes which defines that the State of Florida as an employer clearly makes the State amenable to execution and levy under Section 440.24, Florida Statutes thereby declaring this statute to be valid and thereby affecting in this instance, the executive branch of the government. (Ap-6 & 7) This ruling would appear to be in conflict with the decision of the Third District in Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3rd DCA 1981), but the Third District declined to resolve this conflict by an en banc hearing. (Ap-11)

After the rejecting the petitioners' request for rehearing and clarification and request for rehearing en banc, the Third District issued its order of denial on April 20, 1987. (Ap-13) The Notice to Invoke Discretionary Jurisdiction to this Court was filed on May 4, 1987 with the Third District. (Ap-14)

SUMMARY OF ARGUMENT

POINT I

There is a direct conflict between the First and Third District Courts of Appeal on whether the social security set-off can be taken unilaterally by an employer/carrier or whether the employer/carrier must apply to the deputy commissioner for modification pursuant to Section 440.28, Florida Statutes. If the conflict is resolved, then employer and carriers can conform their practices to the position that is chosen.

POINT II

The decision that an individual can execute and levy against state (public) property based on the general language of Chapter 440, Florida Statutes is in conflict with the decision of this Court, and further expressly declares that every provision of Chapter 440, Florida Statutes is valid as to the State of Florida. This particular decision effects a class of constitutional and state officers, namely, the executive branch of government.

ARGUMENT

POINT I

WHETHER THE DECISION SOUGHT TO BE REVIEWED
IS IN DIRECT CONFLICT WITH DECISIONS
RENDERED BY THE FIRST DISTRICT DISTRICT
COURT OF APPEAL

The decision of the Third District states that an employer

cannot take the social security set-off unilaterally but must apply for modification of the deputy commissioner's order.

Wilcox, supra. (Ap-6) This in direct conflict with:

1. Colonel's Table v. Malena, 412 So.2d 64, 65 (Fla. 1st DCA 1982)

The statutory offset (social security) may be taken administratively and is not dependent on the order of a deputy commissioner.

2. Lister v. Walker, 409 So.2d 1153, 1155 (Fla. 1st DCA 1982)

Also, the off-set is self-executing, just as a social security off-set and an unemployment compensation off-set are self-executing.

3. Harrell v. Florida State University, 427 So.2d 1089 (Fla. 1st DCA 1983)

Although we find that the discovery of a greater amount of social security benefits by the carrier is sufficient basis for modification of a prior order, in that the carrier has a continuing right and responsibility to compute the correct setoff at the time a payment of compensation is due,...

4. Sherrod Drywall v. Reeves, 378 So.2d 301 (Fla. 1st DCA 1979)

...the computation of social security offset is regarded as self-executing in nature and failure of the judge to adjudicate the issue does not constitute reversible error. (IRC cites omitted)

5. Borden, Inc. v. Butler, 377 So.2d 795 (Fla. 1st DCA 1979)

The unemployment compensation set-off, like the Social Security set-off under

Section 440.15(10), Florida Statutes (1977), is self-executing, giving rise to a continuing right and responsibility on the part of carriers to compute the correct set-off at the time a payment of compensation is due.

6. Florida Power & Light Co. v. Adkins, 377 So.2d 57 (Fla. 1st DCA 1979)

We affirm the order of the judge of industrial claims, with the observation that social security offset can deducted administratively by the employer. (IRC cites omitted)

The question of whether the social security off-set can be taken without applying for modification is of utmost importance to petitioners and all other employers and carriers in Florida. Tell us what the law is and we will conform our practices to it.

POINT II

WHETHER THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY DECLARES VALID A STATE STATUTE AND AFFECTS A CLASS OF CONSTITUTIONAL AND STATE OFFICERS

The petitioners believe that the issue of whether an individual can levy and execute against state property is of great public importance; however, the Third District refused to certify this question to this court. (Ap-8 to 10)

However, the petitioners maintain that it can be reviewed under a conflict of decisions since this court has held to the contrary in Meriwether v. Kilbee, supra. Also, the Third District has expressly ruled that Chapter 440, Florida Statutes

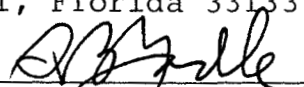
is valid in its entirety against the State of Florida violating the separation of powers clause of the Florida Constitution. Art. II, Sec. 3, Fla. Const. This ruling also affects a class of constitutional and state officers created by Art. IV, Sec. 6, Fla. Const.

CONCLUSION

This Court should accept jurisdiction to consider the merits of this case since there is a direct conflict between the First District and the Third District Courts of Appeal as to the nature of the Social Security Offset, Section 440.15(9), Florida Statutes (1985), as to whether it can be taken unilaterally by the employer/carrier or whether the employer/carrier must apply for modification under Section 440.28. In addition, the District Court has construed the validity of Chapter 440, Florida Statutes as subjecting the State of Florida to all the restrictions and liabilities of a private employer thereby affecting a class of constitutional and state officers.

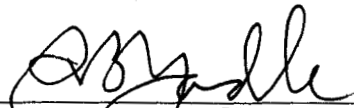
Respectfully Submitted,

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners on Jurisdiction and Appendix of Petitioners was mailed this 18th day of May, 1987 to: ALFRED D. BIELEY, ESQ., 211 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.


H. B. Yandle

HBV/mjw
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