

STATE OF MICHIGAN
IN THE SUPREME COURT

Deputy Chief GARY A. BROWN and
Police Officer HAROLD C. NELTHROPE,

Plaintiffs-Appellees,

v.

KWAME KILPATRICK, Mayor, City of
Detroit, and the CITY OF DETROIT, a
Municipal Corporation; jointly and
severally,

Defendants-Appellants.

Supreme Court Docket Nos.
132016-132017

Court of Appeals Docket Nos. 259911 / 259923

Wayne County Circuit Court Case No: 03-317557
NZ [Hon. Michael J. Callahan]

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**DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS'
APPLICATION FOR LEAVE TO CROSS-APPEAL**

DATE: October 30, 2006

FILED

OCT 30 2006

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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COUNTERSTATEMENT OF QUESTIONS INVOLVED

- I. MAY A PLAINTIFF MAINTAIN A WHISTLEBLOWER PROTECTION ACT CLAIM WHERE HE MERELY REPORTED THE ALLEGED WRONGDOING AS PART OF HIS JOB DUTIES AND DID NOT GO OUTSIDE NORMAL CHANNELS TO EXPOSE THE ALLEGED WRONGDOING TO A SEPARATE PUBLIC AUTHORITY?

Defendants-Appellants say “No.”

Plaintiffs-Appellees say “Yes.”

The Circuit Court said “Yes.”

The Court of Appeals did not directly answer this question.

INTRODUCTION

Both defendants' Application for Leave to Appeal and plaintiffs' Application for Leave to Cross-Appeal ask this Court to review the issue of whether an employee must report wrongdoing to an outside public authority to seek protection under the Whistleblower Protection Act ("WPA"). This Court should allow full briefing and oral argument to consider the important issues in this case, sort out the tangled case law, and address the various statutory and policy considerations. Then, as to the issue raised in the Application for Leave to Cross-Appeal, defendants ask the Court to affirm previous Michigan decisions that have held that a governmental employee cannot be considered a whistleblower if he only reports alleged misconduct to his superiors, through normal channels, in the ordinary course of his job duties, and does not go outside to disclose the alleged misconduct to a separate public authority.

COUNTERSTATEMENT OF FACTS

For a full recitation of the facts in this case, see the defendants' Statement of Facts in their Application for Leave to Appeal.

Essentially, Police Chief Jerry Oliver instructed Deputy Chief Brown to prepare a memo with "bullet points" or "speaking points" regarding the allegations and/or investigation of wrongdoing within the Executive Protection Unit ("EPU"). (JEI 1, Compl ¶ 77; JEI 8, GB Tr 135, 137.) This reporting to the Chief was part of Brown's required job duties as head of the unit that investigates allegations of police and public corruption. He drafted the memo

of alleged wrongdoing at the request of Chief Oliver. (JEI 13, JAO Tr 34.) Chief Oliver told Brown that he was going to meet with the Mayor's Chief of Staff, Christine Beatty, the next day to talk about the Nelthrope investigation and he needed something in writing about the investigation. (*Id.* at 34.) Beatty testified that she never asked for the memo from the Chief. (JEI 14, CB Tr 41.)

Brown gave the Chief a draft memo outlining the allegations. (JEI 8, GB Tr 146.) Brown's draft memo recommended that the allegations be handled administratively and internally by the EPU, rather than criminally. (JEI 1, Compl ¶ 80.) After reviewing it, the Chief gave Brown some directions, and Brown went back to his office and made the Chief's requested changes. (JEI 8, GB Tr 146, 147, 158-160.)

The next day, May 6, 2003, Brown gave the Chief the revised two-page memo. (JEI 8, GB Tr 145; JEI 9, GB Tr 278; JEI 22, 5/6/03 memo.)

The Chief reviewed the May 6, 2003 memo from Brown, stamped it "confidential" and then gave it to Beatty. (JEI 13, JAO Tr 35-37; JEI 14, CB Tr 32-35.) Beatty subsequently gave the memo to the Mayor.

Brown did not give the memo to the Mayor or any of his representatives; he just gave it to his supervisor, Chief Oliver. (JEI 8, GB Tr 144-45.) Nor did Brown discuss the allegations or investigations with anyone affiliated with the Mayor's office. Brown never claimed, and never testified, that he intended to be a whistleblower, that he was trying to get

information to the Mayor or his administration, or that he wanted to disclose the allegations of misconduct to the public.

COUNTERSTATEMENT OF PROCEEDINGS

Defendants rely upon the their Application for Leave to Appeal for their Counterstatement of Proceedings.

ARGUMENT

I. Standard of Review

Questions of law and summary disposition rulings are reviewed *de novo*. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250-51; 632 NW2d 126 (2001); *Michalski v Bar-Levav*, 463 Mich 723, 729; 625 NW2d 754 (2001). In addition, “[T]he determination whether evidence establishes a prima facie case under the WPA is a question of law that this Court reviews de novo.” *Roulston v Tendercare, Inc*, 239 Mich App 270, 278; 608 NW2d 525 (2000).

II. The WPA Does Not Protect Brown Because He Only Reported the Alleged Wrongdoing to His Supervisor In the Ordinary Course of His Employment and He Did Not Bypass Normal Channels to Report to an Outside Public Authority

A. The *Dickson* Court Held That a Public Employee must Report Wrongdoing to a Separate Higher Authority

In *Dickson v Oakland University*, 171 Mich App 68; 429 NW2d 640 (1988), the court of appeals found the WPA inapplicable in part because the plaintiff (an Oakland University police officer) simply reported the wrongdoing to his employer, not to any outside public

authority. In affirming the trial court's grant of summary disposition to the employer, the court stated:

Plaintiff reported the wrongdoing of students and others to his employer pursuant to his job function. **Nothing in the Complaint indicates that the employer was in violation of the law or that the Plaintiff was fired for reporting the employer's violation of the law to a higher authority.** In essence the Complaint indicates that the Plaintiff's superiors suggested he exercise restraint in arresting individuals and also indicates that the University exercised its discretion in determining not to pursue an assault and battery warrant.

Id. at 71 (emphasis added).

It is clear from the text of the court's opinion that it articulated three different reasons why the employee's WPA claim failed: (1) the employee reported wrongdoing pursuant to his job function; (2) the employee did not report any alleged violation by his employer; and (3) the employee did not report the violation to a higher public authority separate from his supervisor.

Plaintiffs simply dismiss the court's third reason for its holding as *obiter dicta*. But it is well-settled that when a court presents more than one reason for its decision, and each reason is sufficient to decide the ultimate issue, then none of the reasons can be regarded as *obiter dicta*. *California v US*, 438 US 645, 689, n10; 98 S Ct 2985; 57 L Ed 2d 1018 (1978) (“[W]hen two independent reasons are given to support a judgment, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.”) (internal citations omitted); *Woods v Interstate Realty Co*, 337 US 535, 537; 69 S Ct 1235; 93 L Ed

1524 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.”); *Natural Resources Defense Council v NRC*, 216 F3d 1180, 1189 (DC Cir 2000) (internal citations omitted) (“where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter dictum*, but each is the judgment of the court and of equal validity with the other.”). So plaintiffs are wrong to dismiss this as *obiter dicta*; rather it is the ruling in *Dickson* – a public employee cannot assert a WPA claim unless he goes out of his way to disclose the alleged wrongdoing to some public agency or authority other than his employer or supervisor.

Plaintiffs ignore what the *Dickson* court actually says, and instead invent a rationale that is not mentioned anywhere in the decision. Plaintiffs state that the court dismissed the public safety officer’s WPA claim because the “violations being reported were relatively petty and not the type of violations from which the WPA was intended to protect.” Pl. Brief, p 16. But nowhere in the text of the court’s opinion does it suggest that it dismissed the WPA claim because the public safety officer’s reports were “petty” and “not the type that the WPA was intended to protect.”

B. This Court in *Dudewicz* Approved the Outside Public Authority Requirement Set Forth in *Dickson*

Significantly, this Court in *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993) agreed with the outside public authority requirement articulated in *Dickson*. This Court said that the *Dickson* panel’s ruling was correct, except it disagreed with the panel’s statement that the WPA only protects employees who report violations by their employers.

This Court stated, “the plaintiff in *Dickson* reported the violation only to his employer, not to a public body within the meaning of WPA. On these facts, the panel correctly found that the WPA was inapplicable.” 443 Mich at 77, n4.

Plaintiffs dismiss this Court’s ruling in *Dudewicz* as *obiter dicta*. But this Court has declared that “when a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.” *Detroit v Michigan Public Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939) (emphasis in original). All that is necessary to decide if the decision is binding precedent on a particular point is whether the Court applied its judicial mind to that particular issue. *Id.*; *People v Alter*, 255 Mich App 194, 200, n1; 659 NW2d 667 (2003); *People v Higuera*, 244 Mich App 429, 437-38; 625 NW2d 444 (2001).

This Court already expressed its view and applied its “judicial mind” on this issue by declaring that *Dickson* was right in holding that a government employee was not a whistleblower because he only reported wrongdoing to his supervisor and did not go to outside channels to expose the wrongdoing.

Indeed, the court of appeals has recognized that *Dickson* and *Dudewicz* established a “requirement” that a governmental employee can only make a cognizable WPA claim if he discloses wrongdoing to an outside public agency or official rather than simply reporting

through the ordinary chain-of-command in the agency employing him. *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 496; 705 N2d 689 (2005).

C. The Holdings in *Phinney* and *Keller* Do Not Apply to this Case

Plaintiffs have not cited any decisions from this Court rejecting the principle that a public employee must report wrongdoing to an outside public authority to be protected by the WPA. Rather, they rely on a couple of court of appeals cases contrary to this Court's ruling in *Dudewicz* and to the court of appeal's own prior ruling in *Dickson*. See *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997) and *Keller v City of Grand Rapids*, 1998 Mich App Lexis 1210 (unpublished, March 24, 1998).

The cases cited by plaintiffs simply disagreed with *Dickson* and this Court's opinion in *Dudewicz*. At most, then, plaintiffs have noted some inconsistency in the case law, which is one more reason for this Court to grant review in this case to clarify the law once and for all, and fully articulate the applicable legal rules and reasoning for the benefit of the courts and the public.

Moreover, none of the cases cited by plaintiffs addressed the situation in the present case – where the government employee did not go outside normal channels to expose wrongdoing to a separate public agency or authority *and* where the government employee was just reporting wrongdoing as part of his job duties. This combination of circumstances presents the most compelling case for dismissal of the WPA claim because the plaintiff is not a whistleblower in any possible sense.

There is good reason to require public employees who report wrongdoing as part of their job duties to go outside normal channels to expose the misconduct. The WPA was intended to protect employees who go out on a limb to disclose wrongdoing – not those who are required to report wrongdoing as an everyday routine job duty. The House Legislative Analysis (2/5/81) [attached as Ex. A] says that WPA was intended to enable a person “to do his or her civic duty without fear of reprisals from an employer.” Employees who are supposed to make reports to their supervisors are not doing their *civic* duty, but simply doing their *job* duty. Moreover, the legislative history also says that “[e]mployees should be free to volunteer their assistance to law enforcement authorities.” *Id.* Plaintiff Brown was not a volunteer, but just doing what his job required. After all, it is the “whistleblower” protection act – the purpose was to protect *whistleblowers*.

In short, a public employee cannot be considered a whistleblower when he reports wrongdoing as part of his normal required job duties and does not go outside normal channels to expose wrongdoing to a separate public authority.¹

Finally, the issues in this case are of sufficient complexity and importance that they certainly should not be summarily disposed of by peremptory order (as plaintiffs request),

¹Defendants seek a ruling that a plaintiff cannot claim to be whistleblower if his assigned job duty is to report wrongdoing **and** he merely reports to his superiors through normal job channels, rather than taking his findings to an outside public authority. It is the combination of the two that makes this the clearest case. Brown certainly fails to state a whistleblower claim because he was just doing his everyday job duty **and** he did not disclose wrongdoing to an outside public body.

particularly since the case law, far from clearly supporting plaintiffs, actually supports defendants.

CONCLUSION

In sum, defendants agree with plaintiffs that this Court should grant leave to review the issues. However, defendants disagree with the plaintiffs' suggestion that these issues should be summarily disposed of by a peremptory order.

DATE: October 30, 2006

Respectfully submitted,

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