

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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**DEFENDANT'S REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO  
DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL**

DATE: October 20, 2006

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**I. Plaintiffs Concede that this Court Should Grant Defendants' Application for Leave to Appeal Because this Case Involves Issues of Significant Public Interest and Major Significance to the State's Jurisprudence**

Plaintiffs agree that this Court should grant review of this case because it involves issues of significant public interest and of major significance to Michigan's jurisprudence.

Pl. Brief, p.22.

**II. The Whistleblower Protection Act Does Not Protect Public Employees When They Report Alleged Wrongdoing as Part of Their Assigned Job Duties**

**A. Both Michigan Courts and Federal Courts Have Recognized the Principle that Public Employees Cannot Claim Whistleblower Status When They Report Alleged Wrongdoing as Part of Their Assigned Job Duties**

Brown was not engaged in protected whistleblower activity because his reporting on the investigation of alleged wrongdoing was simply part of his ordinary, assigned job duties.

Just recently the court of appeals again upheld this job function principle. *Bush v Detroit Sch Dist*, 2006 Mich App LEXIS 2745 (Mich App, Sept 19, 2006). [Ex. A.] In *Bush*, an elementary school principal was allegedly fired after making repeated requests for an audit investigation when she suspected staff of improperly commingling school funds. The court affirmed the dismissal of the principal's WPA claim because "under these circumstances, plaintiff was required to seek an audit as part of her 'job function.' Accordingly, plaintiff was not engaged in a protected activity when she requested the audits." *Id* (emphasis added).

Plaintiffs contend that statements from other Michigan cases recognizing the job duties principle are *dicta*.<sup>1</sup> But the court of appeals in *Dickson v Oakland Univ*, 171 Mich App 68, 71; 429 NW2d 640 (1988), plainly held that the WPA did not protect a university public safety officer when he prepared a complaint report against a student because he “reported wrongdoing . . . pursuant to his job function.”

Moreover, plaintiffs have a hard time explaining the fact that on several occasions Michigan courts have restated the job duties principle established in *Dickson*. The Michigan cases include: *Phinney v Perlmutter*, 222 Mich App 513, 555; 564 NW2d 532 (1997) (distinguishing *Dickson* because in *Phinney* “it was not plaintiff’s ‘job function’ to report violations or suspected violations of law to her employer.”); *Deneau v Manor Care*, 219 F Supp 2d 855, 865 (ED Mich 2002) (ruling that the WPA did not protect someone whose report was “nothing more . . . than what was required by her job duties.”); *Biggs v City of Taylor*, 2004 WL 817182, \*2 (Mich App, April 15, 2004) (declaring that reporting “as part of the normal course of his employment as a police officer is not protected activity under the WPA.”) Plaintiffs cannot explain away the principle, which appears in several Michigan cases and which is the same as the rule stated in *Sassé v US Dep’t of Labor*, 409 F3d 773 (CA 6 2005) and several other federal cases. So just saying “*dicta*” doesn’t cut it.

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<sup>1</sup>*Dickson v Oakland Univ*, 171 Mich App 68; 429 NW2d 640 (1988); *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997); *Deneau v Manor Care*, 219 F Supp 2d 855 (ED Mich 2002); *Biggs v City of Taylor*, 2004 WL 817182 (Mich App, April 15, 2004).

Furthermore, several federal courts support the job duties principle. In *Sassé*, 409 F3d at 780, the Sixth Circuit ruled that because the plaintiff's job as assistant United States Attorney included the investigation and prosecution of criminal conduct, "[w]e therefore hold that in performing these duties, Sassé was not engaging in protected activities."

Plaintiffs distinguish *Sassé* as involving different facts, but none of the facts they mention is relevant to the holding in the case. In any event, plaintiffs concede that in *Sassé* "the Sixth Circuit held that the whistleblower provisions of the CAA, the SWDA and the FWPCA do not protect employees who are merely performing assigned duties . . . ." Pl. Brief, p. 36.

Other federal courts have also embraced the "assigned job duties" doctrine under whistleblower statutes similar to the WPA. *E.g.*, *Willis v Department of Agriculture*, 141 F3d 1139, 1144 (Fed Cir 1998) (plaintiff Willis "did no more than carry out his required everyday job responsibilities . . . . Willis cannot be said to have risked his personal job security by merely performing his required duties"); *Huffman v Office of Personnel Mgmt*, 263 F3d 1341, 1352 (Fed Cir 2001) ("A law enforcement officer whose duties include the investigation of crime by government employees and reporting the results of an assigned investigation to his immediate supervisor is a quintessential example" of conduct that is not protected by whistleblower provisions); *Langer v Dept of Treasury*, 265 F3d 1259, 1267 (Fed Cir 2001).

Plaintiffs say two other federal cases take a different approach. But *Marano v Dept of Justice*, 2 F3d 1137 (Fed Cir 1993) is distinguishable since it involved a DEA agent who reported on misconduct he observed in his workplace and it was **not** his job to lodge such reports or to investigate such misconduct. *Watson v Dept of Justice*, 64 F3d 1524, 1528 (Fed Cir 1995), did not face the issue, since it affirmed the dismissal of a whistleblower claim where “the only issue” was whether the agency met its burden of proving that it would have removed plaintiff even in the absence of protected reporting. Indeed, *Sassé* easily distinguished these two cases cited by plaintiffs. *Sasse*, 409 F3d at 780, n2.

**Significantly, plaintiffs have still not cited any Michigan case upholding a WPA claim for a plaintiff whose reporting was part of his required job duties.**

Moreover, plaintiffs argue that whether an employee is paid to report wrongdoing is irrelevant to the issue of whether the WPA protects paid investigators because all employees are paid. But plaintiffs miss the point. The purpose of the WPA is to give employees, who would otherwise be too afraid to expose misconduct, incentive to blow the whistle and thereby protect the public. See *Henry v City of Detroit*, 234 Mich App 405, 409; 594 NW2d 107 (1998) (citations omitted) (stating “The underlying purpose of the act is the protection of the public. The act meets this objective by . . . removing barriers that may interdict employee efforts to report violations or suspected violations of the law.”) Unlike other employees, an employee who is paid to report wrongdoing does not need the WPA as incentive to expose wrongdoing.

## **B. Brown Is Not a Type Two Whistleblower**

Plaintiffs, relying upon *Henry*, 234 Mich App 405, argue that Brown was a whistleblower. Pl. Brief, p. 30. Under the WPA, type two whistleblowers are “those who are requested by a public body to participate in an investigation held by that public body or in a court action.” *Henry*, 234 Mich at 409; see also MCL § 15.362 (“An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because an employee is requested by a public body to participate in an investigation, hearing, or other inquiry held by that public body, or a court action.”).

In *Henry*, the court found that the plaintiff-police officer was a type two whistleblower because he testified in a civil suit about departmental irregularities. It was not his job duty to investigate or report on departmental irregularities. But the holding in *Henry* does not apply to this case because, unlike the plaintiff in *Henry*, Brown was not an ordinary employee requested specifically to give evidence at an inquest or hearing, but a deputy chief of the police department whose assigned duty was to investigate and report on wrongdoing. If it is your standard job duty to report and to participate in investigations, then you are not a whistleblower that the WPA was enacted to protect.

## **C. Brown’s Report of the Alleged Wrongdoing Was Part of His Normal Job Duties**

Finally, plaintiffs argue that the job duties doctrine is irrelevant because Brown was not carrying out his required job duties. Plaintiffs concede that “Brown, as the deputy chief in charge of the PAB, had the responsibility for investigating and reporting criminal acts and

rule violations by City of Detroit employees.” Pl. Brief, p. 40. Plaintiffs simply say that the investigation at issue in this case was not a typical investigation of police officers and City employees. Yet plaintiffs have unequivocally admitted that Brown’s ordinary job duties required him to report on the investigations in this case: “As Deputy Chief in charge of Internal Affairs, Brown was **duty-bound** to investigate allegations of a criminal nature or serious rule violations against Detroit Police Officers and the City of Detroit Employees . . . . **Brown was required to report the progress on such investigations to the Chief . . . .**”

Plaintiff Brown’s Brief in Support of Motion for Partial Summary Disposition, dated 10/21/04, p. 14 n. 7 (emphasis added). In sum, there is no question that in reporting the alleged wrongdoing, Brown was simply carrying out his normal job duties, so his WPA claim fails as a matter of law.

### **III. The WPA Does Not Protect Brown Because He Did Not Report the Alleged Wrongdoing to an Outside Public Authority**

Plaintiffs assert that a public employee does not have to report misconduct to an outside public authority in order to be protected by the WPA. To the contrary, in *Dickson*, the court stated that a governmental employee cannot be said to engage in protected activity if he merely reports to supervisors in the agency employing him:

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 supervisor 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.

*Dickson*, 171 Mich App at 71 (emphasis added).

Plaintiffs argue that this statement is merely *obiter dicta*. Plaintiffs state the court's reason for dismissing the WPA claim was that the "violations being reported were relatively petty and not the type of violations from which the WPA was intended to protect." Pl. Brief, p. 44. 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." Instead, the court held that one of the reasons why the WPA claim failed was because the public safety officer did not make the reports to a higher authority separate from his supervisor.

The holding from *Dickson* was approved by this Court in *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 77, n. 4; 503 NW2d 645 (1993). There, this Court agreed with the outside public authority requirement articulated in *Dickson* and it said that the *Dickson* panel's ruling was correct, except the Court disagreed with the panel's statement that the WPA only protects employees who report violations by their employers.

#### **IV. Conclusion**

For the foregoing reasons, as well as those stated in defendants' principal brief, defendants request that this Court grant defendants' Application for Leave to Appeal.

DATE: October 20, 2006

Respectfully submitted,

Barris, Sott, Denn & Driker, P.L.L.C.

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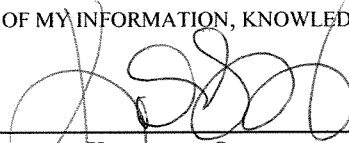
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KATHLEEN STEVENS

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