

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.

Docket No. 132016-7

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' SUPPLEMENTAL BRIEF**

DATE: March 16, 2007

**FILED**  
MAR 16 2007  
CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

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## STATEMENT OF QUESTION INVOLVED

IS A DEPUTY POLICE CHIEF A WHISTLEBLOWER WHEN HE SIMPLY TRANSMITS INFORMATION ABOUT AN INVESTIGATION OF ALLEGED MISCONDUCT TO HIS SUPERIOR AS PART OF HIS ORDINARY JOB DUTIES?

Defendants-Appellants say "No."

Plaintiffs-Appellees say "Yes."

The Circuit Court said "Yes."

The Court of Appeals said "Yes."

## INTRODUCTION

The Court has asked for additional briefing on what constitutes protected whistleblower activity under the Whistleblower Protection Act (“WPA”). In particular, may an employee of a public body be considered a whistleblower when he reports alleged violations within his agency, rather than taking his concerns to an outside public body?

Possibly he may be engaged in protected activity when he blows the whistle internally, within the agency that employs him. However, that does not mean that an employee of a public body is engaged in protected activity when he simply does his job in the ordinary course and reports to his superior on the status of investigations. That is the crucial distinction.

As shown below, the “normal job duties” principle is supported by the WPA, the ordinary meaning of “whistleblower,” legislative history, Michigan case law, case law from other jurisdictions, logic, and common sense.

Accordingly, this Court should reverse the Court of Appeals’ decision in part and rule that plaintiff Brown’s whistleblower claim must be dismissed.

## ARGUMENT

### **A. Both this Court and the Court of Appeals Have Emphasized that the WPA is Meant to Protect Whistleblowers**

This Court has declared that the WPA is only intended to protect whistleblowers: “The act was intended to protect employees who **alert the public** to ‘corruption or criminally irresponsible behavior in the conduct of government or large businesses.’” *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 381, n15; 563 NW2d 23 (1997)

(emphasis added). But plaintiff Brown was not trying to alert the public. Far from alerting anyone to a problem, Brown indicated that there was nothing to be very concerned about.

Moreover, this Court declared that the WPA is meant to protect citizens who make special efforts to alert the public and go out of their way to assist those charged with law enforcement:

The act encourage[s] employees to **assist** in law enforcement and . . . protects those employees who engage in whistleblowing activities. . . Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.

*Id.* at 378-79 (emphasis added). But Brown was not a citizen going out of his way to assist law enforcement; he was a law enforcement investigator just doing his job.

This Court has further declared that under the WPA, “The primary motivation of an employee pursuing a whistleblower claim ‘must be a desire to inform the public on matters of public concern’” *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604, 621; 566 NW2d 571 (1997) (quoting *Wolcott v Champion Int’l Corp*, 691 FSupp 1052, 1065 (WD Mi 1987)). But Brown was not trying to inform the public.

The Court of Appeals also confirmed that the well-accepted meaning of whistleblower applies to the WPA. A whistleblower is “one who, **on his own initiative, takes it upon himself** to communicate the employer’s wrongful conduct to a public body in an attempt to bring the, as yet hidden, violation to light to remedy the situation or harm done by the violation.” *Henry v City of Detroit*, 234 Mich App 405, 410; 594 NW2d 107 (1999)

(emphasis added). It is undisputed that Brown did not act on his own initiative or take it upon himself to blow the whistle; he was just carrying out his job duties and doing what the boss told him to do.

**B. By Enacting the Whistleblowers' Protection Act, the Legislature Clearly Meant to Protect Whistleblowers**

The gloss on the WPA given by this Court and the Court of Appeals is supported by the fact that the Legislature entitled it the “Whistleblower Protection Act.” This is explicit enacted language indicating the legislative intent to protect only “whistleblowers.” *Detroit v Michigan*, 262 Mich App 542, 547 n4; 686 NW2d 514 (2004) (“The title is useful for interpreting an act’s subject, purpose, and scope but is not controlling authority.”).

Plaintiffs presumably will insist that the Court should ignore prior case law and ignore the fact that the Legislature deliberately enacted a statute to protect “whistleblowers.” However, it is appropriate to consider this, as well as other evidence of the legislative purpose when the application of the statute is otherwise unclear or ambiguous.

Doubt first of all arises from the discrepancy between the title protecting whistleblowers and the provisions as interpreted by plaintiffs to protect persons who are clearly not whistleblowers. Moreover, there is ambiguity in the operative provisions as well. The WPA refers to protected activity in terms of an employee who “reports . . . a violation or a suspected violation. . .” MCL 15.362. The most reasonable interpretation is that this means the complaining whistleblower is the person who first discloses the violation and alerts a public body. A possible—but less reasonable—interpretation is that this includes officials who

receive the complaint and simply transmit it to supervisors or describe or summarize it for them. Those who describe, analyze, or outline the allegations are not reporting a violation as whistleblowers intended to be protected by the WPA.

Indeed, other language in the statute highlights this. The statute says whistleblower activity is protected, “unless the employee knows that the report is false.” MCL 15.362. It only makes sense to talk about knowledge of falsehood with regard to the one making the accusation or complaint, the one asserting, contending, or claiming that violations occurred. It does not make sense to ask whether those who receive the complaint and then summarize, describe, or relay the allegations know they are false, since those persons are not vouching for the allegations. This statutory language, at a minimum, creates an ambiguity as to whether the protected activity of reporting violations applies to a second-order “reporter” who summarizes, describes, or transmits the allegations in response to the whistleblower’s complaint.

Accordingly, to clarify this question, it is appropriate to consider the title as well as other evidence of the legislative intent. As the title makes clear, the Legislature meant to protect only “whistleblowers.” The key characteristics emphasized in Michigan case law (as shown in section A) are also part of the common general understanding of “whistleblower.”<sup>1</sup>

First, a whistleblower is motivated to expose wrongdoing. Thus, a standard definition is “an informant who **exposes** wrongdoing within an organization **in the hope of stopping**

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<sup>1</sup>In determining the meaning of the WPA this Court has considered “traditional notions of whistleblowing.” *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 75; 503 NW2d 645 (1993).

it.” *One Look Dictionary Search*, <http://www.onelook.com/?w=whistleblower&ls=a> (accessed March 15, 2007) The United States Supreme Court recently confirmed that whistleblower protection laws are “available to those **who seek to expose** wrongdoing.” *Garcetti v Ceballos*, 547 US \_\_\_; 126 S Ct 1951; 164 L Ed 2d 689, 704 (2006) (emphasis added). See, also, *Hitchcock v FedEx Ground Package Sys*, 442 F3d 1104, 1106 (CA 8, 2006) (applying a statute virtually identical to Michigan’s WPA: “To be protected under the statute, an employee must make the report for the purpose of exposing an illegality . . . [Plaintiff] did not demonstrate that she reported alleged illegalsities with the purpose of blowing the whistle on FedEx.”). Again, Brown was not trying to expose wrongdoing or blow the whistle—he was just passing along information to his boss.<sup>2</sup>

Moreover, “the whistleblower **sounds the alarm** when wrongdoing occurs.” Lillard, *Exploring Paths To Recovery for OSHA Whistleblowers: Section 11(C) of the OSHAct and the Public Policy Tort*, 6 Empl Rts. & Employ Pol’y J 329, 331 (2002) (emphasis added). Brown was not sounding any alarm; he just described the allegations to his boss.

In addition, “whistleblowers tend merely to be ordinary employees who are **so troubled** by their employers’ conduct that **they feel compelled to take action.**” Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U Mich JL Reform 277,

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<sup>2</sup>A whistleblower discovers wrongdoing and initiates or originates a complaint to the authorities, making allegations about the wrongdoing. But Brown did not uncover or allege wrongdoing; he just relayed the fact that someone had made allegations and his staff was investigating.

(Winter 1983) (emphasis added). Brown was not so troubled or concerned that he felt compelled to take action; he just made a routine bureaucratic report to his boss.

### C. The Legislative History Supports This Reading of the Act

This Court has repeatedly relied on legislative history to interpret the WPA. *See, Dudewicz, supra* at 75-76; *Dolan, supra* at 378-79, 381 and n 9, 11, 15; *Shallal*, 455 Mich at 612. The legislative history is instructive since it sheds light on uncertainties or incongruities which arise on plaintiffs' reading of the statute.

The House Legislative Analysis of H.B. 5088 and 5089 (2/5/81) says the WPA was intended to enable a person "to do his or her **civic** duty without fear of reprisals from an employer." (Emphasis added.) *See also*, Dept Of Labor Analysis H.B. 5089 (9/24/80) (purpose of WPA is to prevent retaliation against the employee "for fulfilling civic responsibilities"). Similarly, "[i]n a speech on the floor of the Michigan House of Representatives, Representative James Barcia, the legislation's principal sponsor, urged its adoption to encourage employees to fulfill their **societal** duty to participate in law enforcement." *Supra*, 16 U Mich J L Reform, at 304 (emphasis added). In this case, plaintiff Brown admits he was just doing his **job** duty by reporting on the status of an investigation; he was not performing a civic or societal duty.

Also, the House Legislative Analysis notes: "Employees should be free to **volunteer** their assistance to law enforcement authorities without fear of persecution by an employer."

H.B. 5088 and 5089 (2/5/81) (Emphasis added.) Again, Brown admits he was not a volunteer but just doing what his job required.

In sum, it is the “Whistleblower” Protection Act – the purpose was to protect *whistleblowers*.

**D. Brown was Nothing Like a Whistleblower**

Brown’s actions do not bear the slightest resemblance to whistleblowing.

Brown’s ordinary job duties required him to report to the Chief on the allegations/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).

So, in the ordinary course of business, Brown simply told the Chief about the allegations Nelthrope made to PAB investigators. (JEI 8, GB Tr 133-135.) The Chief instructed him to do a brief memo describing the allegations and initial investigation . (JEI 1, Compl ¶ 77; JEI 8, GB Tr 135, 137.) Brown gave him a draft memo. (JEI 8, GB Tr 146.) The memo recommended that the allegations be handled administratively and internally, rather than criminally. (JEI 1, Compl ¶ 80.) The Chief instructed him to revise it. (JEI 1, Compl ¶ 81.) Brown made the revisions and gave the revised memo to the Chief. (JEI 8,

GB Tr 145-147, 158-160; JEI 9, GB Tr 278; JEI 22, 5/6/03 memo.) The memo concluded: “The issues surrounding these events include administrative and departmental issues that can be addressed through proactive supervision. Therefore, unless directed by the Chief of Police, no further action will be taken regarding these issues.” (JEI 22, 5/6/03 memo.)

Brown testified he did not do this on his own initiative, but the Chief was “using me as a tool to go create something that he wants.” (JEI 8, GB Tr 177.) Indeed, Brown did not regard himself as the author: “I gave the Chief some verbiage that he asked me for . . . It’s his verbiage, not mine.” Since he was admittedly just echoing what the Chief told him to say, Brown obviously was not “disclosing” or “revealing” any misconduct to the Chief as a whistleblower would. Indeed, Brown never claimed that any violation of law occurred – he emphasized it was too early in the investigation to come to any conclusion. (JEI 8, GB Tr 204; JEI 9, GB Tr 249.)

Brown never claimed, and never testified, that he intended to be a whistleblower or that he was trying to alert the authorities or disclose misconduct to the public. Indeed, he disavowed any such intention to be a whistleblower:

“Q Did you have any intent to disclose this memo to the media, to the public?”

“A Never.”

(JEI 8, GB Tr 187.)

In short, Brown certainly did not engage in any initiative to reach out and “blow the whistle” to alert the authorities. Brown’s investigation status updates to the Chief were just the normal performance of his job. **He was not a whistleblower in any sense of the word.**

**E. Law Around the Country Holds That a Report to Superiors as Part of Routine Job Duties is Not Protected Whistleblower Activity**

In view of the established common understanding of what it means to be a whistleblower, case law throughout the country holds that a government employee who just reports wrongdoing to a supervisor as part of his/her job duties is not engaged in protected whistleblower activity.

For example, in *Fields v Dept of Justice*, 452 F3d 1297 (Fed Cir, 2006), a recent case with striking parallels to our case, the plaintiff was a criminal investigator who submitted a memo as part of an internal audit of the propriety of certain DEA activities. He later claimed that he was demoted for the information he reported in the memo. The court held this was not protected whistleblower activity *inter alia* because:

Fields prepared the memorandum jointly with another employee **in response to a request from Joseph Keefe, Chief of Operations, for an internal management review** to be conducted into the arrest of cooperating sources in Colombia. Providing a factual outline of events in response to such a request, **as part of his assigned job duties**, does not constitute a protected disclosure under the WPA.

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**It is part of Fields’s “normal duties” to participate in internal investigations when necessary, and the ad hoc reporting channels set up during an internal audit become the “normal channels” of Fields’s employment for those purposes.**

*Id.* at 1304-1305. Just like Fields, Brown's job was to investigate allegations of wrongdoing and he prepared the memo at the request of his boss.

Other recent cases have repeatedly reaffirmed the job duties doctrine under whistleblower statutes similar to the WPA. *E.g. Huffman v OPM*, 263 F3d 1341, 1352-53 (Fed Cir, 2001) ("reporting in connection with assigned normal duties is not a protected disclosure . . . the core purposes of the WPA are simply not implicated by such reporting. . . The WPA was established to protect employees who go above and beyond the call of duty."); *Blakemore v Dept of the Navy*, 158 Fed Appx 271, 272 (Fed Cir, 2005) (no protected whistleblower activity where employee reported violations to the supervisor who had assigned her the task of investigating violations: "disclosures made as part of an employee's normal job responsibilities through normal channels are not covered by the WPA"); *Willis v Department of Agriculture*, 141 F3d 1139, 1144 (Fed Cir, 1998) (plaintiff "did no more than carry out his required everyday job responsibilities"); *Langer v Department of Treasury*, 265 F3d 1259, 1267 (Fed Cir, 2001) (plaintiff not a whistleblower when he "was merely carrying out his required, everyday job responsibilities").

While many job duties cases are from the Federal Circuit (since it handles most federal whistleblower cases), other federal courts and state courts in recent years have adhered to the same principles.

For example, in *Hutchins v Wilentz*, 253 F3d 176 (CA 3, 2001) plaintiff was asked to investigate certain client bills, and he submitted a memorandum detailing his concerns about the firm's billing practices. Approximately one month later, the plaintiff was terminated. The court of appeals affirmed summary dismissal because the plaintiff had failed to engage in protected whistleblower conduct: "Hutchins's 'investigation' was in response to a specific assignment . . . he merely performed the task he was asked to complete by his supervisor. . . . Hutchins's 'investigation' into the firm's billing practice resulted from a directive from his employer." *Id.*, at 194. *Accord*, *Sassé v United States DOL*, 409 F3d 773, 780 (CA 6, 2005) (assistant United States Attorney's duties "included the investigation and prosecution of environmental crimes, and he therefore had a fiduciary duty to carry out those investigations and prosecutions. . . . We therefore hold that in performing these duties, Sassé was not engaging in protected activities.").

Whistleblower cases decided under the law of other states with statutes very similar to Michigan's have also applied the job duties doctrine. *E.g.* *Skare v Extendicare Health Services*, 431 F Supp 2d 969, 980 (D Minn, 2006) ("she made her complaints in the normal course of her job duties . . . she was doing her job and, in the process, she raised concerns with her supervisors; it does not indicate that she made a "report" under the Act for the "purpose of exposing an illegality."); *Freeman v Ace Telephone Association*, 404 F Supp 2d 1127, 1139 (D Minn, 2005) *aff'd on other grounds* 467 F3d 695 (CA 8, 2006) ("The report must have been made for the purpose of exposing an illegality, and must implicate a violation

of a rule or law. . . . A report that is presented as part of an employee's job duties is not a report under the Act.”)

**F. Michigan Cases Have Also Approved the Job Duties Principle**

Just as in other jurisdictions, cases decided under Michigan law have recognized that an employee whose job is to investigate and report unlawful conduct cannot bring a WPA claim when he or she just carries out this job responsibility. *E.g. Dickson v Oakland University*, 171 Mich App 68, 71; 429 NW2d 640 (1988) (WPA did not apply because – among other reasons – the plaintiff public safety officer “reported the wrongdoing of students and others to his employer pursuant to his job function.”); *Biggs v City of Taylor*, 2004 Mich App LEXIS 978, \*4-5, (April 15, 2004) (reporting violations “as part of the normal course of his employment as a police officer is not protected activity under the WPA” because this is “not an attempt to inform the public of, or bring about remediation for a matter of public concern.”); *Deneau v Manor Care, Inc*, 219 F Supp 2d 855, 865 (ED Mich, 2002) (the WPA did not protect someone whose report was “nothing more . . . than what was required by her job duties.”); *Bush v Detroit Sch Dist*, 2006 Mich App LEXIS 2745 \*16 (Sept 19, 2006) (“plaintiff was required to seek an audit as part of her ‘job function.’ Accordingly, plaintiff was not engaged in protected activity when she requested the audits.”).

## **G. Whistleblower Case Law Overwhelmingly Supports the Job Duties Doctrine**

The preceding sections have set out abundant recent authority from jurisdictions around the country, including Michigan, establishing that a person cannot claim to be engaged in protected whistleblower activity when he merely carries out everyday job duties that require him to investigate and report on possible misconduct. However, the Court of Appeals in this case did not address or even acknowledge this compelling body of case law.

Indeed, it does not appear that there are any cases rejecting the job duties principle. The Court of Appeals certainly did not cite any case upholding a whistleblower claim for a plaintiff who simply reported to his supervisor as part of his required job duties.

The Court of Appeals peremptorily dismissed the job duties argument without mentioning or trying to explain the case authority establishing the doctrine. The Court of Appeals simply cited a case for the proposition that an employee may be acting in the course of his employment when he engages in protected activity. This is wholly beside the point, and utterly fails to grapple with the wealth of law on the job duties doctrine.<sup>3</sup>

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<sup>3</sup>The Court of Appeals erroneously relied upon *Terzano v Wayne County*, 216 Mich App 522; 549 NW2d 606 (1996), for the proposition that the WPA protects an employee who reports violations of the law when he is acting within the scope of employment. But *Terzano* did not involve an employee who reported a violation of the law as part of his or her job duties. In *Terzano*, there was no suggestion that plaintiff's job duties included reporting electrical violations to the city inspector. Moreover, the employee in *Terzano* acted as a whistleblower by disclosing the violation to an outside public authority. Thus, *Terzano* did not address the issue of whether an employee "blows the whistle" where he reports misconduct to his superiors as part of his job duties

The Court of Appeals' published opinion should not be allowed to stand since it incorrectly rejects the job duties principle, without confronting any of the law and logic supporting that principle, and without citing any law or logic refuting that principle.

**H. Whether or Not it is Necessary For a Public Employee to Go to An Outside/Higher Public Body, Simply Reporting Allegations to a Supervisor Pursuant to One's Job Duties is Not Protected Whistleblower Activity**

As shown above, a public sector employee does not qualify as a whistleblower engaged in protected activity where he just makes a routine report in the ordinary course, as part of his assigned job duty to investigate and report on alleged violations to his supervisor.

What about a public sector employee who discovers some wrongdoing and whose job is **not** to investigate and report on such wrongdoing – is he engaged in protected whistleblower activity if he discloses it to the public body that employs him, rather than going to an outside public body? In such a case, the well-established job duties doctrine does not apply, since the employee is not just routinely carrying out his assigned job function, and he truly may be acting as a whistleblower.

In addition to the argument based on the job duties doctrine, defendants had argued that the Court of Appeals decision should also be reversed because it misapplied the outside/higher authority requirement. In *Dickson v Oakland University*, 171 Mich App 68, 71; 429 NW2d 640 (1988), the Court of Appeals ruled that a public sector employee was not engaged in protected activity for several reasons, including the fact that he only reported the wrongdoing to his employer and not to “a higher authority.” This Court agreed in *Dudewicz*

*v Norris-Schmid, Inc*, 443 Mich 68, 77, n 4; 503 NW2d 645 (1993), “the plaintiff in *Dickson* reported the violation only to his employer, not to a public agency within the meaning of the WPA. On these facts, the panel correctly found that the WPA was inapplicable.” Subsequently, two Court of Appeals panels acknowledged this outside/higher authority requirement, but expressed disagreement with it. *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 496; 705 N2d 689 (2005) and *Brown v Mayor of Detroit*, 271 Mich App 692; 723 NW2d 464 (2006).

In light of Michigan precedent (particularly *Dudewicz*) recognizing this outside/higher public authority requirement, defendants raised it as an alternative, secondary ground for reversal. However, this Court’s order of February 2, 2007 indicated an interest in revisiting *Dudewicz* with regard to this issue. Neither *Dickson* nor *Dudewicz* gave any basis or rationale for the outside/higher public authority requirement. Accordingly, this Court may choose to overrule *Dudewicz* to the extent it suggested that an employee of a public body must disclose the violations to an outside, higher, or separate public body in order to be protected by the WPA.

However, even if the Court does that, the Court should confirm the job duties doctrine, as apparently all other courts have done when presented with the issue. The job duties doctrine is founded on a substantial body of law and logic and legislative intent. As it stands, the Court of Appeals summarily dismissed that argument, without attempting to address or explain any of the authorities embracing that position. The Court of Appeals’

published opinion totally missed this serious issue, and leaves Michigan as apparently the only jurisdiction rejecting the job duties doctrine.<sup>4</sup>

## CONCLUSION

The Court should rule that an employee who merely investigates alleged violations and reports to his supervisor as part of his ordinary job duties is not engaged in protected whistleblower activity. Accordingly, the Court should reverse the Court of Appeals decision in part and order entry of summary disposition for defendants on Brown's WPA claim.

Respectfully submitted,

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<sup>4</sup>The court in *Dunleavy v Wayne County*, 2006 US Dist LEXIS 19720 (ED MI, March 30, 2006) held that the plaintiff auditor was a whistleblower even though his job duties included investigating. That case is completely different – plaintiff was deemed to be a whistleblower because he did not just report to his boss, but went and disclosed violations to various outside law enforcement authorities, including the Justice Department, the FBI, and the Michigan Auditor General. Thus, he went beyond his job and made a special effort to disclose his concerns by going to outside public authorities. In contrast, Brown has repeatedly admitted that he was just doing what his job required (Plaintiff Brown's Brief in Support of Motion for Partial Summary Disposition, p. 14 n 7), and he only reported the alleged violations to his supervisor, Chief Oliver. (JEI 8, GB Tr 144-45; JEI 1, Compl ¶ 95).