



TABLE OF CONTENTS

	<u>PAGE</u>
INDEX TO AUTHORITIES.....	ii
ISSUE.....	iii
STATEMENT OF FACTS.....	1
ARGUMENT	
<b>PLAINTIFF’S DECISION NOT TO ATTEND THE MARTIN LUTHER KING DAY CELEBRATION WAS “INTENTIONAL” AND “WILFUL,” AND IT WAS “MISCONDUCT.” SHE WAS INJURED “BY REASON OF” THAT MISCONDUCT. THEREFORE, GIVING MCL 418.305’s CRITERIA ITS COMMON ORDINARY MEANING, PLAINTIFF “SHALL NOT RECEIVE COMPENSATION.”</b> .....	2
A. “Intentional.” .....	2
B. “Wilful.” .....	3
C. “Misconduct.” .....	4
D. “By Reason Of.” .....	6
E. “Shall Not Receive Compensation.” .....	7
F. Response To Plaintiff’s Arguments .....	7
1. The “Seriousness” Of The Misconduct .....	7
2. A Question Of Fact? .....	8
3. Plaintiff’s Discussion With Her Immediate Supervisor .....	8
4. Other Colleagues .....	9
5. Consequences To Court’s Ruling Against Plaintiff .....	9
RELIEF .....	11

## INDEX OF AUTHORITIES

PAGE

### **Cases**

<i>Daniel v Department of Corrections</i> , 468 Mich 34; NW2d 144 (2003).....	6
<i>Day v Gold Star Dairy</i> , 307 Mich 383; 12 NW2d 5 (1943) .....	9
<i>Detwiler v Consumers Power Co</i> , 252 Mich 79; 233 NW 350 (1930).....	10
<i>Fortin v Beaver Coal Co</i> , 217 Mich 508; 187 NW352 (1922).....	8
<i>Kent v Boyne City Chemical Co</i> , 195 Mich 671; 162 NW 268 (1917).....	9
<i>Martin v Ford Motor Co</i> , 401 Mich 607; 258 NW2d 465 (1977).....	8
<i>McMinn v C. Kern Brewing Co</i> , 202 Mich 414; 168 NW 542 (1918) .....	8
<i>People v McIntire</i> , 461 Mich 147; 599 NW2d 102 (1999).....	2
<i>Pohutski v City of Allen Park</i> , 465 Mich 675; 641 NW2d 219 (2002).....	2
<i>Rayner v Sligh Furniture Co</i> , 180 Mich 168; 146 NW 665 (1914).....	9, 10
<i>Stanton v City of Battle Creek</i> , 466 Mich 611; 647 NW2d 508 (2002).....	2
<i>Township of Southfield v Drainage Board for Twelve Towns Relief Drains</i> , 357 Mich 59; 97 NW2d 821 (1959).....	7
<i>Waldbauer v Michigan Bean Co</i> , 278 Mich 249; 270 NW 285 (1936).....	8
<i>Walker v Department of Social Services</i> , 428 Mich 389; 410 NW2d 698 (1978) .....	8

### **Statutes**

1912 (1 <sup>st</sup> Ex Sess) PA 10, Part II, Sec. 2.....	7
MCL 418.305 .....	2, 7, 10
MCL 8.3a .....	2

### **Other Authorities**

1911 Report of the Employers' Liability and Workmen's Compensation Commission of the State of Michigan, Part II, Sec. 2, p 42.....	7
<i>The Random House Dictionary of the English Language</i> , p 991 (2 <sup>nd</sup> ed., unabridged, 1987) 3, 5, 6	
<i>Webster's New Collegiate Dictionary</i> , p 596 (1980).....	2, 3, 5, 6

ISSUE

**PLAINTIFF'S DECISION NOT TO ATTEND THE MARTIN LUTHER KING DAY CELEBRATION WAS "INTENTIONAL" AND "WILFUL," AND IT WAS "MISCONDUCT." SHE WAS INJURED "BY REASON OF" THAT MISCONDUCT. THEREFORE, GIVING MCL 418.305'S CRITERIA ITS COMMON ORDINARY MEANING, "SHALL" PLAINTIFF NOT RECEIVE WEEKLY WORKERS' COMPENSATION?**

## STATEMENT OF FACTS

(Numbers in parentheses refer to the transcript of the proceedings held before Magistrate Michael Barney on February 18, 2004, in the early afternoon. Numbers preceded by "II" refer to the transcript of the proceedings held before the trial Magistrate on February 18, 2004, in the late afternoon. Numbers preceded by "III" refer to the transcript of the proceedings held before Magistrate Barney on March 3, 2004. Numbers preceded by "R" refer to the transcript of the deposition of Dr. J. Barry Rubin. Numbers preceded by "C" refer to the transcript of the deposition of Robert Cornette, Ph.D.)

Defendants incorporate the Statement of Facts contained in their application for leave to appeal. This supplemental brief follows in response to the Court's invitation to file a pre-oral argument supplemental brief in its order entered April 2, 2008.

## ARGUMENT

**PLAINTIFF'S DECISION NOT TO ATTEND THE MARTIN LUTHER KING DAY CELEBRATION WAS "INTENTIONAL" AND "WILFUL," AND IT WAS "MISCONDUCT." SHE WAS INJURED "BY REASON OF" THAT MISCONDUCT. THEREFORE, GIVING MCL 418.305'S CRITERIA ITS COMMON ORDINARY MEANING, PLAINTIFF "SHALL NOT RECEIVE COMPENSATION."**

The statute the Court is focused upon for purposes of the oral argument is straightforward: "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." MCL 418.305. The words in the statute, including the crucial words "intentional," "wilful," "misconduct," and "by reason of," are to be given their plain and ordinary meaning as they are not defined elsewhere within the Worker's Disability Compensation Act and have no technical or peculiar meaning. MCL 8.3a;<sup>1</sup> *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). A dictionary is appropriate to understand the ordinary meaning of these words. *Stanton v City of Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002). Once that meaning is ascertained, the Court's only role is to apply the statute. *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

A. "Intentional."

*Webster's New Collegiate Dictionary* defines "intentional" as: "1 : done by intention or design ... 2 a : of or relating to epistemological intention b : having external reference syn see VOLUNTARY." *Webster's New Collegiate Dictionary*, p 596 (1980). *The Random House*

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<sup>1</sup> MCL 8.3a provides: "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

*Dictionary of the English Language* defines “intentional” as: “1. done with intention or on purpose; intended: *an intentional insult*. 2. of or pertaining to intention or purpose.” *The Random House Dictionary of the English Language*, p 991 (2<sup>nd</sup> ed., unabridged, 1987).<sup>2</sup>

Plaintiff’s non-attendance at the Martin Luther King Day celebration at issue in this case was by plaintiff’s “intention or design.” It was “on purpose.” It was not negligence or forgetfulness that led plaintiff not to attend. Nor did plaintiff have any excuse, such as illness. She deliberately did not attend. Defendants do not believe there is serious debate on this point. Therefore, plaintiff’s decision not to attend the celebration satisfies the “intentional” criterion in the statute.

B. “Wilful.”

“Wilful” or “willful” is defined in *Webster’s* as: “1 : obstinately and often perversely self-willed 2 : done deliberately : INTENTIONAL *syn* 1 see VOLUNTARY 2 see UNRULY.” *Webster’s New Collegiate Dictionary*, p 1331 (1980). *Random House* defines it as: “1. deliberate, voluntary, or intentional: *The coroner ruled the death willful murder*. 2. unreasonably stubborn or headstrong; self-willed. Also, **wilful** ... **Syn.** 1. volitional. 2. intransigent.” *The Random House Dictionary of the English Language*, p 2175 (2<sup>nd</sup> ed., unabridged, 1987).

The trial Magistrate here specifically found: “She actually did willfully not attend.” (Magistrate’s decision, p 21). This finding is clearly correct, with reference to the dictionaries, because plaintiff’s non-attendance was “done deliberately.” It was a decision made “obstinately.”

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<sup>2</sup> *The Random House Dictionary of the English Language* continues with metaphysical definitions of “intentional,” e.g., “pertaining to an appearance, phenomenon, or representation in the mind;” “pertaining to the capacity of the mind to refer to an existent or nonexistent object,” etc., which clearly have no relevance for the instant discussion.

It was “self-willed.” Plaintiff decided not to attend in order to send a message to Focus Hope. Her non-attendance was preplanned. It was calculated to drive home her point. As the Magistrate said:

... she knew attendance at the celebration was mandatory and was very important to the organization to help the community heal from the wounds of the past and bring people together. Nonetheless, she felt so strongly about the celebration taking place in an inappropriate (to her) venue that she was willing to protest, stand up for her beliefs, and take the punishment that she understood from Mr. Lepper previously was to be meted out.” (Magistrate’s decision, p 7).

Plaintiff’s action was “unreasonably stubborn” because Ms. Josaitis had told plaintiff at the time of hire attendance was mandatory; plaintiff accepted those terms of employment; yet, plaintiff did what she did anyway (II 7-8; 62-63). Plaintiff therefore satisfies the “wilful” statutory criterion.

C. “Misconduct.”

Plaintiff’s intentional and wilful decision not to attend the celebration was “misconduct.” Considered in a vacuum, not attending a celebration might not strike one as “misconduct.” But, for this plaintiff, for this defendant, and in this context, it was.

The Magistrate correctly found:

Martin Luther King’s Birthday is exceedingly important to Focus Hope because the organization bases itself and its mission on the principles that Dr. King fought and died for. (Magistrate’s decision, p 4).

\* \* \*

In fact, it is the most important day of the year for Focus Hope and their celebration of Martin Luther King’s birthday is the most important event of the year. The Mission Statement of Focus Hope is taken directly from and patterned after the goals and ideals enunciated and personified by Dr. King and the purpose of the King Day Celebration is to honor Dr.

King's memory and his legacy and to try to put the principles he enunciated into action by bringing the races together. This is all part of the Mission Statement which all perspective [sic] employees ("colleagues") are asked to sign and accede to before hiring. (Magistrate's decision, p 10).

Eleanor Josaitis, as quoted in defendants' application, made it explicitly clear to plaintiff (as she did to all other prospective Focus Hope colleagues) that attendance at the event was "mandatory." (II 8). It was an obligation of employment (II 7-8). Prospective colleagues are directly asked whether they agree to abide by these mandatory requirements (II 8). Plaintiff admitted she was told of these mandatory requirements before her hire (62-63). She was hired because she agreed to these terms of employment (see, II 7-8).

For this reason, what plaintiff did was misconduct because *Webster's* defines "misconduct" as:

**1** : mismanagement esp. of governmental or military responsibilities **2** : intentional wrong-doing; *specif* : deliberate violation of a law or standard esp. by a governmental official ... **3 a** : improper behavior **b** : ADULTERY." *Webster's New Collegiate Dictionary*, p 728 (1980).

*Random House* defines "misconduct" as:

**1.** improper conduct; wrong behavior. **2.** unlawful conduct by an official in regard to his or her office, or by a person in the administration of justice ... **3.** to mismanage. **4.** to misbehave (oneself). ... **Syn.** **1.** wrongdoing, misbehavior, misdeed, misstep." *The Random House Dictionary of the English Language*, p 1228 (2<sup>nd</sup> ed., unabridged, 1987).

Plaintiff deliberately violated a “standard.”<sup>3</sup> Her decision was “improper conduct; wrong behavior” and “misbehavior, misdeed, misstep” in the context of this case. Therefore, plaintiff satisfies the statutory “misconduct” criterion.

D. “By Reason Of.”

In *Daniel v Department of Corrections*, 468 Mich 34, 43; NW2d 144 (2003), the Court addressed the “by reason of” phrase in § 305 by referring to *Black’s Law Dictionary*. *Daniel* says “by reason of” means “[b]y means, acts, or instrumentality of.” *Daniel*, 468 Mich at 43. Plaintiff’s mental condition occurred “by reason of” her decision not to attend the celebration. Plaintiff argues otherwise saying since her injury did not arise contemporaneous with the misconduct, it was not “by reason on” the misconduct. *Daniel* explained, however, “the phrase does not require that an injury arise contemporaneously with the misconduct.” *Daniel*, 468 Mich at 43. Instead, adopting the Court of Appeals’ dissent, *Daniel* says that if the misconduct ““was the starting point for the resultant disciplinary proceedings that ultimately caused his injury,” then the “by reason of” requirement is satisfied. *Daniel*, 468 Mich at 43.

Here, there is no dispute that plaintiff’s non-attendance at the celebration ““was the starting point for the resultant disciplinary proceedings that ultimately caused h[er] injury.”” *Daniel* is very similar in this respect because Mr. Daniel, like the instant plaintiff, claimed depression as a result of disciplinary meetings following the employer’s inquiry into the employee misconduct. Therefore, plaintiff’s mental injury, as in *Daniel*, is “by reason of” her intentional and wilful misconduct.

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<sup>3</sup> *Webster’s* and *Random House’s* opening references to governmental officials or military responsibilities are obviously not pertinent here.

E. “Shall Not Receive Compensation.”

Because the statutory criteria is met, plaintiff “shall not receive compensation.” MCL 418.305. “Shall” is a mandatory, not discretionary, directive. *Township of Southfield v Drainage Board for Twelve Towns Relief Drains*, 357 Mich 59, 76; 97 NW2d 821 (1959).

F. Response To Plaintiff’s Arguments.

1. The “Seriousness” Of The Misconduct.

Plaintiff argues her misconduct was not “serious” or “depraved” enough to qualify as misconduct. The Magistrate’s decision accepted plaintiff’s viewpoint in this respect. The Magistrate rejected the § 305 exclusion saying her misconduct “a far cry from the alleged misconduct involved in Daniels [sic],” which involved sexual harassment. (Magistrate’s decision, p 23).<sup>4</sup> The statute does not, however, say the misconduct must reach a specified level. The only adjectives modifying “misconduct” in § 305 are “intentional and wilful.” Whether the misconduct is “serious” does not matter because that adjective is not in the statute.

It is worth considering here the 1911 Report of the Employers’ Liability and Workmen’s Compensation Commission of the State of Michigan [Report]. This Report was the moving force for enactment of Michigan’s first workers’ compensation act. The Report had recommended what plaintiff now urges. That is, the Report recommended the statute’s language read: “If the employe [sic] is injured by reason of his serious and wilful misconduct, he shall not receive compensation under the provisions of the act.” Report, Part II, Sec. 2, p 42. The Legislature, however, did not adopt the “serious” requirement in the first workers’ compensation act. 1912 (1<sup>st</sup> Ex Sess) PA 10, Part II, Sec. 2. It replaced the recommended adjective “serious” with

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<sup>4</sup> Recall that the Workers’ Compensation Appellate Commission ignored the statute’s words entirely and substituted its own policy preference for the statute. The Commission said that in its view holding the celebration in Dearborn is such a “disconnect and paradox [it] should be obvious to even the most insensitive.” (Commission’s opinion, p 5).

“intentional.” And, the statute has remained that way through the present. Therefore, plaintiff is advocating for reading a requirement into the statute (“serious” misconduct) the Legislature considered and rejected.<sup>5</sup> In any event, if there was a “serious” misconduct requirement, plaintiff’s misconduct in this case *was* serious to Focus Hope for the reasons explained earlier.

2. A Question Of Fact?

Plaintiff also argues that this entire issue is a question of fact binding on the Court. But, where the salient facts are not in serious dispute, the Court has not hesitated to reverse in § 305 cases (and others) the legal conclusion derived from those facts. *Waldbauer v Michigan Bean Co*, 278 Mich 249, 254-255; 270 NW 285 (1936) [where the Court, although “[a]ccepting the finding by the department” with respect to the underlying facts, “vacated” the award disagreeing with the department’s refusal to characterize what had happened as intentional and wilful misconduct]; *Fortin v Beaver Coal Co*, 217 Mich 508, 509-511; 187 NW352 (1922) [where the Court vacated the claimant’s award on the basis the facts found “constituted intentional and wilful misconduct on his part”]. The Court has reviewed the legal conclusion yielded by essentially undisputed, core facts characterizing it as review of the “jural relationship” between the underlying facts and the conclusion they yield.<sup>6</sup>

3. Plaintiff’s Discussion With Her Immediate Supervisor.

Plaintiff also argues she had in some sense cleared her misconduct in advance with her immediate supervisor. Negotiating the penalty to be imposed for a volitional wrongdoing does not erase the fact there has been “misconduct.” It is because you have committed “misconduct” that

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<sup>5</sup> *Cf.*, *McMinn v C. Kern Brewing Co*, 202 Mich 414, 423; 168 NW 542 (1918). There, the Court quoted the administrative tribunal at the time as expressing the view that the “intentional and wilful misconduct” requirement has the effect of requiring more than merely serious and wilful misconduct.

<sup>6</sup> The Court is not invading the factual province of the administrative tribunals by doing so. Rather, the Court is either agreeing or disagreeing with the legal conclusion yielded by the facts. Compare, *Walker v Department of Social Services*, 428 Mich 389, 396; 410 NW2d 698 (1978); *Martin v Ford Motor Co*, 401 Mich 607, 621; 258 NW2d 465 (1977).

you need to discuss the penalty for it. And, there was no indication from plaintiff's immediate supervisor that no one else would speak to plaintiff about her misconduct later.<sup>7</sup>

4. Other Colleagues.

Plaintiff also argues that other colleagues objected to the locale of the celebration, and they were not punished. There is no finding of fact to this effect below. To the extent plaintiff testified that such took place, the response of Ms. Josaitis was that if people had legitimate excuses, described as "an emergency or problem in their family," then they could be excused but that anyone who just "do[es]n't come, then that's another issue." (II 9). As the Magistrate observed, "all employees are required to attend unless they have exceedingly good excuses." (Magistrate's decision, p 4).

5. Consequences To Court's Ruling Against Plaintiff.

Finally, plaintiff urges negative consequences by ruling in defendants' favor. Plaintiff predicts that any violation of a work rule, however trivial, will result in exclusion from workers' compensation benefits. That is not so. First, even if the claimant is acting with "a high degree of negligence," he or she does not fall within the statute's exclusion; the act must be "intentional and wilful." *Day v Gold Star Dairy*, 307 Mich 383, 392; 12 NW2d 5 (1943). Second, the exclusion only applies where the rule is clearly established. *Kent v Boyne City Chemical Co*, 195 Mich 671, 676; 162 NW 268 (1917); *Rayner v Sligh Furniture Co*, 180 Mich 168, 170; 146 NW 665 (1914). Third, where a claimant can demonstrate a rule is routinely ignored, then there

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<sup>7</sup> An analogy may be worthwhile. Suppose a young man seeks a job in a bank and interviews with the bank's president. The bank president tells the man: "If hired, it is mandatory you wear a coat and tie every day, do you accept that?" The man says yes. Months later, the man decides he will not wear a coat and tie to work the next day because the weather forecast is for very hot weather. He advises his immediate supervisor of his intention and the supervisor metes out some penalty. Days later, the bank president learns of the incident and takes the matter up with the young man. The fact that the young man and his immediate supervisor had agreed on a penalty did not rob the young man's action of its "misconduct" character. And, while dressing casually might not be considered "misconduct" in a different context, it is "misconduct" where it is made clear at the time of hire the dress code is a mandatory condition of employment.

really is no “intentional and wilful misconduct” at all. *E.g., Detwiler v Consumers Power Co*, 252 Mich 79, 81; 233 NW 350 (1930). Fourth, not every act of misconduct excludes the person from workers’ compensation benefits; it is only if the person claims he or she is injured “by reason of” that misconduct. Recall the statute’s exclusion requires the injury occur “by reason of” the misconduct.

Consequently, breaking safety rules – for example – that are honored more in their breach than in their observance is not intentional and wilful misconduct and defendants do not advocate otherwise. *Rayner, supra*. But here, there was a rule. It was mandatory. It was not something routinely ignored. In considering consequences, the Court might consider the consequences of not applying § 305 to cases like this. If § 305 does not apply here, employers will need to think twice or three times whether they can even question an employee who breaks an explicit, mandatory rule out of fear that confronting the employee with their error can result in a workers’ compensation award.

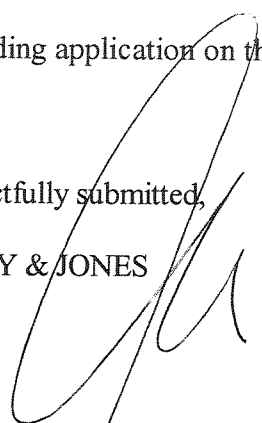
**RELIEF**

WHEREFORE, defendants-appellants, Focus Hope and Accident Fund Insurance Company of America, respectfully request that the Court vacate the award of workers' compensation benefits because plaintiff's claim is excluded by MCL 418.305. In the alternative, defendants request the Court grant defendants' pending application on this issue, as well as the two other important issues in the case.

Respectfully submitted,

LACEY & JONES

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