

STATE OF MICHIGAN
IN THE SUPREME COURT

PATRICIA D. BRACKETT,

Plaintiff-Appellee,

Vs.

S.C. No. 135375

C.A. No. 274078

L.C. No. WCAC 04-000165

FOCUS HOPE, INC., and the
ACCIDENT FUND INSURANCE CO. OF AMERICA,

Defendant-Appellant.

CHARTERS, HECK O'DONNELL
& PETRULIS, P.C.

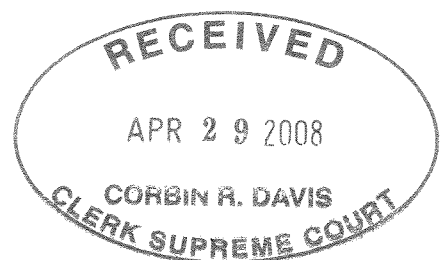
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PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF
PER ORDER OF 4/2/08

135375
PLAE; Suppl



STATEMENT OF FACTS

In its order dated April 2, 2008, this Court invited the parties to file supplemental briefs on the question of "...whether plaintiff's injury resulted from her willful misconduct. MCL 418.305." Plaintiff incorporates, as though fully set forth herein, the Statement of Facts presented in her Answer to Application for Leave. Additional pertinent facts will be noted within the Supplemental Argument below.

SUPPLEMENTAL ARGUMENT

Plaintiff incorporates by reference, as though fully set forth herein, the Arguments presented in her Answer to Application for Leave and offers the following additional argument and legal authority.

This Court asked that the instant case be considered "in light of" Daniel v Department of Corrections, 468 Mich. 34, 658 NW2d 144 (2003) in its remand order to the Court of Appeals dated 11/1/06. The Court of Appeals then found this Plaintiff's actions and conduct to be distinguishable from that of the plaintiff in Daniel, *supra*, and that there is "ample record support for the magistrate's and WCAC's mutual finding that plaintiff's pre-arranged non-attendance at the holiday event did not constitute 'intentional and wilful misconduct' as contemplated by MCL 418.305. Brackett v Focus Hope, (COA Docket # 274078, unpublished opinion 10/23/07). The Court of Appeals decision was correct and should be affirmed.

The question presented in this Court's current order of 4/2/08 -- whether Plaintiff's injury was by reason of her intentional and willful misconduct within the meaning of the statute -- is a question of fact. Daniel, *supra*, pg. 40. It is an affirmative

defense on which the Defendant had the burden of proof below. Allen v National Twist Drill and Tool Company, 324 Mich 660, 663, 37 NW2d 664 (1949). Where there is any evidence to sustain the Workers' Compensation Appellate Commission's (hereafter "WCAC") conclusion that Plaintiff's injury was not by reason of her intentional and willful misconduct under the statute, the Court's duty is to affirm. McMinn v C. Kern Brewing Co., 202 Mich 414, 168 NW2d 542 (1918); Day v Goldstar Dairy, 307 Mich. 383, 12 NW2d 5 (1943); Allen v National Twist Drill and Tool Company, 324 Mich. 660, 37 Nw2d 664 (1949); Daniel, *supra*, pg. 41.

The first Michigan Supreme Court case to interpret the language "intentional and willful misconduct" came almost immediately after it was included in the Workers' Disability Compensation Act. Clem v Chalmers Motors Company, 178 Mich. 340, 144 NW 848 (1914). In that case, the award of benefits was allowed to stand because the conduct of the worker did not amount to misconduct within the meaning of the statute. In that case, the plaintiff was a roofer and he and his co-workers were called to come down off the roof for a group luncheon. A ladder was provided by the employer for going up and down from the roof, which all but the plaintiff used. He chose to descend the roof by climbing down a rope instead, and fell to his death. After reasoning that the plaintiff's actions were not inherently dangerous given his livelihood and the fact that the rope was indeed long and secure enough to have gotten him safely to the ground, had things gone as planned, this Court stated:

"Is that such intentional and willful misconduct as to defeat compensation under the act? There is scarcely a healthy, wide awake 10 year old boy who does not frequently take a greater chance and without harm. For a man accustomed to physical toil, judged by what is occurring daily, it cannot be said that such an act should be characterized as intentional

and willful misconduct within the meaning of the statute.
The allowance of the claim is affirmed.” *Id* pg. 345-346.

The Court in Clem, *supra* was faced with conduct which was possibly foolish, and neither expected or encouraged by the employer, but, falling within the realm of negligence, rather than intentional or willful misconduct, benefits were not to be precluded. Like the plaintiff in Clem, *supra*, Ms. Brackett in the instant case made a choice, and just as the man in Clem, *supra*, reasonably judged he could descend the roof by rope without serious consequence, Ms. Brackett reasonably judged, based on the information given by her supervisor, that she could miss the work function without injury or other consequence beyond forfeiting a day’s pay. Therefore, as in Clem, *supra*, her decision to proceed cannot be characterized as intentional and willful within the meaning of the statute simply because more serious, unexpected consequences occurred.

Eighty-nine years after Clem, *supra*, the Court in Daniels, *supra*, made a few other things very clear about the interpretation of Section 305, consistent with its treatment over the decades. First, it confirms that the question posed by that statutory section is one of fact. *Id* pg. 40-41. Second, it reasserts the rule first established in Clem, *supra*, that “intentional and willful misconduct” is to be distinguished from acts of negligence and gross negligence, and that benefits are awarded despite Section 305 where an employee is injured through his or her own fault. *Id* pg. 44-45. Third, it reaffirms that conduct leading to injury which is quasi-criminal or done in the face of a known danger and with wanton disregard of the consequences, is intentional and willful misconduct. *Id* pg. 45-46, citing Fortin v Beaver Coal Co., 217 Mich. 508, 510, 187 NW 352 (1922). And finally, the Court in Daniel, *supra*, acknowledged that even where an injury occurs in violation of a work rule, Section 305 does not operate to preclude benefits if that rule is

not one that is enforced by the employer. *Id* pg. 46, citing Rayner v Sligh Furniture Company, 180 Mich. 168, 146 N.W. 665 (1914).

In the instant case Plaintiff Brackett's decision to not attend the Martin Luther King Day function at work does not fall into any of the categories of misconduct which this Court in Daniel, *supra*, found prohibited under Section 305. It cannot be seriously argued that missing the holiday event was a quasi-criminal act. Nor does this action fall into the category of proceeding in the face of a known danger with wanton disregard for the consequences, where Ms. Brackett first discussed her intended actions with her direct supervisor and learned that the consequence of her non-attendance would be to forfeit a day's pay, a consequence she was able to handle without injury. Unlike the prior cases in which a "known danger/wanton disregard" test of misconduct has been applied (e.g., Larson v Lock Joint Pipe Co. 298 Mich 53, 298 NW 402 (1941); Waldbauer v Michigan Bean Co. 278 Mich 249, 270 NW 295 (1936); Shepard v Brunswick, 30 Mich App 307, 193 NW2d 370 (1971)), Plaintiff here faced no known threat of certain injury or death in choosing to miss the holiday function, and did not proceed with "wanton disregard" for the consequences.

To the contrary, the evidence suggests she struggled with this decision and did not make it lightly. She testified that the MLK holiday was important to her, and that its celebration by Focus Hope was one of the things that appealed to her when she was hired. (TT I, pg. 66) She valued her employment there. (TT I, pg. 34) She gave reasons based in principle and family history for not wanting to go to Dearborn. (TT I, pg. 35,63) She participated in discussions with her work team about the changed location, listened to the

consultant hired to analyze it, and discussed it in advance with her supervisor as well. (TT I, pg. 36 – 42)

Further, while in hindsight it may be said that Plaintiff nonetheless made a bad decision or exercised poor judgment in choosing not to attend the work event, such conduct merely connotes negligence on her part, and does not preclude the award of benefits under Daniel, *supra*.

Finally, in Daniel, *supra*, the Court found there was evidence of rule enforcement in the record supporting the WCAC's denial of benefits, and so the plaintiff's violation of the rules was not excused in that case. *Id* pg. 47. In the instant case, on the other hand, while there is indeed evidence that attendance at the MLK Day function was important and required (i.e., that it was a "rule"), the Defendant presented no evidence whatsoever that it was a rule that was enforced. To the contrary, the record reflects that this was the very first time the holiday event would not be held on the work premises, and that the decision by the CEO of Focus Hope to change the location to Dearborn was highly controversial, instigating open discussions among all of the workers, and even the hiring of a consultant, and that as many as 80 to 90 other workers chose not to attend it. (TT I, pgs. 36-40, 43,65) Defendant, whose burden it is to show benefits should be precluded under Section 305, proffered no evidence that any of the other 80 or 90 individuals who missed the event were demoted and repeatedly chastised, like Plaintiff, or even that they were docked a day's pay. Or even that any workers were ever disciplined in past years, when the holiday event was held on-site. To Ms. Brackett's knowledge, she was the only one against whom the employer chose to enforce their rule. (TT I, pg. 65)

Therefore, there is no element of this Court's decision in Daniel, *supra*, which applies to the facts of the instant case in such a way as would compel granting leave to appeal or otherwise changing the decisions below.

Incidentally, the requirement that an employer prove both a rule and its consistent enforcement in proving "intentional and willful misconduct" is important in carrying out the purposes of the Act, as well-expressed by Commissioner Ries in Barton v NWS Michigan, Inc. 2007 ACO #75:

"Section 305 was not written as a catch-all to preclude the payment of benefits under the Act whenever the employee has done something disagreeable as a rough means to gaze back on the industrial landscape and dispense some form of factory justice at a time when the employee is in the throes of injury...and the employer, at least relatively speaking, [is] blameless."

Take for example, the following hypothetical situation. Supervisor tells worker who's on his way to carry out a task, to use the front door, not the back door. This is not a rule, but a one-time instruction. Worker decides he can carry out the task faster if he uses the back door and does so. A bird flies into his head and pokes his eye out. The loss of the eye clearly arose out of the course of employment, and the instruction was not given because of dangerous birds, but the worker is clearly at fault for not following the instruction. Is he to be deprived benefits under the Act because he disagreed with his supervisor about the best way to complete his task, though he breached no clear rule or policy? That would be contrary to the intent of the Act and precedent interpreting "intentional and willful misconduct." E.g., Allen, *supra*; Waldbauer, *supra*; Rayner, *supra*.

What if using the back door was instead prohibited by a sign stating it is not to be opened during work hours? This factual scenario involving a "rule" would then seem to

favor application of Section 305, but what if the sign is consistently ignored, even by supervision, with no consequence for violation of the rule it expresses? What if the sign is used primarily for tic-tac-toe games rather than as a warning that disciplinary action will be taken against violators? Is the one-eyed worker who had no reason to believe the rule was meaningful or enforced guilty of prohibited conduct under Section 305? Of course not.

The usual course of daily business involves many do's and don'ts, should's and shouldn'ts which carry varying degrees of import and consequence depending on circumstances at the time, and the ordinary human judgment calls made in dealing with them are inherent in any workplace, and not within the realm of behaviors calling for benefit preclusion. The burden is on the employer to prove that the behavior amounts to something more excessive, i.e., "intentional and willful misconduct."

Furthermore, intentional and willful misconduct alone is not sufficient to preclude benefits for an injury under Section 305. The injury must also be "by reason of" the misconduct. In the instant case, it was neither Plaintiff's non-attendance at the MLK Day event, nor the company's enforcement of its attendance rule that caused Plaintiff's mental injury, and so benefits cannot be precluded under Section 305. The "danger" or discipline which she knowingly faced in her choice not to attend (i.e., being docked a day's pay) was not the thing that caused her injury. Plaintiff understood and accepted the direct and official consequences of her actions with no ill effect on her mental health. It was instead the indirect and unexpected actions of the employer over the following two weeks that caused her injury.

This Court in Daniel, *supra*, endorsed an interpretation of “by reason of” that means the injury “flowed directly and predictably from the misconduct as surely as night follows day.” *Id* pg. 43-44. Assuming, *arguendo*, that Plaintiff’s actions constitute misconduct at all, did her injury flow “directly and predictably” from her actions as surely as night follows day?” Clearly not. The direct and predictable result of missing the holiday event was to forfeit a day’s pay, and perhaps even to be reprimanded. What followed that, however – the removal of her trust-based job duties and the personal confrontations by a single individual who denigrated her trustworthiness and value as an employee in both a public and a private meeting -- was unexpected collateral damage causing the mental injury.

In this case, the employer is an institution purporting to stand for tolerance, sensitivity and civil liberties (see Defendant’s Mission Statement, quoted extensively in Defendant’s Application for Leave). The change of location for its holiday event was the subject of angst and debate among the workers, and as many as 80 to 90 other individuals did not attend it. Prior to missing the event, Plaintiff was a highly trusted colleague who handled thousands and even millions of dollars of donations with little supervision and no conflicts. Under all the circumstances, the demotion and attack on her character for standing on principles expressed by many others in the company was not direct and predictable as night follows day.

The evidence and case law therefore soundly supports the decisions of the Magistrate, the WCAC and the Court of Appeals, who all found that Plaintiff’s injury was not by reason of intentional and willful misconduct, within the meaning of MCL 418.305, and this Court’s duty is thus to deny leave or summarily affirm.

RELIEF REQUESTED

Wherefore, Plaintiff-Appellee requests this Honorable Court deny Defendant's Application for Leave to Appeal and/or summarily affirm the decisions below.

Respectively submitted by,

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& PETRULIS, P.C.**



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