

STATE OF MICHIGAN  
IN THE SUPREME COURT

ON APPEAL FROM THE WORKERS' COMPENSATION  
APPELLATE COMMISSION AND THE COURT OF APPEALS

PATRICIA D. BRACKETT,

Plaintiff-Appellee,

vs

FOCUS HOPE and ACCIDENT FUND  
INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.

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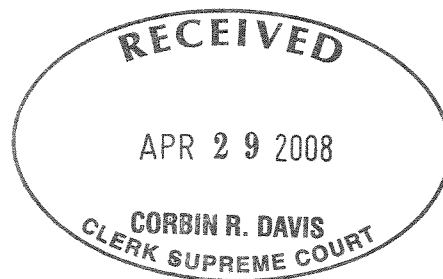
Supreme Court: 135375

Court of Appeals: 274078

Lower Court: WCAC 04-0165

135375  
Amicus by MAJ

AMICUS CURIAE BRIEF ON BEHALF OF  
MICHIGAN ASSOCIATION FOR JUSTICE



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STATEMENT OF QUESTION PRESENTED

DOES A FINDING OF "INTENTIONAL AND WILFUL MISCONDUCT" DEMAND MORE THAN THE MERE VIOLATION OF A WORK RULE, BUT INSTEAD A SHOWING OF WRONGFUL BEHAVIOR OR, AT THE VERY LEAST, AN ACT INTENTIONALLY DONE WITH KNOWLEDGE OF DANGER AND A WANTON DISREGARD FOR THE CONSEQUENCES?

*Amicus MAJ answers "YES."*

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Defendants-Appellants.

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**AMICUS CURIAE BRIEF ON BEHALF OF  
MICHIGAN ASSOCIATION FOR JUSTICE**

**STATEMENT OF INTEREST**

MICHIGAN ASSOCIATION FOR JUSTICE ["MAJ"] is a state-wide bar association, which recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in this state. This case presents an important issue of law, the resolution of which is important to workers' compensation jurisprudence in this state and which will have a direct and substantial impact upon those who suffer injuries in the workplace. MAJ believes that it can help this Court arrive at an appropriate and just interpretation in this case and others like it.

**STATEMENT OF FACTS**

(Parenthetical numbers preceded by "I" refer to pages of the transcript of proceedings held on February 18, 2004 in the early afternoon. Numbers preceded by "II" refer to pages of the transcript of proceedings held that same day in the late afternoon.)

Plaintiff Patricia Brackett commenced employment with defendant Focus Hope on January 16, 2001 (I 27), as a campaign assistant (I 31). She worked for the fundraising director, David Lepper (I 32).

Eleanor Josaitis, CEO and co-founder of Focus Hope (II 6), testified that Martin Luther King Day is extremely important to the organization, and that all employees are informed at the outset of their employment that attendance at Focus Hope's annual celebration of that day is mandatory (II 8-9). However, Ms. Brackett noted that the celebration had always been held on Focus Hope's own campus, where she worked (I 34).

However, when informed that the 2002 celebration was to be held in Dearborn, Ms. Brackett reacted adversely due to that city's history of racism and some experiences her own family members had there (I 35,63). She voiced these misgivings to her supervisor, Mr. Lepper, two or three weeks in advance (I 36-37,63-64). He told her that it was her choice whether or not to attend, but that she would be docked a day's pay if she did not attend (I 37). She accepted that penalty (I 37). Accordingly, Ms. Brackett did not attend, and she estimated that 80-90 other colleagues also skipped the event (I 42-43).

After the event, Ms. Josaitis voiced displeasure that Ms. Brackett had not attended, and ultimately docked her two days' pay, instead of one (I 43-45). In addition, Ms. Josaitis stated in front of others her belief that Ms. Brackett could no longer be trusted or be an ambassador for Focus Hope (I 48-49,72; II 11). Ms. Josaitis subsequently expressed in a letter her reduced confidence in Ms. Brackett's commitment to the organization, based upon her failure to attend the Martin Luther King Day celebration (Plaintiff's Exh #3). There was no indication on the record whether any other employee experienced the same recriminations or penalties as the result of his or her nonattendance.

Ms. Brackett became mentally disabled as the result of these circumstances, leading to the instant litigation. The magistrate, Workers' Compensation Appellate Commission ["WCAC"], and Court of Appeals all granted Ms. Brackett benefits. Each rejected defendant's contention that benefits were barred by the "intentional and wilful misconduct" statute of the Worker's Disability Compensation Act ["WDCA"]. MCL 418.305. This Court has now indicated its desire to hear oral arguments on that issue.

## STANDARD OF REVIEW

This Court reviews questions of law, including matters of statutory construction, de novo. *DiBenedetto v West Shore Hospital*, 641 Mich 394; 605 NW2d 300 (2000). However, questions as to whether a claimant's injury occurred by reason of intentional and wilful misconduct have generally been left to the finder of fact. *Daniel v Dep't of Corrections*, 468 Mich 34, 45-46; 658 NW2d 144 (2003).

## ARGUMENT

**A FINDING OF "INTENTIONAL AND WILFUL MISCONDUCT" DEMANDS MORE THAN THE MERE VIOLATION OF A WORK RULE, BUT INSTEAD REQUIRES A SHOWING OF WRONGFUL BEHAVIOR OR, AT THE VERY LEAST, AN ACT INTENTIONALLY DONE WITH KNOWLEDGE OF DANGER AND A WANTON DISREGARD FOR THE CONSEQUENCES.**

The WDCA precludes an award of workers' compensation for an employee "injured by reason of his intentional and wilful misconduct...":

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]

Defendant effectively suggests that any injury incurred as the result of the violation of an employer's rule triggers this statutory bar. As shall be demonstrated below, however, this contention ignores the entirety of the statutory language, the plain meaning of that language, prior case law interpreting the statute, and similar language employed in the WDCA. Defendant's proposed construction should be rejected accordingly.

In its application, defendant began its substantive argument with various definitions of "misconduct," all of which involved a degree of bad behavior. In that regard, defendant wrote of "improper conduct" or "wrong behavior," a "transgression" or "forbidden act," "a dereliction of duty" or "unlawful behavior," and "improper or wrong behavior."<sup>1</sup> Similarly,

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<sup>1</sup>Defendant's Application, at 10.

*The Oxford American Writer's Thesaurus* (Oxford University Press, 2004), equates the word "misconduct" with the following synonyms:

**misconduct** noun 1 *allegations of misconduct* WRONGDOING, unlawfulness, lawlessness, crime, felony, criminality, sin, sinfulness; unethical behavior, unprofessionalism, malpractice negligence, impropriety. [*Id.*, at 581]

These definitions and synonyms all involve a degree of wrongdoing, making it difficult to accept defendant's premise that *any* violation of an employment rule represents misconduct as a matter of law.

As noted by this Court in *Hammons v City of Highland Park Police Dep't*, 421 Mich 1, 14, n20; 364 NW2d 575 (1985), "misconduct" traditionally required some element of culpability or wrongdoing, typically a "quasi-criminal" act:

We agree with Justice Souris. The term "misconduct" suggests culpability or wrongdoing. The actions of a person whose mind is impaired by a profound emotional disorder and extreme depression are not the product of a free will, of unfettered choice, and hence are not voluntary or intentional in the sense that the term "intentional and wilful misconduct" is used in the act.

Professor Larson has written:

"The modern rule is that violation of a statute is not wilful misconduct per se. There must be the intentional doing of something of a quasi-criminal nature, either with knowledge that it is likely to result in serious injury, or with a wanton disregard of probable consequences.

"A striking illustration of the relation between the statutory offense and the compensation defense is afforded by the decision in *Day v Gold Star Dairy* [307 Mich 383; 12 NW2d 5 (1943)], in which the claimant, having been involved in a collision resulting from his attempt to pass a truck at the crest of a hill on a wet day, was convicted of reckless driving by a jury. Nevertheless, his award of compensation was affirmed under the Michigan statute making wilful and intentional misconduct a defense. The court held that the compensation department was entitled to determine for itself whether the claimant's conduct was merely a high degree of

negligence as distinguished from wilful and intentional misconduct." 1A Larson, Workmen's Compensation Law, § 35.30.

More recently in *Daniel v Dep't of Corrections*, 468 Mich 34, 45; 658 NW2d 144 (2003), the Court wrote:

However, this Court has held that benefits are precluded under the statute where an employee was injured by conduct of a quasi-criminal nature. *Fortin v Beaver Coal Co*, 217 Mich 508, 510; 187 NW 352 (1922). *Fortin* described "quasi-criminal" conduct as "involving the intentional doing of something with knowledge that it is dangerous and with wanton disregard of consequences...." *Id.*

Cases in this state in which the misconduct statute has been successfully applied have also drawn this type of line, often based upon the idea (whether so-characterized or not) of quasi-criminal behavior -- "the intentional doing of something with knowledge that it is dangerous and with wanton disregard of consequences".

One need only examine the line of cases cited by defendant on pages 10 and 11 of its application to see that this is true. Defendant cites to *Daniel, supra* [sexual harassment of a co-employee], *Walbauer v Michigan Bean Co*, 278 Mich 249; 270 NW 285 (1936) [entering a storage bin the employee knew contained poisonous gas], *Shepard v Brunswick Corp*, 36 Mich App 307; 193 NW2d 370 (1971) [failing to wear a required respirator mask near vats of intoxicant and becoming addicted as a result], as examples of misconduct. In each of these cases, the employee proceeded with either clearly wrongful behavior or dangerous conduct deliberately undertaken without regard for the consequences. In other words, each involved quasi-criminal activity.

It is incongruous at best to suggest that missing a celebration, after previously discussing it with a supervisor and agreeing to a minor penalty in exchange, belongs in the same class of cases with sexual harassment, subjection to poison gas, and addiction caused by intentional exposure to intoxicants. The latter acts have a wrongful or improper element to them that the instant plaintiff's actions clearly lacked.

Consequently, defendant's formulation of the issue assumes too much. Defendant writes, "But, the only *statutory* question is: Is it 'misconduct?' The question is not: "How *bad* is the misconduct?"<sup>2</sup> What defendant fails to grasp is that an action must reach a certain level of "badness" before it becomes misconduct. In other words, the nature of the act is considered *before* that act is deemed to represent misconduct, not after.

Furthermore, determining whether a given action constitutes "misconduct" is only a part of the analysis. Defendant is wrong in stating that "the statute requires only 'misconduct.'"<sup>3</sup> The statute actually requires "*intentional and wilful* misconduct." MCL 418.305 (emphasis supplied). The addition of the words "intentional" and "wilful" must mean that more than mere misconduct is required.

The dictionary defines "intentional" as "done by intention or design." *Merriam-Webster's Collegiate Dictionary* (11<sup>th</sup> Ed, 2003), at 651. In other words, an intentional act must, obviously, be intended. However, the legislature also used the same word "intentional" in another provision of the WDCA, the intentional tort exception to the exclusive remedy provision. The intentional tort exception and the misconduct statute essentially "bookend" the WDCA.

Section 131(1) of the WDCA makes workers' compensation the sole remedy an injured worker may pursue against his or her employer, but then makes an exception for an "intentional tort":

The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully

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<sup>2</sup>Defendant's Application, at 12 (emphasis in the original).

<sup>3</sup>Defendant's Application, at 14.

disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law. [MCL 418.131(1)]

The two provisions, §131(1) and §305, are the statutory “flip side” of each other. The former removes an employer from the protections of the act, while the latter has the same impact for an employee. The dichotomy is obvious.

It is also played out in the nature of the showing each provision requires. The legislature’s definition of an “intentional tort” [actual knowledge that an injury is certain to occur and wilful disregard of that knowledge] corresponds well to quasi-criminal behavior which constitutes “intentional and wilful misconduct” [an act done with knowledge that it is dangerous, with wanton disregard of the consequences]. “The use of parallel language, of course, calls for a parallel construction.” *Central States, Southeast v C J Rogers Transportation Co*, 544 F Supp 308, 313 (ED Mich, 1982). Where each provision plays a similar role (albeit for a different party), and each uses similar language, similar constructions are only appropriate. That being so, not just any intentional tort will prevent an employer from claiming the protections of the WDCA, and this Court should hold that not just any misconduct will stop an employee from taking advantages of that Act’s protections. Instead, only “quasi-criminal” behavior should have that effect. This proposed construction is fully consistent with the history underlying the enactment of the provision itself.

The misconduct provision dates back to the institution of the WDCA itself, and has remained essentially unchanged since 1914. *Daniel, supra*, at 41. In *Day v Gold Star Dairy*, 307 Mich 383, 390-391; 12 NW2d 5 (1943), the Court quoted with approval the following language from *McMinn v C Kern Brewing Co*, 202 Mich 414, 423; 168 NW2d 542 (1918), recounting the circumstances of its enactment as follows:

“We do not find that any workmen's compensation law except that of Michigan contains the phrase ‘intentional and willful misconduct.’ Many of the acts use the term ‘serious and willful

misconduct.' Some of them seem to use the term 'serious misconduct,' and others the term 'willful misconduct.' The original bill as introduced in the Michigan Legislature at the First Extra Session of 1912 contained the phrase 'serious and willful misconduct.' It was amended in the House by striking out the word 'serious' and inserting in lieu thereof the word 'intentional.' See House Journal, First and Second Extra Sessions 1912, page 74; Senate Journal, First and Second Extra Sessions 1912, page 99 et sequitur; Senate Journal, First and Second Extra Sessions 1912, page 131; House Journal, First and Second Extra Sessions 1912, page 142. It would seem that the Legislature deliberately inserted the word 'intentional' in place of the word 'serious,' and it seems to the board that 'intentional and willful misconduct' ought to mean something more than 'serious and willful misconduct.'

As this narrative demonstrates, the word "intentional" should be construed to mean more than merely "serious," while defendant's construction does not give it even the latter interpretation.

The legislature's additional use of the word "wilful" in the misconduct statute further supports *amicus* MAJ's proposed construction. "Wilful" is defined as follows:

1: obstinately and often perversely self-willed <a stubborn and ~ child> 2: done deliberately : INTENTIONAL <~disobedience.  
[*Merriam-Webster's Collegiate Dictionary, supra*, at 1433]

Clearly, the legislature must have meant something other than "done deliberately" by adding "wilful" to the statute, since that was already taken care of by the "intentional" requirement. "Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

In any event, "wilful" should be given its primary meaning – "obstinately and often perversely self-willed." The same concept underlies the use of the "quasi-criminal" standard, defined as conduct "involving the intentional doing of something with knowledge that it is dangerous and with wanton disregard of consequences..." *Daniel, supra*, at 45. This is surely obstinately or perversely self-willed behavior.

This definition also fits in well with the case law discussed above. Someone who knew he could be disciplined for sexual harassment but still did it [*Daniel*], an individual aware that he could be killed if he entered a vat containing poisonous gas but still did so [*Waldbauer*], and an employee who knew he could become addicted to a substance he worked around if he did not wear a mask but still didn't [*Shepard*] all operated in an obstinately and perversely self-willed fashion. Each was therefore guilty of intentional and wilful misconduct.

By contrast, an individual who takes a principled stand in skipping a required celebration, but who does so only after discussing it with her immediate supervisor and after agreeing to a penalty in exchange for her nonattendance, has not acted that way at all. The line to be drawn is clear.

By using the terms it did, and by modifying "misconduct" with two words that must necessarily add something to the statutory phrase "*intentional and wilful misconduct*," the legislature should be deemed to have required more than any mere rule violation to trigger the terms of MCL 418.305. This Court should so hold.

In addition, this Court should note that, even if a mere rule violation would suffice to support a finding of intentional and wilful misconduct, case law mandates that the rule be one that was strictly enforced. *Allen v Nat'l Twist Drill & Tool Co*, 324 Mich 660, 664; 37 NW2d 664 (1949); *Rayner v Sligh Furniture Co*, 180 Mich 168; 146 NW 665 (1914). As the proponent of the misconduct defense, it should be defendant's burden to prove all elements of said defense. *Brown v Beckwith Evans Co*, 192 Mich App 158, 167-168; 480 NW2d 311 (1992); *Aquilina v General Motors Corp*, 403 Mich 206, 211, n2; 267 NW2d 923 (1978). Consequently, the misconduct defense should not be entertained or applied in the absence of such proofs.

**RELIEF**

WHEREFORE *Amicus Curiae* MICHIGAN ASSOCIATION FOR JUSTICE respectfully requests that this Honorable Court adopt its proposed construction of the statutory phrase "intentional and wilful misconduct," and affirm the decision of the Court of Appeals and WCAC accordingly.

Respectfully submitted,

MICHIGAN ASSOCIATION FOR JUSTICE



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