

STATE OF MICHIGAN
COURT OF APPEALS

TONY J. DANIEL,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

FOR PUBLICATION

November 2, 2001

9:05 a.m.

No. 224423

WCAC

LC No. 99-000063

Updated Copy

January 4, 2002

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

R.J. DANHOF, J.

Plaintiff Tony J. Daniel appeals by leave granted from the December 9, 1999, opinion and order of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's award of worker's compensation benefits. We reverse the WCAC's order.

I. Facts and Proceedings

Plaintiff began his employment as a probation officer with defendant Department of Corrections in November 1984. As part of his employment, plaintiff supervised convicted felons to ensure compliance with probation orders. Several times a month plaintiff was required to attend probation violation hearings held in the circuit court, where he would interact with the defense attorneys representing the probationers.

According to the record, one of the incidents giving rise to the instant proceedings occurred on August 30, 1994, when plaintiff attended the Kent Circuit Court for a parole violation hearing. On that day, plaintiff made an inappropriate remark to the female public defender representing the probationer. According to the attorney, plaintiff asked her, "[d]o you want to f..k?" When the attorney rebuffed plaintiff's advances, he told her he was married, and if they had an affair it would have to be discreet. Later that day, plaintiff sent the attorney a note in court, telling her that she would have to lose ten pounds before an affair could begin.

On February 10, 1995, plaintiff appeared in court for another parole violation hearing with the same female attorney. According to the attorney, plaintiff made reference to his earlier sexual advance in August 1994, and renewed his request for an affair. Specifically, plaintiff told

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the attorney, "All I told you was that you had to lose ten pounds." Plaintiff also told the attorney, "you want me, you know you want me."

The attorney subsequently complained about plaintiff's unprofessional conduct to his immediate supervisor, Jayne Price, in February 1995. Three other female attorneys followed suit, also alleging sexual harassment by plaintiff. After notifying plaintiff of the allegations, Price conducted an investigation by interviewing the attorneys and other witnesses. Plaintiff categorically denied each and every allegation of sexual harassment. After conducting her investigation, Price recommended to her area manager, Lois Patten, that a disciplinary conference be held regarding five separate counts of sexual harassment. These counts encompassed the August 30, 1994, incident, the February 10, 1995, incident, as well as allegations that plaintiff sexually harassed two other female attorneys on separate occasions in 1994.¹

A disciplinary conference was held on June 20, 1995. Present at the conference were plaintiff, a representative from his union, Price, and probation manager Jim Newell, who presided over the conference. On the advice of his union representative, plaintiff did not testify at the disciplinary conference, but continued to deny sexually harassing the attorneys. Following the conference, Newell made the following observations in a memorandum to Patten dated June 21, 1995:

After thoroughly reviewing the investigator's report, complainants' statements, and employee Daniel's response to questions presented [to] him by the investigator, it is my conclusion that there is a strong basis on which to conclude that the [Michigan Department of Corrections] Work Rules were violated in the manner described in all five counts.

For reasons unclear from the record, plaintiff was subsequently disciplined for only two of the counts of sexual harassment with which he was originally charged. On July 24, 1995, plaintiff was notified in a memorandum by regional administrator Noreen Sawatzki that he was suspended for ten days "due to [plaintiff's] violation of The Department of Corrections Work Rules number 9 and number 12 on August 30, 1994, and February 10, 1995."²

Plaintiff returned to work in August 1995 following his ten-day suspension without pay. In January 1996, plaintiff began treatment with psychologist Daniel DeWitt, Ph.D., and was diagnosed as suffering from depression. Plaintiff thereafter took a leave of absence from work

¹ Plaintiff was alleged to have told one female attorney that he was attracted to Caucasian women, and that he was turned on by a woman's thighs. Plaintiff also asked the attorney if she would date a black man. Plaintiff was also alleged to have asked another attorney, who was pregnant at the time, if she was having a boy or girl. When she indicated that she thought she was having a girl, plaintiff allegedly told her "too bad, a boy means you had deep penetration."

² According to the record, Michigan Department of Corrections Work Rule 9 prohibits "[s]peech, action, gesture or movement that causes physical or mental intimidation, humiliation, or harassment." Michigan Department of Corrections Work Rule 12 prohibits "conduct of an employee which may adversely affect the reputation of the Department"

beginning February 2, 1996.³ During trial, plaintiff testified that he could not work because he felt that his life was "out of control." Plaintiff attributed his depression to Price's not being supportive of him following the suspension and to the "strained" atmosphere he experienced with the attorneys that had accused him of sexual harassment.

In June 1996, plaintiff filed a claim for worker's compensation benefits, alleging that he incurred a mental disability arising from the disciplinary proceedings. After four days of trial, the worker's compensation magistrate made the following observations:

It is clear to me that [p]laintiff's problems started with his discipline for the improprieties of which he was accused. It is difficult to have much sympathy for this claimant, since he brought these troubles on himself by his own misconduct. But compensation, like the rain, falls on the just and the unjust alike.

The magistrate also found that plaintiff's allegations that he was harassed by the female attorneys following his ten-day suspension were not credible. Finding that "[p]laintiff's discipline, and post-discipline employment events up to February 2, 1996, contributed in a significant manner to [plaintiff's] development of a disabling condition of depression, anxiety, and uncontrolled anger," the magistrate awarded benefits to plaintiff.

On appeal to the WCAC, defendant argued as an affirmative defense that plaintiff was precluded from recovering benefits because he was injured by reason of his intentional and wilful misconduct. See MCL 418.305. The WCAC, in a 2 to 1 decision, agreed, holding that although plaintiff's mental disability arose out of and in the course of his employment, MCL 418.301(1), he should not receive compensation because his misconduct prompted the disciplinary proceedings that caused his injury. Plaintiff challenges the WCAC's determination that § 305 operates to bar his claim for worker's compensation benefits.

II. Standard of Review

This Court's review of a decision by the WCAC is limited. *Maxwell v Procter & Gamble*, 188 Mich App 260, 265; 468 NW2d 921 (1991). In the absence of fraud, we must consider the WCAC's findings of fact conclusive if there is any competent evidence in the record to support them. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). However, questions of law in a worker's compensation case are reviewed de novo and the WCAC's decision may be reversed if it was based on erroneous legal reasoning or the wrong legal framework. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000); MCL 418.861; MCL 418.861a(14). Questions of statutory construction are reviewed de novo. *Adams v Linderman*, 244 Mich App 178, 184; 624 NW2d 776 (2000).

³ According to the record, DeWitt authorized plaintiff to return to work in March 1996, but not to his same job because contact with his accusers would exacerbate his symptoms. Defendant refused to comply with that request.

III. Analysis

The Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*, provides compensation for persons suffering injuries arising out of and in the course of employment. MCL 418.301. Unquestionably, the act is to be "liberally construed to grant rather than deny benefits." *DiBenedetto, supra* at 402 (citations and internal quotation marks omitted). However, MCL 418.305 provides: "If the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act."

Defendant in this case concedes that plaintiff's injury arose out of and in the course of his employment. However, the WCAC erred in its interpretation of MCL 418.305. There is no question that plaintiff acted voluntarily and that he was disciplined because of his acts. However, the connection between the acts and the injury was too attenuated for the injury to have occurred "by reason of" his acts, and his behavior did not comprise "intentional and wilful misconduct" as contemplated by MCL 418.305 and defined by the courts.

The WCAC found that plaintiff's injuries resulted from the discipline imposed by his employer. It then went on to determine that, because plaintiff's own alleged act triggered the discipline, MCL 418.305 precluded awarding him benefits. The WCAC interpreted "by reason of" to extend to the ultimate source of the injury. Basically, this interpretation means that although plaintiff's act, by itself, did not result in injury (as it might have if his alleged target had retaliated physically), the discipline imposed should have been foreseen and was an obvious and expected outcome of the act, and it either merged with the act or formed an unbroken link between the act and the injury. The WCAC made only conclusory statements without factual support that the discipline was foreseeable and inevitable, and it did not discuss whether foreseeability should be determined by the application of either an objective or a subjective standard. The WCAC repeatedly asserted that plaintiff knew he would be disciplined. However, plaintiff has insisted since 1995 that he did nothing wrong, that he made no offensive comments. His victims allege that he made offensive comments multiple times, but until 1995, plaintiff had suffered no adverse consequences from his behavior. The WCAC has the power to engage in qualitative and quantitative analysis of the whole record and make independent findings of fact, but in this case *nothing* in the record supports its finding either subjectively or objectively. *Mudel, supra* at 702-703.

Whether plaintiff obviously would be disciplined is simply not the point. If plaintiff had not been an employee, his act would not have resulted in injury. He was injured solely because of his status as an employee; clearly plaintiff was not injured at the time of his act. The WCAC found that plaintiff's injury was the "direct result of his intentional and wilful misconduct" and that plaintiff's injury "naturally flow[ed] from that wrongful conduct." But the same could be said about any of the cases where workers' "horseplay" or escalating aggression led to injuries, such as *Crilly v Ballou*, 353 Mich 303; 91 NW2d 493 (1958), and *Andrews v General Motors Corp*, 98 Mich App 556; 296 NW2d 309 (1980). In both cases, compensation was granted because the question of "who started it?" was inapposite to the intention of the WDCA. *Crilly, supra* at 322-324; *Andrews, supra* at 559-561. We thus find in this case that plaintiff's injury did not occur by reason of his conduct.

Furthermore, we do not find plaintiff's acts rise to the level of "intentional and wilful misconduct" contemplated by MCL 418.305. A phrase that has acquired a unique meaning at common law is interpreted to have the same meaning when used in a statute dealing with the same subject. *Pulver v Dundee Cement Co*, 445 Mich 68, 75; 515 NW2d 728 (1994). The Legislature is presumed to act with knowledge of appellate court statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991); *Glancy v Roseville*, 216 Mich App 390, 394; 549 NW2d 78 (1996), aff'd 457 Mich 580; 577 NW2d 897 (1998). Thus, silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction. *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989); *Glancy, supra* at 394-395. The language of the current MCL 418.305 has remained virtually unchanged since its original enactment in 1912. See 1912 (1st Ex Sess) PA 10, part II, § 2. It is logical to conclude that the Legislature intended to adopt the judiciary's interpretation of the requirement. *Pulver, supra* at 75.

In this context, "intentional and wilful misconduct" is not defined by the statute, but the phrase has been interpreted in this state to encompass acts of "gross and reprehensible nature," "the type of case where a claimant arms himself with a gun, knife or block of wood and pursues a fellow employee, or an employer, with the apparent ability to inflict harm," "moral turpitude, which is defined as an act of baseness, vileness, or depravity," and "the intentional doing of something with knowledge that it is dangerous and with a wanton disregard of consequences." *Crilly, supra* at 327; *Andrews, supra* at 560-561 (citations and internal quotation marks omitted); *Fortin v Beaver Coal Co*, 217 Mich 508, 510; 187 NW 352 (1922). Plaintiff's alleged behavior, although voluntary, crude, and unprofessional, did not rise to this level. The WCAC found plaintiff in violation of the Michigan Civil Service Rules, but mere violation of a work rule is not enough, especially if the rule was not strictly enforced. *Allen v Nat'l Twist Drill & Tool Co*, 324 Mich 660, 664; 37 NW2d 664 (1949); *Michalski v Central Window Cleaning Co*, 292 Mich 465, 466-467; 290 NW 870 (1940); see also *Shepard v Brunswick Corp*, 36 Mich App 307, 311; 193 NW2d 370 (1971). Plaintiff's history of conduct in this case indicates that the rule was not strictly enforced and there are no facts in the record indicating otherwise.

Finally, we note that *Calovecchi v Michigan*, 461 Mich 616; 611 NW2d 300 (2000), does not control the instant appeal because it did not interpret MCL 418.305. However, the decision in that case does have relevance to the present case. In *Calovecchi*, the plaintiff, a state trooper, was the subject of an internal investigation arising from allegations that he assaulted his wife and drew a gun on his stepson. *Calovecchi, supra* at 618. The plaintiff subsequently alleged that he suffered a mental disability after defendant took away his badge and placed him on administrative leave. *Id.* at 620. The allegations against the plaintiff were then dismissed for unstated reasons. That fact distinguishes *Calovecchi* from the present case, because here, as the WCAC succinctly noted, "plaintiff actually did it." That distinction is significant, not because the two cases are *different*, but because they are *similar*. Under the WCAC's reasoning, a juxtaposition of these two cases would mean that when a plaintiff has suffered a mental injury because of an employer's disciplinary proceedings, if the charges are dismissed the worker may collect compensation. If they are not, the worker is denied compensation because of wilful misconduct. Because the employer determines whether the plaintiff was guilty of the charges, the WCAC's decision encourages a finding of guilt, especially regarding an unsympathetic or "difficult" employee. An employer may even discipline less

tactfully, knowing that an injured employee can be denied compensation because the injury can ultimately be traced to the employee's own act. The focus thus shifts from the cause of the injury to the guilt of the employee, the appropriateness of the discipline, and the employee's reaction to it. This improperly forces the consideration of fault and other issues the WDCA was designed to avert.

The WCAC erred in its conclusion because "by reason of" does not extend to the origin of the chain of causation but only to the direct cause of the injury. The WCAC also erred in applying MCL 418.305 because plaintiff's acts, as they appear in the record, do not amount to "intentional and wilful misconduct" as contemplated by the statute. Thus, even if the WCAC had found evidence that the rule plaintiff violated was strictly enforced, and that plaintiff's conduct rose to "intentional and wilful misconduct" as defined by the courts, the statutory requirement of causation is still not met. Any other interpretation in this case contravenes the purpose and spirit of the WDCA.

Reversed.

Neff, P.J., concurred.

/s/ Robert J. Danhof

/s/ Janet T. Neff