

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.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. By repeatedly sexually harassing female attorneys, plaintiff engaged in intentional and wilful misconduct. Moreover, plaintiff's resulting mental disability flowed directly and predictably from his behavior. Allowing "serial sexual harasser[s]" to profit from their misdeeds is an untenable result not contemplated by the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*¹ Because MCL 418.305 operates to bar plaintiff's claim for worker's compensation disability benefits, I would affirm.

I. The Worker's Compensation Appellate Commission's Decision

In a well-reasoned, seven-page written decision, the Worker's Compensation Appellate Commission (WCAC) concluded that plaintiff's reprehensible misconduct barred his claim for worker's compensation disability benefits. The WCAC stated:

[C]ommon sense dictates that cases of misconduct must undergo an additional evaluation. Justice cries out that a wrongdoer should not be able to profit from his wrongdoing, when he knows what he is doing is wrong and he knows what the consequences of being caught are going to be. In this case, there can be no doubt that plaintiff knowingly committed wrongful acts. He was found to be a serial sexual harasser. Sexual harassment is strictly forbidden by the

¹ The Worker's Compensation Appellate Commission characterized plaintiff as a "serial sexual harasser." In my view, granting worker's compensation disability benefits to plaintiff is contrary to the concept of holding an individual accountable for their misconduct.

Michigan Civil Service Rules. The magistrate in this case recognized that Mr. Daniel was a wrongdoer and due no sympathy, having "brought these troubles on himself by his own misconduct." In effect, Mr. Daniel suffered a self-inflicted injury.

It is therefore precisely in a case such as this that Section 305 of the Act should be applied. The rain may indeed, as the magistrate put it, fall on the "just and unjust alike," but as defendant points out, Section 305 puts up an umbrella to prevent compensation from falling on this particular "unjust" claimant. . . .

Plaintiff's injury . . . was the direct result of his intentional and wilful misconduct. We therefore agree with defendant that Section 305 operates to deny plaintiff benefits in this case. This is not a case of fault, neglect or inattention—matters the section was not designed to address. It is instead a case of an individual knowingly engaging in misconduct – behavior strictly prohibited by employer rule distributed to all employees. This is especially important in a mental disability setting. Plaintiff knew what he was doing was wrong, yet he did it anyway, in a consistent and repeated pattern over a long period of time, knowing full well what the consequences of being caught would be. His own intentional wrongdoing brought on the subsequent "injury" Section 305 bars recovery in this case. [Citation omitted.]

II. MCL 418.305

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.

The predecessor of § 305 was initially introduced in 1912, as part of the Legislature's original enactment of our state's worker's compensation legislation. See 1912 (1st Ex Sess) PA 10, part II, § 2.² Professor Larson, in his treatise on worker's compensation law, has noted that Michigan is one of the few states that has enacted and retained this statutory defense to a claim for worker's compensation benefits. 2 Larson, *Worker's Compensation Law*, § 34.01, pp 34-1—34-2. The Legislature enacted MCL 418.305 in an apparent attempt to prevent employees from using the worker's compensation act as a vehicle for benefiting from their own intentional misconduct. See, generally, *Beauchamp v Dow Chemical Co*, 427 Mich 1, 12-13; 398 NW2d 882 (1986), superseded by statute as stated in *Temple v H J Heinz Co*, 180 Mich App 138, 139; 446 NW2d 869 (1989).

² The language of the legislation enacted in 1912 is virtually identical to that of MCL 418.305, providing:

If the employe[e] is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act.

As our Supreme Court has observed, the questions whether an injury arose out of and in the course of employment and whether an employee was injured by reason of his intentional and wilful misconduct are closely "interwoven." *Clem v Chalmers Motor Co*, 178 Mich 340, 344; 144 NW 848 (1914). Consequently, "it . . . follow[s] that the intentional and wilful misconduct which operates to debar the employee from . . . compensation which he might otherwise receive refers to such misconduct within the scope of his employment." *Bischoff v American Car & Foundry Co*, 190 Mich 229, 231; 157 NW 34 (1916) (internal quotation marks omitted).

In the instant case, we are called on to decide whether the WCAC correctly concluded that plaintiff's sexually harassing conduct was "intentional" and "wilful" to the extent that § 305 precludes him from recovering compensation for his work-related mental disability. Whether an individual engaged in wilful and intentional misconduct is a factual determination. *Day v Gold Star Dairy*, 307 Mich 383, 390-391; 12 NW2d 5 (1943); *McMinn v C Kern Brewing Co*, 202 Mich 414, 429; 168 NW 542 (1918); *Lopucki v Ford Motor Co*, 109 Mich App 231, 242; 311 NW2d 338 (1981). In *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691; 614 NW2d 607 (2000), our Supreme Court recognized that the Legislature, through MCL 418.861a(14), has provided the WCAC with authority to make factual findings. *Mudel, supra* at 711-712. In the instant case, both the magistrate and the WCAC concluded that plaintiff engaged in misconduct by sexually harassing female attorneys that he came in contact with as part of his employment. The WCAC, in its legislatively authorized " 'qualitative and quantitative' analysis of the 'whole record,' " *id.* at 699,³ further found that plaintiff's misconduct was wilful and intentional. The WCAC's factual finding regarding the wilful and intentional nature of plaintiff's misconduct is conclusive and binding on this Court in the absence of fraud. *Id.* at 701.

In any event, a review of the record convinces me that the WCAC's conclusion that plaintiff engaged in wilful and intentional misconduct was well-grounded. Because MCL 418.305 does not define the words "wilful" and "intentional," it is proper for this Court to consult their dictionary definitions to ascertain their plain meaning. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994). *Random House Webster's College Dictionary* (2d ed, 1997) defines "wilful" as "deliberate, voluntary, or intentional." Similarly, "intentional" is defined as "done with intention or on purpose; intended."

In one of its earliest interpretations of the predecessor of § 305, our Supreme Court observed that "mere negligence, however great, is not wilful misconduct." *Fortin v Beaver Coal Co*, 217 Mich 508, 510; 187 NW 352 (1922), citing *Gignac v Studebaker Corp*, 186 Mich 574; 152 NW 1037 (1915). However, Justice Weist, speaking for the Court, went on to make the following comments with regard to what constitutes wilful and intentional misconduct.

If . . . the conduct occasioning the injury is of a *quasi*-criminal nature, involving the intentional doing of something with knowledge that it is dangerous and with a wanton disregard of consequences, then it is intentional and wilful misconduct. [*Fortin, supra* at 510 (emphasis in original).]

³ Quoting MCL 418.861a(13).

Three decades later, our Supreme Court reiterated that an employee's injuries occasioned by his own wilful and intentional misconduct are not compensable, and further clarified the type of behavior that would invoke what is now § 305:

Excluded . . . under the terms of the statute are acts of such gross and reprehensible nature as to constitute intentional and wilful misconduct. This presents a situation of an entirely different character than that presented by the playful shove or the roundhouse punch, no matter how tragic may be the latter's unexpected results. And this exclusion of acts of a degree of moral turpitude, it will be observed, is by the legislature itself, not a judicial retrogression to principles of tort. Further than this in definition we do not attempt to go. The precise future line of demarcation will be marked out, in the traditional manner, by the case-to-case decisions. [*Crilly v Ballou*, 353 Mich 303, 327; 91 NW2d 493 (1958) (citation omitted).]

See also *Harrison v Tireman & Colfax Bump & Repair Shop*, 395 Mich 48, 50; 232 NW2d 274 (1975).

Moreover, in *Hammons v Highland Park Police Dep't*, 421 Mich 1, 14, n 20; 364 NW2d 575 (1984), our Supreme Court, by way of footnote, indicated that § 305 will not apply to bar a claimant's recovery of worker's compensation benefits where the individual's actions are "not the product of a free will" because such actions are not "voluntary or intentional in the sense that the term 'intentional and wilful misconduct' is used in the act." *Id.*, citing MCL 418.305.

In my view, plaintiff's reprehensible misconduct in sexually harassing female attorneys in the workplace was undoubtedly wilful and intentional as contemplated by § 305. Plaintiff was disciplined for making inappropriate sexual advances in the workplace on two separate occasions.⁴ Plaintiff, a veteran probation officer with the Michigan Department of Corrections, is hard-pressed to assert that he did not know such behavior was prohibited by defendant, or that he was unaware he was subjecting himself to potential serious consequences.⁵ The WCAC found that plaintiff sexually harassed women on multiple occasions, acting with absolute disregard for the consequences of his actions. Accordingly, though I recognize that § 305 has not been applied in the present factual context,⁶ in my opinion invocation of the provision is

⁴ As the majority observes, plaintiff was alleged to have engaged in several more instances of misconduct; however, for reasons unclear from the record, he was disciplined for only two.

⁵ The majority concludes that "[p]laintiff's history of conduct in this case indicates that the [Michigan Civil Service Rules regarding sexual harassment] w[ere] not strictly enforced" *Ante* at _____. Neither the magistrate nor the WCAC made any factual findings about the enforcement of the rules. Consequently, I believe it is inappropriate for the majority to make a presumption concerning defendant's enforcement, or lack thereof, of the civil service rules on sexual harassment. *Mudel, supra* at 701 (holding that judicial review of record in worker's compensation case is not "a highly fact-intensive examination").

⁶ The vast majority of cases where our Courts have considered the applicability of § 305 and its predecessors involve situations where an individual suffered a work-related physical injury. See, (continued...)

warranted here, where plaintiff voluntarily engaged in reprehensible conduct and incurred a mental disability as a consequence.

Further, I respectfully disagree with the majority's contention that plaintiff was not "injured *by reason of* his intentional and wilful misconduct" to the extent that compensation is barred under MCL 418.305. (Emphasis supplied). Considering the question of causation, the WCAC found that "[p]laintiff's injury . . . was the direct result of his intentional and willful misconduct," and that "[p]laintiff's] own intentional wrongdoing brought on the subsequent injury" In a worker's compensation case matters of causation are factual determinations. See *Staggs v Genesee Dist Library*, 197 Mich App 571, 574; 495 NW2d 832 (1992); *Maxwell v Procter & Gamble*, 188 Mich App 260, 266; 468 NW2d 921 (1991). Whether an individual's wilful and intentional misconduct was responsible for a claimant's injury is also a question of fact. *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606, 609; 295 NW 331 (1940). Consequently, the WCAC's determination that plaintiff was injured by reason of his misconduct is a factual determination conclusive in this Court in the absence of fraud. *Mudel, supra*.

In my opinion, the WCAC's finding that plaintiff was injured by reason of his intentional and wilful misconduct is amply supported by record evidence. For example, Daniel DeWitt, Ph.D., plaintiff's treating psychologist, testified during his deposition:

In my interviews and sessions with [plaintiff], the precipitating causes of the depression appeared to be prolonged stress relating to accusations of sexual harassment brought against him and subsequent discipline and . . . a feeling that he was vulnerable to other accusations and this was an unresolved issue for the past year on the job.⁷

DeWitt went on to observe that "[p]laintiff's] depression was precipitated by work stress, specifically, the accusations and discipline for sexual harassment" Plaintiff also testified that he began to experience symptoms of depression during the period that the sexual harassment allegations were being investigated by his supervisor, Jayne Price, and that these feelings intensified when he returned to work and experienced strained relations with the attorneys that leveled the allegations as well as his supervisor. Accordingly, the record is clear that plaintiff was not "injured solely because of his status as an employee." *Ante* at _____. Rather, plaintiff can

(...continued)

e.g., *Waldbauer v Michigan Bean Co*, 278 Mich 249; 270 NW 285 (1936); *Finney v Croswell*, 220 Mich 637; 190 NW 856 (1922); *Riley v Mason Motor Co*, 199 Mich 233; 165 NW 745 (1917); *Oniji v Studebaker Corp*, 196 Mich 397; 163 NW 23 (1917); *Gignac v Studebaker Corp*, 186 Mich 574; 152 NW 1037 (1915); *Rayner v Sligh Furniture Co*, 180 Mich App 168; 146 NW 665 (1914); *Jendrus v Detroit Steel Products Co*, 178 Mich 265; 144 NW 563 (1913); *Andrews v General Motors Corp*, 98 Mich App 556; 296 NW2d 309 (1980); *Chester v World Football League*, 75 Mich App 455; 255 NW2d 643 (1977). But see *Trombley v Coldwater State Home & Training School*, 366 Mich 649, 660, 671; 115 NW2d 561 (1962).

⁷ By "unresolved issue" DeWitt was apparently referring to the grievance procedure instituted by plaintiff following his suspension in August 1995. The length and outcome of the grievance procedure is unclear from the record.

hold no one but himself accountable for his disability, because it was directly precipitated by his own wilful and intentional misconduct.

I am well aware that § 305 has traditionally found application in cases where an employee's work-related physical injury flowed directly and contemporaneously from his wilful and intentional misconduct. For example, in *Fortin, supra*, the decedent deliberately jumped across a coal pit and was hit by a piece of falling coal. By doing so, the decedent violated a state law prohibiting such action. *Fortin, supra* at 509. Similarly, in *Waldbauer v Michigan Bean Co*, 278 Mich 249; 270 NW 285 (1936), the decedent was killed when he knowingly and deliberately entered a grain bin containing noxious gas. Further, in *Bischoff, supra* at 232-233, the employee's hand was crushed when he climbed a crane, knowing that it was not part of his employment duties to do so. In all three cases, the Supreme Court concluded that the individuals were injured by reason of their wilful and intentional misconduct as contemplated by the statute. To the extent that § 305 has been applied in physical injury cases to bar compensation where such injuries arise "directly" from a claimant's wrongful acts, it may appear that § 305 is limited to such circumstances. However, I share the WCAC's view that § 305 is equally applicable in the present circumstances, where plaintiff's mental disability flowed directly from his misconduct.

A review of the record supports the WCAC's conclusion that plaintiff's sexual harassment "contributed" to his subsequent injury. *Eversman v Concrete Cutting & Breaking*, 224 Mich App 221, 228; 568 NW2d 387 (1997), rev'd on other grounds 463 Mich 86; 614 NW2d 862 (2000). Though plaintiff's injury did not arise contemporaneously from his misconduct, it cannot be disputed that his misconduct was the starting point for the resultant disciplinary proceedings that ultimately caused his injury. Had plaintiff not engaged in sexual harassment, he would not have been subjected to the disciplinary proceedings, and he would not have been suspended from his job. In my view, the disciplinary proceedings, from which plaintiff's mental disability arose, flowed directly and predictably from plaintiff's misconduct as surely as night follows day. In other words, the link between plaintiff's misconduct, the disciplinary proceedings, and his ensuing mental disability formed a continuous, unbroken chain of causation to the extent that § 305 applies to bar his claim for worker's compensation disability benefits.

Finally, I disagree with the majority's assertion that *Calovecchi v Michigan*, 461 Mich 616; 611 NW2d 300 (2000), "ha[s] relevance to the present case." *Ante* at _____. In my respectful opinion, the majority is ill advised to draw parallels between the instant case and *Calovecchi* regarding the applicability of § 305 where the issue whether § 305 applied to bar the plaintiff's claim for disability benefits was not raised in *Calovecchi* or considered by our Supreme Court. Further, the majority expresses several concerns about the potential effect the WCAC's interpretation of § 305 could have on Michigan's employers' discipline of their employees. In my view, a very troubling effect of the majority's decision today is that employers may refrain from disciplining their employees for fear of having to pay disability benefits if the employee suffers some type of disability resulting from disciplinary proceedings.

On the basis of the foregoing, I reject plaintiff's claim that § 305 does not apply to preclude his recovery of worker's compensation benefits. This Court should afford great deference to the WCAC's interpretation of a provision of the WDCA where it is "not clearly incorrect." *Rahman v Detroit Bd of Ed*, 245 Mich App 103, 117; 627 NW2d 41 (2001). Because

I am not persuaded that the WCAC's decision 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), I would affirm.

/s/ Peter D. O'Connell