

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

EUGENE MILLER,  
PLAINTIFF,

V

DOCKET #04-0132

GENERAL MOTORS CORPORATION,  
(GMPT SAGINAW GREY IRON),  
SELF INSURED,  
DEFENDANT.

APPEAL FROM MAGISTRATE AMBROSE.

JOHN I. TSIROS FOR PLAINTIFF,  
SCOTT C. STRATTARD AND BRUCE L. DALRYMPLE FOR DEFENDANT.

OPINION

WILL, COMMISSIONER

This matter was heard by Magistrate Ambrose on March 17, 2004. Plaintiff testified on his own behalf. Bill Savage, plaintiff's shop committeeman at large and Tereasa Miller, plaintiff's wife also testified for plaintiff. Defendant presented lay testimony from James Kapala, plaintiff's supervisor and Gordon Koester, defendant's supervisor of Labor Relations.

Expert testimony for plaintiff came by depositions from Bencot Talisilla, M.D. and Marsha Schroeder, MA. Defendant presented the deposition of Harvey Ager, M.D. as its expert testimony.

On April 7, 2004 the magistrate's decision was mailed. He gave plaintiff an open award. We affirm the magistrate's decision. The magistrate devoted page three through page 14 summarizing the evidence presented. The magistrate did an excellent job preparing the summary and accordingly, pursuant to MCL 418.861a(10) we adopt it as our own.

Having summarized the evidence presented, the magistrate concluded his decision with his findings of fact and conclusions of law. We quote hereafter those findings and conclusions that are most pertinent to defendant's appeal:

In *Robertson v Daimler Chrysler Corporation*, 465 Mich 732 (2002), The Michigan Supreme Court held that not only the actual events, but also the worker's perception of those events must be founded in actual fact in order to prevail in a psychiatric disability claim.

For the reasons set forth herein, I find that Plaintiff has established by a preponderance of evidence that he is disabled. Furthermore, I find that actual events of his employment at Defendant significantly contributed to his disability.

First of all, I find that the actual event of employment that significantly contributed to Plaintiff's psychiatric disability is the meeting that took place on April 4, 2002. Although there was an earlier disciplinary meeting in January 2002, Plaintiff continued to work following that meeting with little or no difficulty. Mrs. Miller testified that she was slightly aware of the January 2002 meeting, but certainly Plaintiff demonstrated no ill effects from it. In that January 2002 meeting, it was explained to Plaintiff that he was being verbally reprimanded, and that if further violations such as the one that occurred in January 2002 repeated themselves, then he would be subject to further discipline. Plaintiff was not discharged. Plaintiff was not given time off work. Plaintiff's pay was not docked. This leads me to conclude that the matter was closed at that point. The union committeeman, Bill Savage, was of the opinion that the matter was closed. I find his testimony credible in that regard. It does not appear as though Gordon Koester had intended to investigate the matter any further after January 2002 until he received notification from Pontiac headquarters that further investigation was to occur, and that another individual from G.M. Corporate would be involved. Following the January 2002 meeting, Plaintiff was of the impression that if he behaved, then no further ill effects would occur regarding his employment. In fact, Plaintiff did behave himself, and it is uncontroverted that no violations or misbehavior occurred after that initial meeting.

The meeting that occurred on April 4, 2002, is certainly the point at which Plaintiff's mental condition unraveled. Although I do not find after listening to all the witnesses that Gordon Koester was yelling and screaming at Plaintiff, as Plaintiff described it, I do certainly find that Gordon Koester continued to pound Plaintiff with the same or similar questions repeatedly over a period of thirty to forty-five minutes. At one point, there was a break in the action, only for Mr. Koester's same questions to continue unabated. At the conclusion of the meeting, Plaintiff was placed on "notice of penalty". Plaintiff was informed that discipline would ensue, and that he would hear within a weeks' time as to his fate. It is also important to note that Plaintiff was not discharged at that time, but in fact was not discharged until May 24, 2002. Plaintiff was told to go back to work, and went back to his area. At that time, he certainly had a nervous breakdown, and the testimony of Mrs. Miller, as well as the medical evidence presented supports that fact. Plaintiff was essentially unable to function from that point forward through the time that he was hospitalized at a psychiatric unit in Midland, and was fairly uncommunicative even with his spouse for several days if not weeks after that. Therefore, I do find that the April 4, 2002 meeting between Gordon Koester, Plaintiff, and others was an actual event of employment, accurately perceived by

Plaintiff, and significantly contributing to his psychiatric disability.

Furthermore, I do not believe that the case at bar conforms with the facts in *Robinson v Chrysler Corporation*, 139 Mich App 449 (1984). In that case, the Michigan Court of Appeals held that since Plaintiff's mental problems arose out of his termination, then they were not compensable. In *Calovecchi v State*, 461 Mich 616 (2000), the Michigan Supreme Court made it perfectly clear that a mental disability caused by the disciplining of an employee is compensable. According to the court, "certainly, acts of employer - imposed discipline are a predictable part of the working environment. Accordingly, their removal as a possible cause of compensable injury would be inconsistent with our long standing interpretation of subsection 301 (1) of the WDCA."

Defendant Exhibit C is the discharge letter apparently mailed to Plaintiff and dated May 24, 2002. Gordon Koester testified that as of the date of the April 4, 2002 meeting, there was no decision to discharge Plaintiff. Therefore, Plaintiff could not have known at that time that he was going to be fired. Clearly, Plaintiff's psychiatric disability, therefore, does not arise out of a termination of his employment, but rather out of a disciplinary meeting, which did not result in any conclusion regarding discipline at the time that it was held. In fact, Gordon Koester testified that he is not certain who made the ultimate decision to discharge Plaintiff. Mr. Koester further testified that he never concluded ultimately whether Plaintiff's actions were intentionally racist, and he did not make the decision to discharge Plaintiff.

Another issue involved in this case is whether or not Plaintiff engaged in misconduct pursuant to MCL 418.305. There was a significant amount of time devoted to the issue of horseplay versus misconduct. It is well established in Michigan that some amount of horseplay between employees is acceptable and does not rise to the level of willful misconduct so as to disqualify a Plaintiff from obtaining benefits. I find that the acts complained of by Defendant in this particular case constitute horseplay, as opposed to intentional and willful misconduct. First of all, it is important to look at Plaintiff's work record with Defendant. Plaintiff worked for well over 30 years with Defendant without any blemish on his employment record. Certainly, Defendant did not provide any evidence that Plaintiff had a history of misbehaving. To the contrary, the defense witnesses, and in particular his supervisor Mr. Kapala, place Plaintiff in a good light in that regard. Plaintiff was portrayed by both Jim Kapala and Gordon Koester as being a helpful, punctual, well behaved employee that did his job. There may have been some horseplay on the part of the Plaintiff in the past, but that seems to be an ongoing theme between employees, and in fact it appears as though horseplay continues to occur at Defendant, at least according to Bill Savage, the shop committeeman at large.

This court is mindful of the sensitive nature of the issues surrounding this case. Certainly, on its face, it would appear to be heinous for a white employee to hang a noose over a pipe and direct an African-American co-employee's attention to that noose. However, I find Plaintiff is fairly naïve regarding these matters, and did not understand the meaning of the word "racism" as it was put to him in the two meetings that were held between Gordon Koester and Plaintiff. Although Plaintiff does understand general principles of appropriate behavior, he certainly does not have an appreciation of the historical relevance of lynching, and other abominable behavior between the races in this country's past. Questions were directed to Plaintiff regarding this issue on cross-examination. I found his answers to be sincere, and his testimony to be credible. Moreover, there certainly was no evidence presented at trial to suggest that Plaintiff fashioned the noose, nor premeditatedly planned on harassing Mr. Watson. I find as credible that he found the noose on a desk, and without much thought at all, flung the rope over the conduit.

Additionally, it is important to note that Plaintiff never tried to hide his actions, but was very up front with all of his interrogators relative to the matter. He did admit to Jim Kapala that he hung the noose over the conduit. He admitted it to his shop committeeman, and in fact admitted it to Gordon Koester. I do find, given this fact, that Plaintiff did not appreciate why Ted Watson would have been offended by Plaintiff's actions. It is also important to look at Plaintiff's past history with Defendant as it pertains to racist behavior specifically. None of the witnesses testifying in this matter indicated that Plaintiff had any prior bad acts that would be viewed as racist, nor did any of the witnesses for either side conclude that this particular incident was racist. Gordon Koester was not able to form a conclusion in that regard. Jim Kapala specifically indicated that he did not believe the act was racially motivated. Bill Savage investigated the matter thoroughly, and certainly came to no such conclusion.

In *Daniel v Department of Corrections*, 468 Mich 34 (2003), the Michigan Supreme Court held that the question as to whether misconduct is "intentional and willful" is one of fact. In this particular case, I do not believe that Plaintiff was injured by reason of his own intentional and willful misconduct pursuant to MCL 418.305. Furthermore, as stated above, Plaintiff's condition flowed from the disciplinary meeting in April, not from either his conduct in January or the meeting held closer in time to that event. Notwithstanding that fact, I do not find that Plaintiff's actions regarding the rope amounted to misconduct within the meaning of the Act. I do find that Plaintiff's actions constituted horseplay, and as such he probably was subject to discipline by Defendant. It is not within this court's jurisdiction to determine whether or not Defendant's ultimate action to discharge Plaintiff was reasonable. Certainly, it is clear from the exhibits in the

matter that horseplay is a violation of shop rules. It is also clear from well established Michigan case law that some degree of horseplay is reasonable and expected in the work place. *Crilly v Ballou*, 353 Mich 303 (1958). It is also important to note that the only eyewitness to testify regarding the rope event in January 2002 is the Plaintiff himself. Therefore, Plaintiff's rendition of events is uncontroverted as to what was actually occurring by way of words and deeds at that time. Again, I do not find that there was a specific racist intent on the part of Plaintiff, and therefore his conduct did not rise to the level of intentional and willful misconduct.<sup>1</sup>

Defendant filed a timely claim for review. On June 18, 2004, defendant filed its brief on appeal raising two issues:

WHERE PLAINTIFF'S DISCIPLINE AROSE BY REASON OF HIS ADMITTEDLY HAVING INTENTIONALLY HUNG A ROPE WITH A HANGMAN'S NOOSE OVER A CONDUIT AND THEN INTENTIONALLY DISPLAYING THE NOOSE TO AN AFRICAN AMERICAN CO-WORKER, THE MAGISTRATE ERRED IN FAILING TO CONCLUDE THAT RECOVERY WAS BARRED BY MCLA 418.305 AND THE HOLDING OF *DANIEL V DEPARTMENT OF CORRECTIONS*, 468 MICH 34 (2003).

WHERE PLAINTIFF'S APPLICATION ALLEGED A PSYCHIATRIC DISABILITY DUE TO REPEATED HARASSMENT BY HIS EMPLOYER, WHERE PLAINTIFF'S ONLY AND REPEATED EXPLANATION OF WHAT CAUSED HIS SYMPTOMS WAS CONCERN REGARDING LOSS OF HIS JOB RATHER THAN HOW HE WAS TREATED AT THE APRIL 2, 2002 MEETING, AND WHERE THE MAGISTRATE MADE NO FACTUAL FINDING OF HARASSMENT, AT THE MEETING, THE MAGISTRATE ERRED IN RELATING PLAINTIFF'S DISABILITY TO ALLEGED HARASSMENT IN THE DISCIPLINARY PROCESS AND IN FAILING TO APPLY *ROBINSON V CHRYSLER*, 139 MICH APP 449 (1984).

In Argument I the defendant claims plaintiff's intentional and willful misconduct gave rise to the disciplinary meeting that caused plaintiff's disability. Specifically, the defendant argued:

It cannot be denied, just as the disciplinary action in *Daniels* occurred because of the sexual harassment performed by the Plaintiff in that case, the disciplinary action in the instant matter occurred because of what the Plaintiff did with the noose and with his co-worker, Ted Watson, in January of 2002. That indeed Plaintiff himself knew that his actions with Mr. Watson involving the noose were the source of his subsequent discipline is manifest from the record. (Ta-38, F-33, A-31.)

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<sup>1</sup> Magistrate's decision, pp 14-20.

The magistrate recognized the weakness of his relationship findings involving MCLA 418.305 when he went on to claim that Plaintiff's actions regarding the hangman's noose did not amount to "misconduct" within the meaning of the WDCA.

At page 18 of his Opinion the magistrate properly observed that it would appeal to be heinous for a white employee to hand a noose over a pipe and direct an African-American employee's attention to that noose." The magistrate proceeded, however, to conclude that Plaintiff was "naïve" about racial matters so that his motivation and display of a hangman's noose to a co-employee constituted only "horseplay".

Plaintiff's actions in January of 2002 involving a noose were misconduct intentionally and willfully performed, Plaintiff acted not only to suspend the noose but, thereafter, to affirmatively bring another employee to it. General Motors' shop rules contained in Defendant's Exhibit "A" prescribed such misconduct with or without racial intent. Just as in *Daniel v Department of Corrections, supra*, disciplinary proceedings in this matter flowed directly and predictably from Plaintiff's misconduct as surely as night follows day.<sup>2</sup>

Whether plaintiff's injury arose by reason of plaintiff intentional and willful misconduct is a question of fact, *Daniel v Department of Corrections*, 468 Mich 34 (2000) at 43. In this case Magistrate Ambrose discussed this issue at length and determined that plaintiff's action was not intentional and willful misconduct. Specifically, there was no evidence presented that plaintiff's actions were intended to racially imitate Mr. Wilson. Neither of defendant's witnesses would attach any racial intent to plaintiff's actions.

Defendant's witnesses described plaintiff to be slow and unable to understand racial intimidation. The magistrate noted that plaintiff described Mr. Watson as his friend and that they played practical jokes on one another.

We find the following from plaintiff's brief to be convincing that plaintiff has not engaged in willful and intentional misconduct:

Defendant attacks Magistrate Ambrose's finding of fact that Plaintiff's actions did not constitute "willful and intentional misconduct," by implying that he was wrong to consider Plaintiff's actions in light of the facts and circumstances then and there existing, and Plaintiff's own mental acuity and naivete. (Defendant's Brief on Appeal, p. 21) The argument is absurd. This practical joke did not occur in a vacuum, it did not occur between faceless and non-sentient beings, but rather it occurred as part of the fabric of Plaintiff's workplace. Plaintiff did not think up the idea of playing a practical joke on someone using a noose, but rather found the noose on a desk and was told that his foreman, Jim Kapala, had played a joke on another

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<sup>2</sup> Defendant's brief pp 20-22.

employee. Plaintiff did not play the joke on Ted Watson because Mr. Watson was a black man, but rather, because Ted was his friend, a friend with whom he had shared many practical jokes, both as the one playing the joke and the one upon whom the joke was played. Plaintiff's testimony in this regard was poignant, innocent and fully credible, and Magistrate Ambrose was correct to believe him, as did his supervisor and even the head of Defendant's Labor Relations department.

Defendant argues that "it is inconceivable that an act which would be 'heinous' if it was performed with racial intent would not constitute misconduct if performed without such racial intent." (Defendant's Brief on Appeal, p. 21) This contention is patently absurd. Intent is not an immaterial factor in determining misconduct, but rather intent goes to the very heart of the issue.

This is easily demonstrated by a comparison of two hypothetical scenarios. In the first scenario, Jones, long-time co-worker of Smith, who knows that Smith has recently suffered a miscarriage and is distraught over the loss of her child, vexatiously inquires of Smith, "So, how's the baby coming?" intending to cause Smith further emotional pain. The action clearly constitutes willful and intentional misconduct." Because it was intended to cause Smith emotional distress, and not because of anything having to do with the question itself.

In the second scenario, Jones does not know that Smith has suffered the miscarriage, nor has he any malicious intent, innocently asks Smith, "So, how's the baby coming?" Jones' action clearly is innocuous and could not possibly be interpreted as constituting "willful and intentional misconduct," notwithstanding the fact that Smith's reaction to the question, her emotional distress in either instance may be exactly the same.

While Defendant cannot fathom how it is that Plaintiff would be "unaware of the potential racial implications of confronting a Black man with a hangman's noose," given his exposure to media coverage over the years, thereby insinuating that Plaintiff knew these implications all along, having spent any time at all with Plaintiff, knowing the simplemindedness of him and his lack of guile, his innocence and naivete, and his good heart, Defendant would be forced to conclude along with its foreman and head of Labor Relations, that Plaintiff's actions were without any racial intent, and were, rather, in his mind, practical joke.

Equally laughable is Defendant's ridiculing Magistrate Ambrose's references to Plaintiff's unblemished work history, and his ready admissions to all of those investigating the incident of its occurrence, as being "inapposite to the nature of the conduct at issue," adding, ridiculously, "Most murderers kill only once and many of the admit their crimes." Apparently, Defendant's citation of *Daniel, supra*, was made without actually reading the decision. Justice Weaver carefully and judiciously

examined all of the facets of Plaintiff Daniel's long history of scurrilous conduct, noting the fact that this wasn't an isolated incident but a pattern of misconduct, and further noting the fact that, unlike Plaintiff Miller, Plaintiff Daniel denied saying the things he was found to have said, notwithstanding the overwhelming evidence that he did. Magistrate Ambrose, like Justice Weaver, examined the conduct contextually. Defendant urges this Honorable Commission to ignore context and judge the conduct as if it occurred in a vacuum, contrary to the dictates of Justice Weaver's majority opinion in the sole case upon which it relies<sup>15,3</sup>.

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<sup>15</sup>Equally ludicrous and contemptible are Defendant's attempts to characterize Plaintiff's actions as tantamount to shouting, "Fire!" in a crowded theatre, and it's characterization of the noose as "an instrumentality of death." (Defendant's Brief on Appeal, p. 22) Inherent in the act of shouting fire in a crowded theatre where there is no fire, is malicious intent, as it is foreseeable that the false warning could result in a stampede wherein patrons could be seriously injured or even killed. The noose is no more "an instrumentality of death," than a rope, a letter opener, a staple gun, a box opener, a steel pipe or any number of items that can be found in the foundry environment. Again, Defendant fails to understand it is not the noose anymore than it would be a letter opener that would constitute an "instrumentality of death," but rather the intent of the actor, the intent of the person wielding the item.

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Thus, *Daniel's* is no barrier to an award of benefits to plaintiff. Furthermore, the magistrate's determination that plaintiff's conduct was not willful and intentional misconduct is supported by competent, material and substantial evidence on the whole record. Particularly persuasive were the unrebutted proofs concerning plaintiff's history of friendship with the co-employee involved as well as his lack of intellectual sophistication and last but not least, an excellent prior work record devoid of any similar previous acts.

In defendant's second argument the defendant claims that plaintiff should be denied workers' compensation based on *Robinson v Chrysler Corporation*, 139 Mich App 449 (1984): Specifically defendant argued:

The magistrate correctly cites the Michigan Supreme Court case of *Calovecchi v State*, 461 Mich 616 (2000) for the proposition that a mental disability arising out of the disciplinary process may be compensable. However, the *Calovecchi* court was dealing with a case in regard to which the Plaintiff's symptoms arose from the Plaintiff having felt completely humiliating by occurrences at a November 17, 1989 meeting when he was stripped of his badge and gun and paraded past several of his co-workers after having been so stripped. *Calovecchi*, *supra* 618 through 620. Unlike *Calovecchi*, Plaintiff herein did not testify as to a reaction from the manner in which the process of discipline was conducted, his sole concern was with the consequences of job loss.

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<sup>3</sup> Plaintiff's brief on appeal pp 63-65.

Whereas here, Plaintiff's concerns and fears giving rise to his symptoms revolved entirely around cessation of employment, the holding of the Michigan Court of Appeals in *Robinson v Chrysler Corporation* that loss of employment would not be a compensable event of employment has cogent application. Indeed, permitting recovery based on fear of job loss breeds utterly irrational results when one considers that, for such a mental claim to be compensable, it must be well founded. Consequently, the only employees with such fears who would be entitled to recovery are precisely those who would not otherwise be working. If such recoveries were permissible, they could clearly be pursued in connection with concerns regarding layoffs and plant closings as well as disciplinary terminations with the result being under some circumstances that the only persons recovering would be those who would have been laid off for economic reasons in any event.

The circumstances posed by this case are analogous to those addressed by the Michigan Court of Appeals in *Greenwood v Pontiac Board of Education*, 186 Mich App 389 (1990). As in this case, Plaintiff in *Greenwood* had filed an application alleging harassment; and indeed, Ms. Greenwood testified that she felt harassed by the actions of her supervisor and others. The Court of Appeals reversed the award of benefits because there was no objective showing of harassment and the Appeal Board had made no finding that plaintiff had actually been harassed by actions of her supervisor. *Greenwood, supra*, page 397. In this case in which Plaintiff has not testified to feeling harassed, the magistrate made no such finding of harassment, no arguable adherence to *Greenwood, supra* can generate anything but a reversal of the magistrate's decision.

Indeed, had Plaintiff testified that he felt harassed, the evidence on the record as a whole would not support such finding that harassment in fact occurred. The union representative testified that Mr. Koester conducted himself throughout the April 2, 2000 meeting in a cool, calm, and business-like manner. Any objective analysis of a situation in which a Caucasian employee has chosen to confront an African-American employee with a noose would lead one to the conclusion that management might reasonably chose to interview that employee on more than one occasion and make repeated inquiry into whether there was a racial motivation for the incident.

The application for Hearing alleged harassment but Plaintiff did not testify as to feeling harassed, and the magistrate did not make a factual finding of harassment. Plaintiff's testimony establishes the basis for his symptoms as fear of loss of his job. Pursuant to *Robinson v Chrysler, supra*, there should not be a recovery on that basis. Even if loss of employment were a proper basis upon which to premise a mental recover, loss of employment was not an actual event in this case on April, 2004. Plaintiff neither carried his burden of proof to establish a compensable mental condition arising out of actual events of employment nor showed a basis for recovery

not barred [in] *Robinson v Chrysler, supra*. Consequently, the decision of the magistrate must be reversed.<sup>4</sup>

Plaintiff's response to this argument included the following:

Defendant repeatedly argues that Plaintiff's concerns and fears of being wrongly terminated, and the consequences and injustice of such a termination, played a significant role in his nervous breakdown, and that, therefore, pursuant to *Robinson, supra*, and apparently ignoring the Michigan Supreme Court's ruling in *Calovecchi, supra* to the contrary, Plaintiff is barred from being awarded worker's disability compensation benefits. However, Defendant offers no authority for such a proposition, which if adopted by this Honorable Commission, be in direct conflict with the Michigan Supreme Court's holding in *Calovecchi, supra*. Defendant argues, as follows, in this regard:

"Indeed, permitting recovery based on fear of job loss breeds utterly irrational results when one considers that, for such a mental claim to be compensable, it must be well founded. Consequently, the only employees with such fears who would be entitled to recovery are precisely those who would not otherwise be working." (Defendant's Brief on Appeal, p. 25)

Defendant's conclusion is not logical. A fear of being fired may be well founded, without one's actually being fired. Depending upon the circumstances presented, the fear may well be legitimate, whether or not the firing is actually carried out. Here, Plaintiff's fear of being discharged was, as circumstances bore out, well-founded and undeniable, but given the circumstances surrounding the second disciplinary hearing, Plaintiff's nervous breakdown was not dependent upon Defendant's actually carrying out the implicit threat of discharge. It wouldn't have mattered if on May 24, 2002, Defendant had come to its senses and dismissed the charges against Plaintiff, for the damage, the nervous breakdown and resulting depression, anxiety and panic, that had already been done on April 4, 2002, at the meeting in Labor Relations and immediately afterward.

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Nor is Defendant persuasive in arguing that "Plaintiff did not testify as to feeling harassed." (Defendant's Brief on Appeal, p. 26) Without actually using the word, which is unnecessary, Plaintiff vividly and accurately described the concerns, fears and feelings of frustration, confusion and injustice, which directly resulted in his nervous breakdown and his ongoing psychiatric disability. Defendant's argument that, "Even if loss of employment were a proper basis upon which to premise a mental recovery, loss of employment was not an actual event in this case on April 4,

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<sup>4</sup>. Defendant's brief on appeal pp 25-26.

2004, represents a wholesale misunderstanding of Plaintiff's case and Magistrate Ambrose's opinion. Clearly Plaintiff was not discharged on April 4, 2002, but seven weeks later on May 24, 2002. But it is not an actual loss of employment that forms one of several bases for Plaintiff's mental disability, but rather the legitimate fear of being fired, with all of the consequences that such a firing would entail.<sup>19</sup>

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<sup>19</sup>Of course the other bases would include Plaintiff's treatment at the second disciplinary hearing, his being "pounded" with question after question, which are repeated notwithstanding the questioner's realization that Plaintiff hasn't a clue regarding the subject matter of his interrogation, and Plaintiff's epiphanic realization that Defendant's persecution of him is unjust, that he is being scapegoated by Defendant.

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In the final analysis, Defendant's arguments ignore the uncontrovertable facts of this case, ignore the harmful testimony of its own management witnesses, ignore its inability to carry the burden of proof on its affirmative defense that Plaintiff's actions were "willful and intentional misconduct," ignore the fact that Plaintiff's actions must be gauged in light of his state of mind, ignore the fact that Plaintiff was Ted Watson's friend and that he would never have set out to hurt his friend, the friend that he had joked with so many times, the friend whom he had covered for repeatedly at work, ignores or misconstrues the rulings in each of the cases upon which it relies, and utterly fails to admit Defendant's own motivations in attempting to scapegoat Plaintiff for its own advantage in litigation involving Ted Watson. Magistrate Ambrose's opinion is consistent with the great weight of evidence presented, is legally correct, and is just and fair given the facts and circumstances herein. Defendant has utterly failed to provide any basis for this Honorable Commission to reverse Magistrate Ambrose's findings of fact, nor any factual nor legal bases upon which to reverse his decision awarding Plaintiff benefits.<sup>5</sup>

In the instant case the magistrate has found with record support that an actual event of plaintiff's employment reasonably perceived by plaintiff gave rise to his disability. This actual event on plaintiff's last day of work, the disciplinary hearing is the cause of plaintiff's emotional collapse. If this event had never occurred more likely than not plaintiff would never have suffered a psychiatric disability work related or not. This event was directly related to his mental disability by the testimony of plaintiff's treating psychiatrist, Dr. Talasila.<sup>6</sup> It is actually a rare occasion when one analyzes a psychiatric disability and can so clearly point to a specific event reasonably perceived by a disabled person as being the obvious precipitator of the disability. The instant case is such an example.

The decision of the magistrate is affirmed.

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<sup>5</sup> Plaintiff's brief on appeal pp 74-75, 77-78.

<sup>6</sup> Dr. Talasila's deposition at pp. 19, 21, 27-28.

Chairperson Reamon concurs.

Rodger G. Will

Commissioner

William G. Reamon, Jr.

Chairperson

#### KENT, COMMISSIONER CONCURRING

I agree in part with my colleagues, but write to clarify my position regarding the Magistrate's implementation of *Robinson*.<sup>1</sup> At the outset of its argument on appeal, defendant argues the magistrate failed to properly apply that standard, which it correctly notes as follows:

In order to establish entitlement to workers' compensation, a Plaintiff must prove by a preponderance of the evidence each element of the claim. *Aquilina v General Motors Corp*, 403 Mich 206; MCLA 418.301(2) requires that mental disabilities to be compensable must be caused, aggravated or accelerated by the employment in a significant manner and must arise out of actual events of employment, not unfounded perceptions thereof. Analyzing whether a claimant's perception of actual events of employment had a basis in fact or reality, i.e., whether the claimant's perception was "founded" the fact finder must apply an objective review by examining all of the facts and circumstances surrounding the actual employment events in question to determine whether the claimant's perception of such events was reasonably grounded in fact or reality. *Robertson v DaimlerChrysler Corp*, 465 Mich 732 at 755.

We have in the past recognized that implementation of the portion of the statute relating the effect of a mental disability to the perceptions of an injured worker and employment events:<sup>2</sup>

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<sup>1</sup> I do not find defendant's contentions regarding reversible error in the magistrate's finding of willful or intentional misconduct of this event as persuasive. While their position is well articulated, I believe the magistrate's finding in that regard to be supported by the requisite evidence, and a proper application of the law. Indeed, in *Daniel*, the Supreme Court stressed the importance of some deference to the findings of fact made by the magistrate regarding the intentional or willful aspect of claimants actions.

Nor, given the facts at hand, do I agree with defendant's contention plaintiff's mental disability should be barred as it related to "fear of losing his job". The Supreme Court in *Calovecchi* made it clear that any factual scenario in which claimant's mental disability arouse out of the events and anxiety prior to the actual loss of a job, can be compensable. In other words, unless plaintiff's mental condition arouse solely as response to termination of employment, *Calovecchi* rejects the defendant's theory.

<sup>2</sup> *Wolf v General Motors Corp.*, 2003 ACO # 68. See also *Golota v American Axle*, 2003 ACO # 261.

Perhaps some of the difficulty in this case stems from the varying nature and significance of actual events of employment. Some events have significance in and of themselves. Other events, such as those described in *Robertson*, have little meaning in and of themselves. Rather, they have significance for worker's compensation purposes only when the employee's characterization of those events is considered. Their significance lies not just in the occurrence of the event, but in the reason the event occurred. Their emotional impact ties directly into the motivation of the principal participants or in the unfairness of certain actions.

For example, when plaintiff says: "I was demoted", there must be a determination that this actual event occurred. If plaintiff says: "I was upset because I was demoted", then the magistrate must then determine whether plaintiff's description of his own reaction is honest. Under *Robertson*, the magistrate does not, in my opinion, have to determine whether plaintiff's reaction meets with some objective criterion for being upset, i.e., that it was reasonable to be upset, or that the average person or an objective observer would be upset.<sup>1</sup>

In contrast, when plaintiff says: "This event upset me because it was done to punish me for speaking out against corruption.", not only the occurrence of the event, but also plaintiff's characterization of the motivation of the actors must be assessed and be reasonably grounded.

Where, as here, plaintiff says certain work events caused him embarrassment or stress, it is only necessary for the magistrate to decide whether plaintiff is credible regarding the occurrence of the events and in his reaction to those events. If there is testimony which shows a reaction inconsistent with plaintiff's being embarrassed or stressed, the magistrate may decline to accept plaintiff's statement as to the impact or significance of the event. Also, if it is unbelievable that a trivial event caused the emotional response, the magistrate is equally free to reject plaintiff's testimony. However, once the magistrate accepts the plaintiff's statement of his subjective reaction to the event, no further inquiry on this point needs to be made if that reaction was based on real events.

In this case plaintiff described both types of events. Plaintiff said he was humiliated by the behavior of certain co-workers. He testified that certain production standards were stressful. He described being embarrassed. Having accepted plaintiff's testimony as credible, the magistrate need do no more under *Robertson*. However, plaintiff also described events which fall into the category of harassment or intentional conduct, where the motivation of the actors or the fairness of the events is in issue. The magistrate also accepted plaintiff's characterization of events, including the motivations of the principal actors. By

accepting plaintiff's testimony regarding the motivation of his supervisors to be credible, the magistrate necessarily found his description of the events to be reasonably grounded in the actual events. He incorporated these findings in this supplemental opinion by reference. *Robertson* does not require any further inquiry, fact finding or analysis.

The majority in *Robertson* recognized the subtle, but significant difference between an employee's reasonable interpretation of actual events and an objective evaluation of the employee's reaction to actual events. In footnote 12, which ended the passage quoted above, the court noted the difference between its interpretation of the word "unfounded" and the understanding of former Justice Brickley who dissented in *Gardner v Van Buren Schools*, 445 Mich 23 (1994). The court stated:

This standard of review varies slightly from that articulated by Justice Brickley, namely, that a claimant's perception of the actual employment events must be "well-founded." *Gardner, supra* at 57. [W]e find nothing in the language of § 301(2) that qualifies "perception" in this way. "Well-founded" evinces a standard that may be construed as more demanding than a reasonableness standard. Thus, we do not agree that the perceptions at issue must be "well-founded." Instead, all that is required is that the claimant's perception of the actual employment events be reasonably founded.

This is the difference between the events here and those in *Robertson*. In *Robertson* plaintiff alleged he was unjustifiably demoted because he refused to perform certain personal services for his supervisor on company time. There was no argument that an actual event took place, plaintiff's demotion. The real issue was whether plaintiff's characterization of these events was reasonable. There was testimony in the record from plaintiff's supervisor which showed plaintiff was demoted purely for economic considerations and for no reason connected with alleged abuse of company time. The Court of Appeals held the characterization of the events was irrelevant. The Supreme Court reversed, holding that plaintiff's characterization of the reason for the demotion must be reasonable.

In this case, the magistrate found actual events and further accepted plaintiff's characterization of certain events at work as being intentional. He then accepted as believable plaintiff's reaction to all of these work events. As a result, the magistrate fully complied the requirement of *Robertson* that an employee's understanding of actual events be reasonable. To require more is to cross the line

from the requirement of a reasonable understanding of actual events to a requirement that the employee's understanding of events be "well-founded".

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<sup>1</sup> Certainly, if plaintiff's reaction to events is extreme or unexpected, this may well reflect a pre-existing emotional condition which would come into play in the evaluation of whether the event was significant based on the comparison of plaintiff's occupational and non-occupational contributors.

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Recognizing the importance of this concept, the Michigan Court of Appeals in *Wolf*<sup>3</sup> stressed the need for the Magistrate to "assess the factual circumstances in terms of how a reasonable person would have viewed them".<sup>4</sup>

*Gardner* ultimately concluded, "The statute, by excluding 'unfounded perceptions' of the actual events of employment, excludes situations in which the claimed events never occurred (i.e., where they are imagined, hallucinatory or delusional)." *Id.* at 49. In essence, *Gardner* held that, under the second sentence of MCL 418.301(2), the key is whether actual events of employment occurred; a claimant's perception of those events, no matter how badly misconstrued, was irrelevant.

Recently, in *Robertson*, our Supreme Court overruled *Gardner*. As mentioned, according to *Robertson*, *Gardner* was inconsistent with the plain language of MCL 418.301(2). **The Court stated that, contrary to *Gardner*, the plain language of the statute "requires a distinct analysis concerning a claimant's perception or apprehension of the actual events of employment."** *Robertson, supra* at 750. **The Court indicated that the perception must be "founded," that is, "based or grounded in fact."** *Id.* . . .

\* \* \*

The *Robertson* Court then went on to state that when determining whether a claimant's perceptions were "founded," an objective standard is applied, i.e., "the factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them." *Id.* at 755. The Court made a point to note that there is a distinction between a claimant's perception of an event and a claimant's reaction to that event, and it is only the former that is evaluated objectively. (emphasis added)

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<sup>3</sup> See 262 Mich 1 (2004).

<sup>4</sup> *Robertson*, p 754-755.

What is difficult in a case such as this, is proper co-ordination of the Supreme Court's choice of terminology, and the gray area explored by this Commission and the Court of Appeals in *Wolf*. Specifically, the Supreme Court in *Robertson* stressed the need for an objective review of all the facts and circumstances to determine whether the claimant's perception of such events was "grounded in fact or reality, and how would a reasonable person "have viewed them":

By the Legislature's use of these terms in the second sentence of § 301(2), it is clear, that in determining whether actual events occurred and whether a claimant's perceptions were "founded," the factfinder must assess the factual circumstances in terms of how a reasonable person would have viewed them.<sup>11</sup>

Thus, in applying the proper statutory test, the factfinder must first determine whether actual events of employment indeed occurred. Then, in analyzing whether a claimant's perception of the actual events of employment had a basis in fact or reality, i.e., the claimant's perception was "founded", the factfinder must apply an objective review by examining all the facts and circumstances surrounding the actual employment events in question to determine whether the claimant's perception of such events was reasonably grounded in fact or reality. (Footnote omitted.)

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<sup>11</sup> Application of an objective standard is also consistent with the underlying purpose of the WDCA, as reasonably inferred through its text. These have been invariably understood to be to compensate those who are injured in the workplace if the injury arose out of the work. *Hills v Blair*, 182 Mich 20, 25; 148 NW 243 (1914) ("Under the provisions of this act, only that employee is entitled to compensation who 'receives personal injuries arising out of and in the course of his employment.' It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him."). It would be inconsistent with this purpose to award compensation to those whose injuries were merely *coincident* with a period of employment, but whose injuries did not "arise out of" that employment. Thus, it is not surprising that the Legislature that enacted § 301(2) sought to limit compensation to mental disabilities that arose out of actual events of employment, not to those that were attributable to the mere imaginings of the employee.

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Yet as aptly noted by the Court in *Wolf*, in the same breath,<sup>5</sup> the Court indicated that the reaction to the events can be "atypical":

Additionally, although the perception inquiry is to be undertaken pursuant to an objective standard, we emphasize in an effort to dispel potential confusion that the "reaction" inquiry," i.e., how a potential claimant "reacts" to actual events of employment, is to be undertaken pursuant to a subjective standard. As Justice Brickley observed, "[a] claimant with a psychiatric disability cannot be expected

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<sup>5</sup> *Robertson*, Footnote 10, p 754.

to *react* to certain events, properly perceived, in a manner entirely consistent with that of a normal healthy individual. . . . While a claimant’s *perception* of the event must be objectively well-founded, that same claimant’s *reaction* to the event can be very atypical.” *Gardner, supra* at 58. In sum, a claimant’s perception is evaluated objectively under the second sentence of § 301(2), while his subsequent reaction is evaluated subjectively under the first sentence provision.

Thus, what was required here was an analysis of whether plaintiff’s perception of the actual event she testified to was “grounded in fact or reality,” using the second part of the *Robertson* framework.<sup>6</sup> After addressing the first prong of the *Robertson* test, the fact finder needed to determine whether the claimant’s perception of the employers actions as a threat to fire him was how a reasonable person would have viewed it using an objective standard.

Only if that first hurdle is met do we get to the “allowance” from footnote 10 that the reaction (which in this case is plaintiff’s mental reaction, amounting to a nervous breakdown) may be atypical. It is in relation to the observation of what the actual events were using a reasonable person object standard that defendant attacks the fact finder.<sup>7</sup>

In at least one portion of its argument on this issue<sup>8</sup>, defendant contends plaintiff’s perception of the events surrounding his last day of work and the alleged harassment was flawed:

Indeed, had Plaintiff testified that he felt harassed, the evidence on the record as a whole would not support such a finding that harassment in fact occurred. The union representative testified that Mr. Koester conducted himself throughout the April 2, 2000 meeting in a cool, calm, and business-like manner. Any objective analysis of a situation in which a Caucasian employee has chosen to confront an African-American employee with a noose would lead one to the conclusion that that management might reasonably chose to interview that employee on more than one occasion and make repeated inquiry into whether there was a racial motivation for the incident.

It is clear from his statement of the *Roberston* test that the magistrate correctly perceived the need for an objective determination regarding the workers perception of those events.

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<sup>6</sup> It is clear that the initial prong of this test, that an actual event had in fact occurred, was established. There was an actual meeting, with statements made, concerning plaintiff’s actions and the employer’s possible discipline of him.

<sup>7</sup> As well, defendant argues he needed to perform a significant contribution analysis, weighing the non-work and work related factors.

<sup>8</sup> While the majority of its discussion centers on plaintiff’s perception that he would “lose his job”, at various points of its brief defendant complains of the magistrate’s fact finding, including an allegation that he did not “mention” all the relevant facts in his opinion.

Further, I discern he performed a distinct analysis to determine if this plaintiff's perception of those events was objectively reasonable.

I am troubled by the apparent disconnect between plaintiff's characterization of the events surrounding the April 2002 meeting on this last day of work pointed out by defendant. Plaintiff characterized this event as one in which the management representative, Mr. Koester, was yelling at him for an extended period of time.<sup>9</sup> However, it appears from the remaining record that in fact Mr. Koester merely asked plaintiff as series of questions, in a normal or business-like tone of voice, trying to get at his motivation for the incident in question.<sup>10</sup>

However, the magistrate recognized that Gordon Koester was not "yelling and screaming at Plaintiff, as Plaintiff described it".<sup>11</sup> As noted above, he went on to find that Mr. Koester "continued to pound Plaintiff with the same or similar questions repeatedly". While that characterization of Mr. Koester's questioning of plaintiff may or may not be accurate, it is the Magistrate's perception of the events, not plaintiffs.

Additionally, defendant points to evidence in the medical record which further casts potential doubt on plaintiff's ability to comprehend the events which occurred accurately, as well as the significance of the work event as a causative factor in relation to non-work stressors. For instance, it notes Dr. Ager listed several non-occupational mental stressors plaintiff suffered from, including possible dementia, alcohol abuse, etc.<sup>12</sup>

However, the magistrate placed less weight on Dr. Ager's testimony, which is his right. Instead, he relied on the expert opinions of Dr. Talasila and Marsha Shroeder, who opined work was the causation factor in plaintiff's mental illness.<sup>13</sup>

These are factual matters requiring an in depth analysis which is present in the magistrate's opinion. Accordingly, while there is some merit in defendant's position on this issue, the record contains competent, material and substantial evidence, and should be affirmed.

James J. Kent

Commissioner

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<sup>9</sup> See Trial Transcript, p 66-74, 133-134.

<sup>10</sup> See Trial Transcript, p 186-187, 211.

<sup>11</sup> See the quoted portion of Magistrate's opinion quoted by my colleagues above, from p 16.

<sup>12</sup> Ager, p 38-39.

<sup>13</sup> The magistrate indicated as treating medical providers, both Dr. Talasila and Marsha Schroeder saw plaintiff significantly more than Dr. Ager.

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

EUGENE MILLER,  
PLAINTIFF,

V

DOCKET #04-0132

GENERAL MOTORS CORPORATION,  
(GMPT SAGINAW GREY IRON),  
SELF INSURED,  
DEFENDANT.

This cause came before the Appellate Commission on defendant's appeal from Magistrate Christopher P. Ambrose's decision, mailed April 7, 2004, granting plaintiff an open award of benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed.

Rodger G. Will

James J. Kent

Commissioners

William G. Reamon, Jr.

Chairperson