STATE OF MICHIGAN

COURT OF APPEALS

RONALD G. SWEATT, Plaintiff-Appellee, v DEPARTMENT OF CORRECTIONS, Defendant-Appellant.	FOR PUBLICATION September 25, 2001 9:10 a.m. No. 226194 WCAC LC No. 99-000026 Updated Copy December 7, 2001

Before: Griffin, P.J., and Neff and White, JJ.

GRIFFIN, P.J. (*dissenting*).

I respectfully dissent. In my view, my colleagues have ignored the plain meaning and combined effect of the interrelated statutes, MCL 418.361(1) and MCL 791.205a. I would reverse.

Plaintiff is a former corrections officer who sustained a work-related injury while employed by defendant. Thereafter, plaintiff received worker's compensation benefits until he was incarcerated on January 12, 1995, for a conviction of delivery of heroin. Following his release from prison, but while still on parole, plaintiff filed a petition seeking reinstatement of his worker's compensation benefits. At the time of the hearing on plaintiff's petition, defendant's representative conceded, "Mr. Sweatt could still not do the type of correction officer work that he was doing before he was injured."

Defendant argued to the worker's compensation magistrate, and later to the en banc Worker's Compensation Appellate Commission (WCAC), that it was not liable for reinstatement of plaintiff's worker's compensation benefits by operation of the combined effect of two statutes. Specifically, MCL 418.361(1) of the worker's compensation act provides, in relevant part:

> [A]n employer shall not be liable for compensation under section 351 [total incapacity], 371(1) [weekly loss of wages], or this subsection [partial incapacity], for such periods of time that the employee is unable to obtain or perform work because of imprisonment *or commission of a crime*. [Emphasis added.]

Further, MCL 791.205a forbids the hiring of felons, such as plaintiff, by the Department of Corrections:

> (1) Beginning on the effective date of this section [March 25, 1996], an individual who has been convicted of a felony, or who is subject to any pending felony charges, shall not be employed by or appointed to a position in the department [of corrections].
>
> * * *
>
> (3) This section does not apply to a person employed by or appointed to a position in the department before the effective date of this section.

At trial, a disability management coordinator for defendant testified that persons with partial disabilities, such as plaintiff, would normally be returned to favored work. However, there was no effort to return plaintiff to favored work because "[h]e's on parole, and he has been convicted of a felony, and there is a State law that prohibits [the] Department of Corrections from hiring individuals who have been convicted of felonies."

At trial, defendant sought to admit into evidence documents establishing that plaintiff's employment with defendant was terminated following his felony conviction. In addressing the magistrate's ruling excluding these documents, the WCAC made a finding of fact that plaintiff's employment with defendant was terminated before the effective date of MCL 791.205a:

> We believe that the documents at issue are not of critical evidentiary importance for the disposition of this case. By seeking to introduce these proofs, defendant is trying to establish that Mr. Sweatt was not employed by the Department of Corrections after November 19, 1991, thereby making the primary prohibition against the hiring of ex-felons (subsection (1) of MCL 791.205a) applicable to plaintiff. Because we conclude, based on the trial record, that plaintiff was not employed by the Department of Corrections at the time MCL 791.205a went into effect and that MCL 791.205a therefore effectively prohibits the Department of Corrections from re-hiring plaintiff because he is an ex-felon, the question of the introduction of these proofs becomes irrelevant.

The WCAC dissenters agreed with the majority in regard to this finding:

> We adopt the conclusion of the four-person majority in this matter that plaintiff was not employed by the Department of Corrections at the time MCL 791.205a, the ex-felon statute, went into effect for the reasons set forth in the controlling opinion.

On appeal, plaintiff does not contest the unanimous WCAC conclusion regarding his employment status as of the effective date of MCL 791.205a.

On remand from the WCAC, the magistrate awarded worker's compensation benefits on the basis that "I find no evidence to support a finding that the State of Michigan would have

made an offer of reasonable employment to plaintiff but for the statutory prohibition." Sitting en banc, the WCAC affirmed in a four-to-three decision. First, the majority agreed

> with defendant's theoretical legal effort to link the prohibition on the hiring of ex-felons in MCL 791.205a to Section MCL 418.361(1). Under the right factual circumstances, the former provision can indeed operate to relieve the Department of Corrections from liability by operation of the "commission of a crime" language in Section 361(1).

However, the WCAC held:

> Linkage of the two statutory provisions [MCL 418.361(1) and MCL 791.205a] requires a critical additional finding of fact. The question of whether an employee is unable to obtain or perform work because of the *commission of a crime* is a question of fact. In order for the Department to avoid payment of compensation under Section 361(1), it must prove, as a matter of fact, that were it not for the statutory prohibition on hiring an ex-felon, it would have made an offer of reasonable employment to plaintiff. [Emphasis in original.]

Although defendant did not argue that plaintiff's claim was barred because of plaintiff's failure to accept reasonable employment, the WCAC majority concluded that plaintiff's petition must be granted because defendant did not sustain its burden of proving that *but for the statutory prohibition* preventing defendant from hiring plaintiff, defendant would have offered reasonable employment to plaintiff.

The three dissenting members of the WCAC rejected the convoluted logic of the majority:

> [T]he majority proceeds to place an artificially-created burden on defendant to prove it would have done the very thing the ex-felon statute prohibits defendant from doing, namely, offering employment to an ex-felon. The majority believes that in order for defendant to link Section 361(1) with the ex-felon statute, it must first prove, as a matter of fact, that but for the ex-felon statute it would have made an offer of reasonable employment to plaintiff. We disagree and find such action is neither legally required nor reasonable. In effect, the majority subjects defendant to a proverbial "Catch 22" situation, ostensibly overlooking the overriding and clear application of the ex-felon statute and exacting from defendant what the statute prohibits.

Defendant appeals to this Court by leave granted. Judge Neff and I agree that the rationale relied on by the WCAC majority was erroneous. The new evidentiary burden of proof and production created and imposed on defendant to establish that, but for a statutory prohibition, defendant would have offered plaintiff reasonable employment is without a statutory basis. However, the reasoning of Judge Neff is similarly flawed.

In affirming the WCAC's decision, the lead opinion rejects the rationale of the WCAC but nevertheless affirms on different grounds. Judge Neff reasons as follows:

> When plaintiff sought reinstatement of his benefits following his release from incarceration, he could work, and had, in fact, been working within his limitations. *Ante* at ___.

Judge Neff also stated:

> The test [under MCL 418.361(1)] is not whether an employee is unable to work for the previous employer, but rather merely whether "the employee *is unable to obtain or perform work* because of . . . commission of a crime." The record is clear that plaintiff is not unable to obtain or perform work for that reason. [Opinion by Neff, J., *ante* at ___ (emphasis in original).]

As previously noted, subsection 361(1) excludes an employer from liability for worker's compensation benefits for such periods that the employee is unable to obtain or perform work because of *imprisonment or commission of a crime*. Judge Neff is correct that the record is clear that following plaintiff 's release from imprisonment, he could obtain and perform favored work and in fact did so. However, the record is clear that during his imprisonment plaintiff was also able to obtain and perform favored work. In this regard, the lead opinion acknowledges the following:

> During his incarceration and after his parole on June 1, 1996, plaintiff worked at various jobs that accommodated his injury-related limitations on stair climbing, standing, and lifting. All indications in the record suggest that plaintiff was a willing and able worker within his limitations. When plaintiff was released from prison, the statutory prohibition of § 361 no longer applied, that is, under the WDCA plaintiff was again entitled to disability benefits. [Opinion by Neff, J., *ante* at ___.]

In his brief, plaintiff admits working pursuant to a work-release program while in prison:

> During his incarceration, plaintiff was employed by Miller Industries as part of a work release program in a job that required him to handle only eight-ounce parts . . . . He held that job from May of 1995 until July of 1996, after his actual release . . . . At that time, he entered rehabilitation for 90 days after an overdose, and was told that his job would be held for him . . . .

The parties, magistrate, WCAC majority, WCAC dissenters, my colleagues, and I all agree that subsection 361(1) operates to exclude defendant from liability for worker's compensation benefits for the period that plaintiff was imprisoned. Also see *Jones v Dep't of Corrections*, 185 Mich App 65; 460 NW2d 229 (1990). However, if the "test" proposed by the lead opinion for subsection 361(1) were applied to the present circumstances, plaintiff would also be entitled to worker's compensation benefits during his period of imprisonment. This is because plaintiff was able to obtain and perform work during his imprisonment and thus "plaintiff is not

unable to obtain or perform work for that reason." (Opinion by Neff, J., *ante* at ___.) Judge Neff's construction of § 361 and its test for application fails because its results, as applied to plaintiff, are simply illogical. In addition, such a construction renders the "commission of a crime" bar a nullity because no criminal conviction would prevent an employee from obtaining work from *all* employers.

The legislative history of how the Legislature came to exclude employers from worker's compensation liability as a result of an employee's "imprisonment or commission of a crime" is accurately traced in the brief of the Attorney General:

> Senate bill 7, as introduced on January 10, 1985 (1985 Journal of the Senate 34), was intended to establish a Workers' Compensation Appellate Commission and Hearing Judges. As introduced, there was no mention in the bill of any change to § 361(1).
>
> A substitute (S-4) was reported favorably out of the Senate Committee on Labor on May 22, 1985 (1985 Journal of the Senate 904).
>
> The bill passed the Senate on May 23, 1985 (1985 Journal of the Senate 919).
>
> On June 24, 1985 the House Committee on Labor reported out substitute (H-4) (1985 Journal of the House 1442), with still no mention of § 361(1).
>
> During the debate, on June 25, 1985, Rep. Engler moved to amend (H-4) as follows, by adding at the end of § 361(1):
>
> "HOWEVER, AN EMPLOYER SHALL NOT BE LIABLE FOR COMPENSATION UNDER SECTION 351, 371(1), OR THIS SUBSECTION FOR SUCH PERIODS OF TIME THAT THE EMPLOYEE IS UNABLE TO OBTAIN OR PERFORM WORK BECAUSE OF IMPRISONMENT, COMMISSION OF A CRIME, DISCHARGE FOR GOOD CAUSE, VOLUNTARY RETIREMENT, OR A PERSONAL ACCIDENT OR ILLNESS THAT IS UNRELATED TO THE PERSONAL INJURY." (1985 Journal of the House 1499-1500.)
>
> Then, there prevailed the motion of Representatives Engler and Ciaramitaro to strike out the comma after "CRIME," and all words following, so that the motion then read:
>
> "HOWEVER, AN EMPLOYER SHALL NOT BE LIABLE FOR COMPENSATION UNDER SECTION 351, 371(1), OR THIS SUBSECTION FOR SUCH PERIODS OF TIME THAT THE EMPLOYEE IS UNABLE TO OBTAIN OR PERFORM WORK BECAUSE OF IMPRISONMENT, [OR] COMMISSION OF A CRIME." (1985 Journal of the House 1499).
>
> The amended motion was adopted (1985 Journal of the House 1500).

> There were no further changes by either the House or the Senate, and, with immediate effect, this wording became law when deposited with the Secretary of State on July 30, 1985.

Before this legislation (1985 PA 103), a disabled worker could draw worker's compensation benefits while imprisoned. *Sims v R D Brooks, Inc*, 389 Mich 91; 204 NW2d 139 (1973). Further, a criminal conviction would not disqualify a worker from receiving benefits. *DeMars v Roadway Express, Inc*, 99 Mich App 842; 298 NW2d 645 (1980). The Engler amendment was obviously intended to change the law. In this regard, shortly after the enactment of 1985 PA 103, the Worker's Compensation Appeal Board in *Bush v Murco, Inc*, 1986 WCABO 1079, 1081, discerned the following legislative intent:

> Presumably the primary motivation behind the enactments of Sections 301(10) and 361(1) is *Sims v R D Brooks, Inc*, 389 Mich 91 (1973), and other cases similar thereto. Plaintiff in *Sims* was ruled entitled to benefits in spite of his incarceration. The Legislature by enacting the above-mentioned sections cured, what to some seemed, an apparent injustice. Incarceration, it should be noted, both placed plaintiff on the "public rolls" and rendered him incapable of accepting "favored work." The former runs counter to the purpose behind the establishment of the Act. *The latter prevents the employer from mitigating his compensation liability*. [Emphasis added.]

When viewed in context, the Engler amendment references the plaintiff's inability to obtain or perform work from his employer because of specified circumstances. These included not only imprisonment and commission of a crime, but also discharge for good cause, voluntary retirement, or accident or illness unrelated to the worker's disability. Although ultimately the three latter categories were not adopted, the exclusion of benefits, when read in context, is tied to the employee's ability to work for his employer. Such events break the causal connection between the employee's original injury and the employer's liability. The inquiry necessitated by the amendment is whether the plaintiff's inability to work for the defendant is due to his work-related disability or an intervening cause: [discharge for good cause, voluntary retirement, unrelated accident or illness,] imprisonment, or conviction of a crime.

Recently, in *Kelley v Desai Constr, Inc*, 2000 Mich ACO 2436, 2438; 14 MIWCLR 1227 (2000), the WCAC acknowledged that there is no employer worker's compensation liability when the employee's inability to obtain or perform work from the employer is due to a subsection 361(1) bar:

> The primary rule governing interpretation of statutes is to ascertain and give effect to the intention of the legislature, to each word, sentence and section of the statute in question. *State ex rel Wayne Co Prosecuting Attorney v Levenburg*, 406 Mich 455 [280 NW2d 810] (1979). Here, the intent of subsection 361(1) appears to be to deny benefits to those injured employees whose incarceration is an impediment to employment. Such employees have, in effect, removed themselves from the workforce by committing a crime for which incarceration results. *Because imprisonment forecloses an employer from finding reasonable*

> *employment for its injured employee, its right to reduce its liability is denied. Thus, without the statutory provision, such an employer would actually be punished by virtue of its employee's incarceration.* [Emphasis added.]

I agree with the above statement and would apply its rationale to plaintiff's conviction of a crime. In my view, such a construction of the statute is consistent with the plain meaning of the statute and its intent to terminate an *employer's* liability for specified actions of its employee. Here, it is plaintiff's commission of a felony that prevents defendant from mitigating its worker's compensation liability. The causal connection between plaintiff's original injury and defendant's liability has been broken by plaintiff's felony conviction that now bars defendant from rehiring plaintiff. The break in the chain of causation occurs as a matter of law, not as a matter of fact. Accordingly, an evidentiary hearing on this issue is a spurious and futile exercise. Under subsection 361(1), it is plaintiff, not defendant, who must suffer the consequences of his misconduct.

In summary, this case involves the combined effect of two interrelated statutes. In this regard, it is a fundamental rule of statutory construction that when two statutes relate to the same subject or share a common purpose they are to be read in pari materia and must be read together. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998); *Jennings v Southwood*, 446 Mich 125, 136-137; 521 NW2d 230 (1994). As the Supreme Court stated in *State Treasurer*, *supra* at 417, quoting with approval from *Detroit v Michigan Bell Telephone Co*, 374 Mich 543, 558; 132 NW2d 660 (1965):

> "Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other." [Citations omitted.]

Subsection 361(1) of the worker's compensation act is clear that defendant is not liable for worker's compensation benefits when plaintiff "is unable to obtain or perform work because of imprisonment *or commission of a crime*." (Emphasis added.) Because, *as a matter of law*, plaintiff is unable to work for defendant because of his commission of a felony, MCL 791.205a, under the plain language of the worker's compensation act, benefits are not owed by defendant. MCL 418.361(1).

I would reverse.

/s/ Richard Allen Griffin