

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.

WHITE, J. (*concurring*).

The rationale of defendant Department of Corrections (DOC) and the dissent is that plaintiff's commission of a felony has made it impossible for defendant, which is subject to the strictures of MCL 791.205a, to mitigate its damages and offer reasonable employment under subsection 301(5)(a) of the Worker's Disability Compensation Act (WDCA), MCL 418.301(5)(a), and therefore subsection 361(1) of the WDCA, MCL 418.361(1), applies. The Worker's Compensation Appellate Commission (WCAC) accepted this rationale in the abstract, but concluded that the magistrate had not erred in concluding that there was insufficient factual support for the underlying premise that were it not for plaintiff's status as a convicted felon, defendant would have offered reasonable employment to plaintiff. The WCAC dissenters and the dissent here view that approach as illogical and subjecting defendant to a "Catch-22." I disagree.

The WCAC majority did not conclude that defendant must actually offer the prohibited employment. Rather, it determined that in any given case, in order for the DOC statutory bar on employing felons to render WDCA subsection 361(1) applicable, there must be a factual finding that the DOC bar actually prevented the DOC from offering reasonable employment, i.e., that the DOC in fact had an open position constituting reasonable employment that plaintiff could have performed, and that it would have offered such employment had the bar not been in effect. Stated differently, the WCAC majority rejected the concept of an absolute disqualification of benefits without regard to whether the DOC was in fact deprived of the mitigation defense offered by WDCA subsection 301(5)(a), pertaining to the offer of reasonable employment. I find no error in this reasoning.

Accordingly, regardless of whether the lead opinion's or the dissenting opinion's view of the interrelationship of MCL 791.205a and MCL 418.361(1) is accepted, I conclude that the decision of the WCAC should be affirmed.

/s/ Helene N. White