STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

COMMISSIONER OF INSURANCE,
STATE OF WISCONSIN,

Petitioner,

v.

PERSONNEL COMMISSION,
STATE OF WISCONSIN,

Respondent.

OPINION AND ORDER

Case No. 80-CV-5649

The record in this case is most unusual. It contains little evidentiary material either by way of testimony or exhibits. Both parties waived their rights to introduce evidence. There appears to have been no evidentiary factual dispute. The briefs before the Commission attached certain documents which appear to be from the records of the petitioner Commissioner of Insurance relating to the employee and her employment. No dispute has been raised about the authenticity of these documents. Since these documents are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned (the files of various commissions and departments) we may take judicial notice of them. Sec. 902.01(2)(3).

Mary Lou McClain was employed as a Community Services Specialist I. Her position called on her to "Evaluate the availability of liability insurance for counties, towns, villages, cities and school districts and risk management programs operated by these governmental units." She was laid off as of June 29, 1979, effective July 1, 1979.

On August 28, 1979, by letter she was informed that she was recalled from layoff (Pers 22.055) and offered a position as Insurance Examiner I. To this she replied asking questions about the position and remarking: "The department should be aware of the fact that I have three school age school children and unreasonable travel requirements would pose an extreme hardship, not limited to their upbringing and education." She also stated that she was aware of the offered position "but did not feel qualified and did not persue (sic) it for this reason...." The reply to her questions indicated that travel would comprise about 70% of her working hours and require staying away from Madison for several weeks at a time. The employee rejected the position because of the travel requirement which she considered made this an unreasonable offer of employment.

The Wisconsin Personnel Commission concluded that McClain had reinstatement and restoration rights pursuant to Pers 16.03, limited by Pers 22.05 and Pers 22.057, and that the petitioner Commissioner violated such rights. The basis for such determination was : 1. She was not qualified for Insurance Examiner I; 2. the travel requirements were not compatible with her position as a single parent with three school age children. It was also found that the offer of the position of Insurance Examiner I was not a reasonable offer.

There was a dissent, but it is the majority decision that we are testing in this review. We refer to the dissent as it raises questions which must be addressed. The dissent takes the position that the employer is the one to judge qualifications and this should carry great weight. The dissenter acknowledges that, while the travel requirement might have some bearing, the individual employee's personal circumstances have no bearing on the reasonableness of the offer. The dissenter concluded that McClain had not proved her case that the offer was unreasonable.

The real issue is whether the offer of the position is reasonable. The issue does not involve whether the employee was reasonable in rejecting the offer. It is obvious that in the light of the employee's domestic situation she was acting reasonably in her rejection of the offer. It is clear from the travel requirements of the offered position that the rejection of the offer would be compelled because of her domestic situation.

If the offer was made by the Commissioner with the knowledge of facts which would compel rejection, the offer would not be reasonable. McClain in her letter of September 6, 1979, states: "The department should be aware of the fact that I have three school age children...." Nowhere does the Commissioner deny such knowledge nor dispute the fact. We believe that the respondent might very well assume that the petitioner's knowledge of her employees goes at least to the knowledge that McClain was a single parent with minor children.

The respondent found that McClain was not qualified for the offered position. The job description and work as a Community Services Specialist I is indeed far different from that of the position offered. The former involves evaluation of risks and the coverage of such risks. The offered position involves the investigation of the business practices of insurance companies and auditing of their affairs. On the basis of McClain's education and experience as against the demands of the offered position one may reasonably conclude she was not qualified. The petitioner takes the position that the employer alone is qualified to judge the qualifications of the employee. This may well be up to the point where the employer goes beyond what is reasonable in making that judgment. The respondent found that as a fact she was not qualified. We find no evidence that points to her qualification, but what little evidence there is indicates the contrary. A conclusion that she was qualified in the light of the information in the record indicates that such a conclusion is not reasonable.

The record also indicates that, although the position offered was available on and before July 1, 1979, when she was laid off, it was over two months before the offer was made. This circumstance permits an inference that the employer did not consider the employee qualified for the vacant position at the time of the layoff.

The record is very unsatisfactory, consisting as it does only of documents, some of which are equivocal. Since none of the parties have complained of the state of the record, we have done the best we can in light of the deficiencies.

We wish to comment about the fact that both the petitioner and respondent are represented by the Attorney General. Different Assistant Attorney Generals were assigned to the case. We do not criticize the individual Assistant Attorney Generals as they have litigated this case as would true adversaries, but we do not condone the practice of the Attorney General representing both sides of the case. This is not an acceptable practice and should be discontinued. It may not have affected the result in this case, but the appearance to the public is bad. An individual attorney or firm would not be permitted to advocate both sides of a case, nor should the Attorney General.

The attorney for the respondent will prepare the judgment affirming the respondent's findings and order and submit the same for entry.

Dated April 14, 1981

By the Court:

W L Jackman

Reserve Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

COMMISSIONER OF INSURANCE,
STATE OF WISCONSIN,

Petitioner,

v. Case No. 80-CV-564

PERSONNEL COMMISSION, STATE OF WISCONSIN, (Mc Clain)

Respondent.

JUDGMENT

The above entitled review proceeding having come before this court for consideration, petitioner having appeared by James P. Altman, Assistant Attorney General, and respondent having appeared by John C. Murphy, Assistant Attorney General, and Ms. Mary Lou McClain having appeared by Attorney Richard V. Graylow, of the law firm of Lawton & Cates; and the court having had the benefit of briefs of counsel, and having filed its Opinion and Order wherein judgment is directed to be entered as herein provided:

IT IS ORDERED AND ADJUDGED that the Decision and Order of the Personnel Commission, State of Wisconsin, of which the majority decision is dated July 25, 1980, entered in the matter of Mary McClain, Appellant and Commissioner of Insurance, Respondent, designated case no. 79-325-PC, be, and the same hereby are, affirmed.

Dated this 24 day of April, 1981.

BY THE COURT:

W. L. JACKMAN, Reserve Circuit Judge