No. 31645 – Patti A. Smith v. The West Virginia Human Rights Commission and United Parcel Service

FILED
July 2, 2004
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Chief Justice, concurring, in part, and dissenting, in part:

I concur with the majority's holding in Syllabus Point 4 of this opinion which recognizes that "[d]epression is a disability cognizable under the Human Rights Act, so long as that depression impairs a major life activity." I dissent in this case, however, because I do not believe the evidence showed that UPS had vacant positions within its South Charleston facility which the appellant was able and competent to perform, and therefore, failed to reasonably accommodate her disability.

It is undisputed that in May 1995, there were only six full-time (eight-hour per day) non-driving positions at the South Charleston facility and none of those positions were vacant. It is also undisputed that the appellant did not have the seniority to "bump" any of the employees holding those six positions. Under *Coffman v. West Virginia Board of Regents*, 182 W.Va. 73, 78, 386 S.E.2d 1, 6 (1988) which applies to this case,[1] "an employer is not required to *create* a special job for an employee who cannot do the one for which she

[1]As noted by the majority, *Coffman* was overruled by *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996). However, *Coffman* applies in this case because the Court's ruling in *Skaggs* was expressly noted as applying prospectively only. *Skaggs*, 198 W.Va. at 70, 479 S.E.2d at 580.

was hired[.]" (Emphasis added). Thus, there was no vacant full-time position to which the appellant could be assigned.

While the appellant testified during a July 1999 hearing that she would have accepted two-part time positions, there is evidence in the record that directly contradicts her testimony. Apparently, when the appellant first became disabled, UPS indicated that it might be willing to permit her to work two separate part-time shifts inside the South Charleston facility until she was released by her doctor to returned to work as a "package car" driver. In response to this offer, the appellant specifically indicated that she did not want to work two part-time jobs.

Based on the evidence discussed above, I fail to see how the majority concluded that UPS never made any effort to reassign the appellant to a vacant position and failed to make any effort to give the appellant part-time or modified work schedules. I believe that the majority essentially concluded that since UPS is a large corporation which employs many people, it could have and should have reasonably accommodated the appellant's disability by providing her another job in its South Charleston facility. Such a decision is unfair. Our rule regarding what constitutes a reasonable accommodation should apply to all employers alike, whether they are large corporations or sole proprietorships.

Accordingly, for the reasons set forth above, I concur, in part, and dissent, in

part, to the decision in this case. I am authorized to state that Justice Davis joins me in this separate opinion.