

No. 26962—*Ira Timothy Stone v. St. Joseph’s Hospital of Parkersburg, a West Virginia corporation, Cass Palmer and Jackie M. Scott*

McGraw, J., concurring in part, and dissenting in part:

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A.

Errors in the Majority Opinion

I dissent to parts IV.A and C of the majority opinion. In part IV.A, the majority concludes that the jury—based upon instructions given by the trial court—could have acted under the misapprehension that a mere assignment to light duty proved disability discrimination. However, the record does not contain anything to suggest that this was the case. The entire thrust of the competing arguments of plaintiff’s and defendants’ counsel was directed at whether or not the defendants acted in good faith and in accord with business necessity. If the plaintiff had at any time contended that a mere transfer to light duty proved disability discrimination, then the defendants’ requested instructions might have been necessary. But the circuit court was well within its discretion in refusing to give instructions that were not related to the actual issues being tried to the jury. Put simply, this jury was not misled as to the applicable law.

In Part IV.C, the majority opinion concludes that the jury could not find discrimination under the facts of this case—taking all of the evidence in the light most favorable to the plaintiff. This is an improper conclusion. The jury was fully entitled to decide that the Hospital’s light duty assignment for Mr. Stone was made in bad faith and without business necessity. The apparently self-serving testimony of Hospital personnel about how they treated Mr. Stone clearly caused the Hospital’s case to founder at trial. Mr. Stone lost a substantial amount of money as a result of his involuntary transfer. Based on the “slim”

evidence that the majority concedes existed, the jury was entitled to conclude that Mr. Stone's monetary loss was involuntary. As a result of these flaws, an entirely fair and proper jury verdict for a working person has been overturned by this Court. Accordingly, I dissent to these erroneous portions of the majority opinion.

B.
Errors in the Concurrence

Despite the erroneous result reached in Parts IV.A and C, the majority opinion is entirely correct on the issue of whether West Virginia courts should blindly adhere to federal case law in the area of disability discrimination law. I therefore disagree with Justice Scott's interpretation of our discrimination jurisprudence, to the extent that the concurrence proposes that our legal analysis in this area should amount to nothing more than Pavlovian responses to federal decisional law.

The majority opinion has fully documented, using scholarly authorities and copious examples, the emergence of a highly diverse and in many instances troubling body of federal law in the area of disability discrimination. Justice Scott's concurrence does not address one single case or example cited in this discussion. Nor does the concurrence confront the majority opinion's detailed analysis of how this Court has often taken a different—and in every instance, superior—approach than that taken by the federal courts.

Obviously, we must presume that the Legislature, by incorporating the language of analogous federal statutes into the West Virginia Human Rights Act, intended that such language should be

interpreted consistent with pre-existing federal case law. *Cf., Larzo v. Swift & Co.*, 129 W. Va. 436, 445, 40 S.E.2d 811, 416 (1946); *Allen v. Raleigh-Wyoming Mining Co.*, 117 W. Va. 631, 636, 186 S.E. 612, 614 (1936) (“In construing statutes adopted from another state, the judicial interpretation already placed on that statute by the highest judicial tribunal of such state will usually be adopted.”); syl. pt. 2, *Rose v. Public Serv. Comm’n*, 75 W. Va. 1, 83 S.E. 85 (1914) (“When a statute is adopted from another state or country the courts usually follow the construction which it had received by the courts of the state or country from which it was taken.”). However, this rule of construction applies only where a significant body of settled case law interpreting the archetypal statute existed *prior* to the enactment of the subject legislation. As the Court noted in *State v. Friedman*, 124 W. Va. 4, 18 S.E.2d 653 (1942), “it is a sound theory in arriving at the meaning of a statutory provision, the substance of which has for some time been in effect in another state and considered and construed by the courts of that jurisdiction, to carefully examine and regard as persuasive the construction adopted there, *particularly the construction made a part of it before its enactment by the jurisdiction of the pending matter.*” *Id.* at 7, 18 S.E.2d at 655 (emphasis added).

It bears emphasizing that the bulk of the federal case law pertaining to the present question developed following amendment of the Act in 1989. Consequently, these later federal cases have no more persuasive value than what is warranted by the cogency and soundness of their logic.

Let there be no mistaking the fact that the approach advocated by the concurring opinion would have the practical result of drastically limiting the rights of people to bring disability discrimination

claims, a result foreshadowed by many recent federal cases. A restrictive approach to protected status in federal disability discrimination law has found support in the ultimate arbiter of federal law, the United States Supreme Court. In *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), the Court held that airline pilots who have myopia, but whose vision is correctable with lenses, did not have protected status to invoke the protections of the ADA and to challenge as unreasonable rules precluding them from certain pilot jobs, despite EEOC guidelines to the contrary. I agree fully with Justice Stevens' dissent in *Sutton*: "If United regards petitioners as unqualified because they cannot see well without glasses, it seems eminently fair for a court also to use uncorrected vision as the basis for evaluating petitioner's life activity of seeing." 527 U.S. at —, 119 S. Ct. at 2160, 144 L. Ed. 2d at 480 (Stevens, J., dissenting).

In *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999), the Court held that an employee who was barred from working as a mechanic because of high blood pressure, which was otherwise remedied through medication, did not have protected status to challenge a *per se* employment bar. The *Murphy* Court reasoned that the employee was not protected because he was not impaired when he took his medicine, and because he could work at other types of mechanics' jobs. Murphy's lawyer aptly posed the obvious "Catch-22" question in a subsequent law review article: "How could UPS fire Mr. Murphy for *being too disabled* and claim that he is not protected by the ADA, whose purpose it is to prohibit discrimination on the basis of disability? . . . The 'truly disabled' may be the smallest and most discrete and insular minority in America." Kirk W. Lowry, *A Discrete & Insular Minority: Behind the Headlines of Murphy v. United Parcel Service, Inc.*,

39 Washburn L. J. 196, 203, 206 (2000) (emphasis added).

There is no sound basis for denying persons with significant impairments of “normal” functioning standing to assert the protections afforded by the disability discrimination laws, simply because those persons can ameliorate the effects of their disabilities. As one recent observer has forcefully stated:

Murphy v. United Parcel Services, Inc. and Sutton v. United Airlines, Inc. will drastically reduce the scope of the ADA’s protection. As a result of these decisions, persons who have disabilities that are partially or fully correctable may no longer be protected from discrimination under the ADA. . . . The Supreme Court’s decisions contradicted the clear legislative history, the majority of the circuits that have decided the issue, the opinion of the Department of Justice, and most importantly, the EEOC—the agency charged with interpreting the ADA. These decisions ignore the intent of Congress, and have harsh ramifications for individuals with treatable disabilities because they will still be subject to discrimination but will not have the protection of the ADA.

Barbara M. Smith-Duer, Comment, *Too Disabled or Not Disabled Enough: Between A Rock and A Hard Place After Murphy v. United Parcel Service, Inc.*, 39 Washburn L. J. 255, 255-56 (2000) (footnotes omitted).

The Supreme Court has, regrettably, misconstrued Congress’s purpose in providing protection for persons “regarded as” being disabled:

The “regarded as” prong is *supposed* to be a catch-all for individuals who do not qualify as disabled according to the first and second prongs of the definition of disability, but have nevertheless been subject to an adverse disability-based employment action. Courts have wrongly limited coverage to those considered “truly disabled.” The entire thrust of the ADA is that individuals should be judged on their abilities, not their medical status. . . .

....

The ADA, like section 504 of the Rehabilitation Act, was never intended to protect only the “truly disabled.” If the law were to be so narrowly construed, there would be no need to include the “regarded as” prong in the definition of disability. Instead, Congress’s goal was more far reaching. . . .

Arlene B Mayerson, *Restoring Regard For the ‘Regarded As’ Prong: Giving Effect to Congressional Intent*, 42 Vill. L. Rev. 587, 609-11 (1997). The original drafter of the ADA, Professor Robert Burgdorf,¹ explained the underlying rationale for providing standing to persons perceived as having a disability, when he observed that

[i]f all individuals have different combinations of strengths and impairments that fall somewhere on the “spectrum of abilities” for the particular function at issue . . . then what do laws such as the ADA mean when they prohibit discrimination against an “individual with a disability?”

....

The recognition that “individuals with disabilities” is a classification created by societal mechanisms that have singled out some people and caused them to be treated differently from others because of real or perceived mental or physical impairments has profound consequences. It explains the overriding importance of the third prong of the definition of disability. If one is regarded as having a substantial impairment by others, then one has a disability. Satisfaction of this prong focuses solely on whether a person has been singled out for different treatment, not upon whatever physical or mental characteristics the person possesses.

Robert L. Burgdorf, Jr., “*Substantially Limited*” *Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 Villa.

¹Professor Burgdorf drafted the original Americans with Disabilities Act bill introduced in Congress in 1988, and chaired the Committee on Rights of Persons with Disabilities of the American Bar Association’s Section of Individual Rights and Responsibilities.

L. Rev. 409, 527-28 (1997).

Not only has the restrictive approach had the substantive effect of limiting plaintiffs' legitimate claims, but it has also had the procedural effect of denying plaintiffs the opportunity to put their cases before juries. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 160 (2000) (noting that federal courts applying the ADA "have misused the summary judgment device by reserving issues for the judge that should have gone to the jury and by setting an inappropriately high evidentiary burden for plaintiffs to defeat defendants' motion for summary judgment"). Requiring people who seek protection under of the laws prohibiting disability discrimination to, as a threshold matter, pigeonhole themselves into a "preferred group" has therefore rightly been criticized for having "impaired the interpretation and enforcement of the[] [discrimination] laws . . . [and has] generated unnecessary complexity, harsh technicalities and [miserly] standards regarding protection under such statutes." Burgdorf, *supra*, 42 Villa. L. Rev. at 414.

The foregoing should help to amplify the discussion in the majority opinion—and show why it is important that this Court firmly note our independence in the area of disability discrimination law. As the Court recently stated in *Haynes v. Rhone-Poulenc*, 206 W. Va. 18, 521 S.E.2d 331 (1999):

[T]he Legislature . . . has directed that the provisions of the [Human Rights] Act "shall be liberally construed to accomplish its objectives and purposes." This Court has consistently followed this "liberal construction" imperative in construing provisions of the Human Rights Act

Id. at 32, 521 S.E.2d at 345 (footnote omitted). I therefore concur fully with the reasoning of Part IV.B

of the majority opinion.