

FILED

December 12, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Starcher, C.J., concurring:

In the instant case, a jury concluded that climbing a ladder and working overhead were essential functions of the Maintenance Mechanic II position. This conclusion is supported by the record, and dispositive of the argument asserted by appellant Frederick Williams, that the appellee hospital should have eliminated those tasks from Mr. Williams' duties.

I write separately to suggest that the jury instructions and the verdict form used by the circuit court were, when fully parsed out, somewhat contradictory. The jury found, through the first question on the verdict form, that Mr. Williams was a "qualified person with a disability." The jury instructions defined a "qualified person with a disability" as a person who, among other things, was able "with reasonable accommodation, to perform the essential functions of his job."

The jury then found, through the second question on the verdict form, that "climbing a ladder and working over your head," actions that Mr. Williams could not perform, were "essential functions of the Maintenance Mechanic II position."

The findings of the jury through these two questions therefore appear to be conflicting. On the one hand, in the first question the jury answered that Mr. Williams,

although disabled, was able to perform the essential functions of his job. On the other hand, in the second question the jury answered that Mr. Williams was *not* able to perform the essential functions of his job.

The jury instructions and the jury verdict form that the circuit court used in this case are, therefore, a classic example of what happens when a court mashes together instructions and forms provided by attorneys for the parties – the result is often confusion, with facts and law muddled by attorney advocacy.¹

That being said, however, I believe the evidence supports the jury’s ultimate conclusion and the circuit court’s judgment order. Mr. Williams was disabled by his medical condition, and as a result was unable to perform an essential part of his job. His employer

¹The definition of “qualified person with a disability” in this case appears to have been taken directly from the *Code of State Regulations*. See 6B C.S.R. §§77.1-4.2, 4.3, 4.4 and 4.5. However, the source of the jury verdict form is unclear. In the future, in similar cases courts should endeavor to formulate jury verdict forms that use the questions posed in Syllabus Point 2 of *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 479 S.E.2d 561 (1996), which states:

To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W. Va.Code, 5-11-9 (1992), a plaintiff must alleged the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff’s disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff’s needs; (5) the employer knew or should have known of the plaintiff’s need and of the accommodation; and (6) the employer failed to provide the accommodation.

had no responsibility to eliminate a substantial portion of his job duties as an accommodation for his disability.

I therefore respectfully concur with the majority's opinion.