

FILED

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

Starcher, J., concurring:

The record in this case could easily leave a reasonable prudent juror with the impression that the appellant, Lisa Akers, was repeatedly and continually sexually harassed at work by her supervisor. At trial, the appellant introduced evidence that she suffered from major depression, generalized anxiety, and post-traumatic stress disorder – all mental disorders recognized in the *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed., Text Revision, 2000) – caused by the sexual harassment and retaliation to which she was subjected in the work place. At the close of the appellant's evidence, the circuit court granted a directed verdict in favor of the appellee hospital. The circuit court plainly erred in taking the case away from the jury and granting a directed verdict to Cabell Huntington Hospital.

The appellant's evidence of her mental disorders and their causation came in the form of expert testimony from a licensed psychologist, who had a Ph.D. in counseling psychology, was a staff psychologist with clinical privileges at a local hospital, and ran a full-time, continuous private practice for more than a decade. The appellant's expert gave testimony regarding mental disorders that afflicted the appellant based upon the requisite diagnostic criteria set forth in the *Manual*. At no time did the expert suggest that the appellant had some medical condition.

The trial court, upon motion from the appellee, imposed an ersatz barrier to the appellant's expert testimony on causation, through its mistaken transmogrification of *mental disorders* into *psychiatric medical conditions*. As a Ph.D. in counseling psychology, the appellant's expert was among the health care professionals for which the *Diagnostic and Statistical Manual of Mental Disorders* was designed. As such, the appellant's expert was qualified to employ both the nomenclature and the diagnostic criteria of the *Manual* in diagnosing the mental disorders with which the appellant was afflicted, and expressing an opinion as to the cause of those disorders. An expert is not required to have a medical degree in order to interpret or apply the *Manual*.

The briefs in the instant case suggest that most victims of sexual harassment are diagnosed and counseled by licensed psychologists, such as the appellant's expert, and not medically-trained psychiatrists. When sexual harassment victims are seen by a psychiatrist, if at all, it is usually only briefly and only to obtain a prescription for medication. The position taken by the appellee in this case is, *sub silentio*, an attempt to create an artificial barrier for sexual harassment litigants that has no basis in our law or rules. Had this Court adopted the appellee's position, victims of sexual harassment would have been robbed of the most readily available, cost-effective and knowledgeable expert at their disposal as proof of a mental disorder and its cause.

As the majority opinion makes clear, the qualifications of an expert witness to testify for the purpose of connecting alleged sexual harassment to a specific mental disorder should be determined based upon the nature and extent of the witness's education, training

and expertise. It is not for this Court to impose an artificial barrier, and require testimony by a medically-trained psychiatrist, when the issue in dispute is not necessarily a medically-related condition.

I therefore respectfully concur.