

FILED

July 8, 2004

released at 3:00 p.m.

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

Albright J., concurring:

The majority opinion in the instant case upholds the reasoning and conclusions of, not one, but two administrative law judges. Two judges listened to the testimony of numerous witnesses. Those same two judges reviewed dozens of exhibits. The two judges concluded that the appellee, United Parcel Service (“UPS”), had vacant positions inside the South Charleston hub, and that UPS failed to even attempt to accommodate appellant Patti Smith’s disability by offering her one of those positions.

My dissenting colleagues suggest that UPS offered testimony that “directly contradicts” the appellant’s testimony about whether UPS offered the appellant a vacant position, but that the majority of this Court, contrary to UPS’s evidence, concluded otherwise. My dissenting colleagues overlook the fact that neither of the two administrative law judges who heard the testimony believed that UPS ever offered the appellant a vacant position.

The majority opinion simply concludes that the Commission applied the wrong legal standard to the evidence – and in doing so, incorrectly concluded that UPS had no legal obligation to offer the appellant a vacant position. Because the Commission did not apply its own 1994 regulation (which required UPS to offer the appellant a vacant position) to the

case, the majority opinion was compelled to set aside the Commission's decision and reinstate the decision of the two administrative law judges.

This Court does not sit as a fact-finder in cases appealed from the Human Rights Commission, and is bound by the record from the tribunals below. The majority opinion reflects that the Commission erred in the law it applied to the factual record; once the correct law was applied, the decision of the administrative law judges to grant the appellant relief was therefore clearly correct.

I respectfully concur.