

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA ADJUTANT GENERAL,

Appellant,

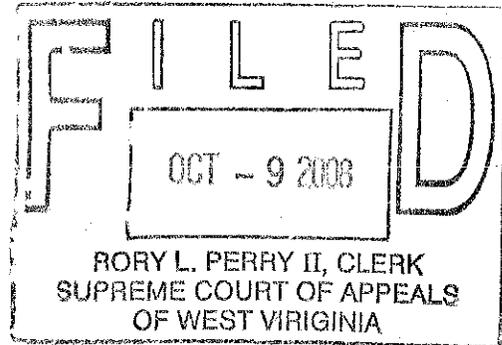
v.

APPEAL NO. 34270

JAMEY LITTLE,

Appellee.

APPELLANT BRIEF



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**Appellant,**

v.

**APPEAL NO. 34270**

**JAMEY LITTLE,**

**Appellee.**

**APPELLANT BRIEF**

**I. NATURE OF PROCEEDINGS BELOW**

The Appellee and plaintiff below, Jamey Little, originated the current civil action against The West Virginia Adjutant General in the Circuit Court of Kanawha County, West Virginia. The plaintiff avers in his complaint that his termination from employment as a firefighter, after his discharge from the West Virginia Air National Guard (“WVANG”), violates the West Virginia Human Rights Act. The plaintiff also alleges that the statute under which his employment as a firefighter was terminated – West Virginia Code Section 15-1B-26 – should instead provide him grandfathering protection, because he was employed as a firefighter prior to the promulgation of that statute.

The Adjutant General moved for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, arguing that he had a legitimate, nondiscriminatory reason for the Plaintiff’s dismissal, since he was following the statutory mandate in W.Va. Code §15-1B-26, and therefore his actions did not violate the West Virginia Human Rights Act. The Adjutant General also argued in his motion for summary judgment that the language in W.Va. Code §15-1B-26 is clear, and that the “grandfather clause” contained in the statute does not provide an exception which would benefit the plaintiff in this case.

After briefing was complete regarding the Motion for Summary Judgment, and after having heard oral argument by the parties, the Circuit Court of Kanawha County denied the Motion for Summary Judgment, and decided to certify a two-part question to this Court pursuant to West Virginia Code Section 58-5-2.

## **II. ORDER OF CERTIFICATION**

### **A. Facts**

The parties stipulated to the following facts:

1. Pursuant to W.Va. Code §15-1A-1, the West Virginia Adjutant General's department is part of the executive branch of State government and is "charged with the organization, administration, operation and training, supply and discipline of the military forces of the State."
2. Also as part of the Adjutant General's duties, firefighters and security guards are hired not only to serve the 130<sup>th</sup> Airlift Wing of the West Virginia National Guard, but also to deal with various emergencies at Yeager Airport and elsewhere.
3. In 1989, the civilian firefighter positions at Yeager Airport were dissolved, and the positions were reopened as state employment positions, under the control and supervision of the Adjutant General. On the 20<sup>th</sup> of July, 1989, the Adjutant General established a job description for the firefighters at the 130<sup>th</sup> Airlift Wing at the Yeager Airport in Charleston, West Virginia, which included a requirement that a candidate be a member of the West Virginia Air National Guard. Specifically, the job description stated:

TITLE: FIREFIGHTER

VI. QUALIFICATIONS:

a. MANDATORY:

\* \* \*

- 5) Qualified Personnel are hired in accordance with department needs, State and Federal policy, and Affirmative Action Plan.  
\* \* \*
- 12) Be a member or eligible and willing to be a member of the WVANG with assignment to the Fire Protection Branch.

4. The Operations and Maintenance Agreement Position Vacancy Announcement, in effect at that time for the position of firefighter, stated:

MILITARY MEMBERSHIP: Position will be filled by a member of the West Virginia Air National Guard, unless the Adjutant General grants a waiver for special qualifications or other reasons justified by the selecting supervisor.

5. After serving approximately 4 ½ years in active duty with the United State Air Force as a firefighter, Plaintiff applied for a firefighter position with the Adjutant General's office, in October of 1996.

6. At the time he applied, Plaintiff was a member of the National Guard.

7. Effective on June 2, 2004, the Legislature enacted W.Va. Code §15-1B-26, which provides:

Only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards: Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter: Provided, however, That no person who is not employed on the effective date of this section as a firefighter and who is not a member of the West Virginia air national guard may be employed as a firefighter for the West Virginia air national guard.

8. In 2002, Plaintiff began receiving periodic counseling and prescribed medications to address anxiety and depression.

9. Plaintiff has testified that he did not always take the medication as prescribed. Plaintiff's treating physician, Dr. Scott Moore, testified that he was not aware that Plaintiff was not taking his prescribed medication. He further testified that Plaintiff continued to show up for his appointments and to discuss medication changes with Dr. Moore until Plaintiff stopped treating with Dr. Moore some time in 2004.

10. On July 20, 2004, Plaintiff attempted to commit suicide by consuming an overdose of prescription medications in a hotel room, in front of fellow firefighters and members of the National Guard, and was required to be hospitalized.

11. As a result of this incident, the National Guard placed Plaintiff on 4T profile, which restricts an individual from being militarily deployable based upon a medical condition.

12. Based upon Plaintiff's 4T profile, the Adjutant General's office placed Plaintiff on a medical suspension from working as a firefighter, due to the requirement that firefighters be members of the military.

13. Plaintiff grieved the Adjutant General's decision to medically suspend him.

14. Plaintiff won his grievance by default, and the parties subsequently entered into a settlement agreement reinstating the sick and vacation leave used up by Plaintiff and also paying Plaintiff \$1,486.56 to cover the pay lost between January 24, 2005, and May 24, 2005.

15. Various psychiatrists and psychologists, who have provided counseling and treatment to Plaintiff, have determined that he suffers from post traumatic stress syndrome and depression.

16. Plaintiff's medical file was evaluated by an Air Force Medical Evaluation Board and, in January of 2005, the Air Force disqualified Plaintiff for world-wide duty based upon a diagnosis of "[300.00] Anxiety disorder with PTSD symptoms, and [E950] suicide and self-

inflicted poisoning by solid or liquid substances.” Plaintiff was subsequently discharged from the Air National Guard.

17. Based upon Plaintiff’s military discharge, and pursuant to W.Va. Code §15-1B-26, Plaintiff was transferred, effective June 16, 2005, to the position of building maintenance specialist with the Civil Engineering branch of the Adjutant General’s office, a position which does not require military membership for employment.

18. Based upon the testimony of Plaintiff’s current treating physician, Dr. Lawrence Kelly, due to Plaintiff’s post traumatic stress disorder, Plaintiff would have been unable to continue employment as a firefighter at least as of August 23, 2005, and would have been unable to continue in any type of gainful employment as of September 27, 2006. Dr. Kelly testified that, following Plaintiff’s office visit with Dr. Kelly on September 27, 2006, he advised Plaintiff to resign his position with the Adjutant General’s office.

19. Plaintiff resigned his employment with the Adjutant General’s office on October 17, 2006.

20. The Defendant has moved for summary judgment on the following grounds: (1) the Adjutant General had a legitimate, nondiscriminatory reason for the Plaintiff’s dismissal pursuant to W.Va. Code §15-1B-26, therefore his actions are not in violation of the West Virginia Human Rights Act; and (2) the “grandfather clause” contained in W.Va. Code §15-1B-26 does not provide an exception to military membership which would benefit the Plaintiff in this case.

**B. Conclusions of Law**

1. The West Virginia Rules of Civil Procedure state that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the

moving party is entitled to judgment as a matter of law.” W.Va. R. Civ. P. 56(c). “The circuit court’s function at the summary judgment stage is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755, 758 (1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

2. “The essence of the inquiry the court must make is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329, 338 (1995) (quoting Anderson, 477 U.S. at 249).

3. W.Va. Code §5-11-1, *et seq.*, also known as the West Virginia Human Rights Act, prohibits certain discriminatory practices by employers against certain classes of employees.

4. In this case, the Plaintiff has alleged that he lost his job as a firefighter because he was diagnosed as suffering from post traumatic stress disorder. Thus, the Plaintiff contends that, although the reason for his discharge as a firefighter was stated to be the loss of his membership in the WV Air National Guard, he was actually discriminated against based upon his disability. The Plaintiff further contends that the Defendant’s reliance on W.Va. Code § 15-1B-26 is a pretext of disability discrimination, and also asserts that this statute does not exempt the Defendant from being held liable for violations of the West Virginia Human Rights Act.

5. The Defendant asserts that the Adjutant General’s reliance upon W.Va. Code § 15-1B-26, as the reason for discharging the plaintiff as a firefighter, demonstrates a legitimate, nondiscriminatory reason for plaintiff’s discharge, and acts as a complete defense to a discrimination claim filed under the West Virginia Human Rights Act because it shows the absence of any discriminatory motive.

6. W.Va. Code § 15-1B-26 provides:

Only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards: Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter: Provided, however, That no person who is not employed on the effective date of this section as a firefighter and who is not a member of the West Virginia air national guard may be employed as a firefighter for the West Virginia air national guard.

7. Based upon the West Virginia Supreme Court's decisions in Stone v. St. Joseph's Hospital of Parkersburg, 208 W.Va. 91, 538 S.E.2d 389 (2000), and Skaggs v. Elk Run Coal, Inc., 198 W.Va. 51, 479 S.E.2d 561 (1996), the Court finds there are genuine issues of material fact requiring submission to a jury. Furthermore, as explained below, the Court finds the Plaintiff is protected by the grandfather clause included in W.Va. Code § 15-1B-26. Therefore, the Court DENIES the Defendant's Motion for Summary Judgment.

### C. Certified Question

1. In this case, Plaintiff was a firefighter employed by the Adjutant General and was a member of the National Guard when he was first hired. The National Guard later discharged Plaintiff based upon a mental disability. The Adjutant General then discharged Plaintiff as a firefighter, based upon W.Va. Code § 15-1B-26, because he was no longer a member of the National Guard. Under these facts, is the Adjutant General's reliance on W.Va. Code § 15-1B-26 a complete defense to Plaintiff's claim that he was discriminated against by the Adjutant General in violation of the West Virginia Human Rights Act, unless the Plaintiff falls within the exception to the requirement of military membership in the "grandfather clause" contained in the statute?

**The Court has ruled in the affirmative on this question, answering it, "yes." Based upon the fact that the West Virginia Legislature had enacted West Virginia Code § 15-1B-26**

prior to the Plaintiff's discharge from the West Virginia National Guard, the Adjutant General was mandated to discharge the Plaintiff as a firefighter, unless he was "grandfathered" into his position.

The Plaintiff's dismissal as a firefighter was due to the failure of the Plaintiff to maintain his membership with the WVANG, regardless of the reason for the failure to maintain such membership. Under Skaggs v. Elk Run Coal Co., Inc., 198 W.Va. 51, 479 S.E.2d 561 (1996), the Plaintiff would have to prove by a preponderance of the evidence that a forbidden intent was a motivating factor in the adverse employment action. The Adjutant General would then be able to show that the same result would have occurred even in the absence of any unlawful motive or, in other words, to show a legitimate, nondiscriminatory reason for his actions. The Adjutant General's reliance upon W.Va. Code §15-1B-26, would clearly demonstrate a legitimate, nondiscriminatory reason for his actions. Thus, unless the plaintiff falls within the exception to the requirement of military membership in the "grandfather" clause contained in the statute, the Adjutant General's reliance upon W.Va. Code §15-1B-26 would be a complete defense to Plaintiff's claim that he was discriminated against by the Adjutant General in violation of the West Virginia Human Rights Act.

However, this Court further finds that any firefighter who was a member of the National Guard on the date this statute was enacted is protected by this grandfather clause. The assertion that a firefighter, who was a member of the National Guard at the time this statute was enacted, but who later is dismissed from the National Guard, somehow loses the benefit of this grandfather clause requires too narrow a reading of W.Va. Code §15-1B-26. Such an interpretation would permit Defendant to keep firefighters, who have never been members of the National Guard, while firefighters, who actually were members of the

**National Guard for many years could be discharged, leaving those originally in the National Guard with less rights than others. The only logical reading of this grandfather clause is that it protects all persons who were firefighters in 2004, when the statute was enacted. Otherwise, Equal Protection under the Due Process Clause of the Fourteenth Amendment is violated.**

These questions arise upon a motion for judgment on the pleadings and present questions of law that the parties agree need to be answered by the West Virginia Supreme Court because the outcome will impact not only Plaintiff and Defendant, but may impact other employees of Defendant who may be discharged by the National Guard, based upon the employee's age, disability or whether or not they were "grandfathered" into their position.

### **III. DISCUSSION OF LAW**

#### **A. Standard of Review**

As the Court most recently opined in Osborne v. United States, 211 W. Va. 667, 567 S.E.2d 677 (2002), "[w]hen this Court is called upon to resolve a certified question, we employ a plenary review." "A de novo standard is applied by this [C]ourt in addressing the legal issues presented by a certified question from a federal district or appellate court." Syl. pt. 1, Light v. Allstate Ins. Co., 203 W.Va. 27, 506 S.E.2d 64 (1998); Syl. pt. 2, Aikens v. Debow, 208 W.Va. 486, 541 S.E.2d 576 (2000); Syl. pt. 1, Bower v. Westinghouse Elec. Corp., 206 W.Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court."); Osborne, 211 W. Va. at 670, 567 S.E.2d at 680. Moreover, it is undisputed that the questions posed by the Circuit Court of Kanawha County, West Virginia, for this Court's determination, are questions of law. As the Court stated in Feliciano v. 7-Eleven, Inc., 210 W. Va. 740, 559 S.E.2d 713 (2001), "[d]uring our

consideration of questions of law, be they presented by certification or otherwise, we employ a de novo standard of review.” “To the extent that we are asked to interpret a statute or address a question of law, our review is de novo.” State v. Paynter, 206 W. Va. 521, 526, 526 S.E.2d 43, 48 (1999); Syl. pt. 2, Coordinating Council for Indep. Living, Inc. v. Palmer, 209 W. Va. 274, 546 S.E.2d 454 (2001) (“Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syl. pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995)”). Feliciano, 210 W. Va. at 744, 559 S.E.2d at 717.

**B. Based on the provisions of West Virginia Code § 15-1B-26, plaintiff's discharge as a firefighter was mandatory, as he no longer fulfilled the statutory requirements of the position, and the Adjutant General's reliance upon W.Va. Code § 15-1B-26 would clearly demonstrate a legitimate, nondiscriminatory reason for plaintiff's termination.**

West Virginia Code § 15-1B-26 requires that “[o]nly firefighters and security guards who are members of the West Virginia National Guard may be employed by the adjutant general as firefighters and security guards.” Because plaintiff was discharged from the WVANG, the Adjutant General was mandated to discharge the plaintiff as a firefighter, *regardless* of the reason for the failure to maintain membership in the WVANG. (See *Exhibit E* to Memorandum of Law in Support of Defendant's Motion for Summary Judgment, pp. 32-33).

In Skaggs v. Elk Run Coal Co., Inc., the West Virginia Supreme Court of Appeals set forth the standard for a claim under the West Virginia Human Rights Act, West Virginia Code § 5-11-9.<sup>1</sup> See Id., 198 W.Va. 51, 479 S.E.2d 561 (1996). In particular, the Skaggs Court held that:

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<sup>1</sup> The Complaint appears only to allege a cause of action under the West Virginia Human Rights Act, as opposed to a Harless cause of action. See Harless v. First Nation Bank in Fairmont, 162 W.Va. 116, 246 S.E.2d 270 (1978). Notwithstanding this fact, the same result would be obtained even if the Plaintiff tried to contrive such an action from the Complaint.

[A] plaintiff states a claim under the Act if he or she proves by a preponderance of the evidence that *a forbidden intent* was *a motivating factor* in an employment action. Liability will then be imposed on a defendant unless it proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive. *Id.* at 198 W.Va. at 75, 479 S.E.2d at 585 (emphasis added).

Moreover, only the burden of production shifts to the employer. *See Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996). Specifically, the Skaggs Court stated:

[W]e apply a burden-shifting framework similar to that adopted in McDonnell Douglas, Barefoot, and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2741, 125 L.Ed.2d 407 (1993) . . . . This method of proof permits a plaintiff to establish his or her prima facie case, which is in essence a rebuttable presumption of discrimination. The *burden of production* then shifts to the employer to come forward with a legitimate, nondiscriminatory reason for its actions. . . . But once the employer meets this *burden of production*, the presumption raised by the prima facie case is rebutted, and the "inquiry proceeds to a new level of specificity." . . . The Barefoot/McDonnell Douglas framework and its attendant burdens and presumption cease to be relevant at that point, and the onus is once again on the employee to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. . . . While Barefoot/McDonnell Douglas allows the employee to shift the burden of production to the employer by establishing a prima facie case, *at all times the burden of proof or the risk of nonpersuasion on the issue of whether the employer intended to discriminate remains on the plaintiff.* *Id.*, 198 W.Va. at 71-72, 479 S.E.2d at 581-82 (emphasis added) (footnotes omitted) (citations omitted).

Although the plaintiff, in his Brief in Opposition to Defendant's Motion for Summary Judgment, made much of the fact that the Adjutant General did not allow him to return to work while he was on medical suspension, these issues are simply not before the Court, because the plaintiff entered into a Release and Settlement Agreement with regard to any and all claims arising out of his medical suspension, on May 13, 2005. (See *Exhibit 1* to Reply Memorandum in Support of Defendant's Motion for Summary Judgment). Pursuant to the Release and Settlement

Agreement, the only claims reserved by the plaintiff were those that “may arise from any future discharge of Jamey A. Little by the Adjutant General.” Thus, despite the fact that the plaintiff would like this Court to focus on the plaintiff’s medical suspension prior to May 13, 2005, it simply is not part of the current action, and the Court should disregard it.

What is, however, a very important issue before this Court, and one for the Court to carefully consider, is whether or not the plaintiff can prove that the Adjutant General discriminated against him when, following plaintiff’s discharge from the Air National Guard, the Adjutant General transferred him to another position within the Adjutant General’s office.

The plaintiff has stated that the Adjutant General “does not seriously challenge the fact that plaintiff has stated a clear violation of the WVHRA.” This is simply untrue. While the Adjutant General does not address whether or not the U.S. military may have discriminated against the plaintiff – which it is legally entitled to do – the Adjutant General vehemently denies that the plaintiff can show that *he* discriminated against the plaintiff in violation of the WVHRA. As set forth in the original memorandum in support of the Adjutant General’s motion for summary judgment, the plaintiff was determined to be disqualified from the Air National Guard due to a diagnosis of “Anxiety state, unspecified, suicide and self-inflicted poisoning by solid or liquid substances,” and the plaintiff was subsequently discharged from the Air National Guard. The Adjutant General does not have the authority to override the Air Force with regard to decisions made by a Medical Review Board regarding whether individuals are medically disqualified from service with the Air National Guard. (See *Exhibit E* to the Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 51-52; see also *Exhibit 2* to Reply Memorandum in Support of Defendant’s Motion for Summary Judgment, p. 32). Further, based upon the fact that the West Virginia Legislature had enacted West Virginia Code § 15-1B-26, the Adjutant

General was mandated to discharge the plaintiff as a firefighter. He did not, and does not, look into the circumstances surrounding a person's dismissal from the WVANG. Simply put, the statute mandates that a firefighter be discharged upon the loss of membership with the WVANG, *regardless* of the reason for the failure to maintain membership in the WVANG. (See *Exhibit E* to the Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 32-33; 40-41; see also *Exhibit 2* to Reply Memorandum in Support of Defendant's Motion for Summary Judgment, p. 29).

The law in West Virginia is absolutely clear that a plaintiff must show that a forbidden, discriminatory intent was a motivating factor in an employment action in order to prevail in an employment discrimination case. The plaintiff simply cannot prove such a discriminatory intent in this case. The *only* evidence as to the Adjutant General's intent in this case is the General's own testimony, which clearly shows that the decision as to whether or not to discharge a firefighter for loss of affiliation in the military service was taken completely out of his hands at the point where the Legislature enacted West Virginia Code § 15-1B-26. (See *Exhibit E* to the Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 40-41).

In fact, the General testified that this was the reason he wanted to have such a statute passed in the first place – so that the Adjutant General would not be forced to look into each individual's unique set of circumstances, and create the appearance that the Adjutant General chose to discriminate against one particular person. (See *Exhibit 2* to Reply Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 18-19). If the Adjutant General were not able to rely upon the statute, which sets forth a neutral, nondiscriminatory requirement for employment as a firefighter, he would then certainly be forced to look into the circumstances surrounding each individual's military discharge, which would, in all likelihood, lead to more

litigation rather than less, because everyone would complain that they should have been the exception to the rule. This was exactly the situation in which the Adjutant General found himself before the statute was passed, even though each and every individual hired as a firefighter by the Adjutant General was fully aware of the military membership requirement at the very moment they filed their application for employment.

The plaintiff has not come forth with any evidence to contradict the sworn testimony of General Tackett, and it is the burden of the plaintiff to do so in order to survive a motion for summary judgment. As this Court stated in Powderidge Unit Owners Ass'n. v. Highland Properties, Ltd., 474 S.E.2d 872 (W.Va. 1996):

If a party moving for summary judgment fails to point to absence of evidence supporting nonmoving party's case with respect to a matter on which the nonmoving party will bear the burden of proof, the motion must be denied, regardless of nonmovant's response but, if movant does make that showing, the nonmovant must go beyond the pleadings and contradict that showing by pointing to specific facts demonstrating a trialworthy issue by identifying specific facts in the record and articulating the precise manner in which that evidence supports [his] claims.

Id. at 879. As further stated in Skaggs, supra, "To get to the jury, the employee must offer sufficient evidence that the employer's explanation was pretextual to create an issue of fact." 479 S.E.2d at 583. The plaintiff has simply failed to point to any set of facts in the record in this case that would demonstrate a trialworthy issue as to the Adjutant General's intent. In his brief in response to defendant's Motion for Summary Judgment, the plaintiff did not even address the General's testimony as to his reasons for transferring the plaintiff to a job within his office which did not require military membership, much less point to specific facts which would contradict this testimony and possibly create a genuine issue of fact as to this element the plaintiff must prove.

What the plaintiff does attempt to do is focus on the Adjutant General's duty to "reasonably accommodate" a disabled individual under the WVHRA. The Adjutant General does not dispute that he has an obligation to "reasonably accommodate" disabled employees to the extent he is legally able to do so. However, the plaintiff again misconstrues the issue. The plaintiff states that he should have been given a leave of absence during the time he was being treated for his drug overdose, and that would have been a "reasonable accommodation" under the WVHRA. However, as stated previously, this case has absolutely nothing to do with the time period during which the plaintiff was being treated for his drug overdose – any claim with regard to the time period that the plaintiff was on a medical suspension was settled in May of 2005. This case is about the plaintiff's discharge as a firefighter, and his transfer to another position within the Adjutant General's office, following his loss of military status. After plaintiff's discharge from the military, the Adjutant General did the *only* thing he could do – terminate the plaintiff as a firefighter and transfer him to a position which did not require military membership. Otherwise, the Adjutant General would have been in violation of West Virginia Code § 15-1B-26. There is no requirement, under the WVHRA or otherwise, that the Adjutant General violate State law in order to "reasonably accommodate" a disabled employee.<sup>2</sup>

The evidence in this case clearly establishes that the plaintiff's dismissal was not as a result of any discriminatory motive on the part of the Adjutant General. The defendant simply followed the policy which had been established before he ever became Adjutant General and before the plaintiff was ever hired, the law which had been enacted by the legislature prior to plaintiff's discharge from the WVANG. Thus, the Adjutant General had a legitimate, nondiscriminatory reason for the plaintiff's dismissal, and the plaintiff cannot establish that this

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<sup>2</sup> While the Adjutant General has not asserted that the transfer of the plaintiff to a non-military position with the Adjutant General's office was intended to be a "reasonable accommodation," it would in fact have been the only

legitimate reason was a mere pretext rather than the actual reason for his dismissal. The plaintiff cannot meet his burden of proof that there was any discriminatory conduct on the part of the Adjutant General and, therefore, the certified question should be answered in the affirmative, with no exceptions as to the “grandfathering” language in W.Va. Code § 15-1B-26.

**C. West Virginia Code § 15-1B-26 does not provide an exception to military membership which would benefit the plaintiff in this case.**

In his Complaint, the plaintiff claims that he is “covered” by certain “provisos” in West Virginia Code § 15-1B-26. As the Complaint was unclear as to what “provisos” in the statute would serve to “cover” the plaintiff, the defendant served an interrogatory upon the plaintiff seeking clarification as to this allegation in plaintiff’s Complaint. In response to this interrogatory, the plaintiff stated:

W.Va. Code § 15-1B-26, provides, in relevant part, “Only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighter and security guards: Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter.” This proviso “grandfathers” all firefighters, regardless of National Guard membership, who were employed by Defendant at the time this statute was enacted, effective June 2, 2004.

(See plaintiff’s response to Interrogatory number 19, *Exhibit F* to Memorandum in Support of Defendant’s Motion for Summary Judgment). However, as is clear from a reading of the “proviso” cited by the plaintiff, the statute in fact states the opposite of what the plaintiff asserts in his discovery response.

The West Virginia Supreme Court of Appeals has long held that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Cogar v. Lafferty, 219 W. Va. 743, 746, 639 S.E.2d 835, 838

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solution available to the Adjutant General without forcing him to violate West Virginia Code § 15-1B-26.

(W.Va. 2006); Syl. pt. 2, State v. Elder, 162 W. Va. 571, 165 S.E.2d 108 (1968). The proviso cited by the plaintiff in support of his argument that he was “grandfathered” is clear and unambiguous. A reading of the statute clearly shows that the plaintiff would not be “grandfathered” by its provisions.

The statute states that “only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards.” This clearly states that national guard membership is a prerequisite to employment as a firefighter or security guard with the Adjutant General.

The statute goes on to state, “Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter.” This language clearly states that the only exception allowed by the statute is for those who were civilian firefighters at the time the statute was enacted. The statute does *not* state that “any person employed as a firefighter on the effective date of this section who *is* a member of the West Virginia air national guard may continue to be employed as a firefighter.” Thus, the statute says the exact opposite of what the plaintiff wants this Court to find that it says, and its “plain meaning [should] be accepted without resorting to the rules of interpretation.” Cogar, supra.

However, if one must look to the intent behind the statute in order to interpret the language used, the Adjutant General has testified that the statute was clearly intended to achieve exactly what it says. The Adjutant General was directly involved in the passage of the legislation, and has testified that the statute was intended to “grandfather” those select few individuals, at the 167<sup>th</sup> Airlift Wing in Martinsburg, West Virginia, who were civilians at the time the statute was enacted, as those individuals were employed as civilian firefighters at the

time the military membership requirement was first implemented in 1989. Since that time, no civilian firefighters have been hired, and no other exceptions have been made. (See *Exhibit E* to the Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 23-26; see also *Exhibit 2* to Reply Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 22-25). The reasons for this were set forth by the Adjutant General during his sworn testimony. The Adjutant General relies upon federal military funding in order to provide the training, uniforms and equipment available to the firefighters and security guards employed by him. Further, if the Adjutant General were forced to retain firefighters who had lost their military affiliation, he may very well end up with an entirely civilian force. This could jeopardize the retention of the 130<sup>th</sup> Airlift Wing, as the Adjutant General has testified that the only real reason the firefighters are there is to protect the equipment belonging to the U.S. military. It would also severely impact his ability to rotate national guard members for deployment, which would unfairly increase the burden on those individuals who remained members of the WVANG. (See *Exhibit 2* to Reply Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 10-17).<sup>3</sup>

#### IV. CONCLUSION AND PRAYER FOR RELIEF

The plaintiff cannot demonstrate that his dismissal as a firefighter, and transfer to a non-military position in the Adjutant General's office, was motivated by a discriminatory intent on the part of the Adjutant General. Further, based upon the clear language of W.Va. Code § 15-1B-26, and the clear intent of the statute, the plaintiff cannot show that the "grandfathering" provision in the statute applies to him in order to afford him any protection in this case.

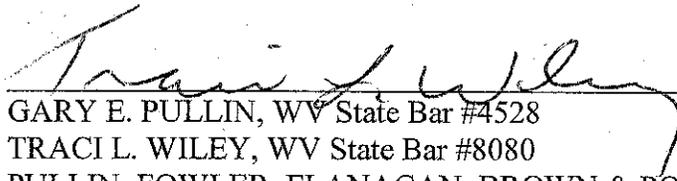
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<sup>3</sup> Since the filing of this action, the West Virginia legislature has passed West Virginia Code § 15-1J-1, *et seq.* (2008), which further clarifies the importance of federal military funding to the State and the Adjutant General's office, and reiterates the requirements of W.Va. Code § 15-1B-26 for firefighters who are employed by the newly established West Virginia Military Authority administered by the Adjutant General's department.

Therefore, based on the foregoing, the Defendant, WV Adjutant General, respectfully requests that this Court find that the Adjutant General's reliance upon the military membership requirement in W.Va. Code § 15-1B-26 demonstrates a legitimate, nondiscriminatory reason for the plaintiff's dismissal as a firefighter and transfer to a non-military position. Further, the Adjutant General respectfully requests that this Court apply the plain language of W.Va. Code § 15-1B-26 to this case and find that the plaintiff was not intended to be "grandfathered" by any provision in the statute. Accordingly, the Adjutant General requests that this Court answer the certified question in two parts: 1) Yes, the Adjutant General's reliance on W.Va. Code § 15-1B-26 is a complete defense to plaintiff's claim of disability discrimination under the WV Human Rights Action; and 2) No, the Plaintiff does not fall within the exception to the requirement of military membership in the "grandfather clause" contained in the statute.

**APPELLANT,**

By Counsel:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA ADJUTANT GENERAL,

Appellant,

v.

APPEAL NO. 34270

JAMEY LITTLE,

Appellee.

**CERTIFICATE OF SERVICE**

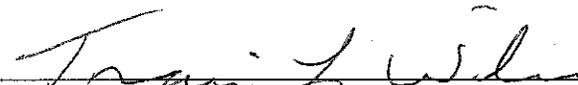
The undersigned counsel for appellant, does hereby certify that a true copy of the foregoing "*Appellant Brief*" was served upon counsel of record

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via hand delivery, on this the 9<sup>th</sup> day of October, 2008.

APPELLANT,

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