

DEC 10 2008

*May v. Honeywell*  
No. 07-35480

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

RYMER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts 1, 3 and 5 of the disposition, but disagree that May's STD benefits are "wages" and that she has a reasonable accommodation claim.

In my view, May's argument that STD benefits are "wages" is foreclosed because STD benefits are a contingent benefit. In *Teamsters v. Northwest Beverages*, the court interpreted the term "wages due" upon termination in Wash. Rev. Code § 49.48 to exclude sick leave, because such leave is a "contingent benefit due only in the event that an employee misses work due to illness." 976 P.2d 1262, 1263 (Wash. Ct. App. 1999). Because any STD payment that May could have received was contingent upon MetLife's determination that May had a qualifying disability, these payments are not wages. Rather, they are a contingent benefit akin to sick leave. *Naches Valley School District v. Cruzen*, 775 P.2d 960 (Wash Ct. App. 1989), does not suggest otherwise. As *Teamsters* explains, "*Cruzen* holds that [a contractual sick-leave buyout] is a vested form of deferred compensation that will be recognized as wages. *Cruzen* does not support a conclusion that sick leave is a form of wages when the CBA does not have a cashout provision." 976 P.2d at 1263. Thus, a benefit is a wage only when there is a contractual guarantee of payment without regard to the occurrence of a contingency. The fact that the contingency occurs does not somehow convert a

contingent payment into “wages.”

Nor do I believe May raised a triable issue on reasonable accommodation. Honeywell offered accommodation that May turned down. May’s February 7, 2005 letter does not raise a reasonable inference that she *could* be accommodated. Her deposition testimony from October 11, 2006 confirms that she was not able to work in any job in 2005. The issue of reasonable accommodation has to be resolved at some moment in time, and there is no genuine issue of material fact as to whether May could have been accommodated in 2005.

I would, therefore, affirm on these claims.