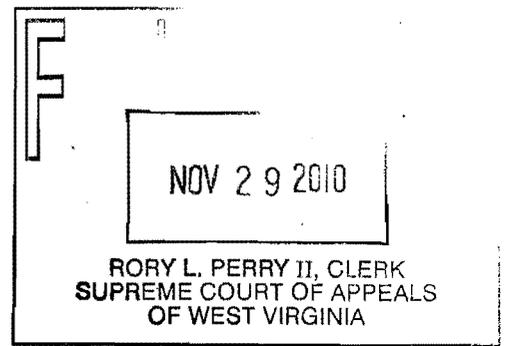


IN THE
SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

NO. 101590



ANTHONY ARMSTEAD,

PETITIONER,

VS.

FEDERAL EXPRESS CORPORATION,

RESPONDENT

***AMICUS CURIAE* BRIEF
IN SUPPORT OF
PETITIONER ANTHONY ARMSTEAD'S
PETITION FOR APPEAL**

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INTRODUCTION

Anthony Armstead appeals from a judgment of the Kanawha Circuit Court, James C. Stucky presiding, that overturned a decision of the West Virginia Human Rights Commission (“the Commission”) holding that the respondent Federal Express Corporation (hereafter “FedEx”) had racially discriminated against Mr. Armstead when it terminated his employment on October 19, 2004. *Amici* maintain that the circuit court grossly exceeded the proper bounds of judicial review of administrative agency cases. Its decision threatens the effective operation of those agencies, generally, and of the Human Rights Commission in particular. Reversing the circuit court is crucial to reenforcing this State’s commitment to racial equality, expressed through the West Virginia Human Rights Act and implemented by the Commission. “[U]nlawful discrimination in employment . . . is akin to an act of treason, undermining the very foundations of our democracy[.]” this Court sounded in its landmark decision in *Allen v. West Virginia Human Rights Commission*, 174 W.Va. 134, 148, 324 S.E.2d 99, 108 (1984). Recent rulings call into question whether the State’s historical opposition to race discrimination persists with the vigor expressed in *Allen*. This Court should use this appeal both to circumscribe circuit court intrusion into administrative factfinding and decision-making and to reaffirm judicial commitment to ending race discrimination.

The administrative law judge (“ALJ”) in this case found, and the Commission affirmed, that FedEx violated § 5-11-9 of the Human Rights Act in discharging – albeit temporarily – the petitioner from his employment as a delivery truck driver in the company’s Morgantown facility after twenty years of service. Mr. Armstead was involved in a verbal dispute with a coworker on September 27, 2004. After a complaint from the coworker and an ensuing investigation, the Morgantown management decided that Mr. Armstead’s behavior warranted a warning letter, which was then

issued. Mr. Armstead appealed that decision through the company's established procedures. The reviewing FedEx official, Richard Connolly, reversed the local management decision and, instead of a warning letter, ordered Armstead's termination. Subsequent company review overturned Connolly's decision and reinstated Armstead with backpay, but Connolly's decision had caused Armstead to suffer economic and incidental damages and incur attorneys' fees for which he seeks recompense. It was Connolly's decision that was the subject of the Human Rights Commission litigation.

STANDARD OF REVIEW

The ALJ concluded in a detailed, carefully reasoned twenty-nine page decision that Connolly's discharge of Armstead was racially motivated, and the Commission affirmed that conclusion. Yet the circuit court, in a perfunctory opinion with next to no explanation, determined that the ALJ and the Commission had both committed clear error. Although the court recited the applicable standard of review, it did not abide by it.

West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties. *West Virginia Human Rights Commission v. United Transportation Union*, 167 W.Va. 282, 284, 280 S.E.2d 653, 654 (1981). Furthermore, West Virginia Code § 29A-5-4 permits a court reviewing an agency decision to overturn an agency's factual determinations only if the agency was "clearly wrong in view of the reliable, probative and substantial evidence on the whole record." *See, e.g., Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W.Va. 703, 712, 629 S.E.2d 762, 771 (2006); *Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission*, Syl. Pt. 2, 172 W.Va. 627, 309 S.E.2d 342 (1983). The circuit court simply ignored these precepts.

This Court must make its own determination as to whether the Commission's decision was supported by substantial evidence in the record. *E.g., O.J. White Transfer & Storage Company v. West Virginia Human Rights Commission*, 181 W.Va. 519, 522-23, 383 S.E.2d 323, 326-27 (1989).

DISPARATE TREATMENT ANALYSIS

This Court has often explained the analysis applicable to disparate treatment cases such as that mounted by the petitioner in this case. The complainant bears the initial burden of demonstrating a prima facie case, *i.e.*, a set of facts that, if credited, would establish an inference of discrimination. *E.g., Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 484, 457 S.E.2d 152, 161 (1995). The employer can rebut that inference by proffering a legitimate nondiscriminatory reason, which the petitioner can overcome by showing that the reason is pretextual. An employee's proof of a prima facie case and pretext will ordinarily support a judicial finding or jury verdict that the employer engaged in unlawful discrimination; in the absence of a credible reason for an adverse employment action taken against a member of a racial minority, it is reasonable for the fact-finder to conclude that race made the difference. *Id.*, 193 W.Va. at 486-88, 457 S.E.2d at 163-65; *accord Skaggs v. Elk Run Coal Company*, 198 W.Va. 51, 71-76, 479 S.E.2d 571, 591-96 (1996).

MR. ARMSTEAD'S CASE

In the context of Mr. Armstead's discharge, a prima facie inference of discrimination was created by his showing that he was an African American, that he was ably performing his job as a courier, and that he was nevertheless discharged. *E.g., Barefoot, supra*, 193 W.Va. at 484-85, 457 S.E.2d at 161-62. FedEx met that case by supplying an explanation: Connolly concluded that Armstead's record as a whole demonstrated that "he posed a 'work place violence threat'" and that it warranted discharge. Finding of Fact 49, ALJ Decision at 11. The ALJ concluded that Connolly's

explanation was pretextual. Not only was there a substantial basis in the record to support that conclusion, and thus preclude any circuit court finding that it was clear error, but the case in support of the ALJ's conclusion was overwhelming.

To begin, a rational unbiased employer does not discharge a capable employee with twenty years on the job because of a single, nonviolent incident and a handful of disciplinary actions that occurred between eleven and a half years to seventeen years earlier. That obvious intuition no doubt explains why Armstead's immediate supervisor decided to discipline him only through a warning letter and why FedEx's management reinstated Armstead upon its review of Connolly's decision. That decision was completely out of the norm. It was such an excessive response (discharge!) to an isolated and minor occurrence of inappropriate behavior by a long-time employee that a compelling conclusion follows: something else – namely, racial bias – must explain the outcome. That conclusion is bolstered by numerous facts in the record:

- The local management team, which was much more familiar with Mr. Armstead's work performance and temperament than Connolly was, imposed only a warning letter on him for his verbal outburst.
- A warning letter at FedEx remains on an employee's record for twelve months, ALJ Finding of Fact 33, and Armstead had not received a warning letter in the preceding eleven and one half years. Despite the fact that FedEx's own policies consider warning letters that are older than one year to be dead letters, Connolly relied on warning letters that were between eleven and a half and seventeen years old.
- During the conference call reviewing Armstead's discipline, Connolly would not permit Armstead to describe extenuating circumstances that might have explained his behavior.

ALJ Finding of Fact 42.

- Although Connolly handled thirty-five to forty appeals a year, he had never enhanced a letter of warning to a discharge prior to Mr. Armstead's case.
- FedEx's policy is that "normally" three letters of warning within one year will provide grounds for more severe discipline. (FedEx Policy 2-5.)
- No one at the Morgantown FedEx facility stated that he or she considered Armstead to be a work place violence threat.
- There was no evidence in the record that Armstead ever threatened anyone at the job site with bodily harm. Finding of Fact 59.
- FedEx Minneapolis Managing Director Michael St. Martin reviewed Connolly's decision and did not find any evidence that Armstead posed a work place violence threat. ALJ Decision at 3 & 13 (Finding 68).
- Connolly treated white employees with behavioral issues more leniently than he did Armstead; instead of firing them outright, he referred them to the company's People Help program for counseling. The circuit court dismissed that fact, concluding that the "ALJ failed to determine if these white employees were similarly situated to Armstead." Circuit Court Final Order at 5. Of course, the circuit court itself made absolutely no effort – none – to examine the record to assess whether the white employees were similarly or differently situated to Armstead. Moreover, and more egregiously, the court ignored the ALJ's finding that the white employees had engaged in conduct that was *worse* than Armstead's. The ALJ concluded at page 21 of her opinion:

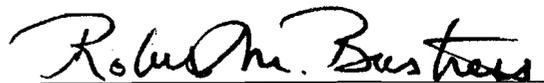
Mr. Connolly did not treat Mr. Armstead the same as he did white employees. He

referred white employees who had anger management problems to People Help, an employee assistance program. Teresa Rogers, a white employee who used abusive language and physically kicked customer packages off a truck, was referred to People Help to help her deal with her anger. Brooke Heyel, another white employee, who had a documented history of using profanity, behaving hysterically, and in an inappropriate and threatening manner, was referred to People Help by Mr. Connolly. Mr. Connolly modified her termination letter down to a warning letter even though she had three warning letters of misconduct. Mr. Rowlee, a white employee with behavioral problems, was also referred to People Help for anger management counseling prior to his termination.

- Connolly fired this twenty-year employee without ever contacting anyone in the Morgantown facility to determine if Armstead presented any sort of work place threat.

CONCLUSION

The circuit court not only failed to accord the deference owed to the factual findings of the ALJ and the Human Rights Commission, the court also ignored the record. The facts overwhelmingly support the conclusion that Connolly's explanation of his decision to terminate Armstead was pretextual and obscured a racially-based decision. Permitting the circuit court's decision to stand would thwart the efforts of the Commission to police and provide redress for unlawful employment discrimination. To prevent that, this Court must reverse the ruling of the Kanawha Circuit Court and direct immediate implementation of the relief awarded by the Commission.



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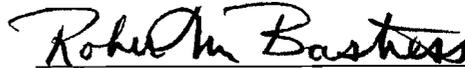
CERTIFICATE OF SERVICE

I have, on this the 24th day of November, 2010, mailed a copy of the foregoing brief to the parties' counsel:

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