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JUN 29 RECD

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

CIVIL ACTION NO. 09-AA-106
JUDGE JAMES C. STUCKY

ANTHONY ARMSTEAD and
THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Respondents.

2010 JUN 23 PM 4:12
KAWAHA COUNTY CLERK'S OFFICE

FINAL ORDER

This matter comes before the Court on Petitioner Federal Express Corporation's, (hereinafter "FedEx") Petition for Review of Final Decision of the West Virginia Human Rights Commission on Behalf of Federal Express Corporation pursuant to West Virginia Code §§ 5-1-11 and 29A-5-4. FedEx appeals the May 13, 2009, Final Decision of the West Virginia Human Rights Commission (hereinafter "Commission"). After careful consideration, this Court **REVERSES** the Commission's Final Decision, which adopted without modification or amendment the Administrative Law Judge's (hereinafter "ALJ") Final Decision dated August 28, 2008, and the Supplemental Final Decision on Damages and Attorneys' Fees dated December 29, 2008.

This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4(g) states,

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 196 W. Va. 588, 595, 474 S.E.2d 518, 525 (1996).

A brief recitation of the facts is as follows. Anthony Armstead (hereinafter "Armstead") was a courier employed by FedEx at its Morgantown, West Virginia, station. There was an incident between Armstead and another courier, Scott Hammerquist (hereinafter "Hammerquist"), on September 2004. Armstead and Hammerquist engaged in a verbal confrontation. The manager, Norman Wills (hereinafter "Wills"), was told about the incident. Hammerquist submitted a written statement. Wills placed Armstead on paid investigative suspension until Wills could determine what had happened. Armstead later submitted a statement of his own.

After reading the statements made by Armstead, Hammerquist, and two witnesses, Wills, his supervisor, and the local FedEx Human Resources representative reviewed the policy PM 2-5 Acceptable Conduct¹. This policy prohibits "[t]hreatening,

¹ FedEx PM 2-5 Acceptable Conduct provides in part:

Termination Option Exercised. Failure to correct behavioral deficiencies results in discharge by the Company. Three notifications of deficiency within a 12-month period normally result in termination. However, an employee's entire employment history should be considered. Based on the severity of the occurrence, an employee may be terminated with less than three notifications of deficiency within a 12-month period. Management is responsible for thoroughly reviewing an employee's disciplinary record with the Company and exercising judgment in determining appropriate action. . . .

Recurrent Patterns. Employees must understand that recurrent patterns of misconduct are noted and cannot

intimidating, coercing, directing abusive language, or displaying blatant or public disrespect toward any employee or customer while on duty, on Company property, at collection sites, or at off-site Company meetings and functions." A "warning letter" is one of two types of formal written deficiency notification, and can result in termination of employment. Armstead was not terminated. He was issued a warning letter for the incident because of the PM 2-5 violation.

FedEx's PM 5-5 Guaranteed Fair Treatment Procedure (hereinafter "GFT") allows an employee who receives a warning letter to ask for that decision to be reviewed by a higher-level manager. Armstead filed a GFT after receiving his warning letter. A teleconference was then held between Armstead; Wills; John Snyder, Wills's immediate supervisor (hereinafter "Snyder"); Richard Connolly, Snyder's immediate supervisor (hereinafter "Connolly"); and the FedEx Human Resources Representative.

Connolly testified that he reviewed Armstead's employment history, and he saw a pattern in Armstead's conduct. The history shows that he was disciplined and had incidents involving his behavior since 1987. Connolly focused on the "overall pattern of poor conduct." He testified that he had never seen "that much discipline throughout a history of conduct-related issues." Connolly terminated Armstead's employment.

Armstead appealed his termination to Connolly's immediate supervisor. After an investigation, no discrimination was found, but Connolly's supervisor determined that there were irregularities in the GFT process: Connolly may not have reminded Armstead that the discipline could be increased on appeal and that Connolly should not have asked Armstead's manager to pick up the phone receiver at the GFT conference

be tolerated. An employee's entire employment history is reviewed and taken into consideration when evaluating recurring patterns of misconduct. Issuance of a warning letter for a deficiency which has been addressed previously

call. Because of these reasons, Armstead's employment was reinstated, and he was given back pay.

A public hearing was conducted, and after briefs were submitted, the ALJ issued a Final Decision awarding Armstead economic damages of \$2,545.26 and statutory incidental damages of \$5,000, plus his attorneys' fees and costs. The ALJ also issued a Cease and Desist Order. An appeal was filed to the Commission. The Commission entered an order on May 13, 2009, that adopted the Final Decision of the ALJ.

FedEx argues that the ALJ's finding that Armstead had established a prima facie case is not supported by substantial evidence on the record or the evidence is not legally sufficient to support a finding of discriminatory motive. To establish a prima facie case of discrimination, the complainant must prove that (1) he was a member of the protected class; (2) he suffered an adverse employment decision; and (3) but for his protected class status, the adverse decision would not have been made. *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170, 358 S.E.2d 423,429 (1986).

Circumstantial evidence in a discrimination case must "sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment-related decision was based upon an unlawful discriminatory criterion." *W. Va. Inst. Of Tech. v. W. Va. Human Rights Comm'n*, 181 W. Va. 525, 530, S.E.2d 490, 495 (1989).

Connolly wrote a detailed rationale for his decision to terminate Armstead's employment. He stated that he reviewed Armstead's entire work history, which is protocol according to FedEx's policy. There were "numerous incidents of conduct

through 2-5 Acceptable Conduct can result in more severe action up through termination.

issues," including abusive language, bad attitude, inappropriate behavior, and lack of professionalism.

Connolly also testified at the hearing that his concern was the recurring conduct issues and stressed his concern that based upon Armstead's history, something bad could happen. His understanding of workplace violence reflects the FedEx's policy on acceptable conduct. It also coincides with the West Virginia Supreme Court of Appeals's concept. In *Adkins v. Gatson*, the Court held that although no one was physically assaulted or threatened, the employer choosing to refuse the intimidating employee from returning to work was a "reasonable measure to assure the Appellants' safety in light of [the intimidating employee's] behavior." *Adkins v. Gatson*, 218 W. Va. 332, 338-39, 624 S.E.2d 769, 776 (2005).

Armstead's behavior fits into the broad definition of workplace violence per FedEx's policy and the Court in *Adkins*.

Inconsistent treatment of employees may be considered if the employees are "similarly situated." *Pritt v. W. Va. Div. of Corr.*, 218 W. Va. 739, 744, 630 S.E.2d 49, 54 (2006). Here, Armstead showed white employees who received different treatment than him. The ALJ failed to determine if these white employees were similarly situated to Armstead.

McDonnell Douglas v. Green puts forth a burden-shifting framework: if the employee does establish a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for its employment decision. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). FedEx's stated legitimate business reason for

terminating Armstead was his long history of conduct issues. The record supports this reason.

The evidence on record as a whole is insufficient to prove discrimination. The Commission's Final Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record

RULING

Accordingly, this Court Orders the following:

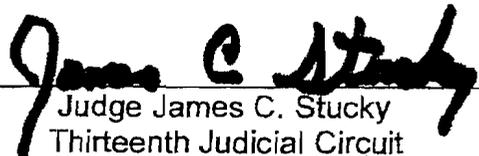
The Final Decision of the Commission is **REVERSED**. This matter is **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk of the Court shall send copies of this Order to all counsel of record:

Mark H. Dellinger, Esquire
Joy B. Mega, Esquire
Bowles Rice McDavid Graff & Love LLP
Post Office Box 1386
Charleston, West Virginia 25325-1386

Edward J. Efke, Esquire
Federal Express Corporation
3620 Hacks Cross Road
Building B - 3rd Floor
Memphis, Tennessee 38125

Jane E. Peak, Esquire
Allan N. Karlin, Esquire
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, West Virginia 26505

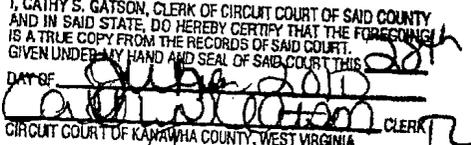
Enter this Order the 23rd day of June, 2010.



Judge James C. Stucky
Thirteenth Judicial Circuit

Date: _____
Certified copies sent to:
___ counsel of record
___ parties
___ other _____
(please indicate)
By: _____
___ certified/1st class mail
___ fax
___ hand delivery
___ intradepartmental
Other directives accomplished: _____

Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 23rd
DAY OF June 2010


CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FEDERAL EXPRESS CORPORATION,

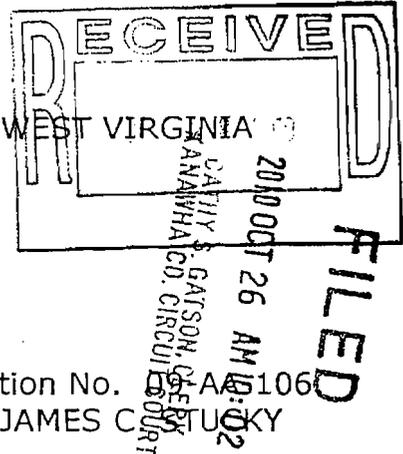
Petitioner,

v.

ANTHONY ARMSTEAD and
THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Respondents.

Civil Action No. 10-106
JUDGE JAMES C. STUCKY



ORDER

On the 19th day of October, 2010, the Court reviewed the Motion to Alter or Amend Judgment Pursuant to Rule 59(e), Petitioner's Opposition to Motion to Alter or Amend Judgment Pursuant to Rule 59(e), and Reply of Anthony Armstead to the Opposition of Federal Express Corporation to Anthony Armstead's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), filed with the Circuit Clerk of Kanawha County, West Virginia, in the above-styled civil action.

Whereupon, after giving due and mature consideration to said written motions, the Court is of the opinion that a hearing is not necessary in order for the Court to make a decision in this matter and good cause or other justification does not exist to grant said motion to alter or amend.

Therefore, the Court is of the opinion to and does hereby **ORDER** that the motion be **DENIED**.

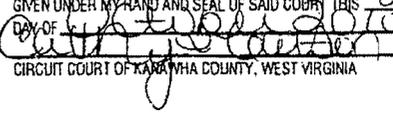
The Court hereby notes the objection and exception of the defendant, Anthony Armstead, to the Court's ruling.

The Court **FURTHER ORDERS** that the Clerk of this Court forward a certified copy of this Order to Allan K. Karlin, Esq., 174 Chancery Row, Morgantown, WV 25605, Lonnie C. Simmons, Esq., 604 Virginia Street, East, Charleston, WV 25301, Ivin B. Lee, Executive Director, WV Human rights Commission, 1321 Plaza East, Room 108A, Charleston, WV 25301-1400, Paul Sheridan, Deputy Attorney General, Civil Rights Division, P.O. Box 1789, Charleston, WV 25326-1789, Mark H. Dellinger, Esq., 600 Quarrier Street, P.O. Box 1386, Charleston, WV 25325, Edward J. Efke, Esq., Federal Express Corporation, 3620 Hacks Cross Road, Building B - 3rd Floor, Memphis, TN 38125.

Enter this 25 day of October, 2010.



JAMES C. STUCKY, Circuit Judge
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, W.V.
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27th
DAY OF October 2010
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA