

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FEDERAL EXPRESS CORPORATION,

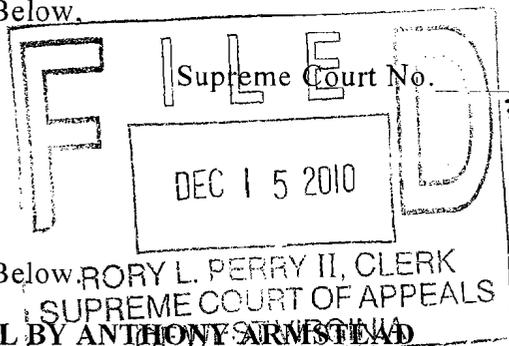
Respondent and Petitioner Below.

v.

ANTHONY ARMSTEAD and
THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Petitioner and Respondent Below. RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS

PETITION FOR APPEAL BY ANTHONY ARMSTEAD



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CATHY S. GIBSON
CLERK
CIRCUIT COURT
KANAWHA CO.

FILED

KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

The petitioner in this case is Anthony Armstead.¹ Mr. Armstead, a driver for Federal Express Corporation (“FedEx”) filed a complaint before the West Virginia Human Rights Commission contending FedEx discriminated against him based upon his race when it terminated his employment as a FedEx driver. On August 28, ALJ Phyllis Harden Carter issued a decision in his favor. See Chief Administrative Law Judge’s Final Decision (“ALJ Decision”).² The decision was affirmed by the Human Rights Commission (“HRC”) on May 13, 2009. FedEx appealed the decision to the Circuit Court of Kanawha County pursuant to W. Va. Code § 5-9-11 and the case was assigned to Judge James C. Stucky. By Final Order filed in the Office of the Circuit Clerk on June 23, 2010, the Circuit Court reversed the decision of the Human Rights Commission. Final Order at 6. Mr. Armstead timely filed a motion under Rule 59(e) requesting that the Circuit Court alter or amend

¹ Although the case below is styled in the name of Mr. Armstead and the West Virginia Human Rights Commission, Mr. Armstead defended the decision below and is the petitioner herein.

² The ALJ’s decision is twenty-nine (29) pages long. It includes eighty-six (86) findings of fact, seven pages of analysis of the facts under the applicable law and twelve (12) conclusions of law. The Circuit Court reversed the ALJ’s decision in an order that is six (6) pages long based on its conclusion that “[t]he Commission’s Final Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.” Final Order. The statement of facts that follows is lengthy because one of the primary issues in this case is whether the evidentiary record supports the decision in favor of Mr. Armstead. As discussed *infra*, the Circuit Court’s decision turns on its finding that the record does not include sufficient evidence to support the decision although the Circuit Court’s decision fails to discuss or even mention almost all of the evidence outlined in this statement of facts.

its decision.³ See Motion to Alter or Amend Judgment Pursuant to Rule 59(e).⁴ Subsequently, by Order filed in the Office of the Circuit Clerk on October 26, 2010, the Circuit Court denied the Motion to Alter or Amend Judgment. This appeal is timely.

STATEMENT OF FACTS

Anthony Armstead is an African-American male and a resident of Morgantown, West Virginia.. 05/15/07 Tr.⁵ at 253-254. He worked as a courier for FedEx beginning in November 1985. *Id.* at 254. At the public hearing, Mr. Armstead's immediate supervisor, Norman Wills, confirmed that Mr. Armstead does well on the road and is in the upper 25% of couriers in terms of meeting goals. 05/16/07 Tr. at 51. In September 2004, Mr. Wills, an African-American male, was

³ The motion was timely filed. Because the ten (10) day filing period for a Rule 59(e) motion is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." W. Va. Rules of Civil Procedure, Rule 6(a). Since the Final Order of the Circuit Court was entered on June 23, the ten day period included two weekends and the Fourth of July. The filing of the Rule 59 (e) motion was therefore timely.

⁴ When Mr. Armstead filed his Motion to Alter or Amend Judgment, FedEx argued that there was no authority for the Circuit Court to consider the motion because Rule 59(e) did not apply to an appeal of a decision of an administrative agency in a circuit court. FedEx argued that Rule 59(e) of the Rules of Civil Procedure does not apply to this case because there is no provision for a Rule 59(e) motion in the Rules of Procedure for Administrative Appeals. Mr. Armstead responded by noting that, in promulgating the Rules of Procedures for Administrative Appeals, this Court did not abrogate the plain language in Rule 81 of the West Virginia Rules of Civil Procedure which states that the Rules of Civil Procedure apply to the review of decisions of administrative agencies by the circuit courts "when the appeal of a case has been granted or perfected." Also, Rule 1(b) of the Rules of Procedure for Administrative Appeals states that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the circuit courts as established by law." Thus, the Rules do not deprive the circuit court's jurisdiction to hear motions to alter or amend a judgment pursuant to Rule 59(e) which applies to administrative appeals as set forth in Rule 81 of the Rules of Civil Procedure. If FedEx were correct in its interpretation of the applicable rules, a circuit court would be powerless to correct any error in any order in an administrative appeal. Given the language of Rule 1, there is no basis for such a result.

Moreover, there is no conflict between the two sets of Rules. For example, Rule 6(c) of the Rules of Procedure for Administrative Appeals contemplates the taking of testimony "in the event a party alleges irregularities in the procedure before the agency." However, the Rules of Procedure for Administrative Appeals do not include any procedural rules regarding the means of taking testimony at a Rule 6(c) hearing, subpoenaing witnesses to the hearing, *et cetera*. In contrast, the Rules of Civil Procedure do address procedural issues involving hearings including, but not limited to, Rule 43 (Taking of testimony), Rule 45 (Subpoena), Rule 46 (Exceptions unnecessary), and Rule 52 (Findings by the court). Similarly, the Rules of Procedure for Administrative Appeals provide for the perfecting of an appeal and the scheduling of briefs, but they do not include a mechanism for correcting errors in an order. The Rules of Civil Procedure, however, including Rule 59(e) (Amendment of judgments) and Rule 60 (Relief from judgment or order), provide that mechanism.

The Circuit Court denied Mr. Armstead's Motion to Alter or Amend, but it did not adopt FedEx's procedural argument in its Order. Should this Court request further briefing on this issue, Mr. Armstead's counsel is prepared to submit a supplemental memorandum.

⁵ References to "Tr." refer to the transcript of testimony at the hearing before the ALJ.

an operations manager at FedEx's Morgantown station and Mr. Armstead's immediate supervisor. *Id.* at 22-23. Mr. Wills reported to John Snyder, a white male, who was the senior manager for the Morgantown station. 05/15/07 Tr. at 24; 05/16/07 Tr. at 31. The Managing Director for the Three Rivers District, which includes the Morgantown station, was another white male named Richard Connolly. 05/15/07 Tr. at 19-20.

A. September 27, 2004

On the morning of September 27, 2004, Mr. Armstead was involved in an argument with another FedEx employee, a white male named Scott Hammerquist. 05/15/07 Tr. at 165; Resp. Ex. 23-24.⁶ According to Mr. Hammerquist, Mr. Armstead entered the document sorting area and, when Mr. Hammerquist asked Mr. Armstead to move out of his way, Mr. Armstead began using the "f-word" toward Mr. Hammerquist. Mr. Hammerquist asked Mr. Armstead to stop, but Mr. Armstead continued using foul language. Resp. Ex. 23, 25, 26. In contrast, according to Mr. Armstead, Mr. Hammerquist told him to get out of his way in a "real nasty and bossy manner." Resp. Ex. 24. Mr. Armstead responded that he was not in Mr. Hammerquist's way and as Mr. Armstead was about to walk away, Mr. Hammerquist shoved up against Mr. Armstead and again told Mr. Armstead to get out of his way. *Id.* The two then exchanged words. *Id.* During their exchange, Mr. Hammerquist said that he was going to have Mr. Armstead's job. *Id.*; *see also* 05/15/07 Tr. at 261-268 (description of incident). After the incident, Mr. Armstead felt the matter was over and left to work his route. *See generally id.* at 267-268.

Mr. Hammerquist did not consider the matter over, complained to Mr. Wills and, that evening, gave Mr. Wills a written statement of the incident, including the names of two witnesses, Donna Messoria and Brian Fox. 05/16/07 Tr. at 27. Upon receiving Mr. Hammerquist's statement, Mr. Wills placed Mr. Armstead on investigative suspension. *Id.* at 27-28. When told of Mr. Hammerquist's complaint, Mr. Armstead then filed his own statement in response to

⁶ References to "Resp. Ex." refer to exhibits introduced into evidence at the hearing by FedEx.

Mr. Hammerquist's statement. *Id.* at 28, lines 7-19. Mr. Wills then placed Mr. Hammerquist on investigative suspension as well. *Id.* at 28-29.

After interviewing Mr. Fox and Ms. Messoria, Mr. Wills contacted his manager, John Snyder, and Kathryn Lis, a FedEx Human Resources representative in Pittsburgh, about the incident. 05/16/07 Tr. at 29. All three concurred that it was appropriate to issue a Warning Letter to Mr. Armstead for his conduct. *Id.* at 29-30, 46-50; Comp. Ex. 8.⁷ In reaching this decision, Mr. Snyder and Ms. Lis both had access to Mr. Armstead's entire discipline history to aid in their decision. 05/16/07 Tr. at 46-48. Based upon the recommendation of Mr. Snyder and Ms. Lis, upon his own review of the FedEx employee manual on discipline, and upon the statements provided by the witnesses, Mr. Hammerquist and Mr. Armstead, Mr. Wills gave Mr. Armstead a Warning Letter, dated September 29, 2004. *Id.* at 29-30; Comp. Ex. 8.

Prior to the September 2004 incident, Mr. Armstead had not received a Warning Letter for any conduct-related issues for over ten years. His last warning letter regarding his conduct occurred in March 1993. 05/15/07 Tr. at 66-67.

B. FedEx's Employee Discipline Process

FedEx has several forms of employee discipline: a counseling, a Performance Reminder, and a Warning Letter. A "counseling" is an informal discussion with a manager regarding inappropriate conduct. The manager may make a note to memorialize the talk, but the note does not contain a detailed record of the incident. 05/15/07 Tr. at 65. Under FedEx's policies, a counseling is not treated as discipline that can automatically lead to termination. Resp. Ex. 27 (Acceptable Conduct Policy); Resp. Ex. 28 (GFT/EEO Policy).

A Performance Reminder is a disciplinary letter that remains on the employee's record for six months and is used to correct employee performance, such as failing to use "proper methods," having accidents, and missing work. 05/16/07 Tr. at 80.

⁷ References to "Comp. Ex." refer to exhibits introduced into evidence at the hearing by Mr. Armstead.

A Warning Letter is issued to correct behavioral issues and remains on an employee's record for twelve months. *Id.* at 80-81. Warning Letters provide employees with notification of behavioral deficiencies. Resp. Ex. 27 at 3.

FedEx has a process called the Guaranteed Fair Treatment Program ("GFT") for employees to appeal certain disciplinary actions. 05/15/07 Tr. at 21. The GFT Program is a three-step appeals process, during which FedEx employees may challenge disciplinary actions up through three levels of management. *Id.* at 14. Employees may appeal the issuance of Performance Reminders or Warning Letters through the GFT Program. Resp. Ex. 28 at 1.

C. Anthony Armstead's Use of the GFT Program

Mr. Armstead appealed the September 2004 Warning Letter through the GFT process. 05/15/07 Tr. at 21. Pursuant to Step One of the GFT Program, on October 15, 2004, Mr. Armstead had a telephone conference with Richard Connolly, a Caucasian person, who was FedEx's Managing Director for the Three Rivers District which included the Morgantown station in which Mr. Armstead worked. *Id.* at 23. Although Mr. Connolly told Mr. Armstead during the conference call that, under FedEx policies, he could make a decision to modify, uphold, or overturn the Warning Letter, he did not explain to Mr. Armstead that "modify" meant that he could modify the disciplinary action up or down. *Id.* at 36-37. Mr. Connolly did not tell Mr. Armstead that he was considering terminating Mr. Armstead's employment. *Id.* at 43-44. He also failed to warn Mr. Armstead that he was considering Mr. Armstead's entire prior employment history of almost twenty years with FedEx, not just the incident with Mr. Hammerquist. *Id.* at 39-44. Nor did Mr. Connolly give Mr. Armstead any opportunity to defend his prior employment record. *Id.* Thus, Mr. Armstead was under the impression that the only issue under consideration in his appeal was whether he should have received a Warning Letter over the September 27, 2004 incident with Mr. Hammerquist. See *id.* at 269-270.

During the conference call, Mr. Armstead attempted to explain to Mr. Connolly that other issues then going on in his life -- his own health problems and the health problems of his wife -- may have contributed to his reaction to Mr. Hammerquist. See 05/15/07 Tr. at 270-271. After

Mr. Armstead had presented his appeal, Mr. Connolly told Mr. Snyder to pick up the phone so he could have a private discussion with Mr. Snyder, advised Mr. Snyder that he was considering terminating Mr. Armstead, and directed him to place Mr. Armstead on investigative suspension. *Id.* at 38-39.

Mr. Connolly knew that Mr. Armstead was African-American. 05/15/07 Tr. at 25. Mr. Armstead contended that Mr. Connolly's decision to turn a warning and one-day suspension, previously approved by two supervisors and an HR employee, into a termination was motivated, in whole or in substantial part, by Mr. Armstead's race, including Mr. Connolly's racially prejudiced conclusion that Mr. Armstead posed a workplace violence threat. *Id.* at 49-50. According to FedEx, Mr. Connolly based his decision to fire Mr. Armstead on his concern about what he considered a long history of misconduct, not on a concern about workplace violence. *See, e.g.*, Comp. Ex. 10 at 2 (May 17, 2005, letter from FedEx Human Resources Adviser John Caldwell to Director of Op. West Virginia Human Rights Commission Donald Raynes). Mr. Connolly, however, acknowledged that concerns about workplace violence were considered by him in deciding to terminate Mr. Armstead's employment. Although Mr. Armstead had not received any disciplinary letters for conduct similar to the Hammerquist incident for over eleven years, Connolly concluded that Mr. Armstead presented a potential workplace violence threat testifying that "workplace violence was something that did come up into my mind based on altercations." *Id.* at 52. When asked what he meant by altercations, Mr. Connolly explained that he meant verbal altercations, intimidating people, and swearing, not physical altercations. *Id.* He went on to define workplace violence as "putting someone in an intimidating position," and stated he "was concerned that, you know, if you look at history and then somebody does something, would that surprise you if that took place." *Id.* at 109. Mr. Connolly also stated that "[i]n all the discipline that was looked at [in Mr. Armstead's file], that this was a thought that I could be putting people at risk." *Id.* at 110. Mr. Connolly reached this conclusion despite the fact that he had no evidence that Mr. Armstead had ever engaged in any inappropriate physical or violent conduct at all, despite the fact that the incidents of verbal altercations had occurred between 1987 and 1993, many years in the past, despite the fact that Mr.

Connolly admitted there was no evidence that Mr. Armstead had used abusive language between March 1993 and 2004, and despite the fact, as noted below, that no one other than Mr. Connolly, including those who know him far better than Mr. Connolly knows him, considered Mr. Armstead to represent any threat of violence at all.⁸ *Id.* at 52, 56-57, 59-62, 210, 258.

Mr. Connolly concluded that Mr. Armstead presented a workplace violence threat without any attempt to investigate the facts. *See* 05/15/07 Tr. at 52-53; St. Martin Depo. at 56. Mr. Connolly did not contact Mr. Wills, who was Mr. Armstead's immediate supervisor, to determine whether Mr. Wills thought that Mr. Armstead presented a workplace violence threat. *Id.* at 52. Had Mr. Connolly checked with Mr. Wills, Mr. Wills would have told him that he, Mr. Wills, did not view Mr. Armstead as a workplace violence threat. 05/16/07 Tr. at 52. Nor did Mr. Connolly ask Mr. Snyder, the senior Morgantown manager, whether Mr. Armstead presented a workplace violence threat. 05/15/07 Tr. at 52-53. Further, had Mr. Connolly checked, Ms. Messoria, one of the witnesses to the September 27 incident with Mr. Hammerquist, would have told him that Mr. Armstead usually was a pretty good person and that his outburst with Mr. Hammerquist had caught her by surprise. St. Martin Depo. at 56. In fact, Michael St. Martin, the FedEx director responsible for an internal investigation into Mr. Armstead's termination, testified that, after conducting his internal EEO Complaint investigation, he did not perceive Mr. Armstead to be a workplace violence threat. *Id.* at 57.

Although Mr. Connolly denied that he had considered Mr. Armstead's race in terminating Mr. Armstead's employment, his testimony at the hearing was not credible. For example, Mr. Connolly was evasive in responding to questions from counsel for Mr. Armstead. *See, e.g.*, 05/15/07 Tr. at 68 (ALJ noting that "[t]he witness has not given a direct answer to Mr. Karlin's questions on a number of occasions"); *id.* at 77-78 (ALJ directing Mr. Connolly to answer the question he was being asked); *id.* at 211 (ALJ noting for the record that Mr. Connolly had not

⁸ Mr. Armstead acknowledged that he had used inappropriate language in the workplace during his earlier years at FedEx, but noted that during those years there was a lot of cursing at the Morgantown station. 05/15/07 Tr. at 257-258.

answered questions that he had been asked several times). Moreover, Mr. Connolly's decision to modify a minor disciplinary action, taken by an African-American supervisor, into a termination was unprecedented, contrary to how such conduct was usually handled by FedEx, and contrary to the way the matter was or would have been handled by Mr. Wills, Mr. Snyder, Ms. Lis, Mr. St. Martin, or Julia Hass, the Human Resource representative who worked with Mr. St. Martin. St. Martin Depo. at 22-23, 68-69, 73; 05/16/07 Tr. at 29-30, 46-50.

On October 18, 2004, one business day after the telephone conference with Mr. Armstead, Mr. Connolly issued a letter advising Mr. Armstead that he was "modifying management's decision and terminating [Mr. Armstead's] employment with Federal Express." Resp. Ex. 20. The next day, on October 19, 2004, Mr. Snyder gave Mr. Connolly's letter to Mr. Armstead, thereby ending Mr. Armstead's almost twenty years of employment with FedEx. 05/15/07 Tr. at 273-275. Mr. Armstead was stunned and devastated. He described feeling as if someone had smacked him on the side of his head with a baseball bat and that he was unable to believe that he had been terminated. *Id.* at 275. Following his termination, Mr. Armstead appealed to Step Two of the GFT process. *Id.* at 277. Mr. Armstead also filed an *internal* EEO complaint against Mr. Connolly on November 11, 2004. *Id.* Under FedEx policy, a GFT appeal is suspended when an employee files an EEO complaint and the EEO complaint is exclusively investigated before continuing with the GFT. *Id.* at 191; *id.* at 277-278. The EEO complaint was investigated by Mr. St. Martin and Human Resources representative Hass. *Id.* at 187-188. *See also* St. Martin Depo. at 15.

Mr. Connolly's reliance on incidents that were more than eleven years in the past was questioned by Kathryn Lis, the Human Resources representative most involved in advising FedEx managers about how they should handle the Hammerquist incident. When FedEx investigator St. Martin interviewed Human Resources representative Lis, she expressed her concern about the long period of time that had elapsed between the September 2004 incident and the Warning Letters upon which Mr. Connolly had relied. Ms. Lis told Mr. St. Martin that she had advised Mr. Connolly of her concerns regarding his decision to discharge Mr. Armstead. St. Martin Depo. at 68-69, 73. Although FedEx investigator St. Martin did not find in favor of Mr. Armstead on his complaint of

discrimination, *see* 05/15/07 Tr. at 188, he believed that a disciplinary letter may have been the appropriate discipline for Mr. Armstead and testified that he would have reinstated Mr. Armstead's employment. St. Martin Depo. at 22. Mr. St. Martin further testified that Ms. Hass would probably agree with him that a Warning Letter, the disciplinary action originally taken against Mr. Armstead, was the appropriate action. *Id.* at 23.

By letter dated November 24, 2004, Mr. Armstead's counsel advised FedEx that Mr. Armstead intended to file a complaint with the West Virginia Human Rights Commission, *see* Comp. Ex. 5, and on November 29, 2004, Mr. Armstead contacted the West Virginia Human Rights Commission. 05/16/07 Tr. at 12. On January 31, 2005, approximately two months after FedEx learned that Mr. Armstead was represented by counsel and that he was pursuing a Human Rights Commission complaint, FedEx reinstated Mr. Armstead to his employment position with back pay. *See generally* Comp. Ex. 2, 5 (letters from Mr. Armstead's counsel to FedEx); Resp. Ex. 31.⁹

D. Evidence of Mr. Connolly's Discriminatory Animus

Even though Mr. Connolly handles approximately 35-40 GFT's a year, he has never increased a Warning Letter to a termination during a GFT other than in the case of Mr. Armstead. 05/15/07 Tr. at 47, 49, 200-202. Mr. Connolly's conduct in this respect was unique at FedEx. In fact, as part of the internal FedEx EEO investigation, Mr. St. Martin and Ms. Hass looked but were unable to find any other case in which a FedEx manager had ever modified a Warning Letter to a termination. St. Martin Depo. at 40-41.

Mr. Connolly's attitude toward racial issues was demonstrated by his reliance, in part, on a June 23, 1993 counseling note in Mr. Armstead's file. The note reflects a counseling in which Mr. Armstead was instructed to be careful in what he says regarding race and FedEx's hiring selections. Comp. Ex. 14. *See also* Resp. Ex. 22 at 5; 05/15/07 Tr. at 70-71. In June 1993 Mr. Armstead asked his then-operations manager Glenn Sutton why their FedEx office did not hire

⁹ The reinstatement by FedEx did not address some of Mr. Armstead's economic loss, his right to damages for emotional distress arising out of the discharge, or his claim for attorney fees for his counsel's representation in initially instituting the HRC complaint and advocating for him with FedEx.

more African-Americans. Mr. Sutton told Mr. Armstead that the office had already met its quota, counseled Mr. Armstead not to bring up race anymore and documented the counseling in Mr. Armstead's file. 05/15/07 Tr. at 272-73; Resp. Ex. 22 at 5. This alleged transgression by Mr. Armstead arose out of conduct that is protected under the West Virginia Human Rights Act. Yet, Mr. Connolly construed this counseling for expressing concern about hiring discrimination as an example of Mr. Armstead's unacceptable conduct in the workplace that justified his firing. Comp. Ex. 14; Resp. Ex. 22 at 5; 05/15/07 Tr. at 70-71.

Mr. Connolly's disparate treatment of Mr. Armstead also supports an inference of discrimination. Mr. Armstead is not the only FedEx employee who has been disciplined for using abusive language or engaging in anger-related behavior. However, in other such instances, FedEx managers, including Mr. Connolly, have referred the employee to anger management programs before taking more serious disciplinary action against the employee. 05/15/07 Tr. at 86, 96, 100-101. This counseling program to which employees with problems may be referred is called People Help. *Id.* at 91-92; 05/16/07 Tr. at 52-53. Mr. Connolly was aware of the People Help program and had previously referred FedEx employees with anger management and/or other problems to People Help. 05/15/07 Tr. at 92. Mr. Armstead introduced two examples of white employees who Mr. Connolly referred to People Help for conduct equal to or worse than the conduct that led to Mr. Armstead's firing.

First, Mr. Connolly recommended People Help for TR,¹⁰ a white female employee, who had appealed the Warning Letter she received in 2002 for making angry complaints about working on a Saturday and kicking a customer package. *Id.* at 96. Mr. Connolly's note about his decision concerning Ms. R states that she had received a Warning Letter, a Performance Reminder, and two counselings between November 2000 and September 2002. In 2000, she was "cautioned to 'continue to work on controlling her emotions at all times.'" Comp. Ex. 20 at 1. On January 8, 2001, less than two months later, she was counseled for "throwing a package in anger." *Id.* On May 3, 2002, she

¹⁰Mr. Armstead has used initials rather than names for other FedEx employees who were disciplined.

was again counseled for unprofessional conduct. *Id.* Mr. Connolly noted that Ms. R's "hot temper and poor conduct seem to be recurring themes." *Id.* He also noted, in his letter to her, that she had exhibited "unwelcome, inappropriate and threatening behavior" and that she admitted to "threatening revenge for being scheduled to work on a Saturday." *Id.* Yet, instead of firing TR, Mr. Connolly referred her to People Help. *Id.*

Second, Mr. Connolly reversed the termination of BH, another white female employee who had received three Warning Letters within the preceding year and had failed to utilize the services of People Help to which she had previously been referred three times. Comp. Ex. 19; 05/15/07 Tr. at 99-101. Mr. Connolly reversed Ms. H's termination even though she had been terminated after receiving three warning letters and two counselings in the less than two years that she had worked for FedEx. *Id.* The conduct which resulted in the termination that Mr. Connolly reversed involved "using profanity and throwing boxes" at another employee and, according to Ms. H's manager, was the third warning letter in a twelve-month period "for the same unacceptable conduct/unprofessional behavior." Comp. Ex. 19, p. 4 of the GFT Tracking Report. The manager also noted that this misconduct had previously been displayed toward two FedEx managers on August 4, 2000 and on October 7, 2000. *Id.* In reinstating Ms. H, Mr. Connolly referred her to People Help in controlling her behavior. Comp. Ex. 19, Memo to Officer, 2.

Although Mr. Connolly upheld the termination of MR, a white male, MR's history is illustrative of FedEx's reliance on People Help as an alternative to discipline or discharge for anger management issues. MR had been referred for anger management counseling after he received two Warning Letters, a Performance Reminder and two counselings. *See* Comp. Ex. 18 (March 29, 2000 letter directing Mr. R to participate in a program on anger management). Although Mr. Connolly did not send Mr. R to anger management counseling, he participated in reviewing Mr. R's appeal of his termination in 2005 and was well aware, from his involvement in that appeal, of the fact that FedEx affords employees an opportunity to rehabilitate themselves before terminating their employment. Comp. Ex. 18; 05/15/07 Tr. at 86. In fact, after his referral to anger management counseling, Mr. R engaged in additional misconduct for which he received another Warning Letter

and two more counselings. Comp. Ex. 18. Despite this, he was not terminated until an egregious incident where he approached and verbally assaulted an elderly couple at a Burger King, an incident which generated two separate complaints to FedEx. Comp. Ex. 18; 05/15/07 Tr. at 88-89.

Moreover, unlike Ms. H, in whose case Mr. Connolly concluded extenuating circumstances existed given the recent death of her godmother, Mr. Connolly did not take into consideration any of the extenuating circumstances Mr. Armstead sought to raise with him with respect to Mr. Armstead's personal and family health issues. 05/15/07 Tr. at 124, 270-71, 285-86.

Despite their more extensive and more recent misconduct, these three white employees were all referred to People Help for assistance with their anger management problems. In contrast, Mr. Armstead was never referred to People Help or to any other employee assistance program. 05/15/07 Tr. at 271-272. Instead, Mr. Connolly stated that "Anthony had every chance to get those [behavioral issues] fixed, and there was a variety of different issues, but they were just ongoing and never were addressed." *Id.* at 109. However, unlike Mr. Armstead, the white employees were not expected to address their behavioral issues on their own without any assistance from FedEx and its People Help program.

In an effort to reinterpret Mr. Armstead's personnel record in order to justify his decision to terminate Mr. Armstead, Mr. Connolly construed two prior Performance Reminders issued to Mr. Armstead by his then-supervisor, Glenn Sutton, in 2000 and 2004, to involve "conduct" rather than "performance" issues. 05/15/07 Tr. at 223-227. Under oath, however, Mr. Connolly admitted that, other than in Mr. Armstead's case, he had never terminated anyone else based on his reinterpretation of another supervisor's Performance Reminders. *Id.* at 228-229.

Although, at the hearing, Mr. Connolly and FedEx contended that Mr. Armstead's discharge was justified by these counselings and Performance Reminders, FedEx did not mention these incidents as justification for its action in its earlier response to the Human Rights Commission

Complaint. In that response, FedEx relied solely upon disciplinary actions taken against Mr. Armstead prior to March 1993. *See* Comp. Ex. 10 at 2.¹¹

E. The Decision of the Administrative Law Judge and the Commission

As noted *supra*, ALJ Carter issued a lengthy decision including eighty-six findings of fact and an evaluation of those facts and inferences under both a disparate treatment/pretext and mixed motive analysis. ALJ Decision at 16-23. She initially determined that Mr. Armstead established a *prima facie* case, pursuant to *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 475 (1986), because he was an African American, his employer made an adverse decision concerning his employment and, but for his race, the adverse decision would not have been made. In concluding that Mr. Armstead had established a *prima facie* case, she considered a variety of evidence including:

- (a) The inconsistency between Mr. Connolly's decision to fire Mr. Armstead and the judgment of the other FedEx managers who reviewed the facts and concluded that Mr. Armstead's conduct merited only a Warning Letter;
- (b) The fact that Kathryn Lis, the FedEx Human Resources representative assigned to advise Mr. Armstead's supervisors on discipline for Mr. Armstead told Mr. Connolly of her concern that he was relying on discipline that was eleven years old;
- (c) The fact that the FedEx investigator who reviewed the Armstead firing did not find any evidence to suggest that Mr. Armstead posed a workplace violence threat;
- (d) The evidence of disparate treatment demonstrated by Mr. Connolly's decision to fire Mr. Armstead instead of referring him to anger management counseling in the People Help program as Mr. Connolly had done in the cases of white employees who had significant anger control problems; and
- (e) The inference, from the evidence at the hearing, that Mr. Connolly had stereotyped Mr. Armstead as an "angry black male who posed a 'workplace violence threat.'"

ALJ Decision at 17-18.

As she concluded that Mr. Armstead had met his *prima facie* case, the ALJ next examined whether FedEx had met its burden of producing evidence of the legitimate and nondiscriminatory

¹¹ Mr. Connolly's history as a Managing Director contains other evidence that supports an inference that he is either biased against African Americans or insensitive to racial prejudice. For example, as a Managing Director, Mr. Connolly has presided over approximately 60 FedEx EEO investigations of which approximately one third involved allegations of racial discrimination. 05/15/07 Tr. at 74, 80. However, Mr. Connolly has never found any evidence of race discrimination at FedEx in any of his investigations. *Id.* at 80.

reason for Mr. Connolly's discharge decision. She concluded that FedEx had met its burden by explaining that Mr. Connolly had the authority to modify a disciplinary decision up or down under FedEx policies. She noted that Mr. Connolly believed that Mr. Armstead posed a workplace violence threat as a result of numerous warning letters, performance reminders, and counseling records.

Having established that FedEx met its burden of producing a discriminatory reason for the firing, the ALJ next examined whether the reason for the firing offered by FedEx was a pretext for discrimination. In reaching her conclusion that FedEx's reasoning was pretextual, the ALJ relied on a number of facts and inferences of record, including, but not limited to:

- (a) FedEx relied on shifting reasons and defenses for terminating Mr. Armstead consistent with the reasoning of a number of discrimination cases from the federal courts;
- (b) The difference in the treatment afforded Mr. Armstead by Mr. Connolly, noted above, when Mr. Connolly terminated Mr. Armstead instead of referring him to People Help as he had done with white employees who had engaged in similar behavior;¹²
- (c) The fact that Mr. Connolly believed workplace violence was a concern without even interviewing any of those who actually knew Mr. Armstead and that Mr. Connolly concluded that Mr. Armstead posed such a threat even though those who worked with him had no such concerns.¹³

ALJ Decision at 20-22.

The ALJ also applied a mixed motive analysis. In a mixed motive analysis, one concludes that the employer was motivated by legal and illegal factors. Thus, in this case, a mixed motive analysis assumes that Mr. Connolly was motivated both by concerns about Mr. Armstead's behavior and by his race. The ALJ then examined, under established precedents, whether Mr. Armstead would have been terminated absent an unlawful motive involving race. She concluded that, absent a discriminatory racial animus, Mr. Armstead would not have been fired. In doing so she relied on

¹² This factor is relevant to both the *prima facie* case and the analysis of pretext.

¹³ These facts suggest discrimination because Mr. Connolly apparently jumped to his conclusion regarding workplace violence without an adequate basis for doing so. Conclusions that someone is a danger to the workplace without an investigation when everyone else reaches an opposite conclusion supports an inference that one is allowing prejudices or biases to influence his judgment.

the fact that “no other Federal Express Corporation Management employee who reviewed Mr. Armstead’s conduct, and work history including Armstead’s supervisors, human resource personnel and Mr. St. Martin concluded that Mr. Armstead’s conduct warranted his discharge.” ALJ Decision at 22-23.¹⁴

With regard to damages, the parties had stipulated that, if Mr. Armstead prevailed, the ALJ would award him damages in the amount of \$2,545.26 for economic loss plus interest and \$5,000.00 for incidental damages. *See* 05/16/07 Tr. 18-19; Complainant’s Proposed Findings of Fact, Legal Memoranda, and Proposed Conclusions of Law, at 15, fn. 11. The ALJ awarded those damages as well as attorney fees and costs.¹⁵ ALJ Decision at 28. Finally, the ALJ ordered FedEx to require its managerial employees with responsibilities related to Respondent’s West Virginia operations to undergo training related to race discrimination and the requirements of the West Virginia Human Rights Act. *Id.*

FedEx appealed the ALJ’s Decision to the Human Rights Commission and, by decision dated May 13, 2009, the Commission affirmed the ALJ.

F. The decision of the Circuit Court

The Circuit Court’s decision concluded that the record supported FedEx’s decision to fire Mr. Armstead based on “his long history of conduct issues.” Final Decision at 5-6. The Circuit Court noted that “Connolly also testified at the hearing that his concern was the recurring conduct

¹⁴ In other words, how can one fairly conclude that Mr. Armstead would have been fired by Mr. Connolly for his conduct, given his work history, without consideration of his race, when none of the other FedEx management employees familiar with his case, including two Human Resources representatives, two supervisors and the FedEx official who investigated Mr. Armstead’s complaint, appear to have considered discharge to have been the appropriate discipline under FedEx policies?

¹⁵ Attorney fees were awarded in a supplemental order. Mr. Armstead recognizes that there may be questions regarding the reasons this case was litigated to conclusion rather than settled in light of the damages at issue. If this is a concern to the Court, Mr. Armstead is prepared to answer any questions the Court may have. This issue was addressed by Mr. Armstead in the affidavit of his counsel submitted in support of his request for attorney fees. *See* Affidavit of Allan N. Karlin at 4, ¶ 17 (explaining in support of request for attorney fees that Mr. Armstead’s counsel “made a number of attempts to engage in settlement discussions with the Respondent [FedEx] [but] was advised that the Respondent generally did not settle cases because it backed its managers and/or because it would not settle unless Mr. Armstead resigned from Federal Express”).

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." *Id.* at 5. The Circuit Court rejected Mr. Armstead's evidence that white employees were treated differently from him, without discussing any of the facts concerning those white employees, because the court concluded that the ALJ did not determine if the "white employees were similarly situated." *Id.* at 5. Finally, the Circuit Court held that the ALJ's Decision was "clearly wrong in view of the reliable, probative and substantial evidence on the whole record." *Id.* at 5-6. The entire decision is six pages long, although a substantial portion of the last page contains the order directing that copies be mailed to the parties and the addresses of those parties. Other than the brief reference to the white employees, the decision fails to include any significant discussion of the facts and inferences relied upon by the ALJ or presented by Mr. Armstead in support of the ALJ's decision.

ASSIGNMENTS OF ERROR

1. Whether the Circuit Court erred in reversing a decision of the Human Rights Commission in favor of an African American employee based upon the Circuit Court's finding that there was evidence in the record that supported the employer's alleged non-discriminatory reason for the discharge where, under the correct analysis, the Circuit Court should have determined whether there was evidence of record to support the HRC decision in favor of the employee who had prevailed, not in favor of the employer who had lost before the Commission.
2. Whether the Circuit Court erred in rejecting evidence of disparate treatment without addressing the evidence where that evidence included two white employees (a) who, like Anthony Armstead, were FedEx drivers who were disciplined after engaging in conduct equal to or worse than his alleged conduct, (b) who, unlike Mr. Armstead, had significant histories of behavioral problems at work in recent years, (c) who were otherwise similarly situated to Mr. Armstead as that term is used in the law applicable to discrimination cases and (d) who, instead of being fired, were referred to anger management training by the same supervisor who fired Mr. Armstead.
3. Whether the Circuit Court erred in setting aside the Human Rights Commission's ruling that the firing of Anthony Armstead, a twenty-year African American employee of FedEx, was discriminatory in violation of the Human Rights Act where the ALJ and the Commission concluded, based upon reliable, probative, and substantial evidence on the record as a whole, that Mr. Armstead's race was a substantial or motivating factor in his discharge.

POINTS AND AUTHORITIES

1. The proper scope of review of the Findings of Fact of an administrative agency such as the Human Rights Commission is whether there is “reliable, probative and substantial evidence” to support the ALJ’s Findings.

W. Va. Code § 29A-5-4(g).
Syl. Pt. 1, *West Va. Human Rights Comm’n v. United Transp. Union*, 167 W. Va. 282 (1981).
Mayflower Vehicle Sys. v. Cheeks, 218 W. Va. 703 (2006).
Frank’s Shoe Store v. West Va. Human Rights Comm’n, 179 W. Va. 53 (1986).
2. On appeal, findings of fact by an “administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.”

Erps v. W. Va. Human Rights Comm’n, 224 W. Va. 126 (2009).
3. “The test for whether co-workers are similarly situated involves a determination as to whether a ‘prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.’”

Mayflower Vehicle Sys. v. Cheeks, 218 W. Va. 703 (2006).
4. In order to establish a *prima facie* case, a complainant need only establish an inference of discrimination.

Barefoot v. Sundale Nursing Home, 193 W. Va. 475 (1995).
5. Discriminatory intent in a disparate treatment case may be established by showing that the decision maker acted out of stereotypical thinking, such as racial stereotypes, and that the complainant need not prove some type of malice or hatred.

Skaggs v. Elk Run Coal, 198 W. Va. 51 (1996).
6. “‘Mixed motive’ refers to cases in which a discriminatory motive combines with some legitimate motive to produce an adverse action against the plaintiff. ‘Disparate treatment’ refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff.”

Skaggs v. Elk Run Coal, 198 W. Va. 51 (1996).
7. If the complainant proves that race was at least part of the employer’s motive, “the burden of persuasion then shifts to the defendant to show that the same decision would have been made in the absence of the discriminatory motive.”

Skaggs v. Elk Run Coal Co., 198 W. Va. 51 (1996).
8. Shifting reasons or defenses between the time of the adverse action and the time of the hearing are also strong evidence of pretext.

Smith v. American Service Co., 611 F.Supp. 321 (N.D. Ga. 1984).

9. “If the plaintiff has raised an inference of discrimination through his prima facie case and the factfinder disbelieves the defendant’s explanation for the adverse action taken against the plaintiff, the factfinder could justifiably conclude that the logical explanation for the action was the forbidden motive. A reasonable person could conclude that if the employer had a legitimate basis for taking the adverse action, then the employer would have presented it at trial, and the employer’s failure to present a credible nondiscriminatory reason leaves a discriminatory reason as a logical inference to be drawn.”

Skaggs v. Elk Run Coal Co., 198 W. Va. 51 (1996).

10. Under a mixed motive analysis, once the ALJ determines that race was at least part of the employer’s motive, “the burden of persuasion then shifts to the defendant to show that the same decision would have been made in the absence of the discriminatory motive.”

Skaggs v. Elk Run Coal Co., 198 W. Va. 51 (1996).

STANDARD OF REVIEW

In an appeal of a decision of the Human Rights Commission, the standard of review is set by statute in W. Va. Code § 29A-5-4(g):

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.

As discuss *infra*, the Circuit Court appears to have applied a *de novo* standard to its review by relying almost entirely on the evidence and argument of FedEx and failing to even mention most of the evidence tendered by Mr. Armstead in support of his claim and relied upon by the HRC.

DISCUSSION OF LAW

A. Introduction

Mr. Armstead contends that the decision to terminate his employment was motivated, in whole or in substantial part, by his race. He understands that employers can fire employees for abusive verbal conduct, but he contends that, as in most disparate treatment cases, the issue is not whether he did something that might be the subject of discipline, but rather whether the conduct he is accused of would normally have led to discharge in the place where he works. Thus, in this case, the issue is not whether Mr. Armstead lost his temper with Mr. Hammerquist. Rather, the issue is whether the Hammerquist incident would have resulted in his firing by Mr. Connolly were Mr. Armstead not an African American. The ALJ concluded, based on her analysis of a variety of evidence, that the answer to that question is negative, *i.e.*, that Mr. Armstead would not have been fired were it not for the fact of his race. In reaching that conclusion, as discussed *infra*, her decision was supported by the evidence of record in this case.¹⁶

The Circuit Court, however, reversed the ALJ because it failed to review and analyze the evidence and inferences Mr. Armstead developed at the hearing and because it mistakenly reviewed the record to determine if there was evidence to support reasons for the discharge proffered by Mr. Connolly and FedEx, rather than to determine if there were reasons to reject the rationale of FedEx as pretext. Mr. Armstead will proceed by explaining the errors in the Circuit Court's analysis and then proceed by demonstrating that a proper analysis of the record should have led the Circuit Court to uphold the final decision of the HRC.

¹⁶ In reviewing the reasoning of the ALJ, it is important to remember that the various elements of Mr. Armstead's case do not exist in isolation from each other. Thus, the fact that others who reviewed Mr. Armstead's conduct and did not believe it merited discharge would not, in itself, prove that discrimination occurred. However, that fact does not stand alone. It is considered and evaluated by the factfinder along with evidence of racial stereotyping, disparate treatment, pretext, reliance by Mr. Connolly on extremely dated warning letters that his Human Resources advisor thought were too old to consider, the fact that Mr. Connolly relied in part on a dated record where Mr. Armstead was counseled for raising questions about the hiring of African Americans, inconsistency in the prior warnings and performance reminders relied on by FedEx in its letter to the Human Rights Commission (Comp. Ex. 10) and those listed by Mr. Connolly in his GFT Executive Summary (Resp. Ex. 22 at 5), and other evidence of record in this case. The persuasiveness of Mr. Armstead's claim arises in part from the cumulation of evidence pointing toward a conclusion that Mr. Connolly's proffered explanation for his decision is not worthy of belief and that, more likely than not, Mr. Armstead was discriminated against based upon his race.

B. The Circuit Court erred in reversing a decision of the Human Rights Commission in favor of an African American employee based upon the Circuit Court's finding that there was evidence in the record that supported the employer's alleged non-discriminatory reason for the discharge where, under the correct analysis, the Circuit Court should have determined whether there was evidence of record to support the HRC decision in favor of the employee who had prevailed, not in favor of the employer who had lost before the Commission

1. The Circuit Court mistakenly reviewed the record for evidence to support FedEx rather than for evidence to support the ALJ's Findings of Fact and Conclusions of Law

Under W. Va. Code § 29A-5-4(g), the Circuit Court should have determined whether there was "reliable, probative and substantial evidence" to support the ALJ's decision in favor of Mr. Armstead. This has been the law, as articulated by this Court in Human Rights Commission and other cases involving decisions by administrative agencies, for decades. *See, e.g.*, Syl. Pt. 1, *West Va. Human Rights Comm'n v. United Transp. Union*, 167 W. Va. 282 (1981) ("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.") *See also* Syl. Pt. 1, *Mayflower Vehicle Sys. v. Cheeks*, 218 W. Va. 703 (2006); Syl. Pt. 1, *Frank's Shoe Store v. West Va. Human Rights Comm'n*, 179 W. Va. 53 (1986). Moreover, as this Court has observed, the United States Supreme Court applies a similar approach to the review of decisions by district courts in Title VII discrimination cases:

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985) as quoted in *Frank's Shoe Store v. West Va. Human Rights Comm'n*, 179 W. Va. at 56.

The Circuit Court, however, failed to review the extensive discussion of facts and inferences in the ALJ's decision and to determine, as required by law, whether the ALJ's findings and conclusions were supported by the evidence of record. Yet, instead of determining whether there

was evidence to support the ALJ's decision, the Circuit Court turned the test on its head and reversed the decision, in part, because it concluded that there was evidence in the record to support FedEx:

Fed Ex's stated legitimate business reason for terminating Armstead was his long history of conduct issues. *The record supports this reason.*

Final Decision at 5-6 (emphasis added). A reviewing court is supposed to review *all* of the evidence and determine whether there is evidence to support the ALJ's decision, not to review the evidence that supports the party that lost before the ALJ and then to reverse the ALJ if it finds some evidence that supports the losing party. Yet, that is precisely what the Circuit Court did when it focused its review on whether there was evidence to support FedEx's "stated legitimate business reason for terminating Mr. Armstead."

2. The Circuit Court failed to review the evidence that supported the ALJ's Findings and Conclusions

The Circuit Court did include a finding against Mr. Armstead under W. Va. Code § 29A-5-4(g) (5):

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.

Final Decision at 6. Yet, the Circuit Court reached this conclusion without mentioning, let alone analyzing, almost all of the ALJ's Findings of Fact, Conclusions of Law or the legal analysis at pages 16 through 23 of her decision.¹⁷ Although the foregoing statement may seem the hyperbole of a litigant who failed to convince the Circuit Court, Mr. Armstead contends that a comparison of the Circuit Court's six-page Final Order with the factual record summarized above and/or incorporated in the ALJ's decision demonstrates that the Circuit Court focused its review on the testimony of Mr. Connolly without any analysis of his credibility and without any discussion of the other evidence that led the ALJ to reach a decision in favor of Mr. Armstead. *Compare* Final Order with ALJ Decision. *See also* discussion *supra* (summarizing extensive record of testimony and exhibits in

¹⁷ The only significant exception is the Circuit Court's very brief and mistaken reference to the evidence that white employees were treated more favorably than the African American complainant. The Circuit Court's errors with regard to this issue will be discussed *infra*.

support of Mr. Armstead). A court cannot reasonably determine whether there is evidence to support the decision on the record as a whole if it does not even discuss the evidence in that record that the ALJ relied upon in support of her decision.

For example, the Circuit Court referenced FedEx's rationale for Connolly's decision, noting that "[t]here were 'numerous incidents of conduct issues,' including abusive language, bad attitude, inappropriate behavior, and lack of professionalism." Final Order at 4-5. Yet, the Circuit Court failed to mention, let alone analyze, that the "conduct issues" as that term is used by FedEx had occurred more than eleven years earlier on September 28, 1990, October 1, 1992, March 2, 1993, *see* Resp. Ex. 22 at 5, that Human Resources representative Lis apparently disagreed with Mr. Connolly and told him that she was concerned about the time period between the Hammerquist incident and the warning letters at issue, *see* St. Martin Depo. at 68-69, or as discussed *supra*, that no other FedEx managers or Human Resource representatives agreed Mr. Armstead's conduct and record of discipline should have led to his discharge.

Similarly, the Circuit Court wrote that Mr. Connolly "wrote a detailed rationale for his decision to terminate Armstead's employment" and continued by referencing Mr. Connolly's testimony in support of his decision. Final Order at 4-5. However, the Circuit Court failed to even mention the ALJ's finding that Mr. Connolly's claim that Mr. Armstead posed a threat of workplace violence was neither credible nor supported by the record. Final Decision at 12, Finding No. 58. Nor did the Circuit Court refer to or consider the evidence, summarized above, that supported the ALJ's finding against Mr. Connolly and FedEx including, but not limited to, the fact that no one at FedEx other than Mr. Connolly thought that Mr. Armstead's presented a risk of workplace violence or the evidence that Mr. Connolly actually purported to rely on a counseling admonishing Mr. Armstead for expressing his concerns about the hiring of African Americans, conduct that is protected under the Human Rights Act. 05/15/07 Tr. at 52, 56-57, 59-62, 210, 258; Resp. Ex. 22 at 5 ("On 6/23/93 the complainant [Armstead] is counseled on careful [sic] in what he says in references to race and hiring selections."); 05/15/07 Tr. at 272 (Armstead explaining counseling he

received when he asked his manager why there were not more blacks being hired at his station and was told that station had already met its quota).

Moreover, although the Circuit Court's decision mentions the *prima facie* case, it fails to mention, let alone analyze, the ALJ's discussion of the evidence supporting a conclusion of pretext or her evaluation of the case under a mixed motive analysis. *Compare* ALJ Decision at 20-23 with Final Order.

Thus, the Circuit Court failed to conduct a proper review of the decision in favor of Mr. Armstead as set forth in W. Va. Code § 29A-5-4(g).

3. The Circuit Court conducted a *de novo* review and substituted its judgment for that of the ALJ

Under well established law, a court “reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syl. Pt. 2, *Erps v. W. Va. Human Rights Comm’n*, 224 W. Va. 126 (2009) quoting from Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588 (1996). Although the Circuit Court concluded that the ALJ's decision was “clearly wrong,” its analysis in reaching that conclusion appears to be based on its own *de novo* review of the record. As noted above, the Circuit Court concluded that the record supported the reason given by Mr. Connolly for firing Mr. Armstead. Final Order at 5-6. Yet, the issue before the Circuit Court was not whether there was evidence to support Mr. Connolly's decision, but whether there was evidence to support the ALJ's decision. In reaching its conclusion, without reviewing the evidence supporting Mr. Armstead, the circuit court appears to have rested its conclusion on its own determination that Mr. Connolly was credible in violation of the applicable standard of review and in the face of a record that strongly supported the opposite conclusion.

The Circuit Court's decision is also inconsistent with FedEx's own arguments. Recognizing, perhaps, that Mr. Connolly was motivated by racial stereotypes, Fed Ex argued in its memorandum to the Circuit Court that Mr. Connolly was *not* concerned about workplace violence when he fired Mr. Armstead. Petitioner's Opposition to Motion to Alter or Amend Judgment Pursuant to Rule

59(e) at 3 (“Connolly made his decision based on complainant’s long history of *conduct*, not anger or violence issues.”). Ironically, the Circuit Court concluded that Mr. Connolly was concerned about workplace violence when he fired Mr. Armstead:

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).

Final Order at 5. Thus, the Circuit Court does not appear to have realized, in reversing the decision, that FedEx had disowned Mr. Connolly’s reliance on workplace violence as a reason for his decision to fire Mr. Armstead. In effect, the Circuit Court made its own factual findings which were not advanced by FedEx and were, in fact, expressly disavowed by FedEx in order to uphold FedEx’s firing of Mr. Armstead.

4. The case upon which the Circuit Court relied do not support its decision

The Circuit Court relied on *Adkins v. Gatson*, 218 W. Va. 332 (2005), in support of its conclusions regarding work place violence:

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.”

Final Decision at 5. *Adkins*, however, does not provide authority for the Circuit Court’s decision. First, unlike the present case and contrary to the Circuit Court’s assertion, there was a physical assault by the perpetrator of workplace violence in *Adkins v. Gatson*. Moreover, the citation to *Adkins* misses the point. The issue in the present case is not whether an employee can be fired for misconduct involving workplace violence. Rather, the issue is whether Mr. Armstead would have been fired were he white rather than black or, stated in another way, whether race was a motivating factor in his discharge. Nothing in *Adkins* is helpful in resolving that issue.

- C. **The Circuit Court erred in rejecting evidence of disparate treatment without addressing the evidence where that evidence included two white employees (a) who, like Anthony Armstead, were FedEx drivers who were disciplined after engaging in conduct equal to or worse than his alleged conduct, (b) who, unlike Mr. Armstead, had significant histories of behavioral problems at work in recent years, (c) who were otherwise similarly situated to Mr. Armstead as that term is used in the law applicable to discrimination cases, and (d) who, instead of being fired, were referred to anger management training by the same supervisor who fired Mr. Armstead.**

The Circuit Court concluded that the ALJ erred in relying on evidence that white employees were treated more favorably than Mr. Armstead:

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.

Final Order at 5. Although the ALJ did not specifically use the words “similarly situated,” Mr. Armstead knows of no legal requirement that the ALJ specifically invoke the words “similarly situated” when analyzing a disparate treatment case so long as the evidence supports a conclusion that the relevant individuals were, in fact, similarly situated to the complainant. Nor did the Circuit Court discuss, evaluate, or review any of the facts upon which Mr. Armstead’s disparate treatment was based.

Most important, individuals are not required to be identical in order to be comparators in a disparate treatment case. This Court explained the appropriate analysis in *Mayflower Vehicle Sys. v. Cheeks*, 218 W. Va. 703, 715-716 (2006):

When examining whether employees are similarly situated, it must be considered whether the employees were “engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” (Internal citations omitted.) The test is whether a “prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.” (Internal citations omitted.) Exact correlation between employees’ cases is not necessary; the proponent of the evidence must only show that the cases are “fair congeners.”

218 W. Va. at 715-716. In the present case, the evidence demonstrates that the comparator employees were similarly situated to Mr. Armstead as defined by this Court in *Mayflower Vehicle Sys. v. Cheeks*. As noted above, FedEx has a program called People Help for employees who are

identified as needing anger management counseling. Given the Hammerquist incident, Mr. Armstead, who had never been referred to anger management counseling, would have been a candidate for People Help. Yet, despite the fact that he had been, according to his supervisor, in the top 25% of FedEx drivers, Mr. Connolly fired him without first offering him the opportunity for counseling through People Help that he offered others and he did so even though Mr. Armstead had not been disciplined for any anger related issues between 1993 and the 2004 incident with Mr. Hammerquist.

In contrast, Mr. Connolly had made decisions involving two white FedEx drivers with anger issues. Those two drivers were referred to People Help despite histories that involved more recent and more frequent problems with anger. Mr. Connolly referred both to People Help instead of firing them. A review of the facts demonstrates that a “prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.” As discussed above, Mr. Connolly reversed the termination of BH even though she had received three Warning Letters within the preceding year. She had never used People Help even though she had been referred to it three times in the past. Comp. Ex. 19; 05/15/07 Tr. at 99-101. Nonetheless, Mr. Connolly reversed Ms. H’s termination for “using profanity and throwing boxes” at another employee and even though this was her third Warning Letter in a twelve-month period “for the same unacceptable conduct/unprofessional behavior.” Comp. Ex. 19 at 4. Her record of misconduct in the less than two years she worked for FedEx included three warning letters and two counselings and, according to her manager, her previous misconduct involved two FedEx managers. *Id.* Despite her serious misconduct in her short tenure at FedEx and despite her failure to attend counseling through People Help, Mr. Connolly rescinded her termination by her manager and referred Ms. H to People Help in controlling her behavior. Comp. Ex. 19 at 2.

Mr. Connolly also referred TR, a white female, to People Help. Ms. R appealed a Warning Letter she received in 2002 for making angry complaints about working on a Saturday and kicking a customer package. *Id.* at 96. Mr. Connolly recognized that TR had received a Warning Letter, a

Performance Reminder, and two counselings between November 2000 and September 2002. In 2000, she had been “cautioned to ‘continue to work on controlling her emotions at all times.’” Comp. Ex. 20 at 1. On January 8, 2001, she was counseled for “throwing a package in anger.” *Id.* On May 3, 2002, she was counseled for unprofessional conduct. *Id.* Mr. Connolly noted that her “hot temper and poor conduct seem to be recurring themes.” *Id.* He also observed that she had exhibited “unwelcome, inappropriate and threatening behavior” and that she admitted to “threatening revenge for being scheduled to work on a Saturday.” *Id.* Nonetheless, he referred her to People Help instead of terminating her employment. *Id.*¹⁸

Moreover, unlike Ms. H, in whose case Mr. Connolly concluded extenuating circumstances existed given the recent death of her godmother, Mr. Connolly did not take into consideration any of the extenuating circumstances Mr. Armstead sought to raise with him with respect to Mr. Armstead’s personal and family health issues. 05/15/07 Tr. at 124, 270-271, 285-286.

Despite their more extensive and more recent misconduct, these white employees were all referred to People Help for assistance with their anger management problems. In contrast, Mr. Armstead was never referred to People Help or to any other employee assistance program. 05/15/07 Tr. at 271-272. Instead, Mr. Connolly stated that “Anthony had every chance to get those [behavioral issues] fixed, and there was a variety of different issues, but they were just ongoing and never were addressed.” *Id.* at 109. However, unlike Mr. Armstead, the white employees were not expected to address their behavioral issues on their own without any assistance from FedEx and its People Help program.

Mr. Armstead, on the other hand, had *not* received warning letters or other admonishments for misconduct involving anger or temper problems in recent years. In fact, Mr. Connolly admitted that, other than the incident that led to Mr. Armstead’s firing, there was no evidence that

¹⁸ Also, as discussed *supra*, Mr. Connolly was well aware of how many chances managers at FedEx were willing to give drivers before they were fired from his review of the employment history of MR discussed *supra*. MR had engaged in multiple incidents of serious misconduct and had been referred for anger management counseling before he was finally fired for verbally assaulting an elderly couple. Comp. Ex. 18.

Mr. Armstead had used abusive language since March 1993. See 05/05/07 Tr. at 210. Yet, unlike these white employees with more recent histories of behavioral problems, Mr. Armstead was fired while they were referred to people help.

Despite this evidence, the Circuit Court apparently rejected the evidence because the ALJ did not *specifically state* that the other employees and Mr. Armstead were similarly situated. However, the two individuals and Mr. Armstead are quite obviously similarly situated in that Mr. Connolly made disciplinary decisions about all three individuals, all three were FedEx drivers, and all four were alleged to have anger management issues. If anything, Mr. Armstead's history of misconduct was less serious than the three white persons who Mr. Connolly referred to anger management because, unlike them, his prior incidents were over eleven years in the past.

Thus, although the ALJ did not specifically state that Mr. Armstead and the two white employees were similarly situated, the evidence demonstrates that they were, in fact, similarly situated. Moreover, the Circuit Court failed to identify any respect in which they were not similarly situated under the appropriate test. As a result, there was evidence to support the ALJ's conclusion that there was an inference of discrimination arising from the disparate treatment between Mr. Armstrong and the two white drivers.

Given these facts and the definition of "similarly situated" articulated by this Court in *Mayflower Vehicle Sys. v. Cheeks*, TR and BH are sufficiently similar to support the ALJ's conclusion that Mr. Armstead established a case of disparate treatment and that incidents such as that involving Mr. Hammerquist, even when they are associated with prior misconduct, have resulted in a referral for anger management counseling, not a discharge. Although a factfinder might argue that there are some differences between TR and BH on the one hand and Mr. Armstead on the other, the issue in this case is whether they are sufficiently similar to support the ALJ's findings in favor of Mr. Armstrong, not whether a different factfinder might have reached a different conclusion.

- D. The Circuit Court erred in setting aside the Human Rights Commission's ruling that the firing of Anthony Armstead, a twenty-year African American employee of FedEx, was discriminatory in violation of the Human Rights Act 'where the ALJ and the Commission concluded, based upon reliable, probative and**

substantial evidence on the record as a whole, that Mr. Armstead's race was a substantial or motivating factor in his discharge'

1. There is reliable, probative, and substantial evidence in the record to support the final decision of the HRC

a. The nature of proof in a discrimination case under the HRC

The Circuit Court's error in analyzing the ALJ's decision may have resulted from a misunderstanding of the judicially approved methods of proving a discrimination case and the reasons for the recognition of those methods. Discrimination cases, unlike many other cases that are litigated in the courts, rarely rely on direct evidence and depend, instead, on circumstantial evidence including evidence of the *prima facie* case, evidence of disparate treatment and evidence that the employer's nondiscriminatory reason for the employment action is pretextual. These proof formulations were developed because state and federal courts have long recognized that, given the nature of discrimination cases, direct evidence of discrimination is rarely available. As Justice Cleckley observed:

In assessing the inferences that may be drawn from the circumstances surrounding a termination of employment, the circuit court must be alert to the fact "employers are rarely so cooperative as to include a notation in the personnel file" that their actions were motivated by factors expressly forbidden by law. (Citation omitted) As a result, a victim of discrimination is seldom able to prove a claim by direct evidence and is usually constrained to rely on circumstantial evidence.

Hanlon v. Chambers, 195 W. Va. 99, 106 (1995). Similarly, in another case, Justice Cleckley adopted the following language from the Third Circuit Court of Appeals:

Gone are the days (if, indeed, they ever existed) when an employer would admit to firing an employee because she is a woman, over forty years of age, disabled or a member of a certain race or religion. To allow those genuinely victimized by discrimination a fair opportunity to prevail, courts will presume that, once the plaintiff has shown the [McDonnell Douglas] elements, unlawful discrimination was the most likely reason for the adverse personnel action.

Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 72 fn. 21 (1996) quoting *Geraci v. Moody-Tottrup, Intern., Inc.*, 82 F.3d 578, 581 (3rd Cir. 1996).¹⁹ See also *Nestor v. Bruce Hardwood Floors, L.P.*,

¹⁹ The Supreme Court of Appeals adopted language from a New York case stating:

"In a case premised on an alleged violation of a statute purposed to counter retaliation or

210 W. Va. 692, 694 (2001) (“In employment discrimination cases, there is often very little direct evidence of discriminatory intent. This Court has said that because discrimination is essentially an element of the mind, there will probably be very little direct proof available.”); *Fravel v. Sole’s Elec. Co.*, 218 W. Va. 177, 178-179 (2005) quoting from *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 6 (1979) (“In a case premised on an alleged violation of a statute purposed to counter retaliation or other discrimination, we must *keep in mind those engaged in such conduct rarely broadcast their intentions to the world.*”). In light of the difficulty obtaining direct evidence to prove an unlawful intent to discriminate, victims of discrimination prove their cases through formulations that have been developed in state and federal courts over many years.

2. The ALJ properly analyzed the facts of the case and her findings of fact and conclusions of law were supported by reliable, probative, and substantial evidence on the record as a whole

a. Mr. Armstead established a *prima facie* case

The ALJ understood and properly applied the law applicable to discrimination claims. She began with an analysis of Mr. Armstead’s *prima facie* case under a test adopted by this Court requiring Mr. Armstead to establish that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the respondent’s protected class status, the adverse decision would not have been made.

Final Decision at 17 (citing *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 475 (1986)).

As the ALJ noted, the first two prongs of the *prima facie* case were met when Mr. Armstead established that he is an African American and that he was fired from his employment.

other discrimination, we must keep in mind that those engaged in such conduct rarely broadcast their intentions to the world. Rather, employers who practice retaliation may be expected to seek to avoid detection, and it is hardly to be supposed that they will not try to accomplish their aims by subtle rather than obvious methods. . . .”

Powell v. Wyo. Cablevision, 184 W. Va. 700, 704 (1991) quoting *Axel v. Duffy-Mott Co., Inc.*, 47 N.Y.2d 1, 6 (1979).

The third prong of the *prima facie* case required only that Mr. Armstead produce some evidence to support an inference that his discharge was motivated by his race. In evaluating whether Mr. Armstead provided that evidence, it is important to remember that Mr. Armstead's burden at this stage of the analysis requires only that he establish an *inference* of discrimination, not that he meet his ultimate burden of proving that discrimination, more probably than not, motivated his discharge. Justice Cleckley explained this point in commenting on the *Conaway* "but for" test:

At the outset, we note some confusion about the *prima facie* case may have developed from the third prong of the analysis we set forth in *Conaway* that "but for the plaintiff's protected status, the adverse decision would not have been made." 178 W. Va. at 170, 358 S.E.2d at 429. *Use of the "but for" language in that test may have been unfortunate, at least if it connotes that a plaintiff must establish anything more than an inference of discrimination to make out a prima facie case.*

Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 484 (1995), emphasis added.

In concluding that Mr. Armstead had established an inference of discrimination and met his initial burden, the ALJ considered several factors. First, she noted that

Mr. Connolly's decision was inconsistent with the decision made by Mr. Wills, Mr. Snyder and Ms. Lis, all of whom considered Mr. Armstead's entire work history before recommending a warning letter. Mr. Wills, Armstead's immediate supervisor, was in a position to observe his daily demeanor and behavior. Ms. Lis expressed concern to Mr. Connolly that the last disciplinary action taken against Mr. Armstead was eleven years old and this was a long period of time between disciplinary actions.

ALJ Decision at 17. All of these factual conclusions are, as noted in the Statement of Facts above, supported in the case record. Taken together, the above facts demonstrate that Connolly's decision was contrary to the decision and/or opinion of everyone else at FedEx who considered the evidence including, in addition to those noted by the ALJ, Mr. St. Martin and Ms. Hass. The fact that Mr. Connolly decided to fire Mr. Armstead when everyone else thought a warning letter was the appropriate disposition suggests that another factor was motivating Mr. Connolly in addition to the facts of the case and, given the other facts established at the hearing, that other factor was most likely race. Moreover, FedEx has yet to explain what motivated Mr. Connolly to fire Mr. Armstead when all of the other Fed Ex managers and Human Resources personnel who were involved in making or

reviewing Mr. Connolly's decision thought that a warning letter, not a discharge, was sufficient discipline.

Second, discriminatory intent in a disparate treatment case may be established by showing that the decision maker acted out of stereotypical thinking, such as racial stereotypes, and that the complainant need not prove some type of malice or hatred. *See Skaggs v. Elk Run Coal*, 198 W. Va. 51, 74 (1996) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Slack v. Havens*, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975)).²⁰ In this case, the ALJ turned to Mr. Connolly's conclusion that Mr. Armstead "posed a 'work place violence threat,'" a conclusion unique to Mr. Connolly. ALJ Decision at 21-22. On these facts, the factfinder can reasonably ask why Mr. Connolly jumped to a conclusion, during Mr. Armstead's hearing to appeal his warning letter, that Mr. Armstead presented a risk of work place violence (a) without asking those who knew Mr. Armstead whether they thought he presented such a danger, (b) based upon warning letters for verbal misconduct that was over eleven years old and that did not involve any incidents of physical violence, and (c) where those who knew Mr. Armstead, including his FedEx manager, one of the co-worker witnesses to the Hammerquist incident, and the FedEx investigators St. Martin and Hass, did not believe that Mr. Armstead presented a risk of violence? Similarly, one could ask what could possibly have led Mr. Connolly to think that Mr. Armstead, a long-term and valued employee of FedEx, suddenly posed a threat of violence? One reasonable conclusion is that Mr. Connolly was acting based on a stereotype of African American males associated with violence. While there may be other explanations for the disparity between Mr. Connolly's conclusions about Mr. Armstead and those of all of the other FedEx managers,

²⁰ As this Court has noted in discussing jury instructions in a Human Rights Act case filed in circuit court:

Although there certainly are plenty of cases in which an employer acts solely out of an antipathy against the protected class (which is the model Defendant's Instruction No. 9 depicts), it is also true that in many other cases an employer's motive is a complex amalgam of several different forces. *The pervasiveness of subconscious prejudices and stereotypes makes any analysis of that amalgam all the more difficult. Thus, to the extent that the McDonnell Douglas analysis operates on the assumption that the employer has acted out of either a purely illegal motive or a purely legal one, it renders itself inapplicable to a large number of employment discrimination cases.* *Skaggs v. Elk Run Coal Co.*, 198 W. Va. at 75, emphasis added.

FedEx failed to offer an alternative explanation.²¹ On the record of this case, there was evidence to support the ALJ's conclusion that "[t]he inference that can be drawn from Mr. Connolly's behavior toward Mr. Armstead is that of stereotyping Armstead as an angry black male who posed a 'work place violence threat.'"²² ALJ Decision at 18.

Third, the ALJ noted that Mr. Connolly "did not refer Mr. Armstead to People Help as he had white employees who had displayed anger management problems on the job." ALJ Decision at 18. Although the Circuit Court questioned this finding, the evidence, as discussed below, supported the ALJ's conclusion.²³

²¹ Instead FedEx argued that, contrary to the Circuit Court's conclusion, Mr. Connolly's decision was not based on concerns of workplace violence. *See* Petition for Review of Final Decision of the West Virginia Human Rights Commission On Behalf of Federal Express Corporation at 12 ("Connolly made his decision based on Complainant's long history of conduct, not on anger or violence issues."); Petitioner's Opposition to Motion to Alter or Amend Judgment Pursuant to Rule 59(e) at 3 (same). As noted at fn. 11 *supra*, Mr. Connolly's testimony supported the ALJ's conclusion that alleged concern for workplace violence was a motive for his decision to fire Mr. Armstead. Even the Circuit Court, in ruling for FedEx, concluded that concern for workplace violence was the reason for Mr. Connolly's discharge decision. Final Order at 5 ("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 [Mr. Connolly's] understanding of workplace violence reflects the FedEx's policy on acceptable conduct.").

²² Unfortunately racial stereotyping still exists in the United States. Numerous studies have corroborated the fact that there is a stereotypical perception that African-American males are violent. *See, e.g.,* Duncan, B. L., (1976) *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, Journal of Personality and Social Psychology 34, pp. 590-598 (finding that whites interpreted an ambiguous shove as hostile or violent when the actor was black and as playing around or dramatizing when the actor was white); Sager, H. A. & Schofield, J. W. (1980), *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, Journal of Personality and Social Psychology 39, pp. 590-598 (replicating Duncan's findings with schoolchildren). *See also,* Michael Sunnafrank & Norman E. Fontes, *General and Crime-Related Racial Stereotyping and Influence on Juridic Decisions*, 17 Cornell J. Soc. Rel. 1, 10 (1983) (finding strong evidence in a sample of college students of crime-related racial stereotyping, such as perceiving blacks as more likely than whites to commit assault and other violent crimes); Lisa A. Harrison & Cynthia Willis Esqueda, *Race Stereotypes and Perceptions about Black Males Involved in Inter-personal Violence*, 5 Journal of African American Men 81-92 (Spring 2001) (discussing research on racial stereotypes showing that black males involved in interpersonal violence are perceived more negatively than their white counterparts); B. Keith Payne (2006), *Weapon Bias: Split Second Decisions and Unintended Stereotyping*, Current Directions in Psychology Science 15, pp. 287-291 (finding that when people see an ambiguous object which could be a gun they are more likely to identify it as a gun if the person in the picture is African American); Jennifer L. Eberhardt, P.G. Davies, Valerie J. Purdie-Vaughns, & Sheri Lynn Johnson (2006), *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, Cornell Law School Legal Studies Research Paper Series, Paper 41 (finding that in cases involving a white victim, the more stereotypically black a defendant is perceived to be, the more likely the person is to be sentenced to death).

²³ The ALJ also cited other reasons in support of the inference of discrimination including Mr. Connolly's disparate treatment of African American supervisor Wills and Mr. Connolly's failure to ever find discrimination in his many EEO investigations of racial discrimination complaints.

b. Mr. Armstead presented evidence that supported the ALJ's finding of pretext

As Mr. Armstead establish an inference of discrimination, the ALJ next evaluated FedEx's alleged nondiscriminatory reason for Mr. Connolly's decision to fire Mr. Armstead, *i.e.*, Mr. Connolly's concern about Mr. Armstead's history of misconduct and potential threat of violence in the workplace, and concluded that FedEx's reason for the firing was pretextual. ALJ Decision at 19. This finding of pretext, part of the well-recognized approach to discrimination cases, is logical. Where the employer comes forward with an explanation for the discharge that is not credible, it is reasonable to conclude that the employer is unwilling to divulge the true reason for the discharge and, in a discrimination case, the primary reason to withhold the real reason for the discharge is that it involves unlawful discrimination or, as this Court has explained:

[I]f the plaintiff has raised an inference of discrimination through his prima facie case and the factfinder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder could justifiably conclude that the logical explanation for the action was the forbidden motive. A reasonable person could conclude that if the employer had a legitimate basis for taking the adverse action, then the employer would have presented it at trial, and the employer's failure to present a credible nondiscriminatory reason leaves a discriminatory reason as a logical inference to be drawn.

Skaggs v. Elk Run Coal Co., 198 W. Va. at 73. In this case, the ALJ's analysis and "reliable, probative and substantial" evidence of record supports a conclusion that a discriminatory reason for Mr. Connolly's decision to fire Mr. Armstead is a logical inference to be drawn.

First, the ALJ noted that FedEx had offered shifting reasons for Mr. Connolly's decision to fire Mr. Armstead. Other courts have concluded that changes in the reasons an employer uses to justify an employment decision can lead to an inference that the proffered justification is not credible. *See Gallo v. John Powell Chevrolet Inc.*, 765 F. Supp. 198, 210 (M.D. Pa. 1991) (finding that the fact that the employer's alleged reasons were not asserted until the hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds"). Shifting reasons or defenses between the time of the adverse action and the time of the hearing are also strong evidence of pretext. *See, e.g., Smith v. American Service Co.*, 611

F.Supp. 321, 328 (N.D. Ga. 1984) (concluding that because the defendant's initial reason for selecting a white person over the plaintiff was retracted and changed, the defendant had not clearly articulated a legitimate non-discriminatory reason for its decision). The ALJ reasoned that FedEx had been inconsistent in the warning letters, performance reminders, and counselings that it relied upon to justify Mr. Connolly's decision:

For example, in his initial statement to the Commission regarding his decision, Mr. Connolly stated that he relied upon warning letters in Mr. Armstead's file dated September 28, 1990, October 1, 1992, March 2, 1993 and September 29, 2004. Resp. Ex. 22, GFT Executive Summary at 5.) Additionally, Mr. Connolly admitted that his initial decision to terminate Mr. Armstead was based in part upon a prior counseling Mr. Glenn Sutton, former Federal Express Morgantown Station Manager had with Mr. Armstead when Sutton counseled Armstead for asking why Federal Express Corporation did not hire more African Americans at the Station.

In defending Mr. Connolly's actions before the Commission, Federal Express Corporation relied upon two additional warning letters dated July 15, 1987 and November 1988, letters that were 20 and 19 years old.

At the public hearing, Mr. Connolly testified that he also relied on counseling and performance reminders in Mr. Armstead's personnel file. (05/15/07 at 227.)

ALJ Decision at 19-20. As noted in the cases above and the others cited by the ALJ at page 20 of her decision, changes in reasoning proffered for a firing decision are considered in the pretext analysis because they suggest that the current reasons offered the factfinder may include post hoc and self-serving explanations for an otherwise discriminatory decision. Thus, FedEx's decision to bolster its reasons for discharging Mr. Armstead in its letter to the Human Rights Commission by adding incidents from 1987 and 1988 while leaving out incidents such as Mr. Armstead's counseling for raising questions about the hiring of African Americans supports an inference that FedEx's presentation at the hearing does not reliably represent Mr. Connolly's original reasoning and motives.

Second, the ALJ also relied on the fact that FedEx did not treat Mr. Armstead the same as he did white employees. ALJ Decision at 21. The evidence supporting this conclusion of the ALJ has been discussed *supra* and provides strong support for the ALJ's findings and conclusions.

The ALJ also analyzed the case under the mixed motive analysis recognized in discrimination cases in this Court. *See, e.g., Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 74 (1996) (“‘Mixed motive’ refers to cases in which a discriminatory motive combines with some legitimate motive to produce an adverse action against the plaintiff. ‘Disparate treatment’ refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff. As a technical matter, then, mixed motive cases form a subcategory of disparate treatment cases.”); *West Va. Inst. of Technology v. West Va. Human Rights Comm’n*, 181 W. Va. 525, 532, fn. 1 (1989) (“[T]he issue in pretext cases is whether either an illegal motive or a legal motive, *but not both*, was the true motive behind the decision. In mixed motive cases, however, there is no one ‘true’ motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate and at least one of which is illegitimate.”) (emphasis in original).

The mixed motive analysis is applicable to the present case because one could conclude that Mr. Connolly’s motives included both lawful motives (Mr. Armstead’s argument with Mr. Hammerquist) and unlawful motives (Mr. Armstead’s race). Under a mixed motive analysis, once the ALJ determines that race was at least part of the employer’s motive, “the burden of persuasion then shifts to the defendant to show that the same decision would have been made in the absence of the discriminatory motive.” *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 75 (1996). The ALJ concluded that race was a factor in Mr. Connolly’s decision for many of the reasons noted above. ALJ Decision at 22-23. She then reasoned that FedEx “cannot show that Mr. Armstead would have been terminated absent unlawful discriminatory racial animus because the evidence is that no other Federal Express Corporation Management employee who reviewed Mr. Armstead’s conduct, and work history including Armstead’s supervisors, human resource personnel and Mr. St. Martin concluded that Mr. Armstead’s conduct warranted his discharge.” *Id.* at 23. Her conclusion that no other FedEx employee would have terminated Mr. Armstead is supported by evidence of the actions and statements of Mr. Wills, Mr. Snyder, Ms. Lis, Mr. St. Martin and Ms. Hass.

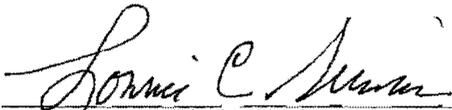
RELIEF PRAYED FOR.

Mr. Armstead requests that this Court accept this Petition for Appeal, reverse and vacate the decision of the Circuit Court of Kanawha County, reinstate the final decision of the Human Rights Commission and award Mr. Armstead such other and further relief as may be appropriate.

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FEDERAL EXPRESS CORPORATION,

Petitioner,

v.

Civil Action No. 09-AA-106
Judge Stucky

ANTHONY ARMSTEAD and
THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Respondents.

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GATHY S. SHERIDAN
KANAWHA COUNTY CIRCUIT COURT
FILED

CERTIFICATE OF SERVICE

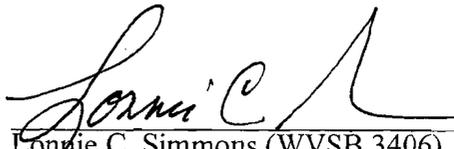
I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITION FOR APPEAL BY ANTHONY ARMSTEAD** was served on all counsel of record on November 24, 2010, through the United States Postal Service, to the following:

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