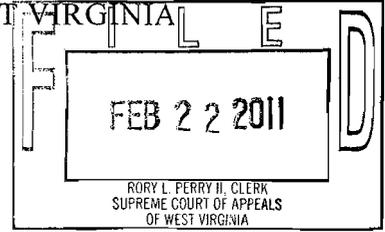


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



FEDERAL EXPRESS CORPORATION,

Respondent (Petitioner Below),

v.

Petition No. 101590

ANTHONY ARMSTEAD and
THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Petitioner (Respondent Below).

**ANTHONY ARMSTEAD'S REPLY TO
RESPONSE IN OPPOSITION TO PETITION FOR APPEAL**

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I. INTRODUCTION

The Response in Opposition to Appeal (“Response”) filed by Federal Express Corporation (“FedEx”) paints a picture of Anthony Armstead as a troublemaker who deserved to be fired because of his long history of serious misconduct. This misleading characterization of Mr. Armstead should be rejected by this Court because it is inconsistent with the evidence of record, contrary to the thrust of the testimony and exhibits, and predicated upon a misunderstanding, if not misrepresentation, of the facts and, in particular, of FedEx personnel policies.

FedEx’s characterization of Mr. Armstead in its Response is not surprising. Employers who discriminate inevitably develop a non-discriminatory reason to justify the adverse employment decision at issue. As a result, the issue in a discrimination case is not whether the employer proffered a non-discriminatory reason for its decision, but whether that non-discriminatory reason can survive the test of an evidentiary hearing or trial. In this case, the FedEx reasons for discharging Mr. Armstead did not survive that test for the many reasons cited by Administrative Law Judge (“ALJ”) Phyllis Harden Carter and discussed in Mr. Armstead’s Petition, 2-13.

Nonetheless, FedEx apparently hopes that, by recycling arguments that failed at the hearing and by creating a distorted image of Mr. Armstead’s conduct and history, it can convince this Court to substitute its judgment of the facts for the judgment of the individual who actually heard the evidence and observed the demeanor of the parties.¹ In any case, the issue now before this Court is not whether Mr. Armstead did something wrong on September 27, 2004 or in the earlier years of his employment at FedEx, but whether a white person in Mr. Armstead’s shoes with Mr. Armstead’s history and record, who was considered to be in the top 25% of FedEx drivers,² would have had a warning letter issued by a supervisor familiar with his work, his attitude, and his usual demeanor

¹ Mr. Armstead is aware that some prior decisions of the Commission have caused concern about the reliability of administrative decisions of agencies such as the Human Rights Commission. However, a careful review of the record will demonstrate that whatever concerns the Court may have about some past cases, this case was fairly tried and justly decided.

² As noted in Mr. Armstead’s Petition, Norman Wills, a FedEx manager, placed Mr. Armstead in the top 25% of FedEx drivers. Tr. 05/16/07 at 51.

converted to a discharge by Mr. Connolly, a manager who did not know him at all, thereby ending his more than nineteen year career as a FedEx employee.

The applicable law is West Virginia Code § 29A-5-4(g)(5) recognizing that a court should uphold the decision of the Human Rights Commission unless the decision was “clearly wrong in view of the reliable, probative and substantial evidence on the record as a whole.” In the sections that follow, Mr. Armstead will discuss some of the reasons why FedEx’s rendition of the evidence and legal arguments are not reliable as a basis for reversing the decision of ALJ Phyllis Carter. Mr. Armstead will not discuss all of Respondent’s arguments as many of them were already addressed in the Petition.³

II. ARGUMENT

A. FedEx Errs in presenting evidence in both its statement of facts and its argument

1. Evidence regarding the issue of anger management and workplace violence

FedEx contends that neither anger management issues nor workplace violence concerns were the basis for Mr. Armstead’s discharge. This is important to FedEx’s defense because Mr. Armstead was able to demonstrate that, if this was the reason he was fired, that reason was pretextual, based on a racial stereotype and/or evidence that Mr. Armstead had been treated differently from white employees with similar or worse anger management/workplace violence issues.

Recognizing the strength of Mr. Armstead’s case, FedEx urges this Court to reject the conclusions of the ALJ regarding anger management/workplace violence based on its claim that Mr. Connolly never really relied on anger management or workplace violence issues in his decision to fire Mr. Armstead. *See, e.g.*, Response, 17 (“The next finding that is improper on legal grounds is that Connolly did not refer Armstead to anger management training as he did other white employees. This is another one of many conclusions based on the flawed assumption that Connolly

³ Mr. Armstead will not address arguments regarding the prima facie case as this issue is directly addressed in the Petition. For the same reason, Mr. Armstead will not address some of the other arguments raised regarding pretext.

terminated Armstead based on anger management or workplace violence issues.”), 22 (“Connolly never used the phrase ‘work place violence threat,’ either in any document or at the hearing.”), 25 (“On review of the whole record, it is clear that the ‘work place violence threat’ reason was not the one articulated by FedEx, but was rather repeated by Armstead’s attorney and erroneously adopted by the ALJ in the Final Decision.”). As demonstrated below, however, FedEx’s argument on this point, at pages 23-24 of its Response, is based on cherry picking excerpts from the evidence while ignoring the “reliable, probative and substantial evidence on the record as a whole.”

First, Mr. Connolly, himself, contradicted FedEx’s contention. At the hearing, he admitted that he told Michael St. Martin, the FedEx manager who interviewed him about the discharge, that his concern about workplace violence played a role in his decision to terminate Mr. Armstead:

Q And when he [St. Martin] asked you why you terminated him [Mr. Armstead], you told Mr. St. Martin that in reviewing the history, you were really concerned with his behavior and his inability to correct his behavior and also *that you had concerns about him turning it in to work place violence issues and negatively impacting my other employees. That’s what you told Mr. St. Martin?*

A *Yes.*

Q Yet you were willing to tell Mr. St. Martin that Mr. Armstead was a work place violence danger without actually talking to anybody who knew him on a first-hand basis to find out if that was true, correct?

A Anyone who knew him on a first-hand basis, no. I went from the information I had received from what is judged as *work place violence. We had had work place violence training on videos and work place violence is not -- it doesn’t have to be something that’s extremely exaggerated or violent. It could be someone put in a situation where they feel intimidated. I felt that they were being put into situations where they’re intimidated over a span of several years that was not being addressed.*

Tr., 05/15/07, 103-104, emphasis added. Moreover, Mr. Connolly stated, in response to other questions, that he believed Mr. Armstead to present a risk of violence in the workplace, despite the fact that he had not asked any of the FedEx managers or employees who actually knew Mr. Armstead whether they thought Mr. Armstead presented such a risk:

Q One of the --

A *Work place violence* was something that did come up into my mind based on altercations.

Q All right. Altercations, had he ever hit anybody?

A Altercations verbally, intimidating people, and swearing.

Q Okay. Before you reached any conclusions on whether Mr. Armstead was capable of work place violence, did you ask Mr. Wills, his supervisor, whether he thought Mr. Armstead presented a work place violence problem?

A No, sir; no, sir.

Q Did you ask Mr. Snyder whether Mr. Armstead presented a work place violence problem?

A Not directly. We went over the history.

Q Mr. Snyder never told you that Mr. Armstead presented a work place violence problem, did he?

A Mr. Snyder, no.⁴

Q I [counsel for Mr. Armstead] didn't intro -- you, at your deposition, you told me work place violence was one of the reasons -- one of your concerns about Anthony Armstead that sooner or later he might hit somebody, correct?

A I said that was one of the things that I had to take into consideration was protecting my other employees.⁵

Q I [counsel for Mr. Armstead] didn't bring up work place violence in this case; you did, didn't you?

A I was --

Q You're the one who first told me work place violence was a consideration and that --

A I was concerned that there could be -- that the behavior could escalate.⁶

Q Now one of the reasons you increased discipline on Anthony Armstead was your concern about work place violence, true?

A Yes, in reviewing the file with all the written counselings just in overall conduct. Now just please keep in mind every GFT is different; every situation is different. I have a responsibility to make sure Anthony was treated fairly, but I also have a responsibility to all the other employees that work with Anthony and that are in this company. *So that is a consideration, sir, that I had to give.*⁷

Although, at various times, Mr. Connolly attempted to downplay his untenable claim that Mr. Armstead represented a threat of violence, the thrust of Mr. Connolly's testimony was that

⁴ Tr., 05/15/07, 52-53, emphasis added.

⁵ *Id.*, 60, emphasis added.

⁶ *Id.*, 53.

⁷ *Id.*, 49-50.

Mr. Armstead's alleged history of "altercations verbally, intimidating people, and swearing" led him to be concerned about Mr. Armstead's potential for workplace violence and that this was a justification for his termination decision.

Second, FedEx contradicts itself on this very issue. On one hand, FedEx denies that Mr. Armstead was terminated for issues involving anger management: "Connolly made his decision based on Armstead's long history of *conduct*, not on anger or violence issues." Response, 17, emphasis in original. On the other hand, FedEx insists the "conduct issues" that Mr. Connolly was concerned about involved "repeated instances of verbal assaults, foul language, and confrontations."⁸ Response, 5. Moreover, as noted above, Mr. Connolly testified that he considered Mr. Armstead's history of "[a]ltercations verbally, intimidating people, and swearing." With due respect to FedEx, both "verbal assaults, foul language, and confrontations" and "[a]ltercations verbally, intimidating people, and swearing" are issues of anger management and workplace violence. It is difficult to reconcile FedEx's claim that Mr. Armstead was *not* fired for anger management issues with Mr. Connolly's testimony that Mr. Armstead was fired because of his history of "verbal assaults, foul language, and confrontations."

Third, as noted in Mr. Armstead's Petition, the Circuit Court actually agreed that Mr. Connolly fired Mr. Armstead due to his concern about workplace violence issues, but nonetheless overturned the Human Rights Commission in Mr. Armstead's favor because the Court failed to realize that Mr. Armstead had effectively demonstrated that firing Mr. Armstead for anger management or workplace violence issues was, on the facts of this case, a pretext for discrimination. Specifically, the Court concluded:

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

⁸ As discussed *infra*, FedEx's reference "repeated incidents of verbal assaults "generally involved incidents that were more than ten years in the past and that even FedEx's HR employee considered to be stale as a basis for discipline. St. Martin Depo, 73 (Q One of the issues, when we looked over Kathryn Lis' notes, we found that one of the issues Ms. Lis had was the time period between the 1993 warning letter for unacceptable conduct and the 2004 termination; correct? A Correct, based on her notes, that's -- she did have a concern about that evidently. Q And she's an HR person? A Yes.).

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.

Final Order, 5. Thus, FedEx asks this Court to uphold the Circuit Court's reversal of the Human Rights Commission based on Judge Stucky's conclusion that workplace violence was an issue in Mr. Connolly's decision and to simultaneously conclude that, contrary to Judge Stucky's decision, Mr. Connolly did not rely on workplace violence concerns in making that decision. For obvious reasons, FedEx's argument should be rejected.

2. Evidence regarding Mr. Armstead's disciplinary history

FedEx's Response portrays Mr. Armstead as a chronic offender by listing a series of alleged incidents of misconduct, claiming that "Connolly saw a pattern in Armstead's conduct that concerned him." Response, 9. In support of this contention, FedEx lists 13 incidents that Mr. Connolly allegedly relied on when he made his decision to fire Mr. Armstead. In doing so, FedEx fails to explain to this Court that most of the incidents did not involve disciplinary action, that it has lumped together warning letters from 1993 and before with counselings (that are not considered discipline under the FedEx System) and with performance reminders (that are not supposed to be used to justify a conduct firing under the FedEx system). As demonstrated below, FedEx's argument is based upon a misreading of its own disciplinary policies and is even inconsistent with the representations that FedEx has previously made in this case.

a. FedEx fails to mention the facts that demonstrate it has provided inconsistent statements of the discipline that Mr. Connolly has relied on

FedEx has been less than consistent in proffering reasons for firing Mr. Armstead. For example, the Human Rights Commission asked FedEx to respond to Mr. Armstead's initial Complaint. In doing so, FedEx did *not* rely on all of the 13 incidents it now lists in its filing with this Court. Instead, FedEx relied, in addition to the Hammerquist incident, on five letters, all of which had been issued more than ten years prior to his discharge. *See* Comp. Ex. 10 at 2 (relying on a July 15, 1987 Performance Reminder, a November 17, 1988 Reminder Letter, an October 2,

1990 Warning Letter, an October 1, 1991 Warning Letter, and a March 2, 1993 Warning Letter). Thus, in FedEx's official response to the Human Rights Commission, FedEx failed to rely on most of the incidents that it contends provided a basis for the discipline. This kind of shifting justification for an employment decision supports an inference of pretext that FedEx implicitly asks this Court to ignore.⁹

b. The facts demonstrate that the incidents on which FedEx relies to justify the discharge are inconsistent with FedEx personnel policies

In order to rely on the incidents listed in its Response, FedEx is required to ignore its own personnel policies in order to mix together disciplinary and non-disciplinary incidents. For example, at page 26 of its Response, FedEx purports to rebut one of the ALJ's findings as follows:

He [Connolly] then specifically lists four warning letters in Armstead's file, and then lists two performance reminders that he considered conduct issues, including one in 2000 and one in April 2004. This statement, written at time of the employment decision, directly and expressly refutes the ALJ's conclusion that "it had been eleven years" since Armstead received discipline for conduct-related behavior.

Response, 26. Although this statement might seem reasonable at first view, it is based on a misrepresentation of the FedEx disciplinary procedure. FedEx repeatedly claims in its Response Mr. Armstead was fired for conduct-related issues. Under FedEx policies, performance letters do not involve discipline for conduct related issues and, therefore, should not be considered in a decision to terminate for conduct-related issues.¹⁰ Warning letters, however, are issued for misconduct and relate to behavioral/conduct issues. These remain on an employee's record for twelve months. Tr. 05/16/07; Resp. Ex. 27, 3.

⁹ At page 27 of its Response, FedEx states that the cases cited in the ALJ's decision differ from the present case. Although changing reasons all involve differing factual situations, this case falls well within the rule. Submitting a letter to the Commission justifying a decision based on a series of ten plus year old warning letters is quite different from the set of reasons proffered in Mr. Connolly's earlier statement or the even larger number of incidents that he purported to rely on at the hearing.

¹⁰ Performance reminders apply to performance issues, not conduct issues. Tr. 05/16/07, 80. They normally remain on the employees record for only six months.

FedEx's factual argument regarding the ALJ's conclusion relies on a sleight of hand performed by Mr. Connolly in order to justify the misconduct discharge. As noted above, performance reminders are not issued for conduct issues and therefore should not provide a factual basis for a conduct discharge:

- Q Now normally, if you're firing someone for conduct, you don't consider performance reminders, correct?
A [Mr. Connolly] Right.

Tr. 05/15/07, 217. Thus, in order to rely on performance reminders to justify a firing for conduct, Mr. Connolly had to take the unusual step of converting performance letters issued by other managers into conduct letters. *Id.*, 217-218. Mr. Connolly did so to justify firing Mr. Armstead, but he could not recall any other case where he converted a performance reminder issued by another supervisor into evidence of misconduct to justify a termination. *Id.*, 230. In reviewing these facts, the ALJ reasonably disregarded the performance reminders converted by Mr. Connolly, referred to the warning letters for conduct and correctly concluded that it had been eleven years since Mr. Armstead received discipline for conduct-related behavior. In other words, her conclusion was consistent with the evidence and not, as FedEx claims, contrary to the evidence.

Not only did Mr. Connolly rely on warning letters that were so old that HR representative Lis cautioned him not to do so, but he also purported to rely on counseling records. Counseling records are short notes in a file to the effect that a manager spoke with an employee about an issue. They are not normally treated as discipline. Resp. Ex. 27 (Acceptable Conduct Policy); Resp. Ex. 28 (GFT/EEO Policy). Employees are not allowed to grieve counseling records. Resp. Ex. 28 at 1 (stating that there is no right of appeal for a document counseling). Moreover, in some cases, the note is so limited that it is difficult to determine the exact conduct that led to the discipline. *See, e.g.*, Comp. Ex. 13 (counseling noting "please be careful with what you say regarding hiring selections, and references to race."). Nonetheless, Mr. Connolly, in order to justify the termination, relied on counselings which had occurred five to ten or more years in the past.

In the GFTP Executive Summary, Mr. Connolly's first statement of his reasons for firing Mr. Armstead specifically relied on a June 23, 1993 counseling in Mr. Armstead's file as evidence of misconduct. In this counseling, as noted above, Mr. Armstead was instructed to be careful in what he said regarding race and hiring selections. Comp. Ex. 14.¹¹ FedEx now claims that Mr. Connolly considered this a note on the "correct way to bring things across." Response, 10. Yet, the counseling note, Comp. Ex. 14, says nothing about the "correct way to bring things across." Once again, Mr. Connolly had to rewrite the history of Mr. Armstead's file to justify the firing.

B. The ALJ Did Not State an Erroneous Business Reason for FedEx's Employment Actions

FedEx argues that there was no evidence that Mr. Connolly was aware of and/or acted on based on a stereotype of African American males.¹² Response, 20 ("Armstead did not ask Connolly any questions that would suggest Connolly knew about the stereotype of an "angry black male," and certainly nothing that would suggest that he believed the stereotype."); *Id.* ("Connolly was never even questioned about whether he is aware of such a stereotype, or even about his own beliefs about African Americans and anger."). However, this argument misconstrues the role of stereotypes in causing discrimination in the workplace. It is immaterial whether Mr. Connolly was aware of the stereotype of African American males as violent. As Justice Cleckley explained in *Skaggs v. Elk Run Coal*, 198 W. Va. 51, 74 (1996), subconscious stereotyping may be the basis for a case under the Human Rights Act:

Technically, pretext can be proved without establishing that the defendant is covering up an illicit motive. (Citation omitted.) (Of course, as explained above, if the pretext is a cover for a legitimate motive, the defendant still wins.) ***More substantively, we do not agree that the plaintiff must prove that the defendant "is intentionally misstating" its explanation. That requirement overlooks the possibility that subconscious or stereotypical thinking may have motivated the employer to take action against the plaintiff.*** (Citation omitted.) For example, an employer could

¹¹ The GFTP Executive Summary (Resp. Ex. 22) was prepared by Mr. Connolly and sets forth his initial rationale for his decision to terminate Mr. Armstead. (Tr., 05/15/07 at 70-71.)

¹² FedEx also argues that Mr. Armstead failed to "link the stereotype to the specific decision-maker." Response, 20. However, contrary to FedEx's argument, Mr. Armstead did link the stereotype to Mr. Connolly, the specific decision-maker in this case.

quite honestly testify that it fired a female employee because of her job performance, yet the plaintiff might still be able to establish “pretext” by proving that the employer subconsciously evaluated women differently.

Emphasis added. Thus, if Mr. Connolly was motivated by a racial stereotype in his conclusion that Mr. Armstead presented a risk of workplace violence, then Mr. Armstead is a victim of unlawful discrimination under this Court’s decision in *Skaggs*. Contrary to FedEx’s contention, there is no requirement that Mr. Armstead also prove that Mr. Connolly was conscious of the fact that he acted based on biased stereotypes. In fact, stereotypes often function in motivating decisions precisely because the individual is unaware of the role the stereotype plays in his thinking.

FedEx contends that “an expert must link the stereotype to the specific decision-maker,”¹³ but this contention is not even supported by the cases upon which FedEx relies. In *Jones v. Cargill, Inc.*, a Title VII case, the federal district court was asked to reconsider a motion *in limine*. 490 F. Supp.2d 978, 988 (2007). Although the court found little evidence in the records that a racial stereotype regarding African-Americans played a role in the adverse employment decision at issue, the court nonetheless permitted the plaintiff to question the decision makers about racial stereotypes. *Id.* at 988. Likewise, in *Johnson v. Brown*, the court declined to take judicial notice “that ‘a stereotype of African-Americans is that they are a lazy people who prefer the dole to work. The supervisors’ unjustified accusations against Johnson fit this stereotype.’” 1998 U.S. Dist. LEXIS 3612, *27 (N.D. Ill. 1998). The court expressly based its decision on the lack of evidence in the record that the decision makers’ judgment was affected by race, stating further, “[t]his court has no doubt that negative racial and gender stereotypes can affect an employer’s assessment of an employee’s conduct or performance. But whether such stereotypes played a role in this case is not a proper subject for judicial notice.” *Id.* at *27-*28. Similarly, the quoted footnote from *Jenson v. Eveleth Taconite Co.* merely notes that the plaintiff’s expert could not tie gender stereotyping to an individual employment decision in that class action case. 824 F.Supp. 847, 864 n. 34 (D. Minn. 1993), *reversed and remanded on other grounds*, 130 F.3d 1287 (8th Cir. 1997). Thus, none of the

¹³ Response, 20.

citations relied on by Federal Express require Mr. Armstead to present expert testimony regarding racial stereotyping before the ALJ can conclude that race was a motivating factor in Mr. Connolly's decision to fire him.

C. The ALJ's Analysis of Pretext Is Supported by the Evidence

1. FedEx's contention that Mr. Armstead was different from the white comparators because he was not terminated for anger or violence issues is contrary to the evidence of record and FedEx's own admissions in its response in this case

In one of its most bizarre arguments, FedEx insists that Mr. Armstead cannot be compared to the two white employees who were referred to anger management rather than being fired because he was fired for "conduct issues," not anger management issues:

The next finding that is improper on legal grounds is that Connolly did not refer Armstead to anger management training as he did other white employees. This is another one of many conclusions based on the flawed assumption that Connolly terminated Armstead based on anger management or workplace violence, and will be discussed more fully in Section 2 below. *Connolly made his decision based on Armstead's long history of conduct, not on anger or violence issues.*

Response, 17, emphasis added. The suggestion that Mr. Connolly did not primarily base his decision on "anger or violence issues" is not only contrary to the record discussed above, it is also contradicted by FedEx's Response filed with this Court. At page 5 of its Response FedEx states:

The evidence plainly demonstrates that Mr. Armstead was terminated by FedEx based not on a "work place violence threat" but on Armstead's entire work history and repeated conduct issues, including *repeated instances of verbal assaults, foul language, and confrontations.*

Emphasis added. It makes no sense for FedEx to insist on the one hand that Mr. Armstead was fired for "repeated instances of verbal assaults, foul language, and confrontations" while simultaneously denying that Mr. Armstead was fired for "anger or violence issues." Nor does FedEx's Response explain how it can argue, with a straight face, that People Help was designed to help white employees deal with anger when their conduct includes kicking a customer's package, "unwelcome, inappropriate and threatening behavior," "threatening revenge for being scheduled to work on a

Saturday” or “using profanity and throwing boxes” at another employee but was not designed to help an African American employee who swore in anger at a co-worker.

2. FedEx errs in its argument that the white comparators can be distinguished from Mr. Armstead based on mitigating factors

FedEx claims that Mr. Armstead’s evidence regarding white comparators is mistaken because “the white employees referred to by the ALJ had differentiating and mitigating circumstances that warranted differing treatment.” Response, 18. It then argues that Ms. H’s¹⁴ third warning letter in a twelve-month period for “using profanity and throwing boxes” at another employee is somehow excusable because it happened a day after Ms. H missed her godmother’s funeral. Yet, FedEx fails to explain why stress over the death of a godmother mitigates a third warning for misconduct in a twelve-month period, but stress over one’s wife’s illness does not mitigate a first warning letter in over ten years. Petition, Tr., 05/15/07, 270 (“I’d been having some -- some problems, illness and my wife, she had been sick.”). Nor does FedEx identify a single mitigating circumstance to explain why Mr. Connolly decided to send TR to People Help instead of firing her when he noted that her “hot temper and poor conduct seem to be recurring themes” and that she had engaged in “unwelcome, inappropriate and threatening behavior” including “threatening revenge” against the person who scheduled her to work on a Saturday.¹⁵ See discussion at Petition, 10-12.

In any case, under the appropriate test, a reviewing court should not second guess an ALJ who heard the testimony and reached a conclusion that was based on her reasonable analysis of the facts. Given the evidence of record, there was “reliable, probative and substantial evidence” to support the ALJ’s conclusions regarding comparators.

¹⁴ FedEx used the name of other employees in its Response. Mr. Armstead believes, however, that it is more appropriate to use initials in the event the comparison persons are discussed in an opinion of this Court.

¹⁵ FedEx does argue that TR was a candidate for People Help because she said she was “blowing off steam” which, according to FedEx somehow makes anger management appropriate for her, but not for African American Armstead whose cussing of a co-worker was no less “blowing off steam” than that of TR who, in “blowing off steam” actually threatened revenge because she was angry about being scheduled for a Saturday.

3. FedEx demonstrates a misunderstanding as to the relevance of the evidence presented by Mr. Armstead

FedEx suggests that none of Mr. Armstead's evidence is probative of discrimination. For example, FedEx argues that "[f]inding different managers within the employer's organization who would have made different decisions has absolutely no relationship to discriminatory intent." Response, 17. Yet, this was not a case of any search for people who disagree with Mr. Connolly. Rather, this was a case where every management employee who was involved in either the discipline of Mr. Armstead (Mr. Armstead's supervisors and Human Resources manager Lis) or who was involved in the subsequent investigation of the decision (St. Martin and Haas) thought that a simple warning letter, not a discharge, was the appropriate discipline, under FedEx policies.

Given these facts, the question arises: why would a manager like Connolly who had extensive experience with FedEx policies conclude that discharge was necessary when no one else familiar with the record reached the same conclusion. Moreover, why would Mr. Connolly reach that conclusion without first investigating the matter by consulting with those familiar with Mr. Armstead. On these facts, one inference is that Mr. Connolly's judgment was tainted by racial prejudice.¹⁶ This inference, standing alone, might not support a decision in Mr. Armstead's favor, but, as discussed in the Petition, this inference did not stand alone as there were other facts and inferences that, taken together, supported the ALJ's decision.

FedEx asserts that "[e]ven if it were true that Connolly made his decision solely or even primarily on the workplace violence issue, the fact that other employees disagreed with his decision does not relate to race in any way." Response, 28. This argument is based on a misunderstanding of how one proves a case of discrimination. The relevance of the fact that everyone else whose opinion is in the record disagreed with Mr. Connolly's assertion that Mr. Armstead presented a risk

¹⁶ Another possible inference is that Mr. Connolly had a personal animus against Mr. Armstead, but there is no evidence of any prior interactions between them that would suggest such an animus. Another inference might be that Mr. Connolly is just a hard-nosed disciplinarian that insists on stiffer consequences for misbehavior. However, there is no evidence to remotely suggest such an inference. In fact, the evidence as to how he treated the two white comparators suggests the contrary inference.

of violence is twofold. First, one proves pretext by demonstrating that the proffered reason for the discharge is not credible. *See, e.g.*, Syllabus Point 5, *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51 (1996) (“Therefore, if the plaintiff raised an inference of discrimination through his or her prima facie case and *the fact-finder disbelieves the defendant’s explanation for the adverse action taken against the plaintiff*, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.”). Thus, evidence that Mr. Connolly’s conclusion was contrary to that of those who knew Mr. Armstead and that of those who reviewed his internal complaint is relevant because it can lead a reasonable factfinder to question the credibility of Mr. Connolly. Second, Mr. Connolly’s willingness to jump to a conclusion about the risk posed by Mr. Armstead without even consulting the opinions of the supervisors who knew Mr. Armstead supports an inference that Mr. Connolly was either not concerned about the truthfulness of his allegation or that he was acting upon a stereotype of Mr. Armstead rather than the actual facts. Thus, the evidence is probative under two of Mr. Armstead’s theories: pretext and stereotype.

FedEx makes a similar argument at page 17 of its Response:

Finding different managers within the employer’s organization who would have made different decisions has absolutely no relationship to discriminatory intent. This is particularly true with different levels of management. A supervisor’s modification of a subordinate’s decision cannot be evidence of race discrimination when nothing about the decision relates to race (i.e., no racial comments, no statistical evidence, etc.). To the contrary, it is axiomatic that agreement or disagreement with the employment decision at issue is immaterial. Citation omitted.

Again, FedEx has muddled the facts and confused the issue. The facts, in this case, are that no one else, including two FedEx Human Resources experts, agreed with Mr. Connolly’s conclusion about Mr. Armstead. For the reasons set forth above, that evidence is probative in this case. Moreover, FedEx’s assertion that such evidence is not probative and that Mr. Armstead needs to present “racial comments” or “statistical evidence” simply has never been the law in West Virginia. As explained in Mr. Armstead’s Petition, discrimination cases are generally proven through circumstantial evidence of disparate treatment and pretext. *See, e.g., Hanlon v. Chambers*, 195 W. Va. 99, 106

(1995) (a victim of discrimination is seldom able to prove a claim by direct evidence and is usually constrained to rely on circumstantial evidence).

D. FedEx Has Misunderstood the Circuit Court's Decision

In his Petition, Mr. Armstead explained that the Circuit Court had, in fact, relied on workplace violence as a justification for Mr. Connolly's firing even though FedEx had consistently disclaimed the importance of workplace violence in Mr. Connolly's decision. Petition, 23-24. FedEx now suggests that the Circuit Court never actually relied on the workplace violence motivation for the decision, but rather that the Circuit Court was simply acknowledging Mr. Armstead's argument when it stated "that, *even considering arguendo* the ALJ's faulty view that FedEx terminated Mr. Armstead for posing a workplace violence threat, Mr. Armstead's argument that no evidence existed to support a termination based on a workplace violence threat was wrong." Response, 5, fn. 1, emphasis added. This statement is plain wrong. The Circuit Court wrote:

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." (Citation Omitted.)

Decision, 5. Nothing in this language remotely suggests that the Circuit Court was "*considering arguendo* the ALJ's faulty view." The word "arguendo" never appears in the Circuit Court's decision and no other language in the decision suggests that the Court was making or even considering an "arguendo" analysis. As in other parts of its Response, FedEx rewrites the record to justify its arguments before this Court.¹⁷

¹⁷ The Circuit Court also wrote "Armstead's behavior fits into the broad definition of workplace violence per FedEx's policy and the Court in *Adkins*." Nothing in this reference suggests an "arguendo" analysis. The Circuit Court clearly concluded, as Mr. Armstead argued, that Mr. Connolly relied on workplace violence as a justification for the termination. However, it failed to consider the weight of the evidence establishing that this justification was pretextual and/or based on racial stereotyping and instead concluded, as if it could engage in a de novo review of the evidence, that the record supported Mr. Connolly's firing for precisely the reason that FedEx continues to disavow.

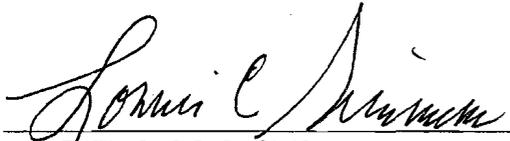
CONCLUSION

For the foregoing reasons, Anthony Armstead asks that this Court vacate the decision of the Circuit Court of Kanawha County and enter an Order reinstating the final decision of the Human Rights Commission.

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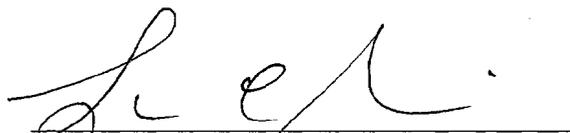
I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **Anthony Armstead's Motion for Permission to File Reply Brief and Anthony Armstead's Reply to Response in Opposition to Petition for Appeal** was served on all counsel of record on February 22, 2011, through the United States Postal Service, to the following:

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