IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FEDERAL EXPRESS CORPORATION,

Respondent and Petitioner Below,

v.

Petition No. 101590

ANTHONY ARMSTEAD and
THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION,

Petitioner and Respondent Below.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

From the Circuit Court of Kanawha County, West Virginia
The Honorable James C. Stucky
Civil Action No. 09-AA-106

RESPONSE IN OPPOSITION TO PETITION FOR APPEAL

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I. INTRODUCTION

The Circuit Court properly found that the ALJ and Human Rights Commission committed clear error in finding that Mr. Armstead was the victim of discriminatory treatment and awarding him $2,545.26 for economic losses, $5,000 for incidental damages, and attorney's fees. 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. This rationale was made clear in the manager's contemporaneous written report of the termination and fully supported by his testimony at the hearing. No evidence in the record casts doubt on this rationale. The Circuit Court applied the proper standard and reached the proper result.

In an instance of clear error, the ALJ found that FedEx's purported rationale for Mr. Armstead's termination was that he posed a "workplace violence threat." The reasoning of the ALJ's entire Final Decision in Armstead's favor flowed directly from this error, as the ALJ found that there was insufficient evidence that Armstead posed a "work place violence threat." Final Decision, p. 22.

Applying a "clearly wrong" standard to the ALJ's factual findings and a *de novo* standard to the ALJ's legal conclusions, the Circuit Court corrected the clear errors and ruled that FedEx's stated reason for terminating Mr. Armstead was his "overall pattern of poor conduct." Final Order, pp. 3-5.[1] Having corrected that clear and critical error, the Circuit Court went on to find that "[t]he evidence on record as a whole is insufficient to prove discrimination. The

[1] Underscoring the lack of merit in Mr. Armstead's position, the Circuit Court 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: "Armstead's behavior fits into the broad definition of workplace violence per FedEx's policy and the Court in *Adkins*." Final Order, p. 5.

Commissions' Final Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record." Final Order, p. 6. The Circuit Court's decision is clearly correct.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Petitioner Anthony Armstead, an employee of Federal Express Corporation filed a Complaint before the West Virginia Human Rights Commission. A public hearing was conducted in Morgantown on May 15-16, 2007. On August 28, 2008, the ALJ issued a Final Decision awarding Mr. Armstead economic damages of $2,545.26 and statutory incidental damages of $5,000, plus attorneys' fees and costs. FedEx filed a timely appeal to the Commission, and the Commission entered a two-page form on May 13, 2009 adopting without modification or amendment the Final Decision of the ALJ. FedEx then filed a timely Petition for Review with the Circuit Court of Kanawha County. On June 28, 2010, the Honorable James C. Stucky entered a detailed six-page Final Order reversing the Commission's Final Decision and dismissing Mr. Armstead's claims in full. Mr. Armstead filed a Motion to alter or amend the Final Order, which the Circuit Court denied. Mr. Armstead now asks this Court to review on appeal the Circuit Court's dismissal of Mr. Armstead's claims.

III. STATEMENT OF FACTS

Petitioner and Respondent Below, Anthony Armstead ("Mr. Armstead"), was a courier employed by Respondent and Petitioner Below Federal Express ("FedEx") Corporation at its Morgantown, West Virginia, station.

In September 2004, Mr. Armstead was involved in an incident with another courier at the Morgantown station. Armstead left his area where his delivery van was and went to another area where three employees were sorting packages. The three document sorters—Scott

Hammerquist, Brian Fox, and Donna Messiora—were busy, with packages in their hands, sorting them and putting them in baskets. Armstead and Hammerquist engaged in a verbal confrontation, which included Armstead using the "F" word towards Hammerquist several times. Hammerquist told Armstead that he would "have [Armstead's] job for that," to which Armstead replied, "There's been bigger and better men than you have tried and failed," and "You know, Scott, I never liked you from the first day I met you." (Tr. I, p. 266–68.)[2]

Hammerquist told the manager at the station that morning, Norman Wills, about the incident and Wills told him that if it was "something serious," then Hammerquist needed to submit a written statement. (Tr. II, p. 27.) Hammerquist did so later that day. Based on the statement, Wills placed Armstead on paid investigative suspension until Wills could determine what had happened. Armstead later submitted a statement of his own.

Wills collected statements from the two other witnesses to the incident. Donna Messiora's statement recounted the incident:

> While Scott was sorting the letters Tony was walking around the document sort, Scott told Tony "Excuse me I'm still sorting letters." Tony did not move out of the way. When Scott asked him to move again, then Tony started using foul language towards Scott telling him he wasn't his manager. Tony continued to use the F word towards him.

(Resp't Ex. 25.) Brian Fox's statement recounted the incident:

> Tony came over to the sort table and Scott ask him if he wanted to help sort – if not excuse himself out of the way when Tony started dropping the F-bomb towards Scott. He said he saw bigger men fall before.

(Resp't Ex. 26.) Neither Messiora nor Fox saw any physical contact occur.

Wills, along with his supervisor and the local FedEx Human Resources representative, reviewed all of the statements as well as FedEx policy PM 2-5 Acceptable Conduct. (Tr. II, p.

[2] Citations to the official transcript of the hearing in this matter will refer to the May 15, 2007, transcript as "Tr. I" and the May 16, 2007, transcript as "Tr. II."

29; Resp't Ex. 27.) PM 2-5 is meant to protect the rights and feelings of other people, to promote a good working environment for employees, and to ensure a high degree of personal integrity. It prohibits, among other enumerated acts, "Threatening, intimidating, coercing, directing abusive language, or displaying blatant or public disrespect toward any employee or customer while on duty, on Company property, at collection sites, or at off-site Company meetings and functions." (Resp't Ex. 27.) A "Warning Letter" under PM 2-5 is one of two types of formal written deficiency notifications, and can result in termination of employment. In this case, Armstead was not terminated, but was issued a Warning Letter for the incident for violation of PM 2-5. (Tr. II, p. 30; Resp't Ex. 19.)

FedEx has a published procedure entitled PM 5-5 Guaranteed Fair Treatment ("GFT") Procedure in which an employee who receives a Warning Letter may ask for that decision to be reviewed by a higher-level manager. (Resp't Ex. 28.) Under the PM 5-5 GFT policy, a reviewing manager has the authority and discretion to uphold, overturn, or modify (up or down) the employment decision on appeal. Armstead filed a GFT regarding his Warning Letter. (Tr. I, p. 116; Resp't Ex. 1.) Pursuant to standard procedure, a teleconference was held between Armstead, Wills, and John Snyder (Wills's immediate supervisor) at the station in Morgantown and Richard Connolly (Snyder's immediate supervisor) and the FedEx Human Resources Representative at the district office in Pittsburgh. On this teleconference, Connolly had Wills give his rationale for issuing the Warning Letter and then had Armstead address his issues of fairness.

FedEx PM 2-5 Acceptable Conduct provides in part:

> **Termination Option Exercised.** Failure to correct behavioral deficiencies results in discharge by the Company. Three notifications of deficiency within a 12-month period normally result in termination. However, an employee's entire employment history should be considered. Based on the severity of the occurrence, an employee may be terminated with less than three notifications

> of deficiency within a 12-month period. ***Management is responsible for thoroughly reviewing an employee's disciplinary record with the Company and exercising judgment in determining appropriate action.***
>
> ....
>
> **Recurrent Patterns.** Employees must understand that recurrent patterns of misconduct are noted and cannot be tolerated. ***An employee's entire employment history is reviewed and taken into consideration when evaluating recurring patterns of misconduct.*** Issuance of a warning letter for a deficiency which has been addressed previously through 2-5 Acceptable Conduct can result in more severe action up through termination.

(Resp't Ex. 27.) (emphasis added) Connolly testified that he always reviews an employee's entire employment history when conducting a GFT, and that during the course of Armstead's GFT teleconference, he had reviewed all of the additional discipline and all the written counselings of Armstead and was concerned about the recurring pattern of conduct. (Tr. I, p. 38; Tr. I, p. 125-26.)

Connolly saw a pattern in Armstead's conduct that concerned him. (Tr. I, p. 129.) His review of Armstead's entire employment history revealed:

- In July 1987, Armstead entered the station office, slammed the door, and immediately began to yell about being tired of people telling him what to do. He slammed his clipboard down on an employee's desk while she was on the phone with a customer. He continued to yell and swear until a manager intervened. (Resp't Ex. 4.)

- On three separate occasions in Fall 1988, Armstead applied for open routes at the station, and then at the last minute either scratched his name out or stated he was "kidding." He would have been the senior applicant, and in some cases his junior peers did not apply because they felt his application foreclosed their opportunity. Armstead was disciplined for his "failure to respect the rights and feelings of his peers and the disruption of station operations." (Resp't Ex. 5.)

- In October 1989, Armstead yelled at a co-worker in front of several other co-workers, then yelled at his manager over the phone when she confronted him about the incident. Armstead was disciplined because he "showed no respect" for his co-workers. (Resp't Ex. 6.)

- In October 1990, Armstead was "(1) using the words 'F[***]' & 'G[**] DAMN' while on duty, (2) making remarks such as "I'll go the extra step, not like some people," (3) "I'll hurt my back so I can get an in town route; (4) making remarks about the cleanliness of others' homes." (Resp't Ex. 7.) When his manager tried to discuss the incident with him in her office with two other employees, he "repeatedly said "G_d Damn," and was suspended without pay. (Resp't Ex. 8.)

- In September 1991, Armstead again used the word "F[***]" at the station, including stating to a fellow worker, "You don't pay my f[***]ing paycheck." (Resp't Ex. 9.)

- In March 1993, Armstead had a confrontation with a co-worker, including calling the co-worker an "a[**]hole" several times, and he was disciplined for the "public disrespect of [his] co-workers." (Resp't Ex. 12.)

- In June 1993, Armstead's manager made an entry in Armstead's calendar on a page entitled "Record of Management Discussions with Employee" about a statement regarding hiring practices and references to race. (Resp't Ex. 13.) Connolly interpreted the notation as counseling Armstead on the "correct way to bring things across," (Tr. I, p. 145) based on his experience that counselings are done when a manager talks to employees "about a way that they could be, you know, acting in a more professional manner or whatever the case may be." (Tr. I, p. 70.)

- In October 1997, Armstead and another employee got into a "verbal argument" at the station in which a manager had to intervene. (Resp't Ex. 14.)

- In August 1998, Armstead received another notation in his employee calendar: "Counciled [sic] Tony about getting along with fellow employees. He must remain professional." (Resp't Ex. 15.)

- In July 1999, another notation was made in Armstead's employee calendar: "Talked to Tony about behavior during my AM meeting and also about auditing his timecard before he leaves." (Resp't Ex. 16.)

- In Spring 2000, Armstead had three dissatisfied customers in a two-month period. One customer disputed Armstead's claims that he attempted a delivery at the customer's residence. Another stated that Armstead had not left a package on his porch as claimed, but instead found an indentation in the snow by the mailbox where a package had been placed and taken. A third complained that his package was left in an unsecure area, became wet, and had to be destroyed. Armstead was disciplined for these acts. (Resp't Ex. 17.) Connolly interpreted the acts described in this letter as examples of "blatant disregard for our customer." (Tr. I, p. 220.)

- In April 2004, Armstead put a package in a mailbox—against clear company rules—as well as at the wrong address, for which he was disciplined. (Resp't

Ex. 18.) Connolly also considered this a similar deficiency as part of Armstead's overall conduct. (Tr. I, p. 158.)

- In September 2004, Armstead was involved in the altercation with Hammerquist for his abusive language towards a co-worker. (Resp't Ex. 19.)

In reviewing Armstead's entire employment history, Connolly did not focus solely on abusive language, but rather the "overall pattern of poor conduct." (Tr. I, p. 160.) He had never seen "that much discipline throughout a history of conduct-related issues." (*Id.*) Connolly made the decision to terminate Armstead's employment. In explaining his decision, Connolly wrote the following in the "MD Rationale" section of the GFT Summary:

> In reviewing the complainant's entire discipline history this is the 4th letter the complainant has received specifically for conduct. The complainant received a warning letter on 9/28/90, 10/1/92, and 3/2/93 and again on 9/29/04. In addition the complainant has received 2 letters that previous management determined performance related which in fact were conduct issues. On 3/24/00 the complainant received a Performance Reminder letter for failure to release a package that had a catalog shipper release. The recipient was home all day and claimed the complainant did not attempt the delivery. The discipline was given based on 2 recent incidences of improper delivery releases noted in the discipline letter. On 4/13/04 the complainant placed a package inside a mailbox for a recipient that lived 1 mile away.
>
> The complainant has several documented counselings in regards to conduct. On 4/22/92 references abusive language and bad attitude. On 6/23/93 the complainant is counseled on careful in what he says in references to race and hiring selections. On calendar dated 10/3 the complainant is counseled on inappropriate behavior in regards to a verbal confrontation on the belt. On calendar dated 8/7 the complainant is counseled on getting along with fellow employees and professionalism in the workplace.
>
> After a thorough review of all the incidents surrounding the situation including past conduct history I have decided to modify management's decision to termination. It is evident that the complainant has numerous incidents of conduct issues. The complainant has been disciplined for the same behavior in the past and has failed to correct his behavior.

(Resp't Ex. 22.) Connolly never specifically references workplace violence and never uses the phrase "workplace violence threat."

Armstead appealed his termination to the next step of the GFT process, which goes to Connolly's immediate supervisor. Armstead stated that he felt his termination was based on his disability, age, and race. After an investigation, no discrimination was found, but Connolly's supervisor determined that there were irregularities in the GFT process—namely, that Connolly may not have reminded Armstead that the discipline could be increased on appeal and that Connolly should not have asked Armstead's manager to pick up the phone receiver at the GFT conference call. As a consequence, Armstead's employment was reinstated, and Armstead was given back pay, including imputed overtime pay.

IV. STANDARD OF REVIEW

This case involves the appeal of the Circuit Court's Order reversing the West Virginia Human Rights Commission's Final Decision and dismissing Armstead's claims. This Court has stated the applicable standard of review:

> In appeals of cases from the Human Rights Commission to the circuit court or this Court, the standard of judicial review is set by statute in W.Va. Code, 29A-5-4(g) [1998]. We discussed this standard in...Shepherdstown Volunteer Fire Dep't v. State ex rel. State Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983), where we held: Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions, 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.'

> Furthermore, we explained the procedure to be followed by the reviewing court in Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W.Va. 53, 56, 365 S.E.2d 251, 254 (1986): [A] reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts."[The] 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." Syllabus Point 1, West Virginia Human Rights Commission v. United Transportation Union, Local No. 655, 167 W.Va. 282, 280 S.E.2d 653 (1981).

PAR Elec. Contrs., Inc. v. Bevelle, 695 S.E.2d 854, 856-857 (W. Va. 2010).

V. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR[3]

1. The Circuit Court properly reversed the decision of the Human Rights Commission because the HRC decision was based upon clear errors of fact and law.

2. The Circuit Court properly ruled that Mr. Armstead's termination was based upon his "overall pattern of poor conduct" and that the record is devoid of proof that any "similarly situated individuals" received disparate treatment.

3. The Circuit Court properly found that the record supported FedEx's stated reason for terminating Mr. Armstead, "his long history of conduct issues."

[3] Petitioner asserts three Assignments of Error. *See* Petition for Appeal, p. 16.

VI. LAW AND ARGUMENT

A. The Circuit Court Cited and Applied the Proper Standard of Review.

In asserting that the Circuit Court applied the wrong standard of review, Mr. Armstead contends that 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.'" Petition for Appeal, p. 20. The Circuit Court did precisely that and properly found that: 1) the evidence in the record did not support the ALJ's decision in favor of Mr. Armstead; and 2) the evidence in the record required judgment in favor of FedEx.

In its Final Order, the Circuit Court undeniably stated and followed the proper standard. The Circuit Court explained:

> This Court's review is governed by the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-1 *et seq.* West Virginia Code § 29A-5-4 states, The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
> The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline,* 196 W.Va. 588, 595, 474 SE.2d. 518, 525 (1996).

Final Order, pp. 1-2.

The Circuit Court noted that FedEx's argument was the proper one under this standard: "that the ALJ's finding that Armstead had established a prima facie case is not supported by substantial evidence on the record or the evidence is not legally sufficient to support a finding of discriminatory motive." Final Order, p. 4.

The Circuit Court, after addressing several critical issues, found that 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 Order, p. 6.

As stated in Armstead's Petition: "[o]n appeal, findings of fact by an 'administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Petition for Appeal, p. 17, *quoting Erps v. W. Va. Human Rights Comm'n,* 224 W.Va. 126 (2009). As the Final Order makes clear, this is precisely the analysis performed by the Circuit Court.

Armstead contends that the Circuit Court searched for evidence to support FedEx's non-discriminatory reasoning rather than determining whether there was evidence in the record to support the ALJ's decision in Armstead's favor. Petition for Appeal, p. 17. This argument is off base. Clearly, the Circuit Court found that "the evidence on record as a whole is insufficient to prove discrimination." Final Order, p. 6. The fact that the record also affirmatively supports FedEx's position does not in any way suggest that the Circuit Court applied the wrong standard. It only further supports the Circuit Court's ruling.

When the decision of the ALJ and HRC is "clearly wrong in view of the reliable, probative, and substantial evidence on the whole record" the rulings of the West Virginia Human Rights Commission should be reversed. *Charleston Town Center Company, LP v. West Virginia*

Hum. Rights Comm., 688 S.E.2d 915, 925-926 (W.Va. 2009) (reversing ALJ's finding that appellees had suffered unlawful discrimination); *see also Ford Motor Credit Co. v. West Virginia Hum. Rights Comm.*, 696 S.E.2d 282 (W. Va. 2010) (dismissing employee's claims, finding that ALJ's and HRC's ruling in favor of employee on claims under the West Virginia Human Rights was clearly wrong). The reversal in this case was warranted pursuant to this standard.

B. The Circuit Court Properly Found that the Record Did Not Support Armstead's Case.

The Circuit Court properly dismissed Armstead's claims. The ALJ's ruling was clearly erroneous for at least four reasons: 1) Armstead did not prove a *prima facie* case of discrimination; 2) the ALJ stated an erroneous business reason for FedEx's employment actions; 3) the ALJ's analysis of "pretext" is neither legally proper, nor supported by the record; and 4) a Cease and Desist Order was clearly not warranted in this case.

1. The ALJ's Finding that Armstead Established a *Prima Facie* Case Is Wrong.

To establish a *prima facie* case of discrimination, Armstead must prove that 1) he was a member of a protected class; 2) that he suffered an adverse employment decision; and 3) that but for his protected class status, the adverse decision would not have been made. *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164 (1986). There is no dispute that the first two prongs were met. The ALJ found that Armstead satisfied the third prong of the *prima facie* case through "circumstantial evidence." (Final Decision, pp. 17–18.) All of the "circumstantial evidence" listed by the ALJ, however, is either a) not legally sufficient to support a finding of discriminatory motive or b) not supported by substantial evidence in the whole record.

a. The ALJ's "circumstantial evidence" is not related to race discrimination.

Circumstantial evidence in a discrimination case must "sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment-related decision was based upon an unlawful discriminatory criterion." *West Va. Inst. of Tech. v. West Va. Human Rights Comm'n*, 181 W. Va. 525, 530 (1989). Some of the items of evidence that the ALJ cites have no logical link to race whatsoever.

The first fact noted by the ALJ is that Connolly's decision was "inconsistent" with the decision that his subordinates or the HR representative would have taken. 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. *See Conaway*, 178 W. Va. at 171; *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 78 (1996) ("Courts simply have no business telling employers how to make personnel decisions."). The ALJ's reliance on internally differing—but racially neutral—decisions is not a legally permissible basis to find discriminatory intent.

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. Even if the factual underpinnings of this conclusion were valid, however, the

ALJ's analysis is legally deficient. Inconsistent treatment of employees may be considered if the employees are "similarly situated." "[A] critical component of any discrimination claim is the determination that the person or persons alleging improper discrimination are similarly situated to those allegedly receiving preferential treatment." *Pritt v. W. Va. Div. of Corr.*, 218 W. Va. 739, 744 (2006). The ALJ made no effort to determine whether the white employees were similarly situated to Armstead. As the Circuit Court correctly stated in the Final Order, "The ALJ failed to determine if these white employees were similarly situated to Armstead." Final Order, p. 5.

Without such an analysis, the comparisons are meaningless. In fact, Armstead's situation was not the same as the other white employees. When examining whether employees are similarly situated, the courts consider 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." *Mayflower Vehicle Sys. v. Cheeks*, 218 W. Va. 703, 715 (2006). As will be discussed in greater detail in Section 3 below, the white employees referred to by the ALJ had differentiating and mitigating circumstances that warranted differing treatment. The ALJ did not find otherwise, and the record would not support such a finding in any case.

Finally, the ALJ notes that Connolly presided over more than twenty discrimination investigations and found no evidence of race discrimination. Even if the record demonstrated that any of these situations actually involved some race discrimination, Connolly's decisions would only be marginally probative. There is not a bit of evidence in the record that any of these investigations actually did involve race discrimination. Presumably Armstead would have presented evidence of a finding by a tribunal, agency, or court if any actually existed. Therefore

this item of "circumstantial evidence" does not in any way relate to or suggest discrimination in this case.

b. The ALJ's "circumstantial evidence" is not supported by the record.

The other pieces of circumstantial evidence relied upon for Armstead's third element of a *prima facie* case are not supported by the factual record. The first item is the misquotation "work place violence threat" so often cited in the Final Decision. This error will be discussed more in detail in Section 2 below. In short, because Connolly never based his decision on the fact that Armstead posed a "work place violence threat," the fact that another manager disagreed with this opinion cannot be a foundation for a finding of discriminatory intent. Moreover, as stated above, contrary opinions about race-neutral employment decisions are immaterial to a court's analysis of the employment decision.

The ALJ also mentions that Connolly "consistently overturned the disciplinary decisions of only one of his supervisors and those are the disciplinary decisions made by Mr. Norman Wills, who is an African-American male." This appears to be a continuation of the ALJ's statement on page 6 of the Final Decision that Wills "had issued only two disciplinary decisions, each of which Mr. Connolly modified upwards." These statements are flatly wrong. Wills never testified that these were the only disciplinary decisions he has made; he has in fact made many over the course of his management career. It is true that Connolly has only modified two decisions upwards, and both were from Wills, but that fact is probative of nothing. First, Connolly has other African American managers. Evidence of the number was not elicited at the hearing by Armstead—no doubt because the actual number would contradict Armstead's theory that Connolly's treatment of Wills was based on Wills's race. At least one other African American manager was mentioned at the hearing, however, so the record at least shows that

Wills is not the only African American manager. Therefore the fact that Wills's decisions were the only discipline decisions modified upwards does not reasonably link to race. Second, Wills testified that he understood Connolly's rationale and agreed in retrospect to the modifications. (Tr. II, pp. 76–77.) Finally, the other decision that Connolly modified upwards was that relating to the discipline of a white employee. The ALJ's conclusion that Connolly was racially motivated to increase the discipline of a white employee simply because the discipline was given by an African American makes no logical sense.

Finally, the ALJ draws the inference that Connolly's behavior towards Armstead "is that of stereotyping [Armstead] as an angry black male." (Final Decision, p. 18.) This conclusion is one of the more egregious in the entire Final Decision. No evidence—not one iota—was presented at the hearing about racial stereotyping. The ALJ's conclusion is based on some sort of judicial notice that there is a stereotype of "an angry black male." This was clearly improper.

More significantly from a record perspective, however, 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. For a factfinder to determine whether a stereotype was a motivating factor, an expert must link the stereotype to the specific decision-maker, not just the company as a whole. *See Jones v. Cargill, Inc.*, 490 F. Supp. 2d 978, 988 (N.D. Iowa 2007) ("There is little evidence in the record that any of the decisionmakers in this case believe in any racial stereotypes. Therefore, the court shall exclude any general evidence relating to racial stereotypes of African-Americans that members of other racial or ethnic groups might believe."); *Johnson v. Brown*, No. 93-C-3489, 1998 U.S. Dist. LEXIS 3612, at *26–28 (N.D. Ill. March 19, 1998) (noting that the court "would need evidence to support a finding that Johnson's supervisors shared [the stereotype]" and that without it, there is no "reasonable basis from which

to infer that the key decisionmakers were motivated by Johnson's race when they terminated him."); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 864 (D. Minn. 1993) ("It was undisputed that Dr. Borgida could not tie the existence of sexual stereotypes regarding women to any individual employment policy or decision, even though he opined that sex stereotyping affected all decisions at Eveleth Mines.") 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.

To find that Armstead met his *prima facie* case, therefore, the ALJ cited a series of "facts" that were deemed to be "circumstantial evidence" of race discrimination. As set forth above, none of these facts are both legally valid and supported by substantial evidence in the whole record. The very cases cited in the Final Decision about establishing a *prima facie* case demonstrate the difference between what is required under the law and what the ALJ relied on. *Cf. Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 485 (1995) ("In this case, the plaintiff supported the skeletal *prima facie* case with evidence that the employer also purged all other members of the decedent's class from its workforce over a period of six to eight months."); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.6 (1981) (In the instant case, it is not seriously contested that respondent has proved a *prima facie* case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male, Walz, who had been under her supervision."); *Shepherdstown Vol. Fire Dep't v. State*, 172 W. Va. 627, 638 (1983) (complainants "are members of a protected group under the law; that they applied for membership in the Department [Shepherdstown V.F.D.] at a time when members were being accepted; that they were qualified and able to meet the duties imposed on members but were

nevertheless rejected; and that membership in the organization remained open and the Respondent continued to accept members."). These cases highlight the difference between situations where a *prima facie* case is genuinely met and the instant case, where logical contortions are required to cobble together even a circumstantial case of discriminatory intent. No substantial evidence supports a legal conclusion that Armstead made out a *prima facie* case of race discrimination.

2. The ALJ Stated an Erroneous Business Reason for FedEx's Employment Actions.

Under the burden-shifting framework of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), if the employee does establish a *prima facie* case, the employer must articulate a legitimate, non-discriminatory reason for its employment decision. It is in this portion of the Final Decision that the ALJ's reasoning runs farthest from the record. The ALJ found:

> Federal Express Corporation articulated non-discriminatory reasons for [Armstead's] termination. The reasons were that Mr. Connolly, in accordance with Corporate policy, could modify up or down a supervisor's disciplinary decision. Connolly felt that as a result of the numerous warning letters, performance reminders, and counseling between 1987 and 1993 that [Armstead] posed a "work place violence threat."

(Final Decision, p. 19.) This is patently inaccurate. Connolly never used the phrase "work place violence threat," either in any document or at the hearing. The ALJ uses this quoted phrase no fewer than 19 times in the course of the Final Decision, despite the fact that it appears in the hearing transcript only twice, both times as part of Armstead's attorney's questions: once to Connolly and once to Armstead.

Nevertheless, the ALJ cites the "work place violence threat" as FedEx's stated reason for termination. This clear and substantial error shapes the ALJ's Final Decision. The ALJ cites to other managers' opinions about the possibility of Armstead being a "work place violence threat." The ALJ points to Armstead's disciplinary record with an eye towards workplace violence, and

concludes that his record does not support that label. The unsupported racial stereotype theory applied by the ALJ only works against FedEx if the stated business reason is based on Armstead being a "work place violence threat."

The reality, however, is that Connolly said no such thing. Connolly's rationale for his decision was set forth contemporaneously in the GFT Summary, quoted above in Section III (Statement of Facts). Connolly made several references to Armstead's numerous "conduct issues," concluding that "After a thorough review of all the incidents surrounding the situation including ***past conduct history*** I have decided to modify management's decision to termination." (Resp't Ex. 22.) (emphasis added). Connolly never referred to workplace violence at all.

Armstead's counsel pressed Connolly at the hearing about the workplace violence issue, but Connolly was firm that, while workplace violence was a concern in light of Armstead's past incidents, "the main reason was a continuous pattern of conduct issues." (Tr. I, p. 52.) Connolly admitted that it was a consideration, although not a major one. As he explained at the hearing:

> Q There's been a lot of talk about work place violence. Was that one of your considerations or a concern that you had during your decision-making process as it related to Mr. Armstead?
>
> A It was a – in reviewing all the discipline history, I looked at the fact of confrontations and the swearing and we had talked about what work place violence constitutes. It's not just someone that's, you know, physically starting trouble in the work place, it's putting someone in an intimidating position. So I was concerned that, you know, if you look at history and then somebody does something, would that surprise you if that took place. So that was part of the concern; it wasn't the major part but it was part.
>
> Q What was your major concern?
>
> A My major concern throughout this was everywhere you looked from the 1987 forward, that there was constantly conversations and documentations by warning letters and performance reminders and counselings dealing with conduct issues, and Anthony had every chance to get these fixed, and there was a variety of different issues, but they were just ongoing and never were addressed.
>
> Q Okay. So that was your major concern which is the ongoing pattern of behavior?

A Yes.

Q And within those concerns, if I understand your testimony correctly, a minor subset to that was work place violence; is that correct?

A Yes, yes. There's no mention of work place violence in the letters that were sent to Anthony. In all the discipline that was looked at, that this was a thought that I could be putting people at risk. That's the only thing it was.

(Tr. I, pp. 109–10.) Armstead's attorney continually tried to get Connolly to restate his reasoning, but Connolly consistently stated that "conduct" was the main issue. For example:

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***.

(Tr. I, pp. 49–50.) (emphasis added).

Q Did you before—and because you believed that Mr. Armstead's behavior was such that it might lead to work place violence by him in the future, that was one of the reasons you terminated him, wasn't it?

A That was one—the main reason was a ***continuous pattern of conduct issues***.

(Tr. I, pp. 51–52.) (emphasis added).

Q So when you were deciding whether or not to terminate Mr. Armstead, let's back up for a second. When you were deciding whether or not to terminate Mr. Armstead, you knew that in your mind he had a history of basically anger management problems, correct?

A ***Conduct issues, yes***.

(Tr. I, p. 90.) (emphasis added).

Connolly's decision was based on Armstead's past history of ***conduct issues***. It is true that many of the past incidents were situations that could be considered workplace violence: swearing at co-workers, slamming clipboards on a co-worker's desk, and getting into confrontations with co-workers. Workplace violence at FedEx is more broadly-defined than physical violence, and it encompasses these acts of intimidation. (Tr. I, p. 50.) It is also true that Connolly would naturally have considered Armstead's conduct to the extent that, in the words of Armstead's own attorney, "might lead to work place violence by him in the future." (Tr. I, p.

52.) Yet these facts do not at all equate to the ALJ's conclusion that Connolly terminated Armstead ***because*** he posed a "work place violence threat." This distortion of the record leads directly to the ALJ's theories about pretext and racial stereotyping. If the ALJ were to have restated the actual business reason articulated at the time of the employment decision and elaborated at the hearing—the pattern of conduct issues—then the record has nothing to refute this reason. 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.

3. The ALJ's Analysis of "Pretext" Is Not Supported by the Record and Is Not Proper Under the Law.

The ALJ also made a clear legal error in the portion of the Final Decision relating to pretext. Under the *McDonnell Douglas* framework, once the employer articulates its legitimate, non-discriminatory reason, the burden ***shifts back to the employee*** to prove by a preponderance that the reasons given were pretextual. Yet the Final Decision opens the analysis on pretext by stating that "Federal Express Corporation, however, failed to set forth through the introduction of admissible evidence clear reason's for Armstead's termination," which places on FedEx not simply the burden to articulate a reason—which the Final Decision in the preceding section notes that FedEx met—but also indicates a burden to prove that its reasons were true, which is a reversal of the proper burden of proof.

The larger error was, of course, the continuation of the fallacious theory that Connolly terminated Armstead because he posed a "work place violence threat." Nor surprisingly, the ALJ found insufficient evidence to support the "workplace violence" theory. If the record is reviewed with the proper context in mind, however, it is clear that Armstead cannot meet his burden of proof that FedEx's articulated non-discriminatory reason was pretextual. FedEx based

its decision on the opinion of a business manager that Armstead's long history of conduct issues warranted his dismissal.

a. FedEx's stated legitimate business reason for its employment action was consistent.

Connolly reviewed Armstead's entire work history when he made his decision at the GFT. His rationale in the GFT Summary (Resp't Ex. 22) demonstrates this. Connolly starts his conclusion in the GFT Summary with "In reviewing the Armstead's entire disciplinary history ... ." He 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.[4] Connolly's rationale continues by noting that Armstead "has several documented counselings in regards to conduct." (*Id.*) He lists four examples.

Connolly's testimony at the public hearing was consistent. As the ALJ noted, he testified that he reviewed Armstead's entire work history, just as he wrote in the GFT Summary. He may have discussed different examples and specifics of Armstead's conduct counselings, but there is no legal requirement that an employer list every fact in support of its decision at the time it was made. Connolly made his decision on Armstead's overall history of conduct related issues, and he wrote that contemporaneously in a document. Connolly maintained that position throughout, whether or not he explained different parts of the discipline history or discussed secondary concerns, like the possibility of workplace violence in the future. There is nothing inconsistent about the reason FedEx had for making its employment decision.

[4] The Final Decision may be technically accurate that it had been eleven years since Armstead received a "warning letter" for his conduct, but Connolly addressed that in the GFT Summary by noting that there were conduct issues that previous management classified under performance related issues that were more recent.

Again, the very cases cited in the Final Decision emphasize the difference between the facts in this case and those cases involving truly inconsistent stated reasons. *Cf. Gallo v. John Powell Chevrolet, Inc.*, 765 F. Supp. 198 (M.D. Pa. 1991) (employer "did not voice any of these reasons to Gallo when he terminated her employment"); *Foster v. Simon*, 467 F. Supp. 533 (W.D.N.C. 1979) (the stated reason for rejecting plaintiff's application was a grade point average requirement that appeared in no documents and was "raised for the first time at trial, and the court was unable to find any mention of this requirement in the administrative proceedings"); *Smith v. Amer. Serv. Co.*, 611 F. Supp. 321 (N.D. Ga. 1984) (first reason given was lack of accounting experience, second reason given was a failed polygraph test); *Townsend v. Grey Line Bus Co.*, 597 F. Supp. 1287 (D. Mass. 1984) (first reason given was the failure of a road test, the second was lack of experience driving motor coaches).[5] These cases hold not that the employer must articulate every detail at all stages, but that the main "reason" for the decision be given before the lawsuit. In contrast with these cases, Connolly documented the reason for his decision—conduct issues—at the time of the decision and restated those same grounds at the public hearing.

b. Three of the four factors considered by the ALJ do not relate to race discrimination so as to support a finding of pretext.

The Final Decision ends with specific bases for concluding that FedEx's articulated decision reason was pretextual, and that instead a discriminatory motive played a role in the decision. The ALJ presented four factors that ostensibly indicate that Connolly's motive was "directly related to Mr. Armstead's protected class status, that is, African American." (Final

[5] *Johnson v. Univ. of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973), also cited in the Final Decision, does not address pretext or a change in stated reasons.

Decision, p. 21.) The four factors are insufficient as a matter of law to establish pretext and, consequently, insufficient for Armstead's ultimate burden of proof.

Three of the four factors are wholly unrelated to race, and cannot therefore be "directly related" to Armstead's protected status. In the first, the ALJ returns to the "work place violence threat" theme. The ALJ reasoned that, because other employees disagreed with the proposition that Armstead is a "work place violence threat," that disagreement apparently means that Connolly made his decision on the basis of race. This is an error of law. Even 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. There is no evidence that Connolly believes African Americans in general are workplace violence threats. There is no evidence in the record at all about workplace violence and how it relates to race. This factor cannot support a finding of pretext.

The second factor cited by the ALJ is that Connolly failed to inform Armstead that he was considering Armstead's entire work history at the GFT teleconference. Leaving aside the GFT policy's clear provision that the entire work history will be reviewed, this fact also has no relation whatsoever to race. Connolly testified that he reviews the entire work history on every GFT he hears. There is no evidence in the record that he conducts GFTs differently based on the race of an employee. This "failure" to remind Armstead that he was considering the entire work history was not even an internal policy violation. This factor cannot support any finding of pretext.

The third factor is related to the second. The Final Decision notes, in whole: "Fourth, Mr. Connolly asked Mr. Snyder to pick up the telephone receiver during the October 15, 2004, telephone conference so that he could have a private conversation with Mr. Snyder." (Final

Decision, p. 22.) How this fact supports a finding of pretext for race discrimination is unknown. No comments about race were spoken on that conversation or any other. This factor cannot support the ALJ's finding that discriminatory motive was "directly related" to Armstead's protected status of his race.

c. The ALJ's reference to inconsistent treatment of employees is not supported by the law or the evidence in the record.

The only factor that is even facially relevant to the question of race discrimination is the ALJ's reference to treatment of other employees. The ALJ found that Connolly "referred white employees who had anger management problems to People Help, an employee assistance program." (Final Decision, p. 21.) The Circuit Court properly ruled that the ALJ failed to consider is whether the white employees were similarly situated to Armstead: "The ALJ failed to determine if these white employees were similarly situated to Armstead." Final Order, p. 5.

The employees mentioned in the Final Decision are not proper comparisons. Armstead's issues were ***conduct*** issues, and Armstead could show no employees with a similar history of conduct issues who were not terminated. Moreover, the fact that Armstead was the only person in 400 GFT reviews whose discipline was elevated to a termination is not probative of race discrimination when many of the other GFT reviews concerned other African American employees, including some referenced by FedEx at the hearing.

i. Emphasis on workplace violence is misplaced.

The test for disparate treatment is not whether FedEx treated Armstead differently than three specific white employees. The ALJ based her conclusion on the ground that Connolly referred other employees to anger management programs, and did not do so to Armstead. Armstead's primary issue, however, as Connolly expressed at the time and at the public hearing, was a long-standing history of disciplinary and behavioral problems. Armstead's history

included instances of getting into verbal altercations with co-workers, using profane language, being disruptive in applying for route positions, having dissatisfied customers, and generally not getting along with co-workers. This chronic behavior problem was not an "anger management" problem or a workplace violence issue, although Connolly's admitted concern that it could potentially escalate to a workplace violence incident was certainly warranted. No employee had similar conduct histories, and of those employees whose histories were close, they were treated consistently to Armstead. If the issue is not one of anger management, however—and the record demonstrates it was not—then those employees with anger management issues cannot be properly compared to Armstead.

ii. The proposed comparators are not similarly-situated.

Even if anger management were the issue, the employees referenced in the Final Decision are still not proper comparisons. The employees must be "similarly-situated" to Armstead in order to make a fair comparison. "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.'" *Mayflower Vehicle Sys. v. Cheeks*, 218 W. Va. 703, 715 (2006) (quoting *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996) and *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)).

One employee, Teresa Rogers, had a "minimal disciplinary history for an employee with such lengthy service." (Compl't Ex. 20.) Ms. Rogers stated at her GFT that she was "blowing off steam" at the incident in question, however, so the anger management program available through FedEx was appropriate. The other employee, Brooke Heyel, had the incident in question on a day after which she had learned a surrogate parent had died and that she had missed the

funeral. In this case Connolly did the right thing for an employee in that emotional state and gave her a second chance, referring her to People Help for advice on self-control. (Compl't Ex. 19.) These employees had "differentiating or mitigating circumstances" to justify different treatment. Armstead does allege to have had personal problems at home, but they were not nearly as dramatic as Ms. Heyel's, and more importantly he could not relate them to the incident on review before Connolly. Likewise, Armstead's disciplinary history was not minimal, but rather was one of the longest Connolly (or the peer manager who reviewed Connolly's decision) had seen.[6] Armstead's situation was not similar to that of Ms. Heyel or Ms. Rogers, and therefore their treatment cannot be compared to his to prove race discrimination.

Michael Rowlee is a better comparator. He was a white employee who was terminated for behavior with less than three written deficiencies, just like Armstead. (Compl't Ex. 18.) His discipline from 14 years prior was cited as a factor, just like Armstead's. Although the ALJ asserts that Mr. Rowlee was "also referred to People Help," Connolly did not refer him. In fact, Connolly stated at the public hearing:

> Let me just clarify one thing. The first one you sent me on the gentleman that was at the Burger King [Rowlee], that was held by a managing director at the time named Craig Cooley. That was not my case. Had I received that case with this warning letter and his past history, he wouldn't have got—I would not have recommended him to any type of anger management. With his past record, I would have terminated him, but that was Craig's responsibility to make that decision.

(Tr. I, p. 101.) Moreover, the comparison with other employees must be probative of racial bias. Mr. Connolly has heard over 400 GFTs. Armstead complains that he was treated differently than all other 400 GFTs, but does not argue that all the other GFT employees were of another race.

[6] It is noteworthy that, although Armstead had access to over 400 GFT files, he did not attempt to contradict this assertion by finding another employee with a longer disciplinary history.

FedEx even cited the instance of an African American courier, Charles Williams, whose termination Connolly ***reversed*** even after he had received three written deficiencies, which FedEx policy indicates should normally result in termination. (Compl't Ex. 13.) The GFT record discloses that Connolly reviewed every circumstance uniquely—consistent with his testimony—and any differences in treatment cannot be attributed to racism.

The ALJ omitted any mention of Connolly's voluntary reversal of an African American employee's termination, even as she concludes that Connolly harbors "racial animus towards African Americans." (Final Decision, p. 25.) The record does not support this finding. In particular, the ALJ credits Wills's opinion that Armstead was not a "work place violence threat," which she found "credible because he has been the supervisor at the Morgantown Station since 2000 and observed Mr. Armstead over a substantial period of time." (Final Decision, p. 12.) Yet Wills, an African American himself, also testified that he has interacted with Connolly at managers' meetings, ball games, cookouts, etc., and that he "spent enough time with him to know that I don't believe that he's a racist." (Tr. II, p. 78.) Inexplicably, the ALJ does not give Wills's opinion on this issue similar credit.

The ALJ cites to none of the type of evidence that successful plaintiffs must in establishing pretext. *See, e.g., Cheeks,* 218 W. Va. at 716 (pretext proven by company misrepresentations to union and by showing that company "routinely gave second and third chances to employees with records far worse than [Armstead's] employment record"); *Childress v. West Va. Human Rights Comm'n,* 190 W. Va. 58, 64 (1993) (pretext proven by showing that other employees with "more serious complaints" were not treated the same as Armstead); *O.J. White Transfer & Storage Co. v. West Va. Human Rights Comn'n,* 181 W. Va. 519, 523 (1989) (pretext proven by showing that company did not have the standardized policy that it relied on as

a reason for its decision). Instead, the Final Decision relies on three dissimilar employee situations out of 400, along with a few other "factors" that are in no way related to race. The record as a whole does not contain substantial evidence to support a finding of pretext.

4. A Cease and Desist Order Is Not Warranted in this Case.

Armstead was reinstated over three years before the Final Decision was issued and has advanced no further claims of discrimination. No systemic corporate practices were uncovered that require modification or repeal. The only Order that could issue would be for FedEx to follow the statutes and regulations that it is currently required to follow, which is the type of order that courts typically do not enter. No evidence of other race discrimination claims from that station, that management chain, or even within West Virginia was presented at the hearing. Court-mandated training beyond that already routinely required by FedEx's corporate policies is not necessary. In short, this is not a case where a Cease and Desist Order is warranted.

VII. RELIEF PRAYED FOR

Respondent, Federal Express Corporation, respectfully requests that this Court deny the Petition for Appeal submitted by Petitioner Anthony Armstead and affirm the Circuit Court's June 23, 2010 Order dismissing this action because the Circuit Court's ruling was correct in all respects.

Respectfully submitted this 23rd day of December, 2010.

FEDERAL EXPRESS CORPORATION

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CERTIFICATE OF SERVICE

I, Mark H. Dellinger, Esquire, counsel for Federal Express Corporation, Respondent and Petitioner Below, do hereby certify that a true and exact copy of the foregoing "Response in Opposition to Petition for Appeal" has been served upon the following persons via U.S. Mail, postage prepaid, as follows:

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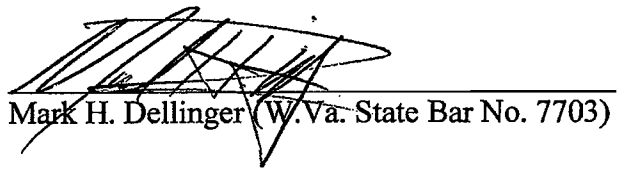
This 23rd day of December, 2010.



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