



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
HUMAN RIGHTS COMMISSION

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Charleston, WV 25301-1400

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Joe Manchin III
Governor

Martha Yeager Walker
Secretary

**Via Certified Mail-
Return Receipt Requested**

May 13, 2009

Anthony Armstead
425 Richwood Ave.
Morgantown, WV 26505-5737

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Joy B. Mega, Esq.
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3620 Hacks Cross Road
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Federal Express Corporation
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Memphis, TN 38125-8800

Re: *Armstead, Anthony v. Federal Express Corporation*
Docket No. : ER-375-05C

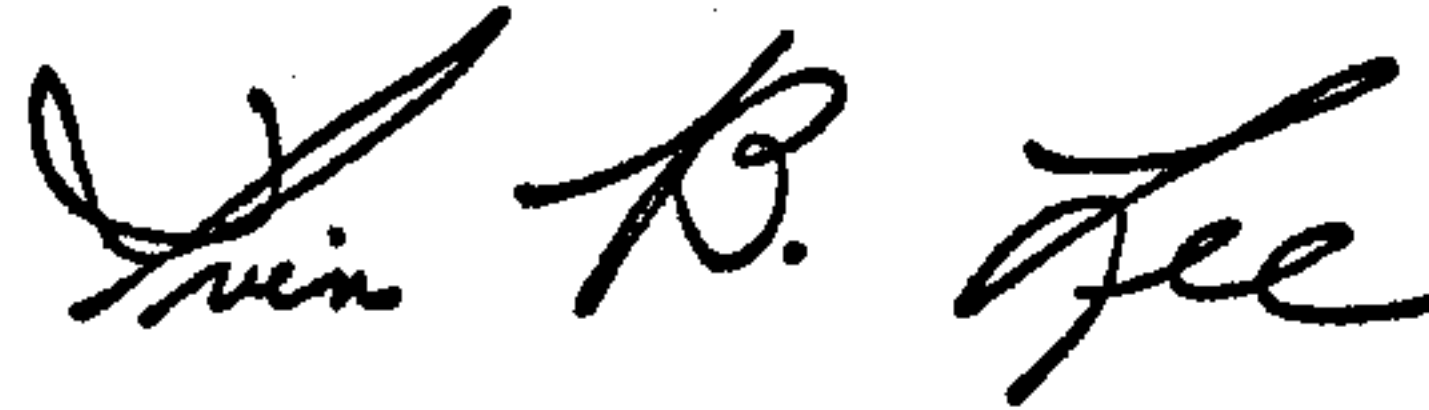
Dear Parties:

Enclosed please find the Commission's Final Order in the above-referenced matter, which incorporates the Final Decision of Administrative Law Judge and a Notice of Right to Appeal.

May 13, 2009
Page Two

Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached Notice of Right to Appeal for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

A handwritten signature in black ink, appearing to read "Ivin B. Lee". The signature is written in a cursive style with a large initial "I" and "L".

Ivin B. Lee
Executive Director

IBL/mst

Attachments

cc: The Honorable Natalie Tenant
Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Anthony Armstead,

Complainant,

v.

Docket Number: ER-375-05

EEOC Numbers: 17J-2005-00206

Federal Express Corporation, Inc.

Respondent.

FINAL ORDER

On April 9, 2009, the West Virginia Human Rights Commission reviewed both the Final Decision dated August 28, 2008 and Supplemental Final Decision on Damages and Attorney Fees and Costs dated December 29, 2008 issued by Administrative Law Judge Phyllis Harden Carter, in the above-captioned matter. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Supplemental Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Supplemental Final Decision as its own, without modification or amendment.

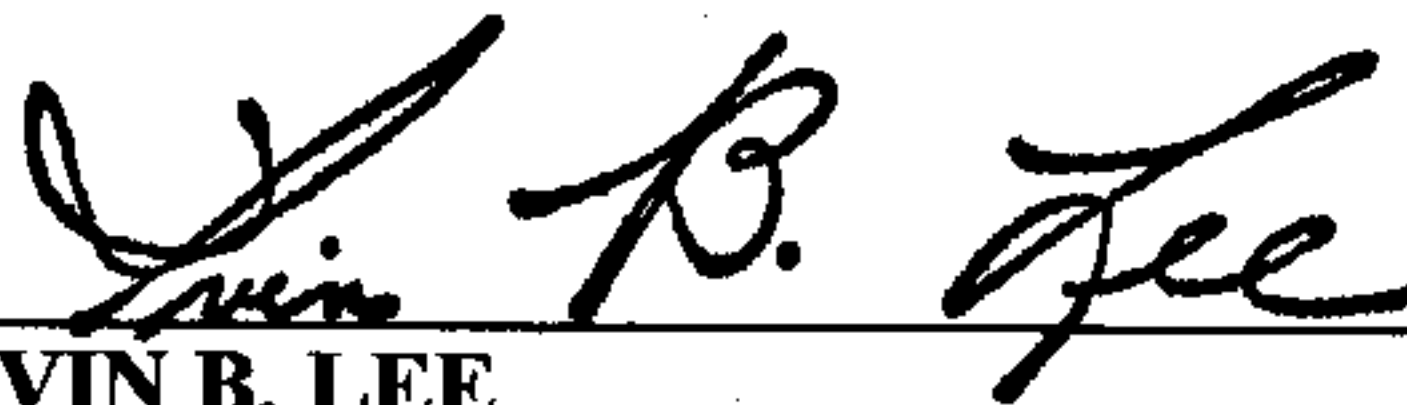
It is, therefore, the Order of the Commission that both the Final Decision and the Supplemental Final Decision of Administrative Law Judge Phyllis Harden Carter are, hereby affirmed in the entirety.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto as Exhibit A.

It is so **ORDERED**.

Entered for and at the direction of the West Virginia Human Rights Commission this 13th day of May, 2009, in Charleston, Kanawha County, West Virginia.

WV HUMAN RIGHTS COMMISSION



IVIN B. LEE
EXECUTIVE DIRECTOR
Rm 108A, 1321 Plaza East
Charleston, WV 25301-1400
Ph: 304/558-2616 Fax: 558-0085

EXHIBIT A

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This **must** be done **within 30 days** from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she **will not** file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed **within 30 days** from the date of receipt of this Order.

For a more complete description of the appeal process see **West Virginia Code § 5-11-11** and the **West Virginia Rules of Appellate Procedure**.



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Joe Manchin III
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Secretary

August 28, 2008

VIA CERTIFIED MAIL- RETURN RECEIPT REQUESTED

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3620 Hacks Cross Road
Building B Second Floor
Memphis, TN 38125

Re: *Anthony Armstead v Federal Express Corporation*
Docket No.: *ER-375-05*

Dear Parties:

Enclosed please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:
"§77-2-10. Appeal to the commission:

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and

serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal;

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director;

10.3. The notice and petition of appeal shall be confined to the record;

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any;

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director;

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal;

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand;

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

Final Decision Armstead v Federal Express Corp.

August 28, 2008

Page 3

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the Commission at the above address.

Yours truly,



Phyllis H. Carter
Chief Administrative Law Judge

PHC/rl

Enclosure

cc: Ivin B. Lee, Executive Director
Dr. Darrell Cummings, Chairperson
Paul R. Sheridan, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Anthony Lee Armstead,

Complainant,

v.

Docket No. ER-375-05

Federal Express Corporation,

Respondent.

Chief Administrative Law Judge's Final Decision

A public hearing in the above captioned-matter was held on May 15 and 16, 2007, at the Monongalia County Courthouse in Morgantown, West Virginia.

The Complainant, Anthony Lee Armstead, appeared in person and his case was presented by Allan Karlin, Esquire and Jane E. Peak, Esquire. The Respondent, Federal Express Corporation, appeared by its corporate representative Norman Franklin Wills, Jr. Respondent's case was presented by Edward J. Efke, Senior Counsel, and Craig C. Conley, Senior Attorney, Federal Express Corporation, and Joy B. Mega, Esquire of Bowles, Rice, McDavid, Graff & Love, LLP.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and arguments of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the Chief Administrative Law Judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and arguments are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary for a proper decision. To the extent

that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited. The court reporter misspelled Richard Connolly's name in the transcript. Mr. Connolly's name was spelled Richard Conley. The name Conley refers to Craig Conley, senior attorney with Federal Express Corporation. The parties stipulated that Teresa Rogers and Michael St. Martin are Caucasian. The parties agreed to submit Mr. St. Martin's deposition as part of the record.

I.

SUMMARY OF CASE

Mr. Anthony Armstead, an African American male, works for Federal Express Corporation at the Morgantown Station. On October 19, 2004, Mr. Richard Connolly, the District Manager for the Three Rivers District terminated Mr. Armstead's employment.

The morning of September 27, 2004, Mr. Hammerquist and Mr. Armstead, employees at Federal Express Corporation's Morgantown Station had an argument in the sort area. Mr. Hammerquist complained to Mr. Norman Wills, Station Supervisor, that Mr. Armstead used the "F" word several times toward him. At the end of the day when Mr. Armstead returned to the Station, he learned that Mr. Hammerquist had made a complaint about his behavior to Mr. Wills. Mr. Armstead then made a complaint against Mr. Hammerquist. Mr. Wills placed Hammerquist and Armstead on paid investigative suspension until he could conduct an investigation.

As a result of the investigation, Mr. Wills found Armstead to be at fault and issued Armstead a warning letter on September 29, 2004. Mr. Wills made the decision to issue the warning letter after he conducted an investigation, reviewed Armstead's work history and consulted with Mr. Snyder, his supervisor and Ms. Kathryn Lis, Senior Human Resources Representative for Federal Express Corporation. Prior to the September 27, 2004, incident, it had been eleven years since Mr. Armstead received a warning letter for using profanity or engaging in other conduct-related behavior.

Mr. Armstead appealed the warning letter through the Corporation's internal investigative process, known as the Guaranteed Fair Hearing Program (hereinafter "GFT"). Mr. Richard Connolly heard the appeal and considered Mr. Armstead's entire disciplinary record and determined Mr. Armstead posed a "work place violence threat." He modified Mr. Armstead's warning letter to a termination letter.

There was no substantial evidence in the record supporting Armstead's termination on the basis that he posed a "work place violence threat." Nor were there three warning letters within a twelve-month period in Mr. Armstead's work history that would have justified the action. Mr. Armstead had not had a warning letter in eleven years.

The substantial evidence in the record supports a finding that Federal Express Corporation did violate the West Virginia Human Rights Act and that Mr. Connolly's decision to terminate Mr. Armstead was motivated, in whole or in part, by racial animus.

Mr. Michael St. Martin, the Federal Express Corporation Managing Director from Minneapolis Minnesota, who investigated Armstead's EEO complaint did not find any evidence to support Mr. Connolly's decision that Armstead posed a "work place violence threat." Additionally, Mr. St. Martin stated, in his deposition, that he would not have terminated Mr. Armstead but would have given him a warning letter.

By letter dated January 31, 2005, Tom Lynch, Vice President, Central Region for Federal Express Corporation reinstated Mr. Armstead to his position of a courier with back pay and benefits. This occurred after Mr. St. Martin reported the results of his investigation and after Mr. Armstead filed a Complaint with the West Virginia Human Rights Commission alleging race discrimination. In addition, Attorney Allan Karlin had notified Federal Express Corporation and the West Virginia Human Rights Commission that he represented Mr. Armstead.

Mr. Armstead is entitled to be made whole and to be put in the position he would have been in had the Respondent not discriminated against him. Although, Mr. Armstead has been rehired, paid back wages, and benefits restored; he has not received his economic loss, interest on back pay, incidental damages, and attorney fees and costs all of which I order in this decision.

II.
QUESTION

Does the fact that Federal Express Corporation reinstated Anthony Armstead to his position as courier and in so doing paid him back wages and benefits, negate his right to pursue his claim for race discrimination under the West Virginia Human Rights Act?

ANSWER

No, the fact that Federal Express Corporation reinstated Anthony Armstead to his position as courier and in so doing paid him back wages and benefits, does not negate his right to pursue his claim for race discrimination under the West Virginia Human Rights Act.

The West Virginia Human Rights Act is a remedial statute that is "liberally construed to accomplish its objectives and purposes." West Virginia Human Rights Comm'n v. Moore, 186 W. Va. 183, 187; 411 S. E. 2d 702, 706 (1991).

The West Virginia Supreme Court of Appeals has consistently held that cases brought under the West Virginia Human Rights Act are governed under the same analytical framework and structures developed under Title VII, at least where the Act does not direct otherwise. West Virginia Univ./West Virginia Bd. of Regents v. Decker, 191 W. Va. 567, 447 S. E. 2d 259 (1994); Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164, 358 S. E. 2d 423 (W.Va. 1986).

The United States Supreme Court has ruled that a Title VII retaliation claim is not barred when an employer reinstates an employee with back pay. Burlington Northern & Santa Fe Ry. v. White, 547 U. S.1053, 126 S. Ct.2405, 2417-18 (2006). This same reasoning is also applicable to a discrimination claim brought under the West Virginia Human Rights Act.

III. **QUESTION**

Did Federal Express Corporation violate the West Virginia Human Rights Act when it terminated Mr. Armstead's employment for the period October 19, 2004 to January 31, 2005?

ANSWER

Yes, Federal Express Corporation violated the West Virginia Human Rights Act because the manner in which Mr. Connolly applied the disciplinary policy to Mr. Armstead's termination was motivated in whole or in part because of his race. For example, Mr. Connolly's decision to terminate Mr. Armstead was inconsistent with the discipline taken by Mr. Wills, Mr. Snyder and Ms. Lis, all of whom considered Mr. Armstead's entire work history before recommending a warning letter. Ms. Lis expressed concern to Mr. Connolly that the last disciplinary action taken against Mr. Armstead was eleven years old, implying that eleven years is long time between disciplinary actions. "Federal Express Corporation policy provides that there shall be three (3) letters of warning within a twelve (12) month period in an employee's disciplinary record to consider a severe action such as termination."

In addition, Mr. Connolly relied upon performance reminders and warning letters issued to Mr. Armstead between the period July 1987 and March 1993 to justify Mr. Armstead's termination on October 19, 2004. At the public hearing, Mr. Connolly admitted that, other than Armstead's case, he had never upgraded another supervisor's disciplinary action from a warning letter to a termination letter.

Further, Mr. Michael St. Martin, the manager who investigated Mr. Armstead's EEO complaint, could not find any evidence to support Mr. Connolly's position that Armstead posed a "work place violence threat."

And finally, as of the date of the public hearing, Mr. Wills, who is an African American male and station supervisor at the Morgantown Station had issued only two disciplinary decisions, each of which Mr. Connolly modified upwards.

IV

FINDINGS OF FACT

1. Complainant, Mr. Anthony Lee Armstead, an African American male, resides with his family at 425 Richwood Avenue, Morgantown, West Virginia (05/15/07 Tr. at 253-54.)¹
2. Mr. Armstead is employed as a courier at Federal Express Corporation in Morgantown, West Virginia. (05/15/07 Tr. 254,256.) He was hired on or about November 29, 1985. (05/15/07 Tr. at 254.) He was terminated on October 19, 2004, and rehired on January 31, 2005.
3. In September 2004, Mr. Norman Wills, an African American, was the Operations Manager at the Morgantown Station where Armstead works and Armstead's direct supervisor. (05/15/07 Tr. at 24, 05/16/07 Tr. at 22-23.)
4. Mr. John Snyder, a white male, was the Senior Manager at the Morgantown Station and Mr. Wills' direct supervisor. (05/15/07 Tr. at 24.)
5. Mr. Richard Connolly, a white male, was the direct supervisor of Mr. John Snyder. Mr. Connolly was the Managing Director for the Three Rivers District which encompasses the Morgantown Station and 30 other stations throughout West Virginia, Maryland, Pennsylvania and Ohio. (05/15/07 Tr. at 19-20.)
6. Mr. Brian Fox, Mr. Scott Hammerquist and Ms. Donna Messoria, all white, are document sorters at the Morgantown Station. (05/15/07 Tr. at 265- 265.)

¹ Citations to the official transcript will be by hearing date, i.e. 05/15/07 or 05/16/07. "Tr" refers to the hearing transcript for the particular date specified. "Comp. Ex and Resp. Ex." refers to Complainant's Exhibits and Respondent's Exhibits that were admitted at the hearing and made part of the record.

**The September 27, 2004 Verbal Exchange
Between Armstead and Hammerquist**

7. On September 27, 2004, Mr. Armstead was involved in an incident with another employee named Scott Hammerquist. This incident took place in the document sort area.

8. The document sort area is an isolated area that is away from the vehicle loading area. (05/16/07 Tr. at 63-64.)

9. On September 27, 2004, Mr. Armstead left his area which was the vehicle loading area, and went to the document sort area where Brian Fox, Scott Hammerquist and Donna Messori were sorting packages. (05/15/07 Tr. at 262.)

10. Mr. Armstead went to the sort area to see if there were any documents in his basket. (05/15/07 Tr. at 263 and Resp. Ex. 24.)

11. While Mr. Armstead was in the document sort area, Mr. Hammerquist told Mr. Armstead that the sorting was not done yet. (05/15/07 Tr. at 266-267.)

12. As Mr. Armstead looked over at his basket, Mr. Hammerquist walked toward him and said that he and others were not finished with the sorting.

13. Mr. Hammerquist told Mr. Armstead to get out of the way "real nasty and bossy" said Mr. Armstead who then replied that he was not in Mr. Hammerquist "furking way." (05/15/07 Tr. at 266-267 and Resp. Ex. 24.)

14. Mr. Armstead used the "F" word toward Mr. Hammerquist several times. (05/15/07 Tr. at 266-267.)

15. Mr. Hammerquist told Mr. Armstead that he would have his job. (Resp. Ex. 24, 05/15/07 Tr. at 261-267.)

16. Mr. Armstead told Mr. Hammerquist that there were "bigger and better men who have tried and failed." Mr. Armstead, while walking away told Mr. Hammerquist "You know Scott, I never liked you from the first day I ever met you." Armstead then got in his truck and left the station. (05/15/07 Tr. at 267-268.)

17. Mr. Hammerquist told Mr. Wills what happened. (05/16/07 Tr. at 27.)

18. Mr. Wills told Mr. Hammerquist to submit a written statement, which he did.

19. When Mr. Armstead returned the same day to the station, Mr. Wills told him what Mr. Hammerquist said. Mr. Armstead was placed on paid investigative suspension until a determination could be made regarding what happened. (05/16/07 Tr. at 28 - 29.)

20. Mr. Armstead also wrote a statement about Mr. Hammerquist who was also placed on paid investigative suspension. (05/16/07 Tr. at 28 and 29.)

21. Mr. Hammerquist's statement identified two white witnesses to the verbal exchange. They were Ms. Donna Messori and Mr. Brian Fox. (Resp. Ex. 23.)

22. Ms. Messori's statement was as follows:

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 the manager. Tony continued to use the "F" word towards him.

(Resp. Ex. 25.)

23. Mr. Fox's statement was as follows:

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

(Resp. Ex. 26.)

24. Neither Ms. Messori nor Mr. Fox saw any physical contact occur between Mr. Armstead and Mr. Hammerquist. (Resp. Ex. 25 and 26.)

The Results of Mr. Wills' Investigation

25. After conducting the investigation, Mr. Wills contacted Mr. John Snyder, and Ms. Kathryn Lis, Human Resources Representative, about the incident. (05/16/07 Tr. at 29.)

26. Mr. Snyder and Ms. Lis had access to Mr. Armstead's entire disciplinary

history as well as Federal Express Policy No. 2-5 Acceptable Conduct. (05/16/07 Tr. at 46,48.)

27. Policy No. 2-5 Acceptable Conduct is meant to protect the rights and feelings of other people, to promote a good working environment for employees, and to ensure a high quality 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." (05/15/07 Tr. at 174; Resp. Ex.27.)

28. Federal Express Policy No. 2-5 states that

Three notifications of deficiency within a twelve-month period normally results in termination. However, an employee's entire employment history should be reviewed. Based on the severity of this occurrence an employee may be terminated with less than 3 notifications of deficiency within a 12-month period. Management should consider the relative nature of all infractions for disciplinary purposes.

29. Mr. Armstead did not have three notifications of deficiency in the twelve-month period prior to his termination. Mr. Armstead's last warning for conduct -related behavior was in March 1993.

30. After reviewing Federal Express Policy No. 2-5, Mr. Wills' investigation and Mr. Armstead's entire disciplinary history; Mr. Wills, Mr. Snyder and Ms. Lis all agreed that Mr. Wills would issue a warning letter to Mr. Armstead advising him that his conduct was unacceptable. (05/16/07 Tr. at 29-30, 46-50; Comp. Ex. 8).

31. Mr. Wills gave Mr. Armstead a warning letter on September 29, 2004, under Federal Express Policy No. 2-5, Acceptable Conduct. (05/16/07 Tr. at 29-30; Comp. Ex. 8).

32. A warning letter under Federal Express Policy No. 2-5 is one of two types of formal written deficiency notifications and can result in termination. (05/15/07 Tr. at 34.)

33. A warning letter is issued to correct behavioral issues and remains on an employee's record for twelve-months. (05/16/07 Tr. at 80-81.)

34. Warning letters provide employees with notification of behavioral deficiencies. (Resp. Ex. 27 at 3.)

35. Warning letters prevent an employee from bidding on a different position within Federal Express Corporation for twelve months. (05/16/07 Tr. at 81; 05/15/07 Tr. at 35.)

36. Employees may appeal the issuance of a warning letter through GFT. (Resp. Ex. 28.)

37. Prior to his September 29, 2004 warning letter, Mr. Armstead had not received a warning letter for any conduct -related issues since March 1993. *See also* Resp. Ex. 4-18 (documented disciplinary action prior to September 2004.)

Mr. Armstead's GFT Level One Appeal

38. Mr. Armstead appealed the September 29, 2004 warning letter through the GFT. This process allows an employee who receives a warning letter to request that the decision be reviewed by a higher-level manager. (05/15/07 Tr. at 21, 116; Resp. Ex. 1 and 28.)

39. On October 15, 2004, Mr. Armstead had a telephone conference with Mr. Richard Connolly, the Managing Director for Federal Express Three Rivers District. The following persons were present: Ms. Kathryn Lis, Mr. Wills, and Mr. Snyder. (05/15/07 Tr. at 23-24.)

40. Mr. Connolly told Mr. Armstead during the telephone conference call that he had the authority and discretion to uphold, overturn or modify the decision that resulted in the September 29, 2004 warning letter. (05/15/07 Tr. at 36-37.)

41. At this teleconference, Mr. Wills explained to Mr. Connolly his rationale for giving Mr. Armstead a warning letter. (05/15/07 Tr. at 118-119.)

42. During the conference call, Mr. Armstead attempted to explain to Mr. Connolly other issues that were going on in his life at the time, such as his health and that of his wife, that may have contributed to his reaction to Mr. Hammerquist, but Mr. Connolly

kept interrupting and requesting that Mr. Armstead speak only about the specific incident with Mr. Hammerquist. (05/15/07 Tr. at 195; 270-71.)

43. After Mr. Armstead had spoken, Mr. Connolly asked him if he had anything further to say, and Mr. Armstead said that was all he had. Mr. Connolly asked Mr. Snyder to take the phone off of the receiver. Thereafter, Connolly and Snyder had a private conversation which Mr. Armstead was not a part of. (05/15/07 Tr. at 38-39, 126, 05/16/07 Tr. at 32.)

44. Attorney Karlin informed Ms. Lis, by letter dated November 1, 2004, and Julie Hass by letter dated November 24, 2004, that he represented Mr. Armstead. (Comp. Exp. 2 and 5.)

45. Virginia G. Connors, Senior Counsel for the Labor and Employment Law Division of Federal Express Corporation wrote to Attorney Karlin by letter dated November 29, 2004, regarding Mr. Armstead's participation in GFT and acknowledging Karlin's representation. She described the program as an internal investigation which did not allow for third party representation. (Comp. Ex 6.)

46. Mr. Armstead filed his complaint with the West Virginia Human Rights Commission on November 29, 2004. (05/16/07 Tr. at 12.)

47. On October 18, 2004, Mr. Connolly notified Mr. Snyder by letter that he was "modifying management's decision" and terminating Armstead's employment. (Resp. Ex. 20.)

48. On October 19, 2004, Mr. Snyder gave Mr. Connolly's letter to Mr. Armstead. (05/15/07 Tr. at 274-75.)

49. At the hearing, Mr. Connolly stated that he decided to terminate Mr. Armstead because he thought Armstead posed a "work place violence threat." Connolly, however, did not interview any employees at the Morgantown Station. He reached this conclusion solely from a review of Mr. Armstead's twenty year work history.

50. Mr. Connolly prepared a GFT Executive Summary in which he set forth the reasons for his decision to terminate Mr. Armstead. In his Executive Summary, Connolly relied on a June 23, 1993 counseling in Mr. Armstead's file in which Armstead was

instructed to be careful about what he said on the job about race and hiring selections performed by Federal Express Corporation. (Comp. Ex. 14 and 05/15/07 at 70-71.)

51. Prior to Mr. Armstead's case, Mr. Connolly had never before increased disciplinary action against an employee within the GFT process from that of a warning to a termination. Mr. Connolly handles 35-40 GFT appeals annually. (05/15/07 Tr. at 47, 49, 200-02.)

52. On only one occasion Mr. Connolly increased disciplinary action that involved changing a performance reminder to a warning letter. This occurred after Mr. Armstead filed his complaint with the West Virginia Human Rights Commission. (05/15/07 Tr. at 201.)

53. Mr. Connolly never contacted Mr. Wills, or any employee at the Morgantown station to determine if Mr. Armstead posed a "work place violence threat." (05/15/07 Tr. at 52.)

54. Mr. Wills never stated that he viewed Mr. Armstead as a "work place violence threat."

55. Mr. Wills' testimony in this regard is credible because he has been the supervisor at the Morgantown Station since 2000 and observed Mr. Armstead over a substantial period of time.

56. Mr. Fox and Ms. Messori, the two witnesses to the September 27, 2004 argument never stated that they viewed Mr. Armstead as a "work place violence threat."

57. Nothing in Mr. Hammerquist's statement about the September 2004 incident with Mr. Armstead indicated that he thought Armstead posed a "work place violence threat" or that he had ever been a "work place violence threat." (Resp. Ex. 23.)

58. Mr. Connolly's decision that Mr. Armstead posed a "work place violence threat" is not corroborated by the record evidence and therefore not credible.

59. There is no evidence in the record that Mr. Armstead ever threatened anyone at the job site with bodily harm and he did not on September 27, 2004.

60. During the internal EEO investigation, Ms. Messori, one of the witnesses to the September 27, 2004, incident said that Mr. Armstead was usually was "a pretty good person and his outburst with Mr. Hammerquist caught me by surprise."

61. All of Mr. Armstead's warning letters were related to his lack of professional behavior toward other employees by the use of inappropriate language, and leaving packages in the wrong places and not because of violent or threatening behavior on the job. (Resp. Ex.4-19; 05/15/07 Tr. At 158, 220.)

The In-House EEO Investigation

62. On November 11, 2004, Mr. Armstead filed an internal Equal Employment Opportunity (EEO) complaint against Mr. Connolly alleging race, age, and disability discrimination. (05/15/07 Tr. at 277.)

63. Federal Express Corporation policy provides that when an employee files an EEO complaint the GFT appeal is suspended until the EEO complaint is fully investigated. (05/15/07 Tr. at 191; 277-288.)

64. Mr. St. Martin conducted Federal Express Corporation's internal investigation of Mr. Armstead's EEO race complaint on site at the Morgantown Station.

65. Mr. St. Martin and Ms. Julie Hass, Human Resources Representative, investigated the EEO complaint. (05/15/07 Tr. at 188).

66. Mr. St. Martin went to the Morgantown Station and interviewed the employees including Mr. Wills. (St. Martin Depo. at 16).

67. Mr. St. Martin did not find any evidence to support Mr. Armstead's allegations of race discrimination. (St. Martin. Depo. at 47.)

68. As a result of his investigation Mr. St. Martin did not perceive Mr. Armstead to be a "work place violence threat," nor did he receive any indication of the same from the Morgantown Station employees he spoke with. (St. Martin Depo. at 74.)

69. As a result of his on site investigation, Mr. St. Martin believed a disciplinary letter may have been appropriate and that he would have reinstated Mr. Armstead. (St. Martin Depo. at 71.)

70. As a result of his investigation, Mr. St. Martin recommended to Mr. Lynch that Mr. Armstead be reinstated to his job as a courier. (St. Martin Depo. at 71.)

70. Kathryn Lis, who initially recommended a warning letter was concerned

about the long period of time that elapsed between the warning letters Mr. Connolly relied upon. She informed Mr. Connolly of her concerns at the time Connolly decided to terminate Armstead. (St. Martin Depo. at 71.)

Armstead's Appeal to Level Two of GFT

71. Once Mr. Armstead's EEO investigation was completed, his appeal to Level Two of the GFT was removed from a suspended status. (05/15/07 Tr. at 189.) (St. Martin Depo at 73.)

72. As part of his Level Two appeal, Mr. Armstead alleged that other witnesses had created a conspiracy against him and that the stressful situation and shortage of managers at Federal Express Corporation were to blame and that the dates of his termination letter were incorrect. (Resp. Ex. 32)

73. The result of the Level Two GFT was that on January 31, 2005, Tom Lynch, Vice President, Central Region, Federal Express Corporation reinstated Mr. Armstead with full back pay and benefits for the period of time he was terminated. (Resp. Ex. 30-31.)

People Help

74. People Help offers counseling and anger management to Federal Express Corporation employees.

75. During his twenty years of employment with Federal Express Corporation, Armstead's supervisors never referred him to People Help. (05/15/07 Tr. at 271.)

76. Although Mr. Connolly referred employees to People Help who had anger management problems, he did not refer Armstead. (05/15/07 Tr. at 91-92, 101.)

77. Teresa Rogers, a white employee, had a work history that included throwing a package, having an accident and striking a fixed object and unprofessional conduct. Subsequently, she received a warning letter which she appealed through GFT. (05/15/07 Tr. at 96.)

78. Mr. Connolly heard the appeal. He upheld management's decision and referred her to People Help for anger management. (05/15/07 Tr. at 96)

79. Federal Express Corporation terminated Michael Rowlee, a white employee because he lost his temper and shouted profanities to a couple in a car at Burger King. He was known to have demonstrated a pattern of unacceptable disruptive behavior. (05/15/07 Tr. at 87-88.)

80. Prior to Rowlee's termination, he was referred to People Help for anger management. (05/15/07 Tr. at 89.)

81. Federal Express Corporation terminated Brooke Heyel, a white employee because of chronic deficiency. On page 4 of the GFT, it was stated that her most recent conduct issue was "behaving hysterically, using profanity and acting unprofessional." She was terminated by her supervisor. (05/15/07 Tr. at 99.)

82. Mr. Connolly reversed the termination and referred her to People Help for anger management problems because she told Connolly that her behavior was related to the death of her grandmother and because her supervisor erred when he allowed her to "out on the road and then after she was on the road, bringing her back and terminating her." (05/15/07 Tr. at 100.)

Mr. Armstead's Damages

83. The parties have stipulated that should Mr. Armstead prevail his economic loss is \$2,545.26. (05/16/07 Tr. at 18)

84. In an August 7, 2007, e-mail to Attorney Karlin; Attorney Efke, counsel for Respondent, advised that Federal Express Corporation would not argue that Mr. Armstead can recover pre-judgment interest.

85. Mr. Armstead was stunned and devastated when he received his letter of termination. He described his feelings as if someone had smacked him on the side of his head with a baseball bat and that he was unable to believe that he had been terminated. (05/15/07 Tr. at 275.)

86. Federal Express stipulated to the full amount of emotional damages available before the Commission if Mr. Armstead prevailed. (05/15/07 Tr. at 276.)

V. Discussion

Disparate Treatment in Employment Discrimination: The Test Under McDonnell Douglas

This is a classic case of disparate treatment in employment based on racial stereotyping and bias both of which are covered under the West Virginia Human Rights Act.

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983).

The Three Step Inferential Proof Formula

The three step inferential proof formula is as follows. First, the complaining party must establish a prima facie case of discrimination. Second, the responding party must articulate a legitimate nondiscriminatory reason for its action. And third, the complaining party must show that the reason proffered by responding party was not the true reason for the decision, but rather pretext for discrimination. Let's look at an application of this formula to this case.

Establishing a Prima Facie Case

To prove a prima facie case, the complaining party must present evidence that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the respondent's protected class status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

Applying these standards to this case, Mr. Armstead established that he is a member of a protected class in that he is African American. Federal Express Corporation took adverse employment action against Mr. Armstead when Mr. Connolly terminated him from his employment. Mr. Armstead has shown some circumstantial evidence which sufficiently links Mr. Connolly's decision to terminate him and his 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 intent. The West Virginia Supreme Court of Appeals recognized that "discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available." Direct evidence is not, however necessary. West Va. Inst. of Technology v. West Va. Human Rights Comm'n 181 W. Va. 525, 539, 383 S. E.2d 490, 495 (1989).

Let's look at some of the circumstantial evidence that links Mr. Connolly's decision to terminate Mr. Armstead with his status as a member of a protected class, thereby, giving rise to an inference that Connolly's decision was based on an unlawful discriminatory intent.

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

Mr. Michael St. Martin, the Managing Director, who investigated Mr. Armstead's EEO complaint could not find any evidence to support Mr. Connolly's thoughts that Armstead posed a "work place violence threat." Mr. Connolly has consistently overturned the disciplinary decisions of only one his supervisors and those are the disciplinary decisions made by Mr. Norman Wills, who is an African American male.

Mr. Connolly did not refer Mr. Armstead to People Help as he had white employees who had displayed anger management problems on the job. And finally, at the time of this public hearing Mr. Connolly had presided over more than twenty Federal Express Equal Employment Opportunity investigations in which racial discrimination was alleged and in each instance he had not found any evidence of race discrimination.

The inference that can be drawn from Mr. Connolly's behavior toward Mr. Armstead is that of stereotyping Armstead as an angry black male who posed a "work place violence threat."

Mr. Armstead established of a prima facie case thereby creating a "presumption that Federal Express Corporation unlawfully discriminated against" him. Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995); Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Shepherdstown Volunteer Fire Dept, 172 W. Va. 627, 309 S.E.2d 342.

Federal Express Corporation Articulated a Legitimate Nondiscriminatory Reason for Terminating Mr. Armstead

The next question that must be answered is whether the employer articulated a legitimate nondiscriminatory reason for its decision to upgrade Mr. Armstead's September 29, 2004 warning letter to a termination letter. The burden now shifts to Federal Express Corporation to rebut the presumption of discrimination by producing evidence that the reason for Mr. Armstead's termination was legitimate and nondiscriminatory.

Federal Express Corporation's burden is one of production of admissible evidence that is legitimate and nondiscriminatory, clearly and reasonably specific, as well as legally sufficient to justify a judgment for it.

Federal Express Corporation articulated non-discriminatory reasons for Mr. 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." When asked at the hearing why he felt Mr. Armstead posed a "work place violence threat," Mr. Connolly stated that he reviewed Armstead's work history over a twenty-year period; considered what he learned about work place violence threats from corporate training videos..

Respondent's Actions Against Mr. Armstead are Pretextual

Federal Express Corporation, however, failed to set forth through the introduction of admissible evidence clear reasons for Armstead's termination. The reasons are pretextual.

Federal Express Corporation offered shifting reasons and defenses for terminating Mr. Armstead as a "work place violence threat." The reasons varied depending upon who requested the information and the purposes for which the reasons were given.

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

In defending Mr. Connolly's actions before the Commission, Federal Express Corporation relied upon two additional warning letters dated July 15, 1987 and November

17, 1988, letters that were 20 and 19 years old. At the public hearing, Mr. Connolly testified that he also relied on counseling and performance reminders in Mr. Armstead's personnel file. (05/15/07 at 227.)

At the public hearing, Mr. Connolly testified that he relied upon other documents which he did not identify as ones that supported his rationale for terminating Mr. Armstead. He also said that he relied upon Mr. Armstead's twenty year work history. (05/15/07 Tr. at 165-166).

Courts are skeptical of alleged reasons which are not asserted until the latter stages of a discrimination dispute. Gallo v. John Powell Chevrolet, Inc., 61 Fair Empl. Prac. Cas. 1121, 1129 (M.D. Pa. 1991) (fact that employer's alleged reasons were not asserted until the hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds"); Foster v. Simon, 467 F. Supp. 533 (W.D. N.C. 1979); Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Pa. 1973). Shifting reasons or defenses between the time of the adverse action and the time of the hearing is strong evidence of a pretext. Smith v. American Service Co., 611 F. Supp. 321, 328 (N.D. Ga. 1984); Townsend v. Grey Line Bus Co., 597 F. Supp. 1287 (D. Mass. 1984), aff'd, 767 F.2d 11 (1st Cir. 1985).

What is pretext?

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason, a false appearance or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986).

Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred, Barefoot, 193 W.Va. 475, 457 S.E.2d 152 (1995), although, discrimination need not be found as a matter

of law. St. Mary's Honor Society v. Hicks, 509 U.S., 113 S.Ct. 2742, 125 L. Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse V. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the Respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the complainant need only show that the complainant's protected class played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant's protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

Several factors indicate that the explanations offered by Federal Express Corporation are pretextual, that a discriminatory motive was involved in the decision to terminate Mr. Armstead, and that this discriminatory motive was directly related to Mr. Armstead's protected class status, that is, African American.

First, Mr. Connolly did not treat Mr. Armstead the same as he did white employees. He referred white employees who had anger management problems to People Help, an employee assistance program. Teresa Rogers, a white employee who used abusive language and physically kicked customer packages off a truck, was referred to People Help to help her deal with her anger. Brooke Heyel, another white employee, who had a documented history of using profanity, behaving hysterically, and in an inappropriate and threatening manner, was referred to People Help by Mr. Connolly. Mr. Connolly modified her termination letter down to a warning letter even though she had three warning letters of misconduct. Mr. Rowlee, a white employee with behavioral problems, was also referred to People Help for anger management counseling prior to his termination.

Second, Mr. Connolly, who did not interview any of the employees with whom Mr. Armstead worked, stated that Armstead posed a "work place violence threat" changing his

September 29, 2004 warning letter to a termination letter. Prior to the incident involving Mr. Hammerquist, it had been eleven years since Mr. Armstead had received a warning letter for using profanity or other conduct -related behavior.

Not only is there no history of violence on the job, Mr. Connolly never interviewed anyone including Mr. Wills, to determine if Armstead posed a "work place violence threat." Had Mr. Connolly inquired of Mr. Wills, Mr. Hammerquist, Mr. Fox or Ms. Messori, he would have found that no one at the job site considered Mr. Armstead a "work place violence threat" but himself.

During the internal EEO investigation, Ms. Messori, a witness to the September 27, 2004 incident said that Mr. Armstead was usually "a pretty good person and his outburst with Mr. Hammerquist caught me by surprise." Mr. St. Martin disagreed with Connolly's decision to modify upward the warning letter to a termination letter on the basis that Armstead posed a "work place violence threat" recommending instead that Mr. Armstead receive a disciplinary letter. The termination was eventually changed back to a warning letter at Level Two of the GFT and Mr. Armstead was reinstated to his former position as a courier and given back pay and benefits.

Third, Mr. Connolly failed to inform Mr. Armstead that he was considering his twenty-year work history, and not just the facts and circumstances surrounding the September 27, 2004 verbal exchange with Mr. Hammerquist. Mr. Armstead assumed that the teleconference concerned only the September 29, 2004 warning letter because Mr. Connolly limited Armstead's comments to the September 27, 2004 incident. Mr. Connolly would not allow Mr. Armstead an opportunity to fully explain his personal situation and its impact on his behavior on September 27, 2004. So, how could he have known that Connolly was considering his twenty-year work history?

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.

Under the burden shifting formula of McDonnell Douglas Mr. Armstead has shown by a preponderance of the evidence that the reasons advanced by Federal Express

Corporation for his termination was pretextual. Under the mixed-motive analysis of Price-Waterhouse certainly Federal Express Corporation had the opportunity to show by a preponderance of the evidence that Mr. Armstead would have been terminated absent Federal Express Corporation's unlawful discriminatory racial animus or racial stereotyping. Federal Express Corporation, however, cannot show that Mr. Armstead would have been terminated absent unlawful discriminatory racial animus because the evidence is that no other Federal Express Corporation Management employee who reviewed Mr. Armstead's conduct, and work history including Armstead's supervisors, human resource personnel and Mr. St. Martin concluded that Mr. Armstead's conduct warranted his discharge.

VI.

DAMAGES

Mr. Armstead is entitled to such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albermarle Paper Co. V. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). Mr. Armstead is to be placed, as near as possible, in the position which he would have occupied had he not been discriminated against.

Mr. Armstead, under the "make whole" rule, is entitled to receive back pay with prejudgment interest, economic damages, incidental damages and attorney fees and costs for his claim against Respondent. When Mr. Armstead was reinstated in his job as a courier, he was paid back wages and benefits. Because he was not made whole; he is entitled to prejudgment interest on the back pay, economic damages, damages for emotional distress and attorney fees and costs.

Interest on Back Pay

Mr. Armstead is entitled to interest on back pay for the period October 19, 2004 - January 31, 2005 and at the rate of 10% per annum. The Commission does not compound

interest. Rodriguez v. Consolidation Coal Co., 206 W. Va. 317, 524 S.E.2d 672 (1999); Hensley v. West Virginia Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998); Frank's Shoe Store, 179 W. Va. 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985); W. Va. Code § 56-6-31.

It has been the policy of the Commission, in keeping with the "make whole" objective of the Act, to calculate back pay awards on a periodic basis, and to calculate interest on accrued back pay.

Incidental Damages

Mr. Armstead was stunned and devastated when he received his letter of termination. He described his feelings as if someone had smacked him on the side of his head with a baseball bat and that he was unable to believe that he had been terminated after almost twenty years of service. He had to cash in his 401K because of the financial hardship the termination caused him and his family.

Mr. Armstead is entitled to incidental damages with respect to his claims against Federal Express Corporation. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989). Bishop Coal provides that the \$2,500 cap on incidental damages may be adjusted from time to time to conform to the Consumer Price Index. Bishop Coal, 380 S.E.2d at 247.

In keeping with this language, the Commission has periodically raised the cap on incidental damages. Currently, the cap for emotional distress damages is \$5,000.00 for each claim. Mr. Armstead is entitled to such damages from the Federal Express Corporation in no less than this amount. The Commission takes the position that in virtually all cases where discrimination is held to have occurred, a Complainant will have suffered at least the maximum worth of damages. Mr. Armstead has suffered injury well in excess of the \$5,000.00 available under the cap. Accordingly, Federal Express Corporation should be charged with the maximum available award.

Economic Damages

Mr. Armstead has totally prevailed and is entitled to be reimbursed his economic damages in the amount of \$2,545.26 as a result of the 401(k) withdrawal.

Cease and Desist Order

Mr. Armstead is entitled to a cease and desist order. The cease and desist order may contain provisions which will aid in eliminating future discrimination. A cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of Federal Express Corporation that the Commission's Order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't, Docket No. PAS-48-77; *see also* Shepherdstown Volunteer Fire Dep't, 172 W. Va. 627, 309 S.E.2d 342 (1983).

The greatest priority in civil rights law enforcement is the elimination of discrimination, and virtually every statute and ordinance provides for authority to issue cease and desist orders. Therefore, as a part of the remedy to the charge where discrimination is found, Federal Express Corporation should be prevented from initiating or continuing a discriminatory policy or practice. This cease and desist authority is always consistent with a "make whole" remedy, because the charging party is never made whole when the real possibility of future discrimination remains following resolution of the individual charge. A cease and desist order is particularly warranted in this case because of Mr. Connolly's racial animus towards African Americans.

Attorney Fees and Costs

The general rule provides that each party bears his own attorney's fees unless there is an express statutory authorization to the contrary. Where there is an express statutory provision to the contrary then that provision must be followed.

The West Virginia Human Rights Act at W. Va. Code §5-11-13 modifies the general rule because it provides that where actions are brought under the Act and a court finds that Respondent engaged in or is engaging in an unlawful discriminatory practice charged by the Respondent, a court in its discretion can award reasonable attorney fees. See also, the Commission's Rules of Practice and Procedure at W. Va. Code State R. tit. 77 § 9.3.

In making discretionary fee awards the Court must find that the party seeking to have the fees and costs shifted is the prevailing party and that the requested fees and costs are reasonable. See Hensley v. Eckerhart 461 U.S. 424,433, 103 S. Ct. 1933 (1983).

Mr. Armstead has prevailed totally and is entitled to attorney fees and costs associated with prosecuting this complaint.

VII.

CONCLUSIONS OF LAW

1. The Complainant, Anthony Lee Armstead, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-10.

2. At all times relevant hereto, Mr. Armstead is a person within the meaning of W. Va. Code § 5-11-3(a), and is an employee of the Federal Express Corporation, as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(e).

3. The Respondent, Federal Express Corporation is an employer as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(d), and subject to the provisions of the West Virginia Human Rights Act. Federal Express Corporation is also a person within the meaning of W. Va. Code § 5-11-3(a).

4. The Complaint in this matter was timely filed in accordance with W. Va. Code § 5-11-10.

5. Mr. Armstead met his prima facie burden and proved that Federal Express Corporation engaged in unlawful discrimination, in violation of the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 *et seq.*

6. The nondiscriminatory defense to Mr. Armstead's charge of discrimination articulated by the Federal Express Corporation was pretextual.

7. Mr. Armstead proved by a preponderance of the evidence that Federal Express Corporation unlawfully terminated him because of his race in violation of the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 *et seq.*

8. Federal Express Corporation discriminated against Mr. Armstead in the terms, conditions or privileges of employment within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*

9. Federal Express Corporation is liable for back pay, benefits, and prejudgment interest for discriminatory actions taken against Mr. Armstead.

10. Mr. Armstead has been reinstated to his job and awarded back pay and benefits, but not prejudgment interest on the back pay.

11. Mr. Armstead is entitled to his economic loss of \$2, 545 plus interest because he had to cash in his 401(k) to support his family.

12. As a result of the alleged discriminatory actions of the Federal Express Corporation, Mr. Armstead is entitled to:

(a) Prejudgment interest on the back pay he has already received at the rate of 10% per annum for the period October 19, 2004 to January 31, 2005;

(b) Economic loss in the amount of \$2,545.26;

(c) Incidental damages in the amount of \$5,000.00 for the humiliation, embarrassment and emotional distress suffered by Mr. Armstead as a result of the discriminatory actions of Federal Express Corporation and

(d) A cease and desist order aimed at preventing Federal Express Corporation from continuing the illegal discriminatory practices evidenced in its actions; and

(e) An order requiring Federal Express Corporation managerial employees, with responsibilities related to Respondent's West Virginia operations, to undergo training