STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

ANTHONY ARMSTEAD,
Petitioner Below, Appellant

v. No. 101590 (Kanawha County No. 09-AA-106)

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION; AND FEDERAL EXPRESS CORPORATION, Respondents below, Appellees

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

An Administrative Law Judge of the West Virginia Human Rights Commission rendered a decision finding that Federal Express Corporation ("FedEx") discriminated against Anthony Armstead ("Armstead") on the basis of race when it terminated him from employment. The Human Rights Commission upheld the decision and entered judgment for Armstead. Although Armstead had been reinstated by FedEx, with back pay, prior to the administrative hearing, the Human Rights Commission awarded Armstead $2,545.26 for economic loss and $5,000.00 for humiliation, embarrassment and emotional distress, both of which amounts had been stipulated by the parties. In addition, Armstead was awarded $82,142.10 in attorney fees and costs.

FedEx filed an appeal in the Circuit Court of Kanawha County. The circuit court reversed the decision of the Human Rights Commission and entered judgment in favor of FedEx. Armstead appeals, contending that the circuit court committed error in concluding that the evidence before the Administrative Law Judge of the Human Rights Commission was insufficient to prove discrimination.

The record is voluminous and includes a lengthy transcript and numerous exhibits. Upon review, the ultimate conclusion that Armstead was terminated on the basis of race, rather than simply wrongfully terminated, is a question upon which reasonable adjudicators might differ. However, this Court's task is not to weigh the evidence and substitute our result for that of the fact finder below, but to determine whether the circuit court abused its discretion in reversing the Commission on the sufficiency of the evidence. *Stevenson v. Independence Coal Company*, 227 W.Va. 368, 709 S.E.2d 723 (2011). For the reasons stated below, this Court is of the opinion that the circuit court abused its discretion. Consequently, we reverse the circuit court and direct that the decision of the Human Rights Commission,

which affirmed the Administrative Law Judge, be reinstated.[1]

I.
Factual Background

The appellant, Anthony Armstead, an African American with approximately 20 years of employment with FedEx, worked as a truck courier at the FedEx station in Morgantown, West Virginia. On September 27, 2004, an incident occurred at the station between Armstead and co-worker Scott Hammerquist, a white male. On that day, Armstead left the loading dock and entered the sorting area to check his basket for packages ready for delivery. Hammerquist, Brian Fox and Donna Messiora were sorting packages. The incident was described by the Administrative Law Judge as follows:

> 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. 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's "furking way." [f-u-r-k-I-–g] Mr. Armstead used the "F" word toward Mr. Hammerquist several times. Mr. Hammerquist told Mr. Armstead that he would have his job. 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.

Neither Fox nor Messiora saw any physical contact between Armstead and Hammerquist. Armstead completed his work that day. Soon after, however, Norman Wills, the Operations Manager at the station, placed Armstead and Hammerquist on suspension, with pay, pending an investigation. Subsequently, Wills found Armstead to be at fault and issued a Warning Letter on September 29, 2004, stating that Armstead had used abusive language toward another employee. Wills issued the letter after reviewing Armstead's work history with FedEx and after consulting with John Snyder (the Senior Manager at the Morgantown station) and Kathryn Lis (the Senior Human Resources Representative for FedEx). The record does not indicate if Hammerquist was disciplined.

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[1] This Court has considered the parties' oral argument, briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered on May 12, 2011. Upon consideration of the standard of review, the Court finds no substantial question of law. For these reasons, a Memorandum Decision is appropriate under Rule 21 of the Revised Rules.

FedEx policy provided three forms of employee discipline: (1) Counseling, (2) Performance Reminder and (3) Warning Letter. Whereas a Counseling or a Performance Reminder involved job performance, a Warning Letter concerned misconduct. As set forth in the FedEx Employee Handbook, § 2-5, misconduct included: "Threatening, intimidating, coercing, directing abusive language, or displaying blatant or public disrespect toward any employee or customer while on duty[.]" The receipt of a Warning Letter adversely affected an employee's ability to bid on other jobs with FedEx.

In addition, the Employee Handbook provided that three notifications of deficiency or discipline within a 12 month period would normally result in termination. The Handbook also provided, however, that the employee's "entire employment history" should be considered and that, based on the severity of the occurrence, the employee could be terminated with less than three such notifications within a 12 month period. The Handbook stated:

> 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.

Although Armstead had received Counselings and Performance Reminders over the years, he was considered to be within the top 25% of FedEx couriers "in terms of meeting goals," and he had not received a Warning Letter in 11 years.

Armstead challenged the September 29, 2004, Warning Letter through the FedEx Guaranteed Fair Treatment Procedure ("GFT") set forth in § 5-5 of the Employee Handbook. Under the GFT process, a Warning Letter can be reviewed by a higher-level manager. The reviewing manager has the authority to: (1) uphold, (2) overturn or (3) modify, up or down, the employment decision below.

The higher-level manager in this case was Richard Connolly, the FedEx District Managing Director, located in Pittsburgh, Pennsylvania. On October 15, 2004, Connolly conducted a teleconference with Kathryn Lis (in Pittsburgh) and Armstead, Wills and Snyder (each in Morgantown). Connolly, a white male, was aware that Armstead is African American. Although the information and potential results of the GFT process were available to Armstead in the Employee Handbook, Connolly did not inform Armstead during the teleconference that his entire employment history was being considered and that Connolly was considering modifying the Warning Letter to a termination. Subsequently, by letter

dated October 18, 2004, Connolly terminated Armstead's employment with FedEx. The letter indicated that the termination was based on an unprofessional, verbal confrontation with Hammerquist and an investigation of Armstead's employment history.

In November 2004, Armstead filed an Equal Employment Opportunity ("EEO") complaint against FedEx alleging that he was terminated on the basis of race. Michael F. St. Martin, another FedEx District Managing Director, investigated the complaint and concluded that the allegation of racial discrimination was without merit. St. Martin later testified, however, that the Warning Letter issued to Armstead by Wills was a more appropriate sanction concerning the incident with Hammerquist than termination.

II.
Proceedings Before the HRC and the Circuit Court

In November 2004, Armstead also initiated a complaint before the Human Rights Commission, again alleging that he was terminated on the basis of race. The West Virginia Human Rights Act provides that it is unlawful for an employer to discriminate against an individual on the basis of race with regard to "compensation, hire, tenure, terms, conditions or privileges" of employment. *W.Va. Code*, 5-11-9 [1998].

In the meantime, by letter dated January 31, 2005, Tom Lynch, FedEx Vice President, Central Region Operations, overturned Connolly's decision and reinstated Armstead with back pay. The letter specified, however, that the Warning Letter of September 29, 2004, would remain on Armstead's record. Nevertheless, in March 2006, the Human Rights Commission found probable cause to proceed with regard to Armstead's termination by FedEx, and on May 15 and May 16, 2007, evidentiary hearings were conducted by the Administrative Law Judge.

On August 28, 2008, the Administrative Law Judge issued a 29-page decision holding that Armstead's termination constituted disparate treatment in employment based upon race in violation of the Human Rights Act. The Administrative Law Judge determined that Armstead established a *prima facie* case by showing that his termination was based, in part, upon Connolly's perception, revealed through Connolly's testimony, that Armstead was a potential workplace violence threat, for which there was no evidence. Moreover, the Administrative Law Judge determined that the assertion of FedEx, that Connolly had a discretionary, nondiscriminatory reason for terminating Armstead based on Armstead's work history, was pretextual because of: (1) the remoteness of the prior Warning Letters, the last of which was issued in 1993, (2) the evidence that Wills, Snyder, Lis and St. Martin believed that the September 29, 2004, Warning Letter, rather than termination, was sufficient and (3)

Connolly's failure to ask Wills or Snyder if Armstead was, in fact, a potential workplace violence threat. The Administrative Law Judge found that the workplace violence issue, in the absence of evidence therefor, raised an inference of racial stereotyping.

The August 28, 2008, decision concluded by awarding Armstead $2,545.26 for economic loss and $5,000.00 for humiliation, embarrassment and emotional distress, both of which amounts had been stipulated by the parties. In addition, the decision required FedEx managerial employees with corporate responsibilities in West Virginia to undergo sensitivity training concerning racial discrimination. By supplemental decision entered on December 29, 2008, Armstead was awarded $82,142.10 in attorney fees and costs. The August 28, 2008, decision and the supplemental decision were affirmed on May 13, 2009, by the Human Rights Commission. *See*, *W.Va. Code*, 5-11-8(d)(3) [1998] (The Commission shall limit its review to whether, *inter alia*, the decision is supported by substantial evidence.).

FedEx filed a petition for review in the Circuit Court of Kanawha County. Thereafter, by order entered on June 23, 2010, the circuit court reversed the May 13, 2009, decision of the Human Rights Commission. Acknowledging the standard of review set forth in *W.Va. Code*, 29A-5-4(g) [1998],[2] the circuit court determined that the evidence was insufficient to prove discrimination and that, consequently, the decision of the Human Rights

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[2] The FedEx petition for circuit court review was filed pursuant to *W.Va. Code*, 5-11-11 [1989], which refers to *W.Va. Code*, 29A-5-4 [1998], concerning judicial review of contested cases under the State Administrative Procedures Act. *W.Va. Code*, 29A-5-4(g) [1998], states:

> The circuit court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
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> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
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> (3) Made upon unlawful procedures; or
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> (4) Affected by other error of law; or
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> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
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> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. pt. 2, *Shepherdstown Volunteer Fire Dept. v. Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

Commission was clearly wrong "in view of the reliable, probative and substantial evidence on the whole record." The circuit court emphasized the testimony of Connolly that, in terminating Armstead, he was concerned about Armstead's recurring conduct. As described by the circuit court, that concern included potential workplace violence. On October 26, 2010, the circuit court denied Armstead's motion to alter or amend the order of June 23, 2010. The order denying the motion did not elaborate on the evidence of record.[3] This appeal followed.[4]

III.
Standard of Review

Where a circuit court has reversed the result before an administrative agency, this Court reviews the circuit court's final order and its ultimate disposition of the case under an abuse of discretion standard. Syl. pt. 3, in part, *West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners v. Harrison*, 227 W.Va. 438, 711 S.E.2d 260 (2011); syl. pt. 1, in part, *Hoover v. West Virginia Board of Medicine*, 216 W.Va. 23, 602 S.E.2d 466 (2004).[5] *See*, syl. pt. 1, *West Virginia Human Rights Commission v. United Transportation Union*, 167 W.Va. 282, 280 S.E.2d 653 (1981) ("West Virginia Human Rights Commission's findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties.").

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[3] No transcripts of any proceedings before the circuit court are included in the record.

[4] In February 2011, this Court granted the motion of the West Virginia Conference of Branches of the NAACP; the Mountain State Bar; and the American Civil Liberties Union of West Virginia to file, as *amici*, a brief in support of Armstead.

[5] The August 28, 2008, determination of the Administrative Law Judge that Armstead had been the victim of disparate treatment was issued in a 29-page decision which included 86 findings of fact. In looking at that decision and the review thereof by the circuit court, we note that syllabus point 1 of *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997), states:

> A reviewing court must evaluate the record of an administrative 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.

See also, syl. pt. 2, *West Virginia Medical Imaging and Radiation Therapy Technology Board of Examiners*, *supra*.

IV.
Discussion

The Administrative Law Judge determined that Armstead established a *prima facie* case of disparate treatment and that, for a number of reasons, the assertion of FedEx that Armstead's termination was nondiscriminatory was pretextual. The legal framework in which the evidence for that result is to be evaluated was set forth in *West Virginia Institute of Technology v. West Virginia Human Rights Commission*, 181 W.Va. 525, 383 S.E.2d 490 (1989), syllabus points 1, 2 and 3 of which hold:

> 1. "In order to make a prima facie case of [disparate-treatment] employment discrimination under the West Virginia Human Rights Act, W.Va. Code § 5-11-1 [to 5-11-19, as amended], the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made." Syl. pt. 3, *Conaway v. Eastern Associated Coal Corp*., 178 W.Va. 164, 358 S.E.2d 423 (1986).
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> 2. The complainant's prima facie case of disparate-treatment employment discrimination can be rebutted by the employer's presentation of evidence showing a legitimate and nondiscriminatory reason for the employment-related decision in question which is sufficient to overcome the inference of discriminatory intent.
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> 3. The complainant will still prevail in a disparate-treatment employment discrimination case if the complainant shows by the preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is merely a pretext for a discriminatory motive.

See also, syl. pts 1 and 2, *Ford Motor Credit Company v. West Virginia Human Rights Commission*, 225 W.Va. 766, 696 S.E.2d 282 (2010).[6]

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[6] Supplementary to the above is the principle of "mixed motive." As explained in *Skaggs v. Elk Run Coal Company, Inc*., 198 W.Va. 51, 479 S.E.2d 561 (1996):

> "Mixed motive" refers to cases in which a discriminatory motive combines with some legitimate motive to produce an adverse action against the plaintiff. "Disparate treatment" refers to cases in which a discriminatory motive produces

Here, the FedEx Employee Handbook provided that three notifications of deficiency or discipline within a 12-month period would normally result in termination. Although Armstead, a 20-year employee, had periodically received Counselings and Performance Reminders, he had not received a Warning Letter in 11 years. The last Warning Letter was issued to Armstead in March 1993 and stated that he called a co-worker an "a-hole" and that Armstead was sorry for having done so.

The Handbook provided that an employee could be terminated with less than three discipline notifications within 12 months if there was a severe occurrence or a recurring pattern of misconduct. Nevertheless, the severity of Armstead's comments to Hammerquist on September 27, 2004, though improper, were mitigated by testimony before the Administrative Law Judge that it was not uncommon at the Morgantown station, in view of the workload, for employees to occasionally say things they did not mean. Moreover, the recurring pattern component is mitigated by the length of time between the September 2004 Warning Letter and the previous Warning Letter issued in March 1993.

In addition, the FedEx Handbook provided for the consideration of an employee's entire employment history. Here, the record establishes that Armstead's entire employment history was considered at every level, from Operations Manager Wills in Morgantown through Armstead's reinstatement in 2005. The evidence reveals that Wills, Snyder, Lis and St. Martin concurred that the 2004 Warning Letter was the appropriate sanction with respect to the incident with Hammerquist. Connolly alone sought to terminate Armstead. In that regard, the evidence further reveals that, although Connolly routinely handled FedEx "GFT" appeals, he had never before increased a Warning Letter to a termination.

During the May 2007 hearings, Connolly denied that he terminated Armstead based on race. Although Connolly's denial was supported by the testimony of Wills, an African American, the evidence established inferences supportive of the Administrative Law Judge's decision. The facts in three areas are problematic for FedEx. First, FedEx policy included a program known as People Help through which its employees could be referred to counseling, or instruction, in anger management. Although the record is unclear as to the race of FedEx employees referred to anger management by Connolly or other managers over the years, Armstead, in 20 years with FedEx, was never referred to the program, even though his employment history contained anger-related incidents. Second, it is undisputed that as the October 2004 teleconference was coming to an end, Connolly asked Snyder (a white male

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> an adverse employment action against the plaintiff. As a technical matter, then, mixed motive cases form a subcategory of disparate treatment cases.

198 W.Va. at 74, 479 S.E.2d at 584.

who was Wills' supervisor and the Senior Manager at the Morgantown station) to pick up the receiver at which time Connolly and Snyder engaged in a private conversation. Although Armstead had not been told during the teleconference that termination was a possible outcome, Connolly told Snyder during the private conversation that termination was being considered.

The third problematic area for FedEx concerns the finding of the Administrative Law Judge that the termination was based, to some degree, on Connolly's perception that Armstead was a potential workplace violence threat. During the May 2007 hearings, Connolly testified:

> 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.

The record is undisputed that Connolly never asked anyone at the Morgantown station, including Armstead's immediate supervisor Wills or Senior Manager Snyder, whether they believed Armstead to be a potential threat. To the contrary, Wills, who was in a position to observe Armstead's demeanor and behavior, and St. Martin, the FedEx EEO investigator, testified that they had no reason to believe that Armstead was a physically violent person. The record contains no evidence that Armstead had ever physically harmed anyone. Immediately after the confrontation with Hammerquist, Armstead walked away and completed his delivery route. In short, the termination of Armstead was out of the norm, especially since management at the Morgantown station was much more familiar with Armstead's work performance and temperament and determined that the Warning Letter constituted a sufficient sanction.

Syllabus point 5 of *Skaggs v. Elk Run Coal Company*, *supra*, holds:

> In disparate treatment cases under the West Virginia Human Rights Act, W.Va. Code, 5-11-9 (1992), proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination. Therefore, if the plaintiff raised an inference of discrimination through his or her prima facie case and the fact-finder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.

Syl. pt. 5, *Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W.Va. 703, 629 S.E.2d 762

(2006).

In the current matter, the findings and conclusions of the Administrative Law Judge and the ultimate administrative determination that Armstead was discriminated against on the basis of race in violation of the Human Rights Act warrant reinstatement, particularly in view of the lack of any detailed analysis in the final orders of the circuit court. As Armstead points out, a comparison of the six page June 23, 2010, order of the circuit court with the extensive findings and conclusions of the Administrative Law Judge demonstrates that the circuit court focused its review on the testimony of Connolly without any discussion of the evidence that led the Administrative Law Judge to reach a decision in favor of Armstead.

V.
Conclusion

For the reasons stated above, this Court is of the opinion that the circuit court abused its discretion in reversing the Human Rights Commission and denying Armstead's motion to alter or amend its order. Consequently, we reverse the final orders of the Circuit Court of Kanawha County entered on June 23, 2010, and October 26, 2010, and direct that the May 13, 2009, decision of the Human Rights Commission, which affirmed the August 28, 2008, and December 29, 2008, decisions of the Administrative Law Judge, be reinstated.[7]

Reversed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

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[7] As noted above, the Human Rights Commission ordered that certain FedEx managers undergo sensitivity training with regard to the Human Rights Act. FedEx asserts in passing or tangentially that its corporate practices render such training unnecessary. As recognized in *Covington v. Smith*, 213 W.Va. 309, 317 n. 8, 582 S.E.2d 756, 764 n. 8 (2003), the casual mention of an issue in a brief is insufficient to preserve the issue on appeal. Therefore, this Court leaves for another day the issue of the authority of the Human Rights Commission to require employers to undergo sensitivity training with regard to the Human Rights Act.