

**DISTRICT OF COLUMBIA  
COMMISSION ON HUMAN RIGHTS**

In the Matter of:

COMPLAINANT,

Complainant,

v.

Docket Number 14-004-P (CN)  
EEOC NO. 10C-2014-0003

FEDERAL EXPRESS CORPORATION,

Respondent.

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FINAL DECISION AND ORDER

**I. STATEMENT OF THE CASE:**

Complainant is a woman, who was 56 years of age at the time the acts of alleged discrimination that give rise to this cause of action occurred. Complainant was terminated from her position of Operations Agent with Federal Express Corporation (“Respondent” or “FedEx”) on September 11, 2012 after being advised her job was being eliminated as a cost-saving measure to the company. In implementing this cost-saving measure the employer made a decision to take all gatekeeping tasks from those employees working in its Washington, D.C. facility and assign these duties to Customer Services Agents (CSAs) working in its new Customer Experience Network Department.

FedEx offered Complainant a part-time position of handler with the company which would have required her to lift 75 pounds and maneuver 175 pounds with the assistance of other employees. Complainant was unable to accept the job because she has a lifting restriction that prevents her from doing heavy lifting.

In September 2012, Complainant was terminated from FedEx. In June 2013, Complainant learned that two men who were younger than she had been hired by FedEx

after her termination to do gatekeeping duties, the same type of work she had performed prior to her termination.

#### Procedural History

Complainant filed her complaint with the District of Columbia Office of Human Rights (“OHR” or “Office”) on August 15, 2013 against FedEx alleging the Respondent violated the District of Columbia Human Rights Act (“DCHRA”) when it subjected her to disparate treatment based on her age and sex. She contended that FedEx told her she was being terminated from her position as Operations Agent because her job was no longer cost-effective and was being eliminated. However one year later the employer hired two younger male employees to perform the same type of work (gatekeeping duties) she had performed prior to her termination.

The Office investigated Complainant’s complaint and issued a Letter of Determination (“LOD”) dated August 8, 2014. OHR found there was probable cause to believe that the Respondent had discriminated against Complainant on the basis of her age (56) when it subjected her to its Staffing Effectiveness Policy (SEP) and offered her a transfer to a position she was physically unable to perform. OHR made a determination there was no probable cause to believe FedEx discriminated against Complainant on the basis of her sex (female).

Both Complainant and FedEx filed requests for reconsideration of the Office’s findings that were not in their respective favor. In Complainant’s case she requested OHR to reconsider its finding there was no probable cause to believe FedEx had discriminated against her on the basis of her sex (female). FedEx requested OHR to reconsider its finding there was probable cause they had discriminated against Complainant on the basis

of her age. On November 17, 2014, the Office issued a Determination on the Parties' Requests for Reconsideration affirming the Initial Findings of probable cause on the basis of age and no probable cause on the basis of gender listed in their initial ruling.

The parties participated in efforts to conciliate this matter with the Office's Mediation Division, to no avail. The Office certified the case to the Commission on Human Rights ("Commission") for a public hearing on October 29, 2015. A status teleconference was held on January 4, 2016 and a scheduling order was issued the same day. Discovery was conducted in the case and a hearing on the merits was held on October 3, 2016. The parties submitted post-hearing briefs after an extension was granted to the parties due to the trial obligations of one of the counsel of record.

On September 11, 2017, a Proposed Decision and Order was issued to the parties finding in favor of the Respondent. The parties were given fifteen (15) days to file Exceptions to the decision. Neither party filed Exceptions. On October 23, 2017, Complainant reported to the Commission office and presented some documents to the undersigned judicial officer in reconsidering the Proposed Decision and Order. When asked if her counsel of record was still her legal representative in this matter she said no. Counsel for the parties were notified in writing of the Complainant's visit to the Commission and provided with copies of the documents submitted by Complainant. The attorneys were offered an opportunity to file a response to the documents, but no responses were received. The tribunal was also provided with copies of the documents submitted by Complainant to review reconsideration.

## **II. ISSUES**

Whether the Respondent discriminated against Complainant on the basis of her age (56) when it subjected her to a Staffing Effectiveness policy and offered her a

transfer to a less desirable position.

### **III. FINDINGS OF FACTS**

1. Complainant is a woman, who at the time of the acts of alleged discrimination was 56 years old. Transcript at 86:1-2 [hereinafter cited as Tr.]
2. In October 2016, Complainant was sixty years old. Tr. at 86:3-5.
3. Complainant worked as a full-time Operations Agent for Federal Express Corporation (“FedEx”) at its Washington, D.C. location. Her dates of employment were from January 28, 1986 to January 30, 2012 for a total of 26 years. Tr. at 86:23-87:7; Tr. at 88:11-12.
4. In 2012, FedEx’s Washington, D.C. location housed two FedEx operations: the WASA operation serviced by AM staff and the DCAA operation serviced by PM Staff. Tr. at 43:10-14. Complainant worked at the WASA location. Tr. at 41:9-11.
5. Complainant’s responsibilities as an Operations Agent included the gatekeeping functions of the operation, namely, assisting carriers, vehicle maintenance personnel, and dispatchers, answering the phone, passing out timecards and distributing VIR equipment, checking for proof of delivery, scanning packages, sending out equipment for repair, and keeping tabs on all keys to the vehicles in the department. Tr. at 87:8-88:10.
6. On January 27, 2012, FedEx issued a letter to Complainant along with six other employees who carried out gatekeeping duties at the D.C. location informing them that their positions had been abolished and they would be given until May 2012 to find other employment within the company. If they were unable to secure another position within the company their employment would end effective May 2012.  
  
Joint Exhibit 2 [hereinafter referred to as Joint Ex.]

7. Prior to Complainant's separation from her job with FedEx she had planned to work four more years with the company before retiring. Tr. at 89:23-90:1.
8. On January 27, 2012, Complainant was earning an annual salary of \$40,065.16 with vacation and sick leave benefits from FedEx. Tr. at 122:13-123:4.
9. Complainant had a 401(k) retirement plan with FedEx at the time of her separation with over \$20,000 in it, which she was forced to withdraw once she lost her job. Tr. at 123:14-124:2.
10. In 1992, Complainant was injured in a work-related accident involving a FedEx truck, and as a result of her injury she had a lifting restriction of which the Respondent was aware. Tr. at 91:13-17.
11. Employee 1 was the Managing Director of the FedEx location in Washington, D.C. at the time of Complainant's dismissal from the company. Tr. at 140:4-16. He worked at the location from 2007 to 2012. Tr. at 141:1-5. His duties included making sure the business operation of FedEx's DC location ran smoothly and that the location followed company policy. Tr. at 141:10-16.
12. Employee 2 was Complainant's immediate supervisor in 2012. Tr. at 229:25-230:1.
13. In January 2012, FedEx introduced the Customer Experience Network (CEN), a retail network, to their Washington, D.C. WASA and DCAA operations. Joint Ex. 22. The CEN was established by FedEx's corporate office to transfer all the gatekeeper functions to CSAs. Tr. at 145:6-146:25.
14. FedEx made the decision to transfer all the gatekeeping functions to CSAs, who were already employed by the company because many of the CSAs were already performing that function. The company reasoned that it would be more efficient to

have the gatekeeping duties centralized in one department. Joint Ex. 22.

15. The duties of a CSA were caretaker, gatekeeper, traces, and all other aspects of customer care. Tr. at 246:16-20.
16. In total, the introduction of the CEN impacted one Handler and one Operations Agent at the WASA operation and five employees at the DCAA operation. Joint Ex. 5; Joint. Ex.8-18.
17. The transition of gatekeeper responsibilities at the Washington, D.C. location was labeled “Gatekeeper Staffing Effectiveness Project.” Those responsible for devising the project were Employee 3, Human Resources Advisor and Liaison to the Staffing Effectiveness Project; Employee 4, Human Resources Manager; and Employee 5, Senior Manager. Employee 6 Tr. at 40:24-41:4.
18. After determining that the CEN introduction would impact the job of seven employees, FedEx managers decided to implement their Staffing Effectiveness Policy (SEP) in an attempt to place employees in other FedEx jobs. Tr. at 148:23-149:5.
19. Employee 6, the Human Resources Advisor with FedEx’s Department of Human Resources, was tasked with the responsibility of explaining the SEP policy to the employees affected by the restructuring of the D.C. office and assisting them in being reassigned to other jobs within the company. Tr. at 19:6-22.
20. FedEx had a document known as the Manager’s Discussion Guide which identified the positions being “eliminated” as a result of the introduction of the CEN and discussed the process of the SEP in reassigning employees who had their jobs eliminated. Joint Ex. 5.

21. FedEx's SEP attempts to place employees whose jobs have been eliminated into other positions within the company; moved to a new location greater than 50 miles from their current location; or were affected due to organizational realignment or business need. Joint Ex. 3.
22. The SEP defines job elimination as the "cessation of 50% or more of a job's duties/responsibilities as a result of an organizational realignment or discontinuance of a function." Joint Ex. 3.
23. Staffing Reduction Forecast is defined as the "identification of position(s) that will be eliminated at a future date." *Id.* The seven positions were set to be eliminated in May of 2012, at which point the employees must have accepted the job offered to them by FedEx or requested severance in order to avoid termination. Joint Ex. 5.
24. The "Processes" section of the SEP states; "Once the employee(s) has been identified, the manager (with assistance from the HR Matrix) is responsible for obtaining a skills inventory from the employee." Joint Ex. 3. Additionally, the SEP provides that; "Such placements may require lateral moves, geographic relocation, assignment to a lower-graded position, a change in employment status (e.g. from full-time to part-time), or a change in shifts." Joint Ex. 3.
25. "If no position exists within the division for which the affected employee qualifies, the division head, with assistance from the HR matrix, will attempt to identify a comparable position (same pay line and within a 50 mile radius) elsewhere within the company." Ex. 3.
26. Under the "Placement Considerations" section of the SEP, a note reads; "[w]hen

merit hourly employees' jobs have been eliminated or migrated, their assignment or placement into new positions is based on business needs with consideration given to company continuous service and employment category." Ex. 3.

27. Neither the SEP nor any other documents or policies state that the Work Assignments policy (4-95) supersedes the SEP during a reduction-in-force. Joint Ex. 3; Joint Ex. 4.
28. Employee 6, Human Resources Advisor, testified that FedEx policies authorized her to institute Work Assignment policy as part of, and in the early stages of the SEP and that the policies resulted in several employees, including Employee 7, being reassigned before remaining employees were subject to the SEP. Tr. at 48:3-49:1.
29. Employee 7, a part-time Operations Agent with FedEx, was reassigned to work in a part-time position at FedEx's GAI-A operation in Rockville, Maryland before the employees selected to have their positions eliminated received notice of their impending layoff. Tr. at 29:4-6; Tr. at 67:9-14. It is undisputed by the parties that Employee 7, who is one year younger than Complainant, had worked at FedEx for 20 years and had approximately 6 fewer years of seniority than Complainant. Tr. at 16:21-17:2.
30. Employee 6 testified that Complainant, as a full-time employee, was ineligible for the part-time Operations Agent position while Employee 7, a part-time employee was eligible. Tr. 52:17-53:5
31. Employee 6 specifically referenced the SEP which reads, "Employees are normally offered and placed in any lateral or lower-graded positions identified within their division for which they are qualified except they must compete for

higher level management positions” Ex. 3 at 317.

32. However, Employee 6 later contradicted her testimony by admitting that additional language in the SEP would allow Complainant to be eligible for the part-time Operations Agent position. Tr. at 58:2-20. The SEP reads, “Placement Considerations, when merit hourly employees’ jobs have been eliminated or migrated, their assignment or placement to new positions is based on business needs with consideration given to company continuous service and employment category.” Ex. 3. Employee 6 testified that this language would provide no bar in moving Complainant to a part-time position. Tr. at 58:22-59:2.
33. Employee 1 testified that Work Reassignment policy is not implicated until later in the process under SEP. Tr. at 180:17-181:1. Additionally he testified that the Work Reassignment policy is not intended to obviate or negate the SEP. Tr. at 185:24-186:2.
34. On January 27, 2012, FedEx issued a “Status Change Letter” to Complainant and offered her the position of part-time Handler at the GAI-A station in Rockville, Maryland. Joint Ex. 12. Handlers were required to handle 75 pounds, to maneuver over 175 pounds with the help of others, and to load and unload tractor trailers, depending on the shift. Tr. at 90:23-91:8.
35. In 1992, Complainant was injured on the job in an accident involving a FedEx truck. As a result of her injury she had a lifting restriction that FedEx was aware of that prevented her from accepting the position. Tr. at 91:13-20; Tr. at 101:5-19. Employee 1 denied being aware of Complainant’s lifting restriction and acknowledged he had never reviewed her personnel record. Tr. at 172:7-8.

36. FedEx's SEP states under the caption "Processes" that "Once the employee(s) has been identified, the manager (with assistance from the HR Matrix) is responsible for obtaining a skills inventory from the employee." Joint Ex. 3. From the evidence presented in the hearing this step was not taken when Complainant was offered the handler position.
37. Complainant advised Employee 1 and Employee 6 upon being offered the handler position that she was not able to accept the job because of her lifting restriction. They both informed her they had no other positions to offer her nor did they make any effort to accommodate her lifting restriction. Tr. at 133:3-23.
38. FedEx has job listing system called JCATS (Job Change Application Tracking System) that is accessible to employees of the company when looking for reassignment opportunities within the company Joint Ex. 27.
39. Complainant checked through the JCATS for employment, but was unable to find any jobs that she was qualified for. Tr. at 134:8-17.
40. Complainant was very distraught over the impending loss of her job with FedEx and went out on medical leave on January 31, 2012 on the recommendation of her treating physician, She never returned to work. Complainant's Ex A. Tr. at 115:17-120:2.
41. Complainant was terminated on September 11, 2012 from her job with FedEx because her gatekeeping duties as an operations agent were absorbed by the CSAs working in CEN and she was not reassigned to another position. Joint Ex. 28.
42. In June 2013, Complainant learned that FedEx had hired Employee 8 and Employee 9 to fill CSA positions at its FedEx Washington, D.C. location. The two men were hired after CSA employees vacated those jobs. Tr. at 253-54.

43. Employee 8 and Employee 9 were hired between January 2012 and November 2014 to work in the FedEx gatekeeping room and they were assigned to do gatekeeping duties, the very same duties she had once carried out as an operations agent. Tr. at 256-57

#### IV. LEGAL ANALYSIS:

Complainant maintains that FedEx has discriminated against her on the basis of her age in violation of the DCHRA. The broad purpose of the DCHRA is “to secure an end in the District of Columbia to discriminate for any reason other than that of individual merit.” *See* D.C. CODE § 2-1401.01. The District of Columbia Court of Appeals has stated: “The Human Rights Act is a broad remedial statute, and is generously construed.” *George Washington Univ. v. D. C. Bd. of Adjustment*, 831 A.2d 921, 939 (D.C. 2003) citing *Wallace v. Skadden Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998); *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392, 398 (D.C. 1991). The Court of Appeals has also held that “[t]he right to equal opportunity without discrimination based on race or other such invidious ground is protected by a policy to which both this nation and its capital city accorded the highest priority.” *Harris v. D. C. Comm. on Human Rights*, 562 A.2d 625, 626 (D.C. 1989).

Under the District of Columbia Human Rights Act (“DCHRA”) it shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: age or of any individual:

(1) *By an employer*- To fail or refuse to hire, or to discharge, any individual or otherwise discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee; D.C. CODE 2-

1401.11(a)(1). Age is defined for the DCHRA as 18 years old or over. D.C. CODE §2-1401.02(2).

Complainant alleged that she was subjected to disparate treatment by FedEx due to her age (56). The standard for meeting the burden of proof in disparate treatment cases is set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *See also; Tex. Office of Community Affairs v. Burdine*, 450 U.S. 248, 248-9 (1981); *accord Rap, Inc. v. D. C. Comm. Human Rights*, 485 A.2d 173, 176 (D.C. 1984); *Cain v. Reinoso*, 43 A.3d 302, 306 (D.C. 2012). Under the *McDonnell Douglas* analytical construct, a complainant has the burden of proof in establishing a *prima facie* case. The Court held in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), that once the plaintiff has established a *prima facie* case of discrimination it “raises the inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” The burden of production then shifts to the respondent to articulate a legitimate nondiscriminatory reason for taking the action in question.

The burden the defendant must meet is only to articulate a legitimate, nondiscriminatory reason for the action in question, not to prove that the reason given was in fact the reason for the action taken. *McDonnell* 411 U.S. at 804. Should the respondent meet its burden of articulating a legitimate nondiscriminatory reason for the conduct, the complainant then has the opportunity to prove by a preponderance of the evidence that the legitimate nondiscriminatory reasons offered by the respondent were not the true reasons for the action taken, but pretext for discrimination. *Tex. Office of Community Affairs*, 450 U.S. at 254 (1981); *Hollins v. FNMA*, 760 A.2d 563, 569 (D.C. 2000). It is noted that the burden of proof of showing the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *See Bd. of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).

In order to establish a *prima facie* case of disparate treatment, a complainant has the burden of proof to demonstrate that:

- (1) that she is member of a protected class and respondent knew or suspected that she was;
- (2) that she suffered an adverse action;
- (3) that the adverse action occurred despite her employment qualifications;
- (4) that the adverse action gives rise to an inference of discrimination.

*See Cain* 43 A.3d at 307; *Arthur Young & Co. Sutherland*, 631 A.2d 354, 362 (D.C. 1993).

Applying the facts of this case to the elements of the *prima facie* case of age discrimination, this judicial officer has concluded that Complainant has cited two incidents of alleged disparate treatment on the basis of age. The first incident was when she was not offered the part-time position of Operations Agent when she was notified January 27 2012 by FedEx her full-time Operations Agent position was being eliminated. The second incident occurred when FedEx hired two men younger than Complainant to CSA positions and they were assigned to perform the gatekeeping duties the Complainant once performed as an Operations Agent. Although the two CSAs were hired in 2012, Complainant did not become aware of them being hired until July 2013. Based on this second incident Complainant filed her complaint of discrimination on October 4, 2013.

Pursuant to the District of Columbia Human Rights Act (“DCHRA”), a complaint of discrimination must be filed within one year of the occurrence of the unlawful discriminatory or the discovery thereof. *See* District of Columbia Code § 2-1403.04 (a), Complainant first discovered the first occurrence of alleged discrimination against her by FedEx in January 2012. In order for her to file a timely complaint of this alleged act of discrimination she should have filed in January 2013. Her complaint as to this incident is found to be untimely. Her appeal of the

second incident of alleged discrimination is found to be timely because she only learned of the CSAs being hired in July of 2013 and she filed her complaint three months later. For these reasons, this judicial officer can only consider the second incident of alleged discrimination.

Complainant established the first element of her *prima facie* case as to the second incident of discrimination, that she was a member of a protected class. The DCHRA lists age as being a trait that is protected under the Act. *See* D.C. CODE § 2-1401.01 (a) (1); D.C. CODE § 2-1401.02 (2). It is undisputed that Complainant is 56 years old. Findings of Facts at ¶ 1 [hereinafter cited as “Facts”].

Complainant established the second element - that she suffered an adverse action. On January 27, 2012, FedEx issued a letter to Complainant that stated her position of Operations Agent was being abolished effective May 12, 2012. Facts at ¶ 20.

Complainant has also established the third element – that the adverse action occurred despite her employment qualifications. FedEx did not offer any evidence that Complainant was not qualified for her position that she had worked for 26 years. Facts at ¶ 3.

Finally, Complainant has established the fourth element – that her adverse action gives rise to an inference of discrimination. FedEx hired two younger employees to carry out Complainant’s former duties.

In 2013, Complainant learned FedEx had hired two young men, Employee 8 and Employee 9 had been hired to replace CSAs, who had left their jobs with FedEx at the DC location. Facts at ¶ 40. These men were carrying out the gatekeeping duties Complainant had once performed. Facts at ¶ 41. The CSA positions also included performing caretaker duties, traces and customer service.. Facts at ¶ 14.

The burden then shifts to FedEx to articulate a legitimate nondiscriminatory reason for why Complainant was terminated from her job as an operations agent. FedEx argued that they

made the decision to eliminate the seven positions that performed gatekeeper duties as an effort ensure efficient, cost effective service to its customers. The undersigned judicial officer notes that FedEx has articulated a legitimate nondiscriminatory reason for why Complainant was dismissed from her position of employment with the company.

The burden shifts back to Complainant to establish by a preponderance of the evidence that FedEx's articulated legitimate nondiscriminatory reason for why it terminated her was pretext for their discriminating against her on the basis of her age.

The undersigned judicial officer does not find that Complainant met her burden of proof in establishing that the legitimate nondiscriminatory reason given by FedEx for why she was terminated was pretext. Complainant was not able to prove that FedEx discriminated against her on the basis of age when it hired Employee 8 and Employee 9 to the positions of CSAs in 2012. It was undisputed that Complainant's position of Operations Agent was eliminated at FedEx's D.C. and the gatekeeping duties in that job were transferred to the CSA positions in the CEN department. The CSAs duties included gatekeeping, caretaking, traces, and total customer care. When Employee 8 and Employee 9 were hired to the jobs of CSAs in 2012 they replaced CSAs, who had left the company. The evidence is insufficient to support a finding that the hiring of these individuals constituted discrimination based on age against Complainant.

## V. CONCLUSIONS OF LAW

1. The Commission concludes as a matter of law that the first incident of alleged discrimination is dismissed as being untimely.
2. As to the second incident of alleged discrimination based upon the foregoing Findings of Fact and discussion, The Commission concludes as a matter of law that the Respondent did not subject the Complainant to disparate treatment based on her age (56) when she was terminated from her position of Operations Agent.

VI. ORDER

The Commission enters a judgment for the Respondent and the Complainant's complainant is dismissed with prejudice.

So Ordered this 6th day of November, 2017.

*Eleanor Collinson*

**Commissioner Eleanor Collinson**

*Karen Mulhauser*

**Commissioner Karen Mulhauser**

*Earl D. Fowlkes, Jr.*

**Commissioner Earl D. Fowlkes, Jr.**