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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD CLAUSNITZER, GABRIEL) Case No. SACV 05-1269 DOC (ANx)
CONTRERAS, ANDY KUBICKI,)
FRANK MARTINEZ, JODY LYNN) AMENDED COMPLAINT
MITCHELL, and all those)
similarly situated) [ADEA COLLECTIVE ACTION]
)
)
Plaintiffs,) DEMAND FOR JURY TRIAL
)
vs.)
)
)
FEDERAL EXPRESS CORPORATION)
and Does 1 through 10,)
inclusive)
)
)
Defendants.)
_____)

AMENDED COMPLAINT

1. This suit is brought to enforce and secure rights of Plaintiffs and other similarly situated older employees under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq., and to eliminate and correct the nationwide pattern and

practice of the Defendant Federal Express Corporation ("FedEx")

1 of discriminating against its couriers who are over the age of
2 forty.

3 JURISDICTION AND VENUE

4 2. This Court has jurisdiction over this case under 29
5 U.S.C. § 626(c) and 28 U.S.C. § 1332, § 1337. Plaintiffs
6 Contreras, Kubicki, and Martinez are employed by Federal Express
7 Corporation at its station in Fullerton, California. Venue in
8 this District is appropriate under the ADEA, 29 U.S.C. § 626(c).

9 PARTIES

10 3. Plaintiff Ronald Clausnitzer ("Clausnitzer") is an adult
11 resident of Dunedin, Florida. He has been employed by Defendant
12 as a courier since December 3, 1983. His primary job site has
13 been FedEx's Clearwater station in Dunedin, Florida. He was born
14 on September 28, 1955.

15 4. Plaintiff Gabriel Contreras ("Contreras") is an adult
16 resident of Brea, California. He has been employed by Defendant
17 as a courier since June 5, 1986. His primary job site has been
18 FedEx's station in Fullerton, California. He was born on October
19 29, 1961.

20 5. Plaintiff Andy Kubicki ("Kubicki") is an adult resident
21 of Yorba Linda, California. He has been employed by Defendant as
22 a courier since September 10, 1984. His primary job site has
23 been FedEx's station in Fullerton, California. He was born on
24 July 18, 1952.

25 6. Plaintiff Frank Martinez ("Martinez") is an adult
26 resident of Brea, California. He has been employed by Defendant
27 as a courier for more than 10 years. His primary job site has
28 been FedEx's station in Fullerton, California. He was born on
January 7, 1951.

1 7. Plaintiff Jody Lynn Mitchell is an adult resident of
2 Salt Lake City, Utah. She has been employed by Defendant as a
3 courier for more than 10 years. Her primary job site has been
4 FedEx's station in Midvale, Utah. After working successfully for
5 Defendant for 16 years, she was transferred to West Valley City
6 in 2003 where she was subject to discriminatory treatment,
7 including false accusations and unfair write-ups by her
8 supervisor. After working for Defendant for 16 years, she was
9 transferred to West Valley City in 2003. Defendant terminated
10 her employment in September 2005. She was born on July 3, 1960.

11 8. Plaintiffs who have either joined this action via
12 opting-in pursuant to 29 U.S.C. § 216(b) or who have expressed
13 the desire to join this action after experiencing Defendant's
14 discriminatory policies and practices live and work throughout
15 the United States, including the states of Colorado, Florida,
16 Iowa, Illinois, Indiana, New Jersey, New York, Ohio, Tennessee,
17 Utah, and Washington.

18 9. Defendant Federal Express Corporation ("FedEx" or
19 "Defendant") is a corporation engaged in the transportation of
20 packages by air and by ground throughout the United States. The
21 corporation's headquarters are in Memphis, Tennessee. FedEx is
22 an employer within the definition and coverage of 29 U.S.C. §
23 630(b) of the ADEA, the California Government Code, and other
24 state laws prohibiting age discrimination.

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EEOC HISTORY

1 10. Plaintiff Kubicki filed a charge of age discrimination
2 against FedEx with the Equal Employment Opportunity Commission
3 ("EEOC") on November 10, 2005, EEOC Case Number: 345-2006-00241.

4 The charge was cross-filed with California's Department of Fair
5 Employment and Housing ("FEHA"). He described the charge as a
6 "Nationwide Class Action Charge" and alleged that FedEx "has
7 engaged in Age discrimination against me and other older
8 couriers." Kubicki was sent a right-to-sue letter from FEHA on
9 December 27, 2005.

10 11. In his charge, Plaintiff Kubicki asserted that, at age
11 53, he is among the oldest couriers at his station. He also
12 alleged that Defendant's method of measuring productivity in
13 terms of delivery stops per hour is discriminatory because
14 Defendant uses the productivity numbers to get rid of older
15 couriers. The productivity requirements are fabricated and
16 changed in ways to get rid of older couriers.

17 12. Plaintiff Kubicki alleged that he has been singled out
18 by a manager who has stated that "we have a problem with those
19 older couriers." He has also been removed from a sort function
20 with the result that some of his work hours have now been given
21 to a younger employee. The change in his job duties also means
22 that he has less time to set up his truck, which will make him
23 appear to management to be less productive. Kubicki fears that
24 he will be terminated at any time.

25 13. Plaintiff Clausnitzer filed a charge with the Tampa
26 office of the EEOC on October 22, 2003 in which he alleged that
27 "Federal Express, consistent with their previously established
28 pattern of retaliation and discrimination against older couriers,

1 devised and executed a plan to deter [others] and myself (Ron
2 Clausnitzer) from exercising our rights under the Age
3 Discrimination in Employment Act.”

4 14. On or about January 27, 2005, Clausnitzer filed an
5 additional charge alleging that he was a target for termination
6 because Defendant was engaging in a patter of retaliation against
7 him and other older couriers. On March 31, 2005, he filed an
8 Amended Class Action charge alleging that in later 1994 and early
9 1995, FedEx adopted and implemented nationwide age discriminatory
10 policies and practices designed to cause older couriers to leave
11 their employment either by directly terminating them or by
12 issuing them repeated notices of less than acceptable
13 performance. By letter dated October 3, 2005, the EEOC advised
14 Clausnitzer of his right to file suit within ninety (90) days of
15 the date he received the letter. Plaintiff Clausnitzer received
16 the letter a few days after it was sent in mid-October, 2005.
17 This suit was filed on December 28, 2005, well within the 90 day
18 period Plaintiff had to fie suit.

19 STATEMENT OF FACTS

20 15. Defendant employs thousands of couriers throughout the
21 United States. On information and belief, hundreds or more of
22 these couriers are age 40 or older.

23 16. Each of the Plaintiffs is a full-time courier or former
24 full-time courier for FedEx. Each has received excellent or good
25 performance evaluations from the time he or she was hired until
26 at least 1994.

27 / / / /
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1 17. Since November 1994, FedEx has utilized a compensation
2 system called "Best Practices Pays" ("BPP"). FedEx also uses a
3 standard for assessing the performance of couriers called
4 "Minimum Acceptable Performance Standards" ("MAPS").

5 18. Upon information and belief, BPP and MAPS have been
6 used by Defendant to force or encourage older, experienced
7 couriers to quit or otherwise leave their employment with FedEx,
8 and to do so before they became 55 years of age.

9 19. FedEx has given managers and other supervisors lists of
10 older couriers who are targets for increased supervision,
11 discipline, harassment and termination from employment. This
12 targeting is based strictly upon age. FedEx has not engaged in
13 similar targeting of younger couriers.

14 20. Under the policies first adopted in 1994 and
15 implemented and intensifying thereafter, FedEx gives older
16 couriers who are injured on the job or who otherwise require
17 medical absence intense scrutiny and harassment, and finds
18 reasons to discharge them or induce them to leave. FedEx has not
19 treated younger couriers who have been injured or who have
20 otherwise required medical absences with such scrutiny and
21 harassment; nor have younger couriers been discharged or induced
22 to leave their employment with FedEx.

23 21. FedEx has interpreted and administered BPP and MAPS in
24 a manner that harms couriers who are over the age of 40.

25 22. Although BPP and MAPS do not mention age, the two
26 programs have become vehicles by which FedEx causes its older
27 couriers to quit or be discharged from its employment. Those
28 procedures and others are administered by FedEx in a manner that
rarely if ever causes the termination of younger couriers.

1 23. Defendant has also terminated older couriers for taking
2 the same actions as younger couriers while the younger couriers
3 were not disciplined or terminated. Older couriers have been
4 terminated for trivial reasons when they have no record of
5 discipline or performance problems. Older couriers fear
6 termination because their actions are highly scrutinized by
7 management while the actions of younger couriers are not.

8 24. Older couriers have also been falsely accused of
9 wrongdoing and have had their performance appraisals affected
10 negatively as a result.

11 25. Defendant has also forced older couriers to retire by
12 assigning them to routes that are likely to cause injuries. When
13 the couriers take short or long term disability leave to have
14 surgery or allow their injuries to heal, their jobs are no longer
15 available to them when they are ready to return to work. When
16 faced with the alternative of taking a position with FedEx for
17 significantly less pay and/or having to take a position in a
18 different state, the older couriers simply quit.

19 26. Under the policies and practices described above, FedEx
20 has shown preference to younger, less experienced couriers in
21 starting times, assignments of production goals, overtime
22 assignments, route assignments, discipline, performance
23 evaluations and other terms and conditions of employment as
24 compared to older couriers, including Plaintiffs.

25 27. Employment practices that discriminate against older
26 couriers and favor younger couriers are the prevailing pattern
27 and practice of FedEx in the United States. Upon information and
28 belief, FedEx has continued to follow employment practices in the
United States that favor younger couriers and harm older

couriers.

1 28. As part of its compensation to couriers, FedEx provides
2 a health plan that assures assistance to the employee in the
3 payment of medical expenses, drug prescriptions, and dental
4 expenses. FedEx provides a Medical Absence Pay and Short Term
5 and Long Term disability benefits if a courier is sick or injured
6 and unable to work. FedEx provides a pension plan, a profit
7 sharing plan, a retirement saving plan, and an optional savings
8 plan. FedEx's contribution to these plans costs the corporation
9 thousands of dollars per courier in addition to the courier's
10 regular wages. In a booklet distributed to couriers in or about
11 1994, FedEx estimated that a courier earning \$33,893 in gross pay
12 cost the corporation another \$15,161 in employee benefits. On
13 information and belief, the benefits FedEx pays to couriers cost
14 the company about 45% of the courier's gross pay

15 29. Upon information and belief, FedEx has adopted and
16 applied BPP and MAPS in a discriminatory manner to encourage or
17 require its older couriers to leave their employment before they
18 become eligible for retirement. FedEx took such actions, based
19 on the belief that elimination of older couriers from its work
20 force would reduce its labor costs and the costs of its health
21 and medical benefits, retirement program, and other employee
22 benefit plans.

23 30. Defendant's discriminatory practices have harmed
24 Plaintiffs and other similar situated employees over the age of
25 forty. Those practices resulted in the termination of the
26 employment of some members of the class. Other class members
27 have suffered from a loss of income and other benefits, or other
28 disadvantageous terms and conditions of employment.

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31. Unless restrained by order of this Court, Defendant will continue to pursue policies and practices that cause Plaintiffs and other similarly situated older couriers to suffer irreparable harm.

CLAIM ONE

For Discrimination in Violation of the ADEA

(On Behalf of All Plaintiffs and the Class)

32. Plaintiffs reassert and reallege paragraphs 1 through 31, inclusive, as if fully set forth and incorporate said paragraphs herein by reference.

33. Plaintiffs and the class of similarly situated older couriers are all age 40 or older.

34. Plaintiffs and the class of similarly situated older couriers were all well-qualified to perform the job responsibilities of a FedEx courier. Each performed his or her job in a satisfactory manner.

35. The employment practices of FedEx described above in paragraphs 12 through 28 harmed Plaintiffs and the class of similar situated older couriers while favoring younger couriers. The practices so described and are not based upon a reasonable factor other than age.

36. Defendant has knowingly and purposefully engaged in age discriminatory practices with the full knowledge that in so doing it was discriminating against its older couriers, without regard for the rights of those couriers under the ADEA.

37. Defendant has followed the age discriminatory employment practices described above and has shown reckless disregard for the rights of its couriers under the ADEA and under relevant provisions of state laws prohibiting age discrimination

in employment.

1 38. Defendant has not asserted a reasonable factor other
2 than age as a justification for its age discriminatory practices.

3 Defendant has no bona fide occupational qualification or
4 business necessity to justify its discriminatory practices
5 against its older couriers.

6 CLAIM TWO

7 For Violation of Cal. Gov. Code § 12940

8 (On Behalf of the Class of California Residents)

9 39. Plaintiffs reassert and reallege paragraphs 1 through
10 38, inclusive, as if fully set forth and incorporate said
11 paragraphs herein by reference.

12 40. Section 12940 of California's Government Code makes it
13 unlawful:

14 For an employer, because of the . . . age . . . of any
15 person . . . to discharge the person from employment . . .
16 or to discriminate against the person in compensation or in
17 terms, conditions, or privileges of employment.

18 41. There are thousands of couriers employed by Defendant
19 in the state of California. On information and belief, at least
20 several hundred of these couriers are 40 or older.

21 42. The practices alleged in paragraphs 12 through 28 are
22 unlawful under California's Fair Employment and Housing laws,
23 Cal. Gov. Code § 12940. Plaintiffs Contreras, Kubicki, and
24 Martinez are all over age 40 and seek to represent the class of
25 couriers over 40 years of age who work in California.

26 43. Plaintiff Kubicki has exhausted the administrative
27 requirements of California's Fair Employment and Housing laws.

28 44. The claims of Plaintiffs Contreras, Kubicki, and

1 Martinez and of other older couriers share common questions of
2 fact and law, including whether Defendant intentionally engaged
3 in a pattern or practice of age discrimination against its older
4 couriers by implementing company-wide employment practices that
5 were intended to, and did result in driving older couriers out of
6 their employment as couriers; and whether Defendant engaged in
7 policies and practices that discriminated against couriers over
8 age 40 that were not required by or consistent with business
9 necessity.

10 45. The claims of Plaintiffs Contreras, Kubicki, and
11 Martinez are typical of the age discrimination claims of the
12 class they seek to represent. Plaintiffs are current couriers
13 who have been harassed and discriminated against in the terms and
14 conditions of their employment. Plaintiffs all claim that
15 Defendant intentionally engaged in a pattern or practice of age
16 discrimination against older couriers by implementing company-
17 wide plans that were intended to and did drive older couriers out
18 of the company disproportionately. The factual issues concerning
19 liability under the state law claim are identical or similar to
20 the issues concerning liability under the ADEA.

21 46. Plaintiffs are adequate representatives of the class
22 they seek to represent because they are not and have never been
23 supervisors or members of management. There are no conflicts of
24 interests between themselves and the class they seek to
25 represent. In addition, Plaintiffs have retained experienced
26 counsel with a multi-state practice in age discrimination
27 matters, collective actions, and other employment discrimination
28 matters.

47. The actions taken against Plaintiffs and other older

couriers constitute discrimination under Cal. Gov. Code § 12940.

1
2 48. As a direct and proximate result of Defendant's
3 deliberate, intentional, and unlawful violation of Plaintiffs'
4 statutory rights, Defendants wrongfully caused Plaintiffs and
5 other older couriers to lose income and benefits and to suffer
6 humiliation and personal embarrassment.

7 49. The acts committed by Defendant were committed with
8 oppression, fraud, and malice and resulted in emotional distress
9 to Plaintiffs and other older couriers.

10 50. Defendant has not asserted a reasonable factor other
11 than age as a justification for its age discriminatory practices.
12 Defendant has no bona fide occupational qualification or business
13 necessity to justify the discrimination against its older
14 couriers.

15 CLAIM THREE

16 For Retaliation in Violation of the ADEA

17 (On Behalf of Plaintiff Clausnitzer)

18 51. Plaintiff Clausnitzer reasserts and realleges
19 paragraphs 1 through 50, inclusive, as if fully set forth and
20 incorporate said paragraphs herein by reference.

21 52. On or about December 1, 2003, Defendant began taking
22 adverse actions against Plaintiff Clausnitzer as part of a plan
23 of retaliation for Clausnitzer's participation in two previous
24 lawsuits against FedEx (*Freeman, et al. v. Federal Express Corp.*
25 and *Bost, et al. v. Federal Express Corp.*).

26 53. Plaintiff Clausnitzer's senior manager, Robert Saiz,
27 demanded that Plaintiff meet certain unrealistic performance
28 standards or be terminated. On information and belief, Mr. Saiz
was instructed to eradicate the Clearwater, Florida station of

1 "dead wood". In January 2004, Plaintiff Clausnitzer was told
2 that he was one of the "targets".

3 54. In January and/or February 2004, Plaintiff
4 Clausnitzer's route goals were changed by Defendant without
5 notice or reason. While younger couriers' routes were
6 reorganized and condensed, Plaintiff Clausnitzer's routes were
7 significantly increased by the addition of bulk stops, early
8 pickups, and more diverse delivery situations.

9 55. In April 2005, plaintiff Clausnitzer was targeted and
10 disciplined for productivity issues under MAPS. Unlike his other
11 younger co-workers, Defendant changed the basis upon which his
12 performance is measured so that his performance appears to be
13 below the MAPS "goals". Based on this alleged sub-standard
14 performance, Plaintiff Clausnitzer is closer to termination than
15 his younger co-workers.

16 56. Defendant took such adverse actions against Plaintiff
17 Clausnitzer knowing that Plaintiff had complained of age
18 discrimination before both the EEOC and in federal court.

19 57. As a result of Defendant's retaliation, Plaintiff
20 Clausnitzer has suffered harm, including emotional and mental
21 distress.

22 **PRAYER FOR RELIEF**

23 Plaintiffs pray for orders requiring the Defendant to
24 notify, in a form to be approved by the Court, all current
25 couriers over the age of 40, and former couriers who had reached
26 the age of 40, before their employment with Federal Express was
27 terminated, of the allegations in this law suit and the right to
28 participate in this suit; and

Plaintiffs pray for an order granting class certification on

behalf of all California residents;

1 Plaintiffs pray for an order preliminarily and permanently
2 enjoining Defendant and its officers, agents, employees,
3 successors and all persons from engaging in employment practices
4 that discriminate against older couriers on grounds of age, and
5 from following neutral employment practices that have a
6 discriminatory impact against older couriers, unless the employer
7 can show that such practices are based upon a "reasonable factor
8 other than age" within the meaning of the ADEA. Such an order
9 should enjoin the Defendant from:

10 1) treating older couriers less favorably than younger
11 couriers in the allocation of routes, start times, overtime
12 opportunities, discipline and other terms and conditions of
13 employment;

14 2) terminating or disciplining older couriers who are absent
15 from work because of injuries or other medical problems while
16 they are recovering from same, in the absence of solid medical
17 evidence that they are disabled from performing the duties of a
18 courier;

19 / / / /

20 3) treating older couriers less favorably than younger
21 couriers in discipline and other terms and conditions of
22 employment;

23 4) following employment practices such as BPP and MAPS and
24 other practices that have a discriminatory impact against older
25 couriers, unless this Court determines that any such practice is
26 based upon a reasonable factor other than age;

27 5) failing or refusing to reinstate older couriers whose
28 employment was terminated by Defendant because of their age or

1 because of unlawful practices by Defendant which resulted in
2 their separation from employment by Defendant not based upon a
3 factor other than age;

4 6) retaliating against any couriers who have opposed any
5 discriminatory policies or practices, or who have made a charge,
6 testified, assisted, or participated in any manner in an
7 investigation, proceeding, or litigation.

8 Plaintiffs further pray for an award of damages to them and
9 plaintiffs who opt into this suit for:

10 1) loss of income and the value of fringe benefits as
11 determined by the jury; including the loss of future earnings for
12 those couriers who have lost their positions with Defendant until
13 such time as they are reinstated or offered reinstatement;

14 2) an award of liquidated damages as determined by the jury;

15 3) an award of punitive damages for violations of FEHA as
16 determined by the jury;

17 4) an award of compensatory damages for violations of FEHA
18 as determined by the jury;

19 / / / /

20 5) pre-judgment interest in an amount to be determined;

21 6) costs of litigation, including expenses and attorneys'
22 fees and expert witness fees; and

23 7) such other relief as may be just.

24 Dated: March , 2006

Respectfully submitted,

26 David L. Rose
27 Terri N. Marcus
Attorneys for PLAINTIFFS

DEMAND FOR JURY TRIAL

1 Plaintiffs hereby demand a jury trial as provided by Rule
2 38(a) of the Federal Rules of Civil Procedure.
3

4 DATED: March , 2006

ROSE & ROSE, P.C.

6 By: _____

David L. Rose
Terri N. Marcus
Attorneys for PLAINTIFFS

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