

CV 09 3018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
THOMAS MESSINA,

Plaintiff,

- against -

UNITED PARCEL SERVICES, INC. and
BENJAMIN ZMIGRODSKI,

Defendants.
-----X

(S.F.)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

COMPLAINT

★ JUL 15 2009

Jury Trial Demanded

LONG ISLAND OFFICE

HURLEY, J.
WALL, M.J.

Plaintiff, **THOMAS MESSINA**, by and through his attorneys, Leeds Morelli & Brown, P.C., alleges, upon knowledge as to himself and his own actions and upon information and belief as to all other matters, as follows:

JURISDICTION AND VENUE

1. This is a civil action based upon the Defendants' violation of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"); the New York State Executive Law, Human Rights Law, §296 *et seq*; and any other cause of action which can be inferred from the facts set forth herein.
2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343 (4), 1367, 2201. The pendent jurisdiction of the Court (28 U.S.C. § 1367) is invoked over state law causes of action.
3. Venue is proper pursuant to 28 U.S.C. § 1391.

4. All conditions precedent to maintaining this action have been fulfilled. Plaintiff has filed a formal administrative complaint with the Equal Employment Opportunity Commission and has received a Right to Sue letter dated April 20, 2009 which is attached as Exhibit A. This action is filed within 90 days of Plaintiff's receipt of his Right to Sue letter.

PARTIES

5. Plaintiff, Thomas Messina, was and still is a resident of the County of Nassau, State of New York.
6. Defendant, United Parcel Service, Inc. ("UPS) was and still is a corporation doing business at 55 Glenlake Parkway, Atlanta, Georgia with a local office located at 184-54 149th Avenue, Springfield Gardens, NY 11413.
7. Defendant, Benjamin Zmigrodski ("Zmigrodski"), was and still is employed as a manager at the United Parcel Service, Inc. located at 184-54 149th Avenue, Springfield Gardens, Queens County, NY 11413. Zmigrodski was, and is, responsible for UPS' maintenance and operation, including, but not limited to, the hiring, firing, granting of promotions and discipline of employees and all other employment related issues. Additionally, said defendant is a policymaker for UPS, charged with the responsibility of ensuring that employees are not subjected to harassment or discriminating treatment. He is also responsible for properly training and supervising employees with respect to harassment, discrimination

and retaliation. Zmigrodski had the power to make personnel decisions regarding Plaintiff's employment and aided, abetted, compelled and/or incited the unlawful treatment set forth below.

BACKGROUND FACTS

8. Thomas Messina ("Messina") commenced his employment with "UPS" in or about October 1995.
9. Plaintiff has a physical impairment, which substantially limits one or more of his major life activities namely intestinal cancer.
10. Plaintiff is 58 years of age.
11. On or about January 31, 2007, Messina was terminated from his position at UPS for allegedly taking "unauthorized breaks under circumstances establishing that an employee was intentionally wasting excessive time...."
12. When Messina filed a grievance with his union, Local 295, against UPS regarding his termination, the Union and Messina met with UPS to resolve the dispute.
13. On or about March 31, 2008, Messina, UPS and Local 295, entered into a resolution called the "Last Chance and Settlement Agreement" ("the agreement"). The agreement stipulated that Messina would return to work on April 1, 2008, with a time served suspension. It stipulated that Messina's reinstatement and

continued employment with UPS was conditioned upon his enrollment in, and successful completion of, the anger management course recommended by the Teamster Center Services. Additionally, Messina was required to continue participation in the therapy sessions recommended by the Teamster Center Services.

14. On or about April 1, 2008, the day Messina was scheduled to return to work, he was feeling very ill. At this time, Messina was unsure of why he was feeling ill, but he was eventually diagnosed with cancer. Messina called Ron Cotti ("Cotti") at UPS and informed him that he was not feeling well and would not be able to come in that day because he was going to see a doctor. Later that day, Messina's doctor, Dr. Sanz, scheduled Messina for a colonoscopy on April 4, 2008. Dr. Sanz wrote Messina a note stating that he would be undergoing several medical tests and would not be able to return to work for the remainder of the week. Messina also called Ben Zmigrodski ("Zmigrodski"), his manager at UPS, Sandra Atkins, a Teamster Center Representative and Edward McCormack of Local 295, to update them on his condition.
15. On or about April 2, 2008, Messina underwent a CAT scan.
16. On or about April 3, 2008, Messina hand delivered Dr. Sanz's note regarding his scheduled medical tests to Cotti at UPS.

17. On or about April 4, 2008, Messina underwent a colonoscopy and had a biopsy taken.
18. On or about April 7, 2008, Messina had a session scheduled with the therapist he was required to see under the agreement with UPS. Messina called his therapist, Dr. Robert Adamns, explained his medical condition, and told him that he would call to reschedule when he was able to resume therapy sessions.
19. Later that day, Messina had an appointment with Dr. Sanz, where he was informed that he had large intestine cancer. Messina requested a letter for work, and Dr. Sanz told him that he would have his office prepare one. Messina then called Cotti to inform him that he had been diagnosed with cancer.
20. On or about April 8, 2008, Messina underwent an endorectal sonogram to further pinpoint the location and extent of his cancer.
21. On or about Friday, April 11, 2008, Messina received a letter from Dr. Sanz to provide to UPS.
22. On or about Monday, April 14, 2008, Messina received a phone call from Ben Zmigrodski ("Zmigrodski"), his manager at UPS. Zmigrodski questioned Messina about his cancer. Messina informed Zmigrodski that he had received the letter from his doctor, and that his wife was making a copy to give to UPS.

23. On or about April 15, 2008, Messina spent the entire day at Sloan Kettering Memorial Hospital in New York City for issues relating to his cancer diagnosis and cancer treatment.
24. On or about April 16, 2008, Messina sent the letter from his doctor, Dr. Sanz, to the attention of Ben Zmigrodski at UPS and Lou Calemine at Local 295, via overnight mail.
25. On or about April 17, 2008, Dr. Sanz's letter, addressed to both Ben Zmigrodski and Lou Calemine, was received and signed for by UPS and Union Local 295.
26. On or about April 18, 2008, Messina had a medical oncology consultation at Sloan Kettering Memorial Hospital in Rockville Center.
27. On or about April 19, 2008, Messina underwent a CAT scan of his chest for issues relating to his cancer diagnosis.
28. On or about April 23, 2008, Messina had a medical radiology consultation at Sloan Kettering Memorial Hospital in Rockville Center.
29. On or about April 24, 2008, Messina continued his radiology consultation at Sloan Kettering Memorial Hospital in Rockville Center.

30. On or about April 25, 2008, Messina went to UPS to update Zmigrodski on his condition. Zmigrodski was not in his office, so Messina waited an hour and then related the information to the manager in charge, Edward Figeron, who wrote down Messina's information and assured Messina that he would give it to Zmigrodski.
31. On or about April 28, 2008, Messina underwent surgery at North Shore Medical Center in Plainview to have a port inserted for chemotherapy.
32. On April 28, 2008, Messina received a termination letter from UPS. Said termination letter, dated April 23, 2008, stated that "as a result of your incompliance, as described in 'Last Change and Settlement Agreement', your employment at United Parcel Service has been terminated and your seniority lost."
33. Messina was terminated from UPS after nearly thirteen (13) years with the company for allegedly failing to keep his therapy sessions as stipulated in the agreement when, in reality Messina was terminated because of his cancer diagnosis. Messina was clearly unable to keep his therapy sessions as stipulated in the agreement because he had been diagnosed with cancer and was undergoing extensive medical treatment. Messina followed procedures and informed UPS

management of his medical situation in an appropriate and timely manner. Messina also called his therapist to explain that he needed to reschedule his appointments.

34. Based on the foregoing, Plaintiff has been subjected to unlawful disability discrimination in violation of the “American with Disabilities Act Amendment Act of 2008,” as well as all applicable provisions of state and local law.

CLAIMS FOR RELIEF

35. Plaintiff repeats, reiterates and re-alleges each and every allegation set forth above with the same force and effect as if more fully set forth herein.
36. The Defendants wrongly discriminated against Plaintiff based on his disability. These actions are in violation of the Americans with Disabilities Act Amendment Act of 2008; and the New York State Executive Law, Human Rights Law, § 296 *et seq.*
37. As more fully set forth above, Zmigrodski aided, abetted, incited, compelled and/or coerced the aforementioned unlawful conduct in violation of New York State Executive Law, Human Rights Law, § 296.

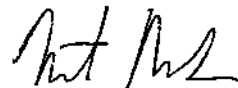
38. By reason of Defendants' violation of Plaintiff's rights, Plaintiff has suffered a loss of monetary benefits associated with his employment in addition to suffering physical, emotional and other damages.

WHEREFORE, Plaintiff demands judgment against Defendants, where applicable, for all compensatory, emotional, physical, liquidated, and punitive damages (where applicable), lost pay, front pay, injunctive relief, and any other damages permitted by law. Specifically, Plaintiff demands judgment against Defendants in an amount to be determined by a jury for compensatory damages and punitive damages (where applicable). It is further requested that this Court grant reasonable attorneys' fees and the costs and disbursements of this action and any other relief to which Plaintiff is entitled. Plaintiff demands a trial by jury.

Dated: Carle Place, New York
July 14, 2009

Respectfully Submitted,

LEEDS, MORELLI & BROWN, PC
Attorneys for Plaintiff
One Old Country Road, Suite 347
Carle Place, New York 11514
(516) 873-9550



MATTHEW MARKS- 5848

Exhibit A

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)

To: **Thomas Messina**
30 Buttercup Lane
Levittown, NY 11756

From: **New York District Office**
33 Whitehall Street
5th Floor
New York, NY 10004

On behalf of person(s) aggrieved whose identity is
CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
16G-2008-05833	John B. Douglass, Supervisory Investigator	(212) 336-3765

(See also the additional information enclosed with this form.)

NOTICE TO THE PERSON AGGRIEVED:

Title VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA): This is your Notice of Right to Sue, issued under Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII or the ADA **must be filed in a federal or state court WITHIN 90 DAYS** of your receipt of this notice; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

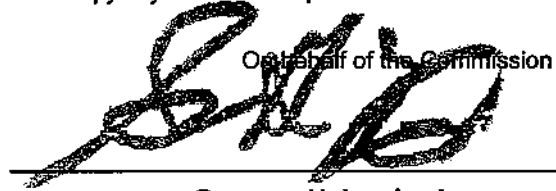
- More than 180 days have passed since the filing of this charge.
- Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.
- The EEOC is terminating its processing of this charge.
- The EEOC will continue to process this charge.

Age Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, **the paragraph marked below applies to your case:**

- The EEOC is closing your case. Therefore, your lawsuit under the ADEA **must be filed in federal or state court WITHIN 90 DAYS** of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.
- The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

Equal Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.


On behalf of the Commission

**Spencer H. Lewis, Jr.,
Director**

04/20/2009

(Date Mailed)

Enclosures(s)

cc: **UNITED PARCEL SERVICE, INC.**
Legal Department
55 Glenlake Parkway N.E.
Atlanta, GA 30328

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