

COPY

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

04 0363

MARK HOHIDER and ROBERT DIPAOLO,)
On Behalf of Themselves and All Others)
Similarly Situated,)

Plaintiffs,)

v.)

UNITED PARCEL SERVICE, INC., and DOES)
1-100)

Defendants.)

Civil Action No. _____

Judge _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

FILED

2009 MAR 10 AM 10:26

CLERK
U.S. DISTRICT COURT

COMPLAINT

1. Plaintiffs, Mark Hohider and Robert DiPaolo, individually and on behalf of all others similarly situated, by their undersigned attorneys, for this class action complaint, allege as follows. All allegations in this complaint are based upon the investigation of counsel, except the allegations pertaining to the named plaintiffs, which are based upon the plaintiffs' personal knowledge. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery. Additionally, once the discovery process is underway, the roles of other unknown conspirators and participants in the wrongdoing identified herein will likely be revealed, and plaintiffs will seek leave to amend this complaint to add new parties and/or new claims.

NATURE OF THE ACTION AND SUMMARY OF ALLEGATIONS

2. Plaintiffs bring this class action on behalf of themselves and all others similarly situated against United Parcel Service, Inc. ("UPS" or the "Company") for discrimination in employment, by: (a) maintaining a de facto policy, pattern and practice of requiring employees to provide a "full" or "100%" medical release, without restrictions, before permitting them to return to duty following a medical leave of absence; (b) failing and/or refusing to engage in the required interactive process, and/or refusing to engage in the interactive process in good faith, to identify reasonable accommodations for those employees who attempt to return to work following an absence due to medical treatment or a medical condition, as required under the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq. (ADA); (c) failing and refusing to reinstate permanently disabled employees in a position that will effectively accommodate their medical restrictions without imposing an undue hardship on UPS; and (d) failing and refusing to permit

employees who have filed workers compensation and/or disability discrimination claims from returning to work, in retaliation for having exercised their rights to seek workers compensation, and/or the protection of the federal civil rights statutes.

3. Defendant is a federal contractor doing business with the United States government. By virtue of this status, UPS is required to comply with the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 ("Rehab Act"), to correct unlawful employment practices on the basis of disability, including the statutory mandate to provide reasonable accommodations to individuals with disabilities. At all times relevant to the factual claims which form the basis for this suit, Defendant has been subject to the requirements of the Rehab Act. The Rehab Act requires the Defendant to engage in an interactive process with the employees, to identify and agree upon either 1.) a reasonable accommodation to allow the employee to return to productive employment while performing the essential functions of his or her former job, or 2.) another vacant position. The Company's policy requires it to violate its duty to persons seeking accommodations which is to engage in the interactive process required under the ADA and under the Rehab Act. UPS is required by law to engage in the interactive process in order to identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations.

4. The Company does not have a practice of providing employees absent from work due to an injury with other work as an accommodation; at most, on a case by case basis, UPS provides temporary light duty work only to those individuals who have an estimated return to full duty date within thirty days. UPS' policy denies effective accommodations, both to individuals whose disabilities are chronic or long-term, as well as to those individuals whose impairments UPS perceives as likely to be chronic or long-term. When the Company has information sufficient to put

it on notice that the employee might have a long-term or chronic disability, by policy, it does not engage the employee in the required interactive process. Instead, UPS uniformly asks the employee to have a physician complete a written report and to have the doctor submit the completed form directly to UPS. Next, UPS employees review the form, and on the basis of the content of the form, UPS makes a decision as to whether it believes the individual requesting the accommodation is a “qualified individual with a disability” as a matter of law, without ever questioning the meaning of the content of the form, and without any communication directly with the individual on whose behalf the accommodation request was made.

5. The only actions UPS takes when it receives notice that an individual may have a disability and has requested, or is apparently in need of, an accommodation, is to send the individual a form for a doctor to fill out and return, and then to send back a form letter to the individual stating that the request is denied. UPS knows Plaintiffs have a history or record of being disabled under the ADA and/or Rehab Act. The interactive process requires UPS to seek information directly from the employee regarding his or her relevant education, skills, abilities, and limitations or restrictions, and whether the individual’s major life activities are substantially impaired by the disability. UPS fails to do so. The Company’s actions and failures and refusals to act are in violation of the Rehab Act’s prohibition against disability discrimination and Defendant’s affirmative obligation to accommodate the known disabilities of Plaintiffs and the Class members.

6. Plaintiffs further allege that Defendant is liable under the ADA, which 1.) prohibits discrimination against any qualified individual with a disability by an employer, *inter alia*, because of the individual’s disability, record of disability, or perceived disability, 2.) requires the employer to provide reasonable accommodations including reassignment to vacant positions, unless doing so

would impose an undue hardship on the business, and 3.) prohibits retaliation against any individual who has engaged in protected activity under the statute. Defendant has a codified practice for processing requests for accommodation in order to return to work, which when applied as written, constitutes a per se violation of the Defendant's duty to engage with the employee in the good faith interactive process to identify reasonable accommodations under the ADA.

7. UPS does not engage in the interactive process in good faith. Defendant's written policy, the "ADA Compliance Program ("Program"), provides a multi-step process which managers are directed to apply to individuals who seek to return to work following an injury or medical leave. Under the Program, after an employee notifies the Company that he or she has a physical or mental impairment and requests an accommodation, the Company's medical officer (usually a nurse) first gathers medical information from the employee's doctor on a form provided by the Company. The Defendant then makes a legal judgment as to whether the person making the request is a "qualified individual with a disability" under the ADA. Only when UPS decides that the person has a legally "qualifying disability," will the Company even superficially engage in the interactive process to determine whether an accommodation is "warranted or feasible."

8. UPS' job descriptions uniformly falsely represent that the ability to lift seventy (70) pounds is an essential function of nearly every bargaining unit job. The Company's job descriptions for bargaining unit positions are designed and intended to further the discriminatory practices of UPS by including as "essential duties" of these positions activities which UPS knows in practice are rarely, if ever, required to be performed by any single individual without assistance and which are not "essential functions" as defined under the law.

9. The Company also has a policy or practice of refusing to reinstate individuals,

regardless of their present disability status (i.e., whether the person is or ever was a qualified individual with a disability under the law, or whether the person requests or requires any accommodation), in retaliation for having exercised their rights under the ADA. Defendants' managers have told Plaintiffs that Plaintiff Hohider would not be reassigned to a vacant funded position as an accommodation until his discrimination complaint was addressed, and that, Plaintiff DiPaolo could return to work only if he dropped or withdrew his ADA claims.

10. UPS is one of the world's largest private mail carriers with hundreds of thousands of employees worldwide, including over 70,000 package truck drivers in the United States alone. When a UPS employee attempts to return to work following an accident or a medical leave of absence and notifies the Company of such intention, UPS requires as a routine policy and practice that such employee obtain a 100% full medical release prior to any reinstatement with the Company. UPS in fact does have positions available within the company which could accommodate the plaintiffs and the class. In the absence of the submission of a full medical release, medically restricted employees may be allowed to temporarily work in the Company's "light-duty" ("TAW") program, which is less physically challenging and may comport with their restrictions and capabilities. However, the TAW program is only rehabilitative in nature and, in fact, injured and medically restricted employees who have a limited prospect of full recovery (i.e., those whose restrictions are expected to persist for more than thirty (30) days) are ineligible to participate in the TAW program.

11. UPS not only denies permanently disabled employees engagement in the interactive process to determine a reasonable accommodation for them as mandated under the ADA, but, as a de facto policy, pattern and practice, denies permanently disabled and/or permanently restricted

employees access to other less physically demanding work on a permanent basis within the Company. This policy, pattern and practice of non-interaction, bad faith, non-accommodation and retaliation by UPS on the basis of disability status constitutes a per se violation of the ADA. UPS arbitrarily and unilaterally denominates such permanently disabled employees who attempt to return to work from medical leave without a full medical release as “inactive” employees, as a pretext for violating their rights, and routinely refuses to engage them in the interactive process and denies them reasonable accommodations in violation of the ADA.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the federal question subject matter of this civil rights action pursuant to 28 U.S.C. §1331, the ADA.

13. This Court has personal jurisdiction over defendant because the Company systematically and continuously engages in substantial interstate commercial conduct and business activity in Pennsylvania, and the case arises out of UPS’ unlawful conduct within this Commonwealth.

14. Plaintiffs have complied with all conditions precedent to filing suit under the ADA, 42 U.S.C. §12117(a) and 42 U.S.C. §2000e-5(f)(1) and (3). Plaintiffs filed a charge of employment discrimination based on disability status with the Equal Employment Opportunity Commission (“EEOC”) on or about March 6, 2001 (Hohider), and in July, 2001 (DiPaolo), within 300 days of the commission of an unlawful employment practice alleged herein. Plaintiffs received a Notice of Right to Sue from the EEOC on or about December 12, 2003. Copies of the Notices of Right to Sue are attached hereto as Exhibit A and are incorporated by reference as though fully set forth herein. This complaint is filed within 90 days of receipt of the Notices of Right to Sue.

15. Venue is proper in the Western District of Pennsylvania, pursuant to 28 U.S.C. §1391(b) and (c), and in the Pittsburgh Division, pursuant to W.D.PA.LR 3.1. The unlawful employment practices occurred and continue to occur, in and around Westmoreland County, Pennsylvania, where Plaintiffs reside, where Plaintiffs formerly worked, where the discrimination and the damages occurred and where the unlawful employment policy and practices remain in effect in continuous, systematic, or systemic violation of the statutes.

PARTIES

16. Plaintiff Mark Hohider ("Hohider") is a resident of the State of Pennsylvania. Plaintiff was hired by UPS as a part-time loader/unloader in October, 1986, and continued to be employed by Defendant, performing various duties, until he suffered a permanently disabling back and neck injury in an automobile accident at work, on August 4, 1999. At that time he sought medical treatment and care, was diagnosed with herniated and/or bulging discs as well as depression, and was placed on workers compensation. Hohider attempted to return to work at the UPS hub facility in New Stanton, Pennsylvania in December, 1999, without an accommodation. Similarly, he requested that he be permitted to return to work, with or without an accommodation, in October, 2000, in December 2000, and continuously thereafter. He received a limited medical release from a UPS-selected physician, stating that he could return to work performing other jobs within the Company that were consistent with his permanent physical restrictions.

17. Plaintiff Robert DiPaolo ("DiPaolo") is a resident of the State of Pennsylvania. He was hired by Defendant as a full-time employee in 1972, and worked as a package car driver until he suffered a permanent injury to his right arm while at work, in 1997. DiPaolo suffers from reflex sympathetic dystrophy and has been diagnosed with depression. He returned to work at UPS

performing light duty work for a short time until he had surgery on his arm in September, 1997. He has attempted to return to work with or without an accommodation continuously since May, 1998, but the Company has refused to reinstate him to any position consistent with his restrictions and abilities. DiPaolo submitted to UPS a limited medical release from a UPS physician stating that he could return to work performing other jobs within the Company that were consistent with his permanent physical restrictions. Although DiPaolo is among the most-senior of all full-time employees in the Laurel Mountain District, and has been the successful bidder on posted jobs at UPS on three separate occasions since suffering his disabling injury, Defendant has failed and refused to permit him to return to work.

18. Defendant UPS is a Delaware corporation, having corporate headquarters located at 55 Glenlake Parkway, NE, Atlanta, Georgia 30328. At all relevant times, UPS has continuously been an employer, a person, and a covered entity within the meaning of 42 U.S.C. §12111(2),(5) and (7).

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this action as a class action pursuant to Rule 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all job applicants, and all past, and present employees of UPS, with apparent or actual disabilities, or a history of being disabled, who have been denied the benefits of engaging in an interactive process for determining a reasonable accommodation in good faith, and/or who have been denied accommodations for their known disabilities, and/or refused to be reinstated by UPS to work duties that they can perform, with or without an accommodation, (the "Class"). Excluded from the Class are the Company, its officers and directors and management, including members of their immediate families, their legal

representatives, heirs, successors or assigns and any entity in which defendant has, or had, a controlling interest.

20. The Class consists of at least thousands of persons located throughout the United States. Class members are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. The exact number and identity of Class members is properly determined through discovery.

21. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to Class members which predominate over questions which may affect individual Class members include:

- (a) Whether Defendant's policies, procedures, acts and omissions violated, and continue to violate, the ADA;
- (b) Whether Defendants policies, procedures, acts and omissions violated, and continue to violate, the Rehab Act;
- (c) Whether Defendant owed duties to Class members;
- (d) The nature of the duties Defendant owed to Class members; and
- (e) Whether Plaintiffs and the Class have sustained injury by reason of Defendants' acts and omissions.

22. Plaintiffs' claims are typical of those of the Class because Plaintiffs and Class members suffered similar harm as a result of Defendants' unlawful and wrongful conduct. Absent a class action, Class members may not receive appropriate relief and will continue to suffer losses, and the violations of law alleged herein will proceed without remedy.

23. Defendant UPS has acted or refused to act on grounds generally applicable to the

Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

24. Plaintiffs are committed to pursuing this action and have retained counsel experienced in class action litigation of this nature. Plaintiffs will fairly and adequately represent the interests of the Class and Plaintiffs have no interests which are adverse or conflict with those of the Class.

25. The prosecution of separate actions by Class members would create a risk of inconsistent adjudications establishing incompatible standards of conduct for the Defendant.

26. A class action is the superior method for fair and efficient adjudication of this controversy. Because the damages suffered by many individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class members to individually seek redress for the wrongful conduct alleged herein. Indeed, the likelihood that individual Class members will prosecute separate actions is remote due to the time and expense necessary to conduct such litigation. Plaintiffs' counsel, highly experienced in class actions, anticipates no difficulty in the management of this action as a class action.

FACTUAL ALLEGATIONS

FIRST CLAIM:

Violation of the Americans with Disabilities Act of 1990,

as amended, 42 U.S.C. § 12101 et seq.

27. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

28. As a result of the unlawful policy, pattern and practice, and unlawful conduct of Defendant UPS as described herein, Plaintiffs and Class members suffered pecuniary and non-

pecuniary damages, including lost wages and benefits, out of pocket expenses, interest, emotional distress, and reasonable attorneys fees, the exact amount of which will be determined at trial.

SECOND CLAIM:

Violation of the Rehabilitation Act of 1973, as Amended 29 U.S.C. 794

29. Plaintiffs repeat and re-allege each and every allegation contained above as if fully set forth herein.

30. As a result of the unlawful policy, pattern and practice, and unlawful conduct of Defendant UPS, in concert with individual managers and other employees of UPS described herein, Plaintiffs and Class members suffered pecuniary and non-pecuniary damages, including lost wages and benefits, out of pocket expenses, interest, emotional distress, and reasonable attorneys fees, the exact amount of which will be determined at trial.

WHEREFORE, plaintiffs pray for relief and judgment, as follows:

(A) Determining that this is a proper class action to be certified under Rule 23 of the Federal Rules of Civil Procedure;

(B) Grant a permanent injunction enjoining Defendant, its directors, officers, employees, agents, successors, heirs and assigns, and all persons in active concert or participation with them, from engaging in, ratifying, or refusing to correct, employment practices which discriminate in violation of the ADA and the Rehab Act;

(C) Order Defendant to institute and implement, and individual Defendants to attend and/or otherwise participate in, training programs, policies, practices and programs which provide equal employment opportunities for persons with present, past, or perceived disabilities;

(D) Order Defendant to make Plaintiffs and the Class whole by providing appropriate

back-pay with prejudgment interest, in amounts to be proved at trial, reinstatement to positions consistent with their physical or mental abilities and restrictions having compensation, responsibility, and duties, commensurate with their education, experience, and skills;

(E) Order Defendant to remove and expunge, or to cause to be removed and expunged, all negative, discriminatory, and/or defamatory memoranda and documentation from Plaintiffs' and the Class's records of employment;

(F) Awarding extraordinary, equitable and/or injunctive relief as permitted by law, equity and the federal statutory provisions sued hereunder, pursuant to Rules 64 and 65 of the Federal Rules of Civil Procedure;

(G) Awarding Plaintiffs and Class members all restitutionary and/or remedial relief;

(H) Awarding Plaintiffs and Class members pre-judgment and post-judgment interest, as well as their reasonable attorneys' fees, expert witness fees and other costs; and

(I) Award such other legal and equitable relief as the court deems appropriate and just.

A jury trial is demanded as to all issues triable to a jury.

Dated: March 9, 2004

Respectfully submitted,



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