NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

ISAAC L. BROCKINGTON,
Complainant,

v.

FEDERAL EXPRESS CORPORATION D/B/A FEDEX CORPORATION,FEDEX EXPRESS, FEDDEX, FEDERAL EXPRESS,
Respondent.

NOTICE AND FINAL ORDER

Case No. 1255504

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on May 6, 2009, by Migdalia Pares, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: JUN 17 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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ISAAC L. BROCKINGTON,
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v.

FEDERAL EXPRESS CORPORATION, d/b/a FedEx Corporation, FEDEX EXPRESS, FedDex, FEDERAL EXPRESS
Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **1255504**

SUMMARY

Complainant charged Respondent with unlawful discrimination based upon disability when it denied him long term disability ("LTD") benefits, rescinded his Medical Leave of Absence ("MLOA"), failed to accommodate his known disabilities and terminated his employment. However, the charges of discrimination are dismissed as time barred.

PROCEEDINGS IN THE CASE

On December 17, 2003, Complainant filed a complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Migdalia Parés, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on September 17, 2007, September 18, 2007, November 7, 2007, November 8, 2007, and January 8, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Josh Zinner, Esq., during the hearing held on September 17, 2007; by Josh Zinner, Esq., and Michael T. Groben, Esq., during the hearing held on September 19, 2007; by Michael Groben, Esq., during the hearings held on November 7, 2007 and November 8, 2007; and by Molly Doherty, Esq., during the hearing held on January 30, 2008.

Respondent was represented by Colby S. Morgan, Esq.

At the public hearing Respondent's counsel advised that FedEx Corporation is a multinational holding company doing business through subsidiaries including, in relevant part, Fedex Express. The caption is hereby amended to "Isaac L. Brockington v. FedEx Corporation, holding company, d/b/a FedEx Express, FedEx, Federal Express." (ALJ's Exhibit 3; Respondent's Exh. 2; Tr. 15-16)

At the request of the presiding ALJ, on November 6, 2007, Respondent provided its Policy Manuals ("P") published in 2001 and 2003. Respondent's November 6, 2007 submission letter is hereby received as ALJ's Exhibit 5. The 2001 and 2003 Policy manuals are hereby respectively received as ALJ's Exhibit 6 and 7. (Tr. 252)

Permission to file proposed findings of fact and conclusions of law was granted. Both parties filed timely post hearing submissions.

FINDINGS OF FACT

1. On December 17, 2003, Complainant filed a complaint with the Division, charging Respondent, with unlawful discriminatory practices relating to employment because of his

disability by denying him LTD benefits, revoking his MLOA, failing to accommodate his known disabilities and terminating his employment. (ALJ's Exhibit 1)

2. Respondent is a multinational corporation engaged in the business of worldwide package delivery. It has offices abroad and in major cities in the United States. Respondent is self insured. (Complainant's Exh. 10, Respondent's Exh. 2)

3. On June 13, 1989, Respondent hired Complainant in the position of Ramp Transport driver and courier. (ALJ's Exhibits 1, 2; Complainant's Exh. 10)

4. Complainant's job responsibilities included driving and delivering packages of up to 75 pounds. (Respondent's Exh. 4)

5. On December 10, 1998, Complainant sustained serious injuries while on the job in one of Respondent's station warehouses when his body was crushed between a truck and a conveyor belt. At the time, Complainant was 34 years of age. (Tr. 476-80)

6. An employee on a MLOA is considered a "full employee" of Respondent. (Tr. 288, 362)

7. Respondent allows a maximum period of 30 months on a leave of absence unless the employee is on short term disability ("STD") or LTD. (Respondent's Exhibits 28, 38)

8. From December 17, 1998 to June 16, 1999, a period of six months, Complainant was on MLOA and receiving STD benefits. (Respondent's Exh. 2)

9. From June 17, 1999 to September 17, 2002, a period of 39 months, Complainant was on MLOA and receiving LTD benefits on the ground that he was Totally Disabled All Occupations ("TDAO"). (Respondent's Exh. 2)

10. On September 17, 2002, Respondent's disability review physician concluded that Complainant could work in a sedentary position, was not TDAO as defined by the LTD disability plan, and denied the continuation of LTD benefits. (Complainant's Exh. 4)

11. On September 18, 2002, the denial of LTD benefits automatically revoked Complainant's MLOA. (Tr. 288, 362)

12. On September 18, 2002, Respondent failed to apply its return to work policy for employees returning from a MLOA to Complainant. The policy requires the Human Capital Management Program ("HCMP") managers to do everything possible to identify, assign and/or offer Complainant a position comparable to his former Ramp Transport position, within his limitations. HCMP has jobs that are reserved for its placement assistance program for employees returning from a MLOA that are not published in the weekly vacancy bulletin known as "JCATS." (ALJ's Exhibits 3, 4; Respondent's Exhibits 28, 38)

13. On October 2, 2002, Respondent advised Complainant that his LTD was revoked because he was no longer totally disabled from all occupations, that his MLOA exceeded 30 months and that his employment was going to be terminated. (ALJ's Exh. 1; Respondent's Exh. 23; Tr. 509)

14. Under the termination notice, Respondent offered Complainant the option of being placed on Personal Leave of Absence ("PLOA") without pay for 90 days within which to apply and compete for a vacant position posted in JCATS. The PLOA status did not overturn Respondent's October 2, 2002 decision to terminate Complainant's employment. (Respondent's Exh. 23; Tr. 574)

15. Respondent's HCMP managers sent Complainant the weekly JCATS job vacancy bulletin so that he could apply for a position in the competitive hiring process. (Respondent's Exh. 28, 38; Tr. 583, 725-32)

16. Complainant challenged the determination with an in-house appeal. Complainant advocated that he was totally disabled and unable to work. At the same time Complainant was

receiving notices of job vacancies but had insufficient information to bring to his doctor to see if he could perform the duties of these positions. (Complainant's Exh. 8; Respondent's Exh. 25; Tr. 510-11; 580-90)

17. In January, 2003, the 90-days PLOA status within which to be rehired into another position expired. (Tr. 536-37, 559)

18. On February 4, 2003, Nanette Malebranche, Respondent's Long Island Managing Director, sent Complainant a letter stating that his employment was terminated because he exhausted the maximum 30 month leave and did not have a release to return to work. (Respondent's Exhibits 26, 38)

19. On March 6, 2003, Respondent by Samuel L. Nesbit Jr., Acting Vice President, Eastern Region, extended Complainant's PLOA status by 90 days to June 2003. Nesbit further advised Complainant that at the end of the 90-day PLOA without pay, Complainant's employment would be terminated if he did not have a position. The extension of time within which to participate in the competitive hiring process did not overturn Respondent's October 2, 2002, decision to terminate Complainant's employment. (Respondent's Exh. 27, 38; Tr. 537)

20. Complainant received JCATS job vacancy listings from Respondent but did not apply because the jobs that were listed required a college degree and the ability to lift 75 pounds. Complainant could not fulfill these requirements. (Complainant's Exhibits 3, 4; Respondent's Exh. 28, 44-A; Tr. 155-56, 183, 538-39, 583, 601, 671, 713)

21. On June 4, 2003, Respondent terminated Complainant's employment. (Respondent's Exh. 22)

22. On December 17, 2003, Complainant filed the instant complaint. (ALJ's Exh. 1)

OPINION AND DECISION

Jurisdiction

The Division is not preempted by ERISA from making a determination on Complainant's discrimination claims under the Human Rights Law.

Section 514 (a) of the Employee Retirement Security Act of 1974 ("ERISA") (Pub. La. 93-406, 88 Stat. 829, Enacted September 2, 1974) provides that the federal statute supersedes state law insofar as it relates to an employee benefit plan. *See* 29 U.S.C. §1144 (a). However, Section 514 (d) of ERISA provides "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under such law." *See* 29 U.S.C. §1144 (d). The courts have interpreted Section 514 (d) of ERISA to mean laws (such as the State Human Rights Law), which prohibits conduct that is illegal under federal statutes, are saved from preemption in Section 514 (A) of ERISA. *See Shaw v. Delta Airline, Inc.*, 463 U.S. 85, 101-02 (1983) (holding that federal civil rights statutes direct state authorities to work with the EEOC to enforce its mandates, so cannot be preempted by ERISA); *Devlin v. Transportation Communications Int'l Union,* 173 F. 3d 94, 99-100 (2d Cir. 1999).

Complainant alleges that Respondent knew of the disability that needed accommodation but failed to engage in an interactive process to reasonably accommodate him. If proven true, such conduct is prohibited both under the State Human Rights Law, as well as under federal anti-discrimination laws, including the American with Disabilities Act. *See Jackan v. N.Y.S. Dep't of Labor,* 295 F. 3d 562, 565-66 (2d Cir. 2000) cert denied 531 U. S. 931 (2000); *Thompkins v.*

United Healthcare, 204 F. 3d 90 (1st Cir. 2000). Therefore, Complainant's claims are not preempted by ERISA and the Division can make a determination as to whether Respondent's conduct constituted discrimination.

Statute of Limitations

Complainant's claims are barred by the statute of limitations. "Any complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." N.Y. EXEC. L. §297.5. This provision is mandatory and constitutes a statute of limitations.

The one year period for filing begins to run when the potential complainant first receives notice of the alleged discriminatory action. *Ha-Sidi v. N.Y. State Div. of Human Rights*, 65 A.D.2d 751, 409 N.Y.S.2d 755 (2d Dept. 1978); *Pinder v. City of New York*, 49 A.D.3d 280, 853 N.Y.S.2d 312 (1st Dept. 2008); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). For claims involving termination of employment, the one year starts to run not from the date that employment ends, but from the date that the employee is advised that he or she will be terminated. *Queensborough Community College v. State Human Rights App. Bd. (Marenco,)* 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977).

In the instant case the acts complained of, namely; 1) on September 17, 2002, Respondent denied Complainant LTD benefits; 2) on September 18, 2002, Respondent revoked Complainant's MLOA; 3) on September 18, 2002, Respondent failed to apply to Complainant its return from MLOA policy by failing to determine if he could be accommodated and by assigning him to a position he could perform within his known limitations that was not advertised in JCATS and that was reserved to accommodate employees returning from MLOA; 4) on October 2, 2002, Respondent advised Complainant, in writing, that his employment would

be terminated unless he requested to be placed on a 90-day PLOA without pay status to apply and secure another position in the competitive hiring process using JCATS. Each of these acts constitutes discrete, single adverse determinations. It is clear that these events occurred prior to December 18, 2002, one year before the filing of the instant complaint. Therefore, they are outside the statutory time period.

The fact that Complainant engaged in an internal appeal procedure with the possibility of reversing the adverse decisions made on September 17, 2002, September 18, 2002 and October 2, 2002 is insufficient to toll the limitations period. There is no evidence that Respondent actively misled Complainant about his status, or that it restricted him in some extraordinary way from exercising his rights to allege discrimination with the Division. *Sculeratti v. New York University,* N.Y.S. 2d 2003 WL 21262371 (N.Y. Supp.) *citing Cordone v. Wilens & Baker,* 286 A. D. 2d 89 (1st Dept. 2001).

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the case be dismissed.

DATED: May 6, 2009

Bronx, New York

Migdalia Parés

Administrative Law Judge