

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X
JUSTIN MELFI,

Complainant.

--against--

VERIFIED
COMPLAINT

CITY OF OLEAN, CITY OF OLEAN FIRE DEPARTMENT,
MAYOR WILLIAM J. AIELLO,
and CHIEF TIM RICHARDSON,

Respondents.

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Plaintiff, Justin Melfi, alleges as follows:

PARTIES

1. Plaintiff, Justin Melfi, is a natural person with a place of residence located in Olean, New York.
2. The City of Olean is a city located within Cattaraugus County, New York whose primary business address is 101 East State Street, Olean, New York 14760.
3. The current mayor of the City of Olean is Mayor William J. Aiello and maintains a business address identical to the City of Olean.
4. The City of Olean Fire Department is part of the City of Olean Department of Fire, Building and Emergency Services and whose current leader is Chief Tim Richardson.
5. Both the City of Olean Fire Department and Chief Tim Richardson have a business address identical to the City of Olean.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 and as conferred by 29 U.S.C. § 2611.

7. Defendants are subject to the jurisdiction of this Court and venue is proper in this District pursuant to 28 U.S.C. § 1391 (b) as the acts and omissions giving rise to the claims in this complaint occurred within the Western District of New York.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. Plaintiff has exhausted administrative remedies as a prerequisite to bringing this claim as follows:
9. Plaintiff filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). That complaint was designated as EEOC Charge No. 525-2020-01595.
10. On October 13, 2020, the EEOC mailed Plaintiff a Dismissal and Notice of Rights letter demonstrating that he has exhausted his administrative remedies.

FACTUAL BACKGROUND

11. Complainant was hired by the Defendant City of Olean and/or City of Olean Fire Department in July of 2011 as a Firefighter. Complainant is currently assigned to Platoon "E" in the Code Enforcement Department.
12. Complainant applied for and duly began his Family Medical Leave Act leave on June 23, 2019 because of the birth of his son.
13. On August 8, 2019 Complainant applied for a Lieutenant position with the Respondents which he was qualified for and was #1 on the eligibility list for this position.
14. On September 15, 2019 Complainant returned to work from his FMLA leave.
15. After his return to work Complainant noticed that other, less senior firefighters would have preference for shift choice over Complainant.
16. Complainant noticed this preference that other, less senior firefighters had over the Complainant because the Complainant was constantly assigned the least desirable shift, the ambulance shift, while others were rotated.
17. Because of this Complainant has come to suspect that after his return to work he has lost his seniority with the Respondents.
18. On October 23, 2019 Complainant becomes aware that he was charged for taking vacation time while he was on FMLA.

19. Complainant complained of this charging Complainant for leave while he was on FMLA to then Lt. Tim Richardson who is now Chief Richardson.
20. Complainant specifically told Lt. Richardson that morning around 10:00 A.M. that Complainant was being retaliated against for taking FMLA leave. Lt. Richardson told the Complainant to take the issue up with the Captain Patrick Zink.
21. Complainant, despite following the chain of command for reporting discrimination, duly contacted Complainant's Captain.
22. Captain Zink directed Complainant to complain to Chief Robert Bell. Complainant was hung-up on by the Captain.
23. Accordingly, Complainant called Chief Bell's office phone and cell phone multiple times but was unable to reach Chief Bell.
24. Therefore, Complainant went to the station to speak with Chief Bell in person.
25. During this complaint to Chief Bell on October 23, 2019, Complainant restated his complaint regarding the retaliatory treatment he received by being charged for vacation days while on FMLA leave.
26. Complainant specifically referred to the FMLA and to the applicable Contractual Bargaining Agreement in this discussion with Chief Bell.
27. Chief Bell stated that he didn't know the provisions of the FMLA, or what Complainant was owed because "people here do not take time off."
28. Complainant's complaint to Chief Bell thus turned into a disagreement.
29. After this discussion Chief Bell treated the FMLA approved leave taken by Complainant as an unexcused absence.
30. Chief Bell also attempted to press charges against Complainant because Complainant complained of discrimination.
31. However, no charges were ever filed against Complainant.
32. Despite this, Respondents subsequently claimed that Complainant violated the law and sought to punish Complainant for complaining of discrimination.
33. Because of Respondents' retaliation against Complainant for complaining of discrimination on October 23, 2019, Respondents placed Complainant on administrative leave with pay on October 28, 2019.

34. On November 1, 2019 Complainant was denied his pay for the foregoing vacation/FMLA dispute. Complainant was also paid at a lower hourly rate than his typical hourly rate.
35. On November 15, 2019 Complainant directed his union to grieve his loss of vacation days while on FMLA leave and the union duly grieves on Complainant's behalf.
36. On December 2, 2019 Complainant is informed by Respondents that Respondents intended to terminate Complainant for the disagreement between he and the Chief on October 23, 2019.
37. This intent to terminate was contrary to Respondents' policy regarding progressive discipline.
38. Also, on this date Complainant was placed on unpaid suspension.
39. On December 4, 2019 Chief Bell denies Complainant's November 15, 2019 grievance stating that Respondents conduct conforms with the CBA and FMLA.
40. Complainant, Complainant's union and Respondents attempt to negotiate a disposition of Respondent's intent to terminate Complainant.
41. On January 8, 2020 Mayor Aiello recommends an unpaid disciplinary suspension for Complainant in lieu of termination.
42. On January 12, 2020 Complainant appeals the Mayor's recommendation and again appeals the unpaid suspension and the Respondents' intent to terminate or otherwise discipline Complainant.
43. On January 29, 2020 Complainant files a claim with the Department of Labor.
44. On February 13, 2020 Complainant files for unemployment.
45. On February 14, 2020 Complainant becomes aware of several promotion opportunities within the Olean Fire Department and follows-up with Chief Richardson.
46. On February 28, 2020 Complainant is interviewed for a Lieutenant position.
47. On March 23, 2020 Respondents offered Complainant an unpaid suspension of shorter duration but coupled with a last chance agreement.
48. Also in March and April of 2020, upon information and belief, several employees were promoted to the Lieutenant position on a provisional basis.
49. On April 21, 2020 the Department of Labor, in response to Complainant's complaint to the Department of Labor on January 29, 2020, notifies Complainant that Respondent City of Olean wrongly withheld Complainant's holiday pay while Complainant was on FMLA.
50. Plaintiff was ordered to return to work on October 23, 2020.
51. Plaintiff duly complied with this order to return to work.

FIRST CAUSE OF ACTION

FMLA Interference by Defendants

52. Plaintiff repeats each and every allegation set forth herein in the preceding paragraphs as though fully set forth herein.
53. Under the FMLA, an employee has "a private right of action to seek both equitable relief and money damages against any employer (including a public agency) in any Federal or State court of competent jurisdiction" should that employer "interfere with, restrain, or deny the exercise of the FMLA rights." *Sista v. CDC/ Isis N. Am., Inc.*, 445 F.3d 161, (2d Cir. 2006) (quoting *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 724-25 (2003)).
54. To state a prima facie case of discrimination under the Family Medical Leave Act, "plaintiff must establish that (1) she is an eligible employee under the FMLA, (2) [defendant] is an employer as defined in FMLA, (3) she was entitled to leave under FMLA, (4) she gave notice of her intention to take leave, and (5) she was denied benefits to which she was entitled under FMLA." *Singh v. NY State Dep't of Taxation & Fin.*, 911 F Supp 2d 223, 239 (W.D.N.Y. 2012).
55. As the first element, plaintiff is eligible for leave under the FMLA as an employee of a public agency.
56. As to the second element, defendant employer is a defined employer under the FMLA as a public agency.
57. As to the third element, plaintiff was entitled to leave under FMLA having worked in excess of 1,250 hours for the past twelve (12) month period preceding his request, and was employed for a period of at least twelve (12) months and works at a location where the employer has at least fifty (50) or more employees.
58. As to the fourth element, plaintiff gave notice of his intention to take FMLA leave by requesting such leave on June 23, 2019.
59. As to the fifth element, plaintiff had his FMLA interfered with, restrained or denied its exercise when the Defendants refused to compensate him for holidays while he was on FMLA leave as required by the Contractual Bargaining Agreement that governs Plaintiff's leave allocations.
60. Based on the foregoing allegations, plaintiff states a cause of action for discrimination in violation of the Family Medical Leave Act against Defendants.

SECOND CAUSE OF ACTION

Retaliation in Violation of the Family Medical Leave Act by Defendants

61. Plaintiff repeats each and every allegation set forth herein in the preceding paragraphs as though fully set forth herein.
62. "In order to make out a prima facie case [of retaliation under the FMLA], [a plaintiff] must establish that: 1) he exercised rights protected under the FMLA; 2) he was qualified for his position; 3) he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent." *Potenza v. City of N.Y.*, 365 F.3d 165, 168 (2nd Cir. 2004).
63. As to the first element, plaintiff exercised his rights protected under the FMLA by requesting FMLA leave on June 23, 2019.
64. As to the second element, plaintiff was qualified for his position which is evidenced by the fact that he was hired and still working for defendant immediately prior to plaintiff's request for FMLA leave.
65. As to the third element, plaintiff suffered an adverse when defendant's denied his holiday pay, placed him on unpaid leave, and failed to promote him.
66. As to the fourth element, this adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent because of its temporal proximity to the protected action and because of the disciplinary action that was initiated against him when he opposed the interference with his FMLA leave.
67. Based on the foregoing allegations, plaintiff states a cause of action for retaliation in violation of the Family Medical Leave Act against Defendants.

WHEREFORE, Plaintiff respectfully requests this Court to enter an Order:

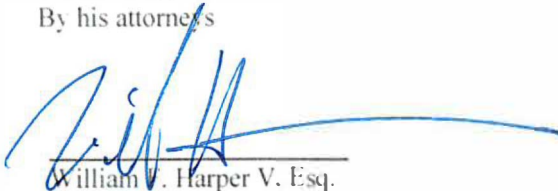
- A. Awarding Plaintiff lost compensation and benefits in an amount to be determined at trial;
- B. Awarding Plaintiff damages for his emotional distress and other injuries in an amount to be determined at trial;
- D. Defendants pay Plaintiff the costs of this action, together with reasonable attorneys' fees and disbursements;
- E. A declaratory judgment in favor of the Plaintiff;
- F. Injunctive relief as this Court deems just and equitable; and
- G. Plaintiff to have such other and further relief as this Court deems just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) Fed. R. Civ. P., plaintiff hereby demands a trial by jury for all issues triable of right by a jury in this case.

Dated: January 8, 2021

Respectfully submitted,
Plaintiff Justin Melfi
By his attorneys



William V. Harper V. Esq.
Attorney for Plaintiff
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Telephone: (716) 856-5676
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X
JUSTIN MELFI.

Complainant.

--against--

VERIFICATION

CITY OF OLEAN, CITY OF OLEAN FIRE DEPARTMENT,
MAYOR WILLIAM J. MELLO,
and CHIEF TIM RICHARDSON.

Respondents.

-----X

JUSTIN MELFI, under penalty of perjury, deposes and says:

I have read the attached Complaint captioned in this matter and find it to be true to my knowledge, except as to matters alleged upon information and belief, which I believe to be true.


JUSTIN MELFI

Sworn before me on this 8th day of Jan., 20 21


Notary Public



The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFF JUSTIN MELFI <hr/> (b) County of Residence of Listed Plaintiff Cattaraugus <hr/> (c) Attorney's (Firm Name, Address, and Telephone Number) LINDY KORN LAW OFFICE OF LINDY KORN, PLLC 535 WASHINGTON ST BUFFALO, NY 14203 716-856-5676	DEFENDANTS CITY OF OLEAN, CITY OF OLEAN FIRE DEPARTMENT, MAYOR WILLIAM J. AIELLO, and CHIEF TIM RICHARDSON, Attorneys (If Known)
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II. BASIS OF JURISDICTION (Place an "X" in One Box Only)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)																								
<input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:30%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:40%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;">1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated <i>or</i> Principal Place of Business in This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated <i>and</i> Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;">3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	1	<input type="checkbox"/> 1	Incorporated <i>or</i> Principal Place of Business in This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated <i>and</i> Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)					
CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Lab or Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (139 5ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions	

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)							
<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another District (Specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment	

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
 FMLA Interference/retaliation under 28 U.S.C. §1331

VII. REQUESTED IN COMPLAINT:	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.CP.23	DEMAND \$	CHECK YES only if demanded in complaint: JURY DEMAND: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
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VIII. RELATED CASE(S) IF ANY (See instructions): _____ JUDGE: _____ DOCKET NUMBER: _____

DATE: 8 Jan 2021 SIGNATURE OF ATTORNEY OF RECORD:

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of New York

JUSTIN MELFI

Plaintiff

v.

CITY OF OLEAN, CITY OF OLEAN
FIRE DEPARTMENT, MAYOR
WILLIAM J. AIELLO, and CHIEF
TIM RICHARDSON,

Defendants

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

CHIEF TIM RICHARDSON
101 EAST STATE STREET
OLEAN, NEW YORK 14760

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

LINDY KORN, ESQ.
LAW OFFICE OF LINDY KORN PLLC
535 WASHINGTON STREET, NINTH FLOOR
BUFFALO, NY 14203

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

▸ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

▸ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

▸ I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

▸ I returned the summons unexecuted because _____ ; or

▸ Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: