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COURT OF APPEALS

STATE OF NEW YORK

JACOBSEN,

Appellant,

-against-

No. 34

NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION,

Respondent.

20 Eagle Street
Albany, New York 12207
February 11, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 34, Jacobsen.

2 Counselor?

3 MR. MCCALLION: May it please the court,
4 two minutes, please?

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
6 ahead.

7 MR. MCCALLION: Thank you. Kenneth
8 McCallion for appellant William Jacobsen, who is here
9 with us today.

10 CHIEF JUDGE LIPPMAN: Counsel, let me - - -
11 let me ask you a question.

12 MR. MCCALLION: Yes.

13 CHIEF JUDGE LIPPMAN: How does this - - -
14 how does the difference between the State Human
15 Rights Law and the City Human Rights Law play into
16 your client's arguments? Under either one you're
17 okay?

18 MR. MCCALLION: Oh, yes, absolutely. The
19 legal test, and I - - - I think there's no serious
20 disagreement, is whether - - - certainly he was
21 disabled. There's no question as to that. The legal
22 issue, there's no dispute as to the standard. Did -
23 - -

24 CHIEF JUDGE LIPPMAN: The standard is not
25 the same, or it is the same under both?

1 MR. MCCALLION: No, it is, essentially, the
2 same.

3 CHIEF JUDGE LIPPMAN: Yeah, what's the
4 standard?

5 MR. MCCALLION: Whether the Health and - -
6 - Health and Hospital Corporation provided Mr.
7 Jacobsen with a sufficient accommodation so that he
8 could continue to perform the essential - - -

9 CHIEF JUDGE LIPPMAN: Whose burden is it
10 under the two - - -

11 MR. MCCALLION: - - - elements of his job.

12 CHIEF JUDGE LIPPMAN: - - - different
13 statutes? Whose burden is it under the two statutes,
14 whether he had a sufficient accommodation?

15 MR. MCCALLION: It - - - it shifts. First
16 the plaintiff has to show that there's a disability,
17 which we showed. And then, the burden shifts to the
18 City, in this case - - -

19 JUDGE SMITH: But under the state law - - -

20 MR. MCCALLION: - - - the Health and the
21 Hospital Corporation.

22 JUDGE SMITH: Under the state law, isn't it
23 part of - - - isn't it part of the plaintiff's burden
24 to - - - in proving the disability, to prove that it
25 was one - - - that there was a reasonable

1 accommodation that could accommodate?

2 MR. MCCALLION: Yes, that there was a
3 possibility of a reasonable accommodation, and then
4 the burden - - -

5 JUDGE SMITH: And under the city law,
6 that's a matter of defense, isn't it? That's
7 defense's burden to show the absence of a possibility
8 of a reasonable accommodation?

9 MR. MCCALLION: Yes, that's a - - - that's
10 a technical - - -

11 JUDGE SMITH: But let me ask you.

12 MR. MCCALLION: - - - difference.

13 JUDGE SMITH: Under either standard, why
14 isn't it a problem for you that you've got a doctor
15 who says there's no way this guy can go near a
16 construction site, and you've got him saying, oh, I
17 can go to a construction once a week. He admits that
18 he - - - he admit - - - he doesn't say that he could
19 do his job without ever getting near a construction
20 site. Why - - - why isn't it clear on this record,
21 that he'd never get medical clearance to do this job?

22 MR. MCCALLION: Well, this is factually
23 intensive, and the case law will tell us that whether
24 - - - whether he could perform the essential elements
25 of the job with an accommodation, is factually

1 intensive and should - - -

2 JUDGE SMITH: Factually intensive? But
3 you've got a letter from his doctor saying, almost in
4 those words, he can't do it and never will.

5 MR. MCCALLION: That is a letter, Your
6 Honor, and this is - - - I think, goes to the crux of
7 the case - - - you're going right to it. That is a
8 letter in June of 2006, after the plaintiff had been
9 assigned two tours of duty in an active construction
10 site. The real issue is what was the doctor's letter
11 that authorized him - - - that gave him medical
12 clearance to go back to work - - -

13 JUDGE SMITH: Back to the - - -

14 JUDGE RIVERA: So is it - - -

15 JUDGE SMITH: - - - the previous work.

16 MR. MCCALLION: - - - at the time that the
17 assignment was made. I'm sorry.

18 JUDGE SMITH: I see your - - - I understand
19 what you're saying, but even the previous December,
20 she was pretty unequivocal. She said, no - - - he
21 cannot be present on a construction site.

22 MR. MCCALLION: The operable letter, which
23 is never touched by the City, is the one seven days
24 before he went back to work; that's March the 21st,
25 2006. And - - - and what - - - during that period,

1 Mr. Jacobsen had continued to undergo steroid and - -
2 - and cortisone treatment and other treatments, and
3 his condition improved as long as he was away from a
4 dangerous site.

5 JUDGE GRAFFEO: Well, that's - - - that's
6 my next question.

7 JUDGE RIVERA: So is - - -

8 JUDGE GRAFFEO: What does reasonable
9 accommodation embrace? Does it mean that the
10 employer, here HHC, had to create a new job where
11 there would - - - would not be visits to construction
12 site or exposure to construction dust?

13 MR. MCCALLION: Oh, no, abso - - -
14 absolutely not. All Mr. Jacobsen wanted, and all the
15 law requires, is that the bar not be changed for what
16 are the essential elements of the job. And there was
17 a stipulation in this case - - - your job, we would
18 suggest is fairly easy - - - as to - - -

19 JUDGE GRAFFEO: Well, I - - - I thought
20 your adversary is arguing that this position,
21 especially - - - what is it - - - Queens College
22 project, or whatever it was - - -

23 MR. MCCALLION: Right, Queens Hospital
24 Center.

25 JUDGE GRAFFEO: - - - definitely was going

1 to require site visits to the construction site, that
2 that was part of the responsibilities of that
3 position. You're saying it wasn't?

4 MR. MCCALLION: Yes, of course. But what
5 he - - - what Health and Hospital Corporation did was
6 assign him on a permanent basis to the Queens
7 Hospital Center. In other words, his desk - - -

8 JUDGE SMITH: You're saying - - - you're
9 saying they could have - - -

10 MR. MCCALLION: - - - where he reported
11 every day - - -

12 JUDGE SMITH: - - - they could have sent
13 him back to 346 Broadway where he had mainly a desk
14 job with occasional visits to construction sites?

15 MR. MCCALLION: That's what every health
16 facility planner did.

17 JUDGE SMITH: That is - - - that is - - -
18 that is the accommodation you say you were looking
19 for.

20 MR. MCCALLION: Well, two. There's only
21 two possibilities if you have to occasionally go into
22 a dangerous construction site. One is to keep the
23 person out of it; have his primary assignment at the
24 main office. But when he occasionally has to go in
25 the field - - - and by the way, the field means - - -

1 there or whether he's visiting on occasion.

2 MR. MCCALLION: Right, although there's two
3 aspects to the field. Most fieldwork for a health
4 facility planner is in an air-conditioned conference
5 room inside the hospital.

6 CHIEF JUDGE LIPPMAN: But when he was
7 outside - - -

8 MR. MCCALLION: But if they had - - -

9 JUDGE RIVERA: But when he's actually
10 exposed to the - - -

11 CHIEF JUDGE LIPPMAN: - - - he needs a
12 respirator or something?

13 MR. MCCALLION: Well, he needs proper
14 protective equipment which - - -

15 CHIEF JUDGE LIPPMAN: If he's with the
16 dust.

17 MR. MCCALLION: - - - is required by law in
18 an asbestos abatement program, which was ongoing at
19 the Queens Hospital Center.

20 JUDGE RIVERA: So then - - - so then you're
21 - - -

22 MR. MCCALLION: You need a respirator.

23 JUDGE RIVERA: You're arguing in terms of
24 his disability, he needed to get back to the desk
25 job. But any employee, regardless of the disability,

1 would have required the equipment that he requested,
2 which is this special respirator, not just a plain
3 dust mask.

4 MR. MCCALLION: Oh, yes, in fact - - -

5 JUDGE RIVERA: Is that correct?

6 MR. MCCALLION: Mr. Jacobsen had a
7 longstanding - - - call it - - - quarrel with the
8 Health and Hospital Corporation that it was not
9 providing proper - - -

10 JUDGE RIVERA: The proper equipment when
11 he's exposed - - -

12 MR. MCCALLION: - - - protective equipment.

13 JUDGE RIVERA: - - - to asbestos. But he
14 could have - - -

15 JUDGE GRAFFEO: Was there - - - was - - -

16 JUDGE RIVERA: But your position is that he
17 could have done this job, if he goes to the field and
18 he's given this particular type of dust mask.

19 MR. MCCALLION: Oh, absolutely. And he - -
20 -

21 JUDGE GRAFFEO: Did - - -

22 JUDGE RIVERA: Until - - - until - - - I'm
23 sorry.

24 JUDGE GRAFFEO: Was there a request for the
25 respirator before the trial court? I thought that

1 request wasn't made until the Appellate Division.

2 MR. MCCALLION: It's - - - it's interesting
3 you bring that up.

4 JUDGE GRAFFEO: Well, because preservation
5 is a concern. That's why I'm asking - - -

6 MR. MCCALLION: Oh - - -

7 JUDGE GRAFFEO: - - - the question.

8 MR. MCCALLION: Absolutely.

9 JUDGE GRAFFEO: Was it - - - was it raised
10 at the trial court level, what would be the proper
11 kind of equipment?

12 MR. MCCALLION: Yes.

13 JUDGE GRAFFEO: Or that the dust mask was
14 inappropriate?

15 MR. MCCALLION: Yes, in our - - - in our
16 brief, starting at page 52, in Mr. Jacobsen's
17 affidavit, he goes through paragraph by paragraph
18 saying that I asked, "If I was going to be
19 permanently assigned to a construction site at Queens
20 without proper respiratory equipment, that was a
21 violation of law."

22 JUDGE GRAFFEO: And when was that? Is that
23 to the Appellate Division brief or is that something
24 submitted to the trial court?

25 MR. MCCALLION: It was in the - - - the

1 trial court, but it was on the record on appeal.

2 JUDGE SMITH: This is your - - - this is
3 you present brief quoting your affidavit to the trial
4 court, is that what you're reading?

5 MR. MCCALLION: Oh, yes, yes, I'm sorry.

6 JUDGE GRAFFEO: Okay, all right.

7 MR. MCCALLION: It went back - - -

8 JUDGE GRAFFEO: I just wanted to be sure
9 the argument was made before the trial court.

10 MR. MCCALLION: Right, Mr. Jacobsen never
11 submitted any affidavits after the trial court.

12 JUDGE RIVERA: And can I - - -

13 MR. MCCALLION: The record was pretty much
14 fixed at that point.

15 JUDGE RIVERA: May I just clarify one other
16 point - - -

17 CHIEF JUDGE LIPPMAN: Judge Rivera.

18 JUDGE RIVERA: - - - because of the time,
19 and then - - - then your adversary can take - - -
20 take the podium.

21 Is it your argument that there was a point
22 in time when, if you had been given the appropriate
23 accommodation, whether that was never to return to
24 this particular type of field placement, or if on
25 occasion you had to return to this particular type of

1 field placement, you had the respirator, that he was
2 at that point, a disabled person within the meaning
3 of the statutes, but that once he was not provided
4 with either version of these accommodations, he was
5 no longer disabled?

6 MR. MCCALLION: Well, that - - -

7 JUDGE RIVERA: At some point he cannot do
8 this job now.

9 MR. MCCALLION: That's correct. By June of
10 2006, and that's the doctor's letter they point to,
11 they say, ah-ha, we got you. We've sent you out into
12 the field without a proper respiratory equipment on
13 two occasions, and now that you're totally disabled,
14 ah-ha, we got a letter from your doctor saying that
15 you can no longer perform the essential - - - your
16 essential duties.

17 So we're going to give you a reasonable
18 accommodation; we write you a letter. We're going to
19 put you on unpaid medical leave for six months. We
20 got you.

21 Now, just in response to your point as to
22 the resp - - -

23 CHIEF JUDGE LIPPMAN: Finish off, counsel.

24 MR. MCCALLION: - - - respiratory
25 equipment. In the record - - - and this hasn't been

1 terribly emphasized and wasn't touched by the
2 Appellate Division - - - there was a notice of claim
3 filed by Mr. Jacobsen through counsel in December of
4 2005, which said you're violating about eighteen
5 different federal, state and local statutes requiring
6 workers' safety, including your failure to provide
7 proper respiratory equipment.

8 At that time, in December and January, he
9 also filed a complaint with the New York City Human -
10 - - with the Human Rights organization, which then
11 called, and filed a workers' comp, accusing HHC and
12 its supervisors on January 5th of 2006, of - - - of
13 intentionally sending him into - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. MCCALLION: - - - the field without
16 proper equipment.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 You'll have more time in rebuttal.

19 MR. MCCALLION: Thank you, Your Honor.

20 CHIEF JUDGE LIPPMAN: Thanks.

21 MS. NATRELLA: Good afternoon. May it
22 please the court, my name is Elizabeth Natrella,
23 representing the respondent, HHC.

24 CHIEF JUDGE LIPPMAN: Counsel, why didn't
25 you just send him back to the Manhattan job at 346

1 Broadway?

2 MS. NATRELLA: Because part of - - -

3 CHIEF JUDGE LIPPMAN: Why - - - why
4 wouldn't it have been a perfectly rational
5 accommodation? Is there something more to this?

6 MS. NATRELLA: Well, Your Honor - - -

7 CHIEF JUDGE LIPPMAN: It would seem in the
8 normal - - -

9 MS. NATRELLA: - - - the essential
10 functions of his job - - -

11 CHIEF JUDGE LIPPMAN: - - - in the normal
12 course given - - -

13 MS. NATRELLA: - - - of a health - - -

14 CHIEF JUDGE LIPPMAN: In the normal course,
15 given someone who's got this problem, where he is
16 much more in the field and out and breathing the dust
17 in this other job, why wouldn't the logical
18 accommodation, both legally and as a human being, why
19 wouldn't it have been to send this guy back to 346
20 Broadway, or wherever it was?

21 MS. NATRELLA: Well, the premise of that
22 assumes that he could perform the essential functions
23 of a health facility planner at - - -

24 CHIEF JUDGE LIPPMAN: He seemed to think he
25 could - - -

1 MS. NATRELLA: Yes, but that's not - - -

2 JUDGE SMITH: Aren't - - - aren't you
3 supposed to engage in an interactive process to find
4 that out? I mean, weren't you supposed to say to
5 him, hey, Bill, if we send you back to the old place
6 and you get - - - and - - - and you go to a
7 construction site once a week, can you get your
8 doctor to sign off?

9 MS. NATRELLA: Well, Your Honor, here, we
10 did engage in an interactive process, and we did, in
11 fact, just to go back, under both the City and
12 State's Human Rights Law, we pled as an affirmative
13 defense at paragraph 45 of our answer, that he was
14 unable to - - - he could not perform the essential
15 functions of his position. He - - -

16 JUDGE SMITH: Wait, wait. How's that - - -
17 pleading a defense is not engaging in an interactive
18 process. When did you - - - where did you - - -
19 where do you engage in the interactive process?

20 MS. NATRELLA: We engaged in the
21 interactive process as fully detailed by the
22 Appellate Division here, where when plaintiff, who -
23 - - the diagnosis is made in September 2005, after
24 his assignment to Queens County Hospital, based on
25 the employer's operational needs and after large

1 downsizing at Health and Hospitals Corporation.

2 JUDGE GRAFFEO: So why at that - - - why at
3 that point not send somebody else to Queens Hospital
4 and move him back to the central office?

5 MS. NATRELLA: Well, he went on a medical
6 leave, and the central office position, which the
7 record is replete with, shows that, in fact,
8 fieldwork was an essential function, whether - - - we
9 accepted for purposes of our - - -

10 JUDGE ABDUS-SALAAM: Who was performing it
11 when he was on medical leave? Somebody else was
12 doing it right?

13 MS. NATRELLA: Well, I'm talking about the
14 346 Broadway position that - - -

15 JUDGE SMITH: If he - - - I think he - - -
16 I - - -

17 MS. NATRELLA: - - - he's seeking
18 interactive dialogue - - -

19 JUDGE SMITH: If I understand it, he
20 concedes that he had to do some fieldwork, but he
21 says he could have managed a day or two. Why did you
22 never call his bluff and say, all right, get your
23 doctor to say that?

24 MS. NATRELLA: Well, in fact, we did. Part
25 of our interactive dialogue here was a back-and-forth

1 exchange of letters during times when we had given
2 medical leaves - - -

3 JUDGE SMITH: Did you ever - - - did you
4 ever say in so many words, if you can do one day of
5 work - - - of fieldwork, we'll keep you?

6 MS. NATRELLA: No, Your Honor, and that was
7 not - - - we were not required to. That, in fact,
8 was an essential function of his job.

9 JUDGE SMITH: More - - - you say more than
10 - - -

11 MS. NATRELLA: He could not - - -

12 JUDGE SMITH: - - - you say that more than
13 a day - - - you say you were entitled to keep him in
14 Queens doing it every day.

15 MS. NATRELLA: Well, we - - - we said that
16 the job description for a health facilities planner
17 included seventy-five to eighty percent of the
18 function of being in the field, but regardless of
19 that - - -

20 JUDGE SMITH: But - - - but for several
21 years he had sent - - - spent considerably less than
22 that in the field.

23 MS. NATRELLA: Right. And for purposes of
24 summary judgment, we accepted the allegation that his
25 position only involved twenty to twenty-five percent.

1 But he had to be in the field. His doctors - - -

2 JUDGE RIVERA: Okay, but - - - but - - -

3 but if - - -

4 MS. NATRELLA: - - - we engaged in the

5 discussion - - -

6 JUDGE RIVERA: But if you have - - - if you
7 have several people in this same title, are they not
8 interchangeable? Why couldn't someone else take that
9 placement where they're so exposed to the dust, that
10 they're doing eighty percent, and let him keep a
11 placement where he's not so exposed? Or at least
12 give him the respirator?

13 MS. NATRELLA: Well - - -

14 JUDGE RIVERA: But if they're
15 interchangeable, why not just move him?

16 MS. NATRELLA: The end of the dialogue
17 here, and this is plaintiff's own medical doctor
18 says, I am clarifying my position. My position in
19 March was he can return - - - he's cleared for - - -
20 to return. That's what he wanted; that's what he
21 sought. We had consistently been questioning the
22 various doctor's letters. Then she says, he's
23 cleared to return to work; he can go back to the
24 field to attend project meetings. Then as of August,
25 she says, no, he will never be medically cleared to

1 perform - - -

2 JUDGE SMITH: He says that's because there
3 was a deterioration in his health after you failed to
4 accommodate him.

5 MS. NATRELLA: Well, we accommodated him by
6 two medical leaves, and when he returned to his
7 position in late March of '06, it was only at - - -
8 then in - - - on May 10th, he asked for - - - he - -
9 - he claims that he sought a respirator from his
10 immediate supervisor.

11 He did not - - - on May 10th, he writes a
12 letter requesting reassignment to his old position.
13 He - - - his letter - - - his doctor's letters - - -
14 this is a Mount Selling - - - Sinai pulmonary doctor
15 throughout here - - - don't say he can go back to the
16 field if he has a respirator and can be exposed to
17 dust. His doctor's letters here, and that's what we
18 have to follow here - - -

19 JUDGE ABDUS-SALAAM: Counsel, could you - -
20 -

21 MS. NATRELLA: - - - say he will never be
22 cleared.

23 JUDGE ABDUS-SALAAM: Counsel, could you
24 explain how it came to be that Mr. Jacobsen had a
25 dust mask as opposed to a respirator if he didn't ask

1 for something? Are you saying that when he came back
2 from one of the medical leaves, just because the
3 supervisor thought it might be a good idea, gave him
4 a dust mask as opposed to the respirator?

5 MS. NATRELLA: No, I haven't said that at
6 all.

7 JUDGE ABDUS-SALAAM: No, I'm just - - -

8 MS. NATRELLA: Oh.

9 JUDGE ABDUS-SALAAM: I'm asking. I'm not -
10 - - I'm unclear about how he wound up with a dust
11 mask as opposed to a respirator if he never made a
12 request for a respirator or some other form of - - -

13 MS. NATRELLA: Well, I believe if you read
14 his deposition testimony on this point, he, at one
15 point, says the terms are interchangeable. Then he
16 says, she gave me a dust mask. And then his lawyer
17 says, well, did you actually ask for a respirator,
18 and then he says yes.

19 So the testimony is a bit murky. He did
20 ask his supervisor for some - - -

21 JUDGE SMITH: We - - - we - - - if it's
22 murky, we have to view it in the light most favorable
23 to him for summary judgment purposes.

24 MS. NATRELLA: Well, Your Honor, yes, if
25 you find that the dialogue needed to continue beyond

1 the medical facts here that the only - - - that his
2 doctors say he wouldn't be cleared.

3 JUDGE SMITH: I - - - I - - - I understand
4 - - -

5 MS. NATRELLA: And also his request - - -

6 JUDGE SMITH: I understand, but the - - -

7 MS. NATRELLA: Right, his request would
8 come - - -

9 JUDGE SMITH: I - - - excuse me, please,
10 please.

11 MS. NATRELLA: I'm sorry.

12 JUDGE SMITH: I do understand what you're
13 saying. The rules are I get to interrupt you; you
14 don't get to interrupt me; I'm sorry.

15 The - - - I understand that the doctor's
16 letters are very, very strong for you, but on - - -
17 for summary judgment purposes, can a court say
18 conclusively that he's bound by those letters?
19 People don't always follow the doctor's advice. They
20 get another doctor who will tolerate more.

21 MS. NATRELLA: Well, Your Honor, here,
22 though, the requests that were made for reasonable
23 accommodation, both from plaintiff, from his doctors,
24 from his union, all ask for reassignment to a
25 position that included fieldwork. We fully explained

1 that that was - - -

2 JUDGE SMITH: What he - - - he - - - and he
3 says - - -

4 MS. NATRELLA: - - - would present a danger
5 to himself based on his medical documentation.

6 JUDGE SMITH: He says - - - I admit his
7 doctor doesn't say it - - - but he says he could have
8 done it.

9 MS. NATRELLA: He eventually says that.

10 JUDGE SMITH: Why isn't that an issue of
11 fact?

12 MS. NATRELLA: That's not what he - - -
13 that's not what he claimed. He says that - - -

14 JUDGE GRAFFEO: Well, what I don't
15 understand is why did you have this individual
16 assigned to Queens Hospital instead of something
17 similar to the position he had previously, where he
18 was only in the field one or two days a week?

19 MS. NATRELLA: Well, the record here - - -

20 JUDGE GRAFFEO: Why was that - - -

21 MS. NATRELLA: - - - indicates - - -

22 JUDGE GRAFFEO: Why wouldn't - - - why
23 would you send someone who had been out on medical
24 leave to that site, instead of sending one of your
25 other inspectors?

1 MS. NATRELLA: The record here indicates
2 that the operational needs of HHC as an employer were
3 to staff - - - provide further staffing at the Queens
4 Hospital Center position and also - - -

5 CHIEF JUDGE LIPPMAN: Yeah, but why him?

6 JUDGE ABDUS-SALAAM: Well, he's - - - was
7 he - - -

8 JUDGE GRAFFEO: Why this person? That's
9 what I'm asking.

10 MS. NATRELLA: But - - -

11 JUDGE GRAFFEO: Why this person? Why not
12 shift the workforce around so you could accommodate
13 his medical needs?

14 MS. NATRELLA: Well, I believe, the law is
15 - - -

16 JUDGE RIVERA: The point - - - what if you
17 have several people in that title?

18 MS. NATRELLA: - - - very clear with
19 respect to reasonable accommodation both under the
20 Second Circuit's decision in Davis, the First
21 Department's decision in Pimental, that you don't
22 have to create a light-duty position. You don't have
23 to rearrange - - -

24 JUDGE RIVERA: But it's not creating a job.

25 CHIEF JUDGE LIPPMAN: Counsel, does it

1 matter whether you're under the State or City Human
2 Rights law? You win - - -

3 MS. NATRELLA: Not for this purpose, Your
4 Honor. We have - - -

5 CHIEF JUDGE LIPPMAN: You win on both?

6 MS. NATRELLA: We win on both, because it
7 goes back to what our lead argument is, is that we
8 demonstrated on our motion for summary judgment - - -

9 CHIEF JUDGE LIPPMAN: You agree you win on
10 both or you lose on both?

11 MS. NATRELLA: No, no. I - - - I think it
12 is possible - - -

13 JUDGE SMITH: You win on both or you win on
14 one?

15 CHIEF JUDGE LIPPMAN: You win on both or
16 you win on one? Okay.

17 MS. NATRELLA: Well, we - - -

18 JUDGE RIVERA: You win something.

19 MS. NATRELLA: - - - obviously engaged in a
20 dialogue here that as - - - I mean, the Appellate
21 Division opinion fully lays - - - lays out our
22 exchange of letters, the medical leaves, our attempts
23 to give him time to come back. Frankly, during that
24 last six-month period, when he was given time to show
25 that he could perform the functions - - - and it's

1 not just the functions for the Queens position, it's
2 the functions of a health facilities planner - - -
3 has to be in the field, has to be able to inspect
4 sites. And we gave him that time - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MS. NATRELLA: - - - and during that six-
7 month period - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MS. NATRELLA: - - - the doctor said no
10 medical clearance ever.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 Appreciate it, counsel.

13 Counselor?

14 MR. MCCALLION: This was the - - - the
15 record's clear that the interactive process engaged
16 in was the Human Resources, Mondo Hall, in December
17 of 2005 wouldn't return his phone calls. That's why
18 Mr. Jacobsen went to the New York City Human Rights
19 Commission and had them call, and they took the call
20 from the city attorney. That's the interactive - - -

21 JUDGE PIGOTT: Ms. Natrella - - - Ms.
22 Natrella alludes to the - - - I'm assuming the August
23 4th letter from Dr. Skloot, that says that "He will
24 never be medically cleared to fully perform the
25 essential functions of his duty."

1 MR. MCCALLION: He was fully disabled by
2 August 4th after two tours of duty without proper
3 medical equipment, yeah, but on March - - -

4 JUDGE SMITH: She doesn't - - -

5 MR. MCCALLION: On March the 21st - - -

6 JUDGE SMITH: She doesn't mention in that
7 letter that that was new news. She makes it sound as
8 though that was just his condition. She didn't - - -

9 MR. MCCALLION: No, because if you go back
10 - - - and the City dances around this - - - on March
11 21st - - - this is the operable letter from Dr.
12 Skloot. I quote: "He can" - - - "He is ready to
13 return to work immediately. He is medically cleared
14 to work in the field so that he can attend project
15 meetings. I advised him that it is imperative that
16 he not be exposed to any type of environmental dust,
17 and he has assured me that his fieldwork will not
18 include such exposure".

19 The record shows that he assured his
20 doctor, not because he's a supervisor, but because he
21 went to Vincent James and said, Mr. Supervisor - - -

22 JUDGE SMITH: Doesn't - - -

23 MR. MCCALLION: - - - will you assure me
24 that I won't be exposed to environmental dust
25 wherever you assign me; and he assured him.

1 JUDGE SMITH: Doesn't it - - - doesn't it
2 sound a little more like he's - - - he's telling - -
3 - he's not - - - he doesn't want to tell his doctor
4 how bad things are, because he wants to keep his job?

5 MR. MCCALLION: That would be true except
6 for the deposition of Vincent James, his supervisor,
7 who says, yes, I remember that call; I remember that
8 discussion, and I assured him - - - in fact, I'm as
9 shocked as anybody else, that it was an
10 environmentally hazardous environment out at Queens
11 Hospital Center. The supervisor never went out
12 there, other than an air-conditioned office. He ne -
13 - - he never went out to see the desk - - -

14 JUDGE SMITH: So you're - - - you're - - -

15 MR. MCCALLION: - - - in a active
16 construction area that he was assigned to - - -

17 JUDGE SMITH: You're saying that - - -
18 you're saying that the HHC employee testified there
19 was no dust on the construction site?

20 MR. MCCALLION: No, he testified that he
21 assured Mr. Jacobsen that they would comply with the
22 requirements - - - the accommodation, in the words of
23 the statute - - - of the March 21st letter from his
24 doctor that he would be not exposed to any type - - -

25 CHIEF JUDGE LIPPMAN: Well, wait, are you -

1 - -

2 MR. MCCALLION: - - - of environmental
3 dust.

4 CHIEF JUDGE LIPPMAN: Are you saying, then,
5 that even at Queens, he could have been accommodated?
6 Irrespective of whether they brought him back to 346
7 Broadway, even if they're at Queens, you think they
8 could have done things that would have accommodated
9 him - - -

10 MR. MCCALLION: Well - - -

11 CHIEF JUDGE LIPPMAN: - - - based on the
12 supervisor's deposition?

13 MR. MCCALLION: The record is crystal
14 clear. The supervisor did not know that these were
15 hazardous conditions - - -

16 JUDGE SMITH: What's your answer - - -

17 MR. MCCALLION: - - - out there.

18 JUDGE SMITH: - - - to the Chief's
19 question?

20 MR. MCCALLION: Oh, I'm sorry.

21 JUDGE SMITH: Are you saying that or you're
22 not saying it?

23 MR. MCCALLION: If he was permanent - - -
24 his desk was in an office which was undergoing an
25 asbestos abatement and active construction. If he

1 had a full - - - full-face, full-mask respirator on
2 the entire time he was out there sitting at his desk,
3 yes - - -

4 JUDGE SMITH: The question is - - -

5 MR. MCCALLION: - - - that would have been
6 an accommodation.

7 JUDGE SMITH: The question is, would he
8 have done the job if he had to stay out in Queens?

9 MR. MCCALLION: He did do the job when he -
10 - -

11 JUDGE SMITH: That's a yes?

12 MR. MCCALLION: Yes, and he did. In fact,
13 they say, well, he killed himself by go - - - walking
14 out into a construction zone without protective
15 equipment. What was he supposed to do? Go out and
16 buy his own - - - his own respirator?

17 It's required by the law, and I would
18 respectfully ask on behalf of Mr. Jacobsen, that this
19 court affirm the principle that a municipality or
20 indeed any employer must comply with the full body of
21 laws now, which provide for a workplace safety and
22 that no employee be exposed to what Mr. Jacobsen was
23 exposed to, and as a consequence, will have to spend
24 the rest of his life attached to a oxygen tank.

25 CHIEF JUDGE LIPPMAN: Okay, counsel,

1 thanks.

2 MR. MCCALLION: Thank you.

3 CHIEF JUDGE LIPPMAN: Thank you both.

4 Appreciate it.

5 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Jacobsen v. New York City Health and Hospitals Corporation, No. 34 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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