Matter of Ansbro v Nigro
2022 NY Slip Op 32580(U)
July 25, 2022
Supreme Court, New York County
Docket Number: Index No. 150230/2022
Judge: William Perry

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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IN THE MATTER OF THE APPLICATION OF ANDREW ANSBRO, INDIVIDUALLY AND AS PRESIDENT OF THE UNIFORMED FIREFIGHTERS ASSOCIATION, DANIEL RICHTER, KEVIN MARTINEZ, JAMES MURPHY

Plaintiff,

- v -

DANIEL NIGRO, DAVE CHOKSHI, ERIC ADAMS, THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 150230/2022

MOTION DATE 01/07/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 25, 33, 34, 35, 36, 37, 50

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In the motion at bar, petitioners request that the Court grant a preliminary injunction restraining respondents from:

1. Continuing its evaluation of the COVID-19 exemption process until respondents begin employing cooperative dialogue in each case.

2. Temporarily and permanently enjoining and restraining respondents, in any manner or by any means, from continuing the evaluation of the exemption process until respondents begin providing the individual reasons for exemption denials.

3. Vacating the denials of the previous requests for religious and medical exemptions and requiring individual reconsideration of each request.

4. Restoring those firefighters who were placed or continued Leave Without Pay ("LWOP") after their Reasonable Accommodations ("RA") were denied to active

paid status and reimburse the lost wages and fringe benefits since their wrongful denial of their exemption and RA requests.

5. Directing that respondents follow the statutorily mandated process for resolving exemption and requests for Reasonable Accommodations.

6. Awarding petitioner costs and attorneys' fees.

This action arises out of an Order of the Department of Health and Mental Hygiene ("DOHMH") which required all City employees to show proof of at least one dose of the COVID-19 vaccine by 5:00 pm on October 29, 2021.

In the case at bar, petitioners do not challenge the validity of the DOHMH Order. Petitioners contend that the New York City Fire Department's ("FDNY") process for granting medical or religious reasonable accommodations is arbitrary, capricious, and unlawful, and contravenes the statutory requirements governing reasonable accommodations.

Specifically, petitioners claim that (a) reasonable accommodation requests are being denied without a sufficient "cooperative dialogue", (b) that the process for evaluating such requests is discriminatory with regard to the firefighter's religious beliefs or disabilities and, that (c) the denials fail to provide individualized reasoning for its conclusion.

Respondents oppose the motion arguing that petitioners have not demonstrated their entitlement to a preliminary injunction. First, respondents argue that petitioners are not likely to succeed on the merits of this case because the FDNY's guidelines evaluating its employees' reasonable accommodation requests are rationally based upon national and state guidelines and that the DOHMH order itself declares that nothing within it "shall be construed to prevent accommodations required by law".

Respondents next argue that petitioners' claims that the loss of pay, medical benefits and employment do not constitute 'irreparable harm", which is defined as one that may not be repaired and proof of which is required to succeed on a motion for a preliminary injunction. Respondents contend that these claims are in fact "financial harm", which are compensable by money damages.

Respondents also assert that contrary to petitioner's allegations, the FDNY actively engaged in the interactive process/cooperative dialogue process by not only requesting additional information from applicants when needed, but also by having a specific and detailed review process conducted by trained employees.

In addition, respondents state that no requested accommodation has been denied with finality given that an appeal process still exists for further review and consideration. Citing *Palma v. NY City Campaign Fin. Bd.*, 2006 NY Slip. Op. 30797 (U), *21 (Sup. Ct NY City, 2006) (quoting *De. St. Aubin, v. Flacke,* 68 NY2d 66 (1986)) (where an agency has not yet made a formal decision and there is no "actual concrete impact, the courts should avoid becoming entangled in abstract or hypothetical problems…"). Respondents assert that the denial letters include instructions on how to submit an appeal, and, in many instances, the FDNY has facilitated firefighters' appeals of their accommodation denials, including the three petitioners.

It is well settled that for a preliminary injunction/temporary restraining order to be granted there are three required elements that must be established: (1) likelihood of success on the merits, (2) irreparably injury absent granting of the preliminary injunction, (3) and a balancing of the equities in the movant's favor. *Berman v TRG Waterfront Lender, LLC,* 181 AD3d 783 (2d Dept, 2020) (see Keller v. Kay, 170 AD3d 978 (2d Dept, 2018). All of these elements must be satisfied and demonstrated by clear by clear and convincing evidence. *Liotta v.*

Mattone, 71 AD2d 741 (2d Dept, 2010). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see *Tatum v. Newell Funding, LLC,* 63 A.D.3d 911, (2nd Dep't, 2009); *Cooper v. Bd. of White Sands Condo*., 89 A.D.3d 669, 669, (2nd Dep't, 2011). Whether a party is entitled to a preliminary injunction is a determination entrusted to the sound discretion of the motion court (see *Doe v. Axelrod,* 73 N.Y.2d 748 (1988); *Eastview Mall, LLC v. Grace Holmes, Inc*., 182 A.D.3d 1057, (4th Dep't, 2020).

Upon review of the papers submitted and the relevant documents presented, this court finds that the petitioners have failed to demonstrate their entitlement to a preliminary injunction. As explained below, petitioners have demonstrated that their claims have merit and could more than likely succeed should this matter be tried. They have also shown that the balance of the equities tilt in their favor. However, petitioners are unable to demonstrate that their claims of loss of pay, medical benefits and employment constitute irreparable harm, which showing is required to obtain injunctive relief.

Irreparable harm is a legal concept which argues that the type of harm threatened cannot be corrected through monetary compensation or conditions cannot be put back the way they were. The party seeking such relief through a request for injunctive relief must show that judicial action is required to prevent imminent injury for which there is no other way to prevent the threatened harm.

The petitioners have demonstrated a likelihood of success on the merits, as they have shown that the respondents failed to engage in "meaningful/ cooperative" dialogue with petitioners regarding the accommodations for religious exemptions to the vaccine mandate. Petitioners have likewise shown that such failure to engage in such dialogue violates the State Human Rights Law, codified at Executive Law Article 15 as well as the New York City Human Rights Law, codified in Title 8, Chapter 1 of the New York City Administrative Code.

In a June 18, 2020, the Appellate Division of the First Department in *Hosking v. Memorial Sloan Kettering Medical Center*, 186 AD3d 64 (1st Dep' 2020) held that a reasonable accommodation requires a "good faith interactive process," clarifying the individual needs of the employee and the busines, and the appropriate accommodation. The New York State Human Rights law requires "at least some deliberation between the parties about the viability of an accommodation, while the New York City Human Rights law, places the burden on the employer to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business. See, *Jacobsen v. New York City Health and Hospitals Corp.*,22 NY3d 824 (2014).

The New York City Human Rights Law ("NYCHRL") requires a more rigorous process than the State Human Rights Law. Courts must construe the "NYCRL" broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possibly." *Albino v. City of New York,* 16 NY3d 473 (2011). Unlike the NYSRHL, the NYCHRL places the burden on the employer to show the unavailability of any safe and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business. *Jacobsen v. New York City Health and Hospitals Corporation,* 22 NYS3d 824 (2014).

The record clearly indicates that respondents' administration of the accommodation requests proceeded without any "cooperative dialogue."

Cooperative dialogue presumes an interactive process/engagement wherein information is exchanged by the parties in a manner where each party is afforded the opportunity to be heard by the other. Such interaction need not be face to face and may be in written form as long as the needs of the person requesting the accommodation understands and knows of the potential accommodations that may address the requests and the possible difficulties that the

accommodations may pose for the covered entity (see, *Hosking v. Memorial Sloan-Kettering Medical Center*, 186 AD3d 58 (2020).

There was no "cooperative dialogue" here. Instead, respondents asked exemption applicants to submit documentation from their religious leaders in support of their applications. This request was improper, as such information could have or should be been elicited during the cooperative dialogue process. This improper request was also made without respondents first articulating any objective basis for questioning either the religious nature or the sincerity of the applicant's belief and how this information relates to the person requesting the accommodation. This request clearly shows that respondents' process for evaluating the accommodation requests may be construed as arbitrary, capricious and possibly unlawful.

Although respondents claim that they engaged in the interactive process, they finally argue that they could not provide actual "cooperative dialogue" to the thousands of firefighters who have applied for accommodations because in their own words, "due to time constraints, it was unfeasible to verbally interview every single applicant personally."

This argument lacks merit, as time could have been made to comply with this necessary statutory requirement relating to reasonable accommodations.

As noted earlier, although petitioners have satisfied two of the three elements required to obtain injunctive relief, they have not shown that their anticipated potential injuries are irreparable. Petitioners claims of loss of pay, medical benefits and employment may be repaired/ compensable through an award of money damages, resumption of medical benefits and reinstatement to petitioners' former job titles. Without this showing, the motion may not prevail and must be denied.

This constitutes the Decision and Order of the Court.

725/2022							
DATE					WILLIAM PERRY, J.S.C.		
CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE