

Matter of Hickey v City of New York

2024 NY Slip Op 32063(U)

June 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 517587/2022

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 14th day of June 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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In the Matter of the Application of JASON HICKEY
Petitioner(s)

Index No: 517587/2022

For a Judgment and Order Pursuant to Article 78
of the Civil Practice Law and Rules

ORDER

-against-

CITY OF NEW YORK, ERIC ADAMS, as Mayor of the City of
New York, NEW YORK CITY FIRE DEPARTMENT, and
LAURA KAVANAGH, as Acting Commissioner of the New
York City Fire Department,

Respondent(s)

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Petition/Affidavits Annexed

1-22; 45-46

Exhibits Annexed/Reply.....

29-44

Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

In this matter, Jason Hickey (“Petitioner”) moves (Motion Seq. 1) for an order pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) declaring that the City of New York, Eric Adams, as Mayor of the City of New York, New York City Fire Department, and Laura Kavanagh, as Acting Commissioner of the New York City Fire Department (“FDNY”) (Collectively “Respondents”) denial of Petitioner’s request for a medical exemption or accommodation was arbitrary and capricious, an error of law, and an abuse of discretion in violation of the New York City Human Rights Law (“NYCHRL”) and the New York City Administrative Code 8-107. Petitioner also seeks an order reversing the Respondents’ denial of his application, effectively granting him an exemption to COVID-19 vaccination while his medical diagnoses continue, returning Petitioner to work in a full-time, full duty capacity as a Fire Lieutenant with the FDNY as if his constructive discharge did not occur; making Petitioner whole for lost compensation, if any, including lost overtime opportunities, damages, reasonable attorney’s fees and costs. Respondents have opposed the motion on the grounds that Petitioner’s request is moot, and assuming arguendo that it is not moot, that Respondents’ denial was not arbitrary and capricious, an error of law, or an abuse of discretion.

This action is brought to challenge FDNY’s February 22, 2022, Final Decision denying Petitioner’s application for a medical exemption or accommodation from the Respondents’ COVID-19

vaccination mandate, and to challenge Petitioner's constructive discharge from his position as a Lieutenant at the FDNY. Petitioner worked as an essential worker during the COVID-19 pandemic. On March 12, 2020, Mayor Bill DeBlasio issued Emergency Executive Order No. 98 declaring a state of emergency in New York City to address the threat posed by COVID-19 to the health and welfare of city residents. Thereafter, on March 25, 2020, the New York City Commissioner of the Department of Health and Mental Hygiene ("DOHMH") also declared the existence of a public health emergency. Subsequently, on or about October 20, 2021, DOHMH issued an order that required all New York City employees to receive COVID-19 vaccination no later than 5 p.m. on October 29, 2021.¹ Any city employee who failed to provide the requisite proof of vaccination would be placed on Leave Without Pay beginning on November 1, 2021.

On October 21, 2021, FDNY Chief of Operations sent buck slip OPS-21- 10-08 ("Buck Slip") to all commands informing employees of the City's Order.² The Buck Slip contained a summary of the COVID-19 vaccine mandate, a copy of the order, a FAQ sheet and also the process by which an employee could apply for a religious or medical accommodation or exemption. Pursuant to the Buck Slip, Existing City employees who opt to file a reasonable accommodation request must apply with their agency's EEO Officer for an exemption from this vaccine requirement no later than October 27, 2021, to avoid being placed on LWOP on November 1, 2021. Employees who seek reasonable accommodations from their agencies after October 27, 2021, will be placed on LWOP until the reasonable accommodation is decided, including any appeals. For reasonable accommodation requests filed on or before October 27, 2021, employees will be permitted to continue to submit weekly negative PCR test results while their accommodation request is under consideration or on appeal. Pursuant to the order, the only allowable accommodation from the vaccination mandate that will not cause undue hardship and/or disruption is weekly testing and submission of negative PCR results.

On October 25, 2021, Petitioner submitted his application for a medical exemption or accommodation which included medical documents from Dr. Feldman ("Feldman") regarding his diagnoses and a letter from Dr. George Ruggerio, DO., ("Ruggerio") the medical advisor who has been overseeing Petitioner's care, and an Employee Authorization for Release of Medical Records form ("HIPAA Release"). On December 3, 2021, Petitioner was advised by the FDNY via email that his request for a medical accommodation was denied and that "the asserted basis for the accommodation is insufficient to grant the requested accommodation, particularly in light of the potential undue hardship to

¹ The order states, in pertinent part, that by October 29, 2021, City employees must provide proof to the agency or office where they work that: (1) they have been fully vaccinated against COVID-19; or (2) they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or (3) they have received the first dose of a two-dose COVID-19 vaccine.

² (Respondents' Exhibit C).

the Department.” The e-mail also set forth the appeal procedure, which required Petitioner to appeal within 7 days of receipt of the denial as well as the potential consequences of failing to receive a vaccination.³ On December 6, 2021, Petitioner replied to the FDNY’s Equal Employee Opportunity Commission (“EEOC”) via email stating, “I received an email denying my request for a Reasonable Accommodation with regard to the COVID-19 vaccine mandate,” and “I am requesting the FDNY EEO Office to enter an appeal on my behalf and forward my provided supporting documentation.”⁴ Petitioner did not submit any new additional documents with his email. On January 5, 2022, FDNY sent a notice to Petitioner entitled, “Supplemental Information: Denial of Medical Request for Vaccine Mandate Exemption,” which stated, “Your request for a medical exemption from the vaccine mandate was denied because the medical basis and the records or notes submitted in support of the requested exemption did not sufficiently establish a contraindication from receiving the COVID-19 vaccine. Further, given the state of the public health emergency, the nature of the Department’s life-saving mission, and the impact to the safety and health of Department members and the public that Department members regularly interact with, the requested accommodation could not be granted.”⁵

On February 20, 2022, the Citywide Panel denied Petitioner’s appeal and affirmed the FDNY’s denial of Petitioner’s request for an accommodation.⁶ On February 22, 2022, Petitioner was notified again that his appeal had been denied, and that he had “three business days from the date of the denial notice to submit proof of vaccination.” Petitioner was further advised that if he did not submit such proof, he would be “placed on leave without pay.” As part of its determination the City of New York Reasonable Accommodation Appeals Panel (“City Appeal Panel”) states that it has carefully reviewed the Agency’s determination, all of the documentation submitted in connection with the appeal and that based on the review, the City Panel’s decision classification for Petitioner’s appeal “does not meet criteria.” This determination was the final decision with respect to Petitioner’s accommodation request. The court notes that the record does not reflect whether Petitioner was ever placed on LWOP, or if he was permitted to take weekly tests, however Petitioner ultimately retired from his employment with the FDNY on April 1, 2022.

In support of his Petition, Petitioner argues that the administrative decision to deny his request for a medical exemption or accommodation was arbitrary and capricious, error of law, and an abuse of discretion. Petitioner asserts that he was diagnosed with “Factor V Leiden Mutation, Heterozygous Type” in 2019, and that the COVID-19 vaccinations greatly increase his risk of blood clots. Petitioner states that Respondents issued boiler plate denial forms that did not analyze applications on a case-by-case basis, nor

³ (Respondents’ Exhibit E).

⁴ (Petitioner’s Exhibit 8; Respondents’ Exhibit F).

⁵ (Petitioner’s Exhibit 10; Respondents’ Exhibit G).

⁶ (Petitioner’s Exhibit 11; Respondents’ Exhibit H).

did it provide evidence that it conducted an individualized assessment of Petitioner's request or a rational explanation for its assertion of potential undue hardship. Petitioner states that the City Department of Health issued a "Guidance on Accommodation for Workers" form on December 20, 2021, which outlined that employer may deny accommodations that impose an undue hardship provided that several factors were considered, and it also listed that weekly testing, masking, and social distancing as types of accommodations for those seeking medical exemptions.⁷ Further, Petitioner argues that Respondents violated the NYCHRL and New York City Administrative law because it is an employer's burden to show the unavailability of any safe and reasonable accommodation or to show that any proposed accommodation would place an undue hardship on its business, which they failed to do. Petitioner also contends that Respondents failed to comply with the statutes by not engaging in cooperative dialogue regarding alternative accommodation requests, which involves a three step process wherein an employer must (1) initiate cooperative dialogue, (2) engage in cooperative dialogue, and (3) conclude cooperative dialogue—Respondent's only satisfied their obligation to initiate and fail to allege that the other steps of the process were followed. In support, Petitioner submits an affidavit from Ruggiero, his medical advisor, who states that in his professional and medical opinion, given Petitioner's current medical diagnosis that he should not receive any of the COVID-19 vaccinations.

In opposition, Respondents argue the FDNY had a rational basis for denying Petitioner's application, and that the City Appeal Panel's decision to uphold the denial was not arbitrary and capricious, an error of law, or an abuse of discretion. Respondents concede that Petitioner's application stated that he had a blood condition that recommends against receiving COVID-19 vaccinations because all of the available vaccines have reported thrombosis and vascular/clotting related events, along with submitted medical documents. However, Respondents assert that FDNY denied Petitioner's application because he failed to demonstrate that he was suffering from a disability that entitled him to an exemption or accommodation because his condition was not listed as an eligible medical condition. Respondents state that the vaccine mandate is a lawful condition for employment and has been upheld multiple times in the state. Respondents contend that FDNY's decision was consistent with its obligation to provide a safe workplace in compliance with the DOHMH's mandate and that it could not permit unvaccinated employees, absent an exemption or accommodation to perform work for the FDNY. Further, Respondents contend that there was no other accommodation available that would allow Petitioner to safely work as a

⁷ Factors listed in the "Guidance on Accommodation for Workers" form include: the nature and cost of the accommodation needed; the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility; the overall financial resources, size, number of employees, and type and location of facilities of the employer; the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; the impact of the accommodation on the operation of the facility (Petitioner's Exhibit 9).

firefighter in close proximity with the public and other firefighters. Respondents claim that it engaged in sufficient cooperative dialogue with Petitioner by issuing the Buckslip pursuant to the New York City Commission on Human Rights guidelines which stated that employers may satisfy their obligation to initiate the cooperative dialogue by reminding staff of all policies regarding reasonable accommodations and the process on how to apply for such accommodation. In support, Respondents submit affidavits from Don Nguyen (“Nguyen”), the Assistant Commissioner of EEOC office at the FDNY and Eric J. Eichenholtz (“Eichenholtz”), the Managing Attorney of the New York City Law Department, Office of the Corporation Counsel. Respondents now maintain that Petitioner’s demand for declaratory relief and for an exemption are now moot.

It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal (*People ex rel. Napoli v Annucci*, 219 AD3d 496 [2d Dept. 2023]; *Matter of Kirkland v Annucci*, 150 AD3d 736 [2d Dept. 2017]; quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707 [1980]). Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries (*Kirkland* at 738). Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy (*Matter of Citi neighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Comm.*, 2 NY3d 727 [2004]; *Chang v Maliq M.*, 154 AD3d 653 [2d Dept. 2017]). Where a controversy is otherwise moot, a court may nevertheless review it if it presents for review “important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable” (*Id.*; *Clyne* at 714).

Article 78 proceedings are used to challenge action (or inaction) by agencies and officers of state and local government (*Levine v Bd. of Educ.*, 186 AD2d 743 [2d Dept. 1992]). A petitioner may recover monetary damages in an Article 78 proceeding only if the damages are incidental to petitioner’s primary relief (CPLR 7806; *Gross v Perales*, 72 NY2d 231 [1988]). Such damages may include full back pay and benefits retroactively (*Brown v Waterloo*, 187 AD3d 1493 [4th Dept. 2020]). Whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case (*Id.*). Monetary relief may be incidental to an Article 78 proceeding if the relief is contingent on the court’s determination that action by an agency or its official was unlawful, and the damages flow directly from that action (*Id.*; *Hughes Village Restaurant, Inc. v Village of Castleton-on-Hudson*, 46 AD2d 1044 [3d Dept. 2007]).

As an initial matter, this action must be dismissed as against the FDNY because agencies are not legally cognizable entities and therefore not proper parties to actions (see NY City Charter § 396; *Jenkins v City of New York*, 478 F3d 76 [2d Cir. 2007]; *Barrera v City of New York*, 47 Misc 3d 1028 [Sup Ct.

Queens County 2015]). Similarly, claims against municipal officials in their official capacities are really claims against the municipality and, thus, are redundant when the municipality is also named as a defendant (*Brandon v Holt*, 469 US 464 [1985]; *Rosen & Bardunias v County of Westchester*, 228 AD2d 487 [2d Dept. 1996]; *Frank v State*, 86 AD3d 183 [3d Dept. 2011]). Thus, this action must be dismissed as against Laura Kavanagh, as Acting Commissioner of the New York City Fire Department and Eric Adams as Mayor of the City of New York.

Here the court finds that Petitioner's challenges are not moot. By order dated February 6, 2023, Mayor Adams issued Executive Order 25, which revoked Executive Orders 75 and 76 mandating COVID-19 vaccination for city employees. Additionally, by order dated February 9, 2023, the DBOH amended portions of the October 20, 2021, and October 31, 2021, orders which required COVID-19 vaccinations for city employees.⁸ However, while it is unclear whether Petitioner was placed on LWOP, he is seeking damages in part for back pay and benefits, thus he has a right or interest that would be affected by the court's ruling on his petition (see *Clyne* at 714; *New England Health Care Emps. Union, Dist. 1199, SEIU AFL-CIO v Mount Sinai Hosp.*, 65 F3d 1024, 1029 [2d Cir. 1995]). Moreover, there is a present controversy between the parties regarding Petitioner's contentions that that his retirement amounts to a constructive discharge or termination because he alleges that Respondents deliberately created working conditions that were so difficult or unpleasant that a reasonable person in his shoes as an employee would have felt compelled to resign since he had to choose to either take a vaccine which posed health risks or be placed on LWOP and/or terminated (*Stetson v NYNEX Serv. Co.*, 995 F2d 355, 361 [2d Cir 1993]; see also *Abramson v Board of Educ. Of City of New York*, 120 AD2d 474 [2d Dept. 1986]; *Mascola v City Univ. of N.Y.*, 14 AD3d 409 [1st Dept. 2010]).

Pursuant to CPLR 7803, judicial review of an agency determination is limited to whether the determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *Matter of Save America's Clocks, Inc.*, 33 NY3d 198 [2017]). The courts cannot interfere unless there is "no rational basis for the exercise of discretion, or the action is without sound basis in reason and . . . taken without regard to the facts." (*Id.* at 207). The reviewing court does not examine the facts de novo to reach an independent determination (*Heintz v Brown*, 80 NY2d 998 [1992]; *Matter of Marsh v Hanley*, 50 AD2d 687 [3d Dept. 1975]). The reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated (*Matter of Purdy v Kreisberg*, 47 NY2d 354 [1979]). If the acts of the administrative agency find support in the record, its determination is

⁸ Pursuant to the amendment, Paragraph 3 of the October 20, 2021, order was repealed, so that a city employee who does not provide the required proof of vaccination no longer needs to be excluded from their work premises.

conclusive even if the court would have reached a contrary result (*CHT Place, LLC v New York State Division of Housing and Community Renewal*, 219 AD3d 486 [2d Dept. 2023]; *Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269 [1972]). In demonstrating that administrative actions were taken arbitrarily or in bad faith, the petitioner bears a heavy burden of proof, for which conclusory allegations and speculative assertions will not suffice (*Matter of Harpur v Cassano*, 129 AD3d 964 [2d Dept. 2015]). Additionally, Public Health agencies, in particular, are entitled to a high degree of judicial deference when acting in their area of particular expertise (*C.F. v NYC Dept. of Health and Mental Hygiene*, 191 AD3d 52 [2d Dept. 2020]). Capricious action in a legal sense may be established when an administrative agency decides differently on identical facts (see *Lefrak Forest Hills Corp. v Galvin*, 40 AD2d 211 [2d Dept. 1972]; *Italian Sons & Daughters, Inc. v Common Council of Buffalo*, 453 NYS2d 962 [4th Dept. 1982]).

Under the New York City Human Rights Law (“NYCHRL”), it is an unlawful discriminatory practice for an employer, because of an individual’s disability, to refuse to hire or to discharge such individual, or otherwise to discriminate against such individual in the terms, conditions and privileges of employment (New York City, N.Y., Code 8-107[1][a]). The NYCHRL defines disability as any physical, medical, mental or psychological impairment, or a history or record of such impairment and does not include “reasonable accommodation” or the ability to perform a job in a reasonable manner (New York City, N.Y., Code 8-102[16][1]). Instead, the NYCHRL shifts the burden to the employer to show an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job, provided that the disability is known or should have been known by the employer (New York City, N.Y., Code 8-107[15][b]; *Hosking v Mem. Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 62 [1st Dept 2020]). Moreover, such “reasonable accommodation” should not cause undue hardship in the conduct of the employer’s business” (New York City, N.Y., Code 8-102; *Id.*). An accommodation shall be considered to constitute an undue hardship, under the NYCHRL, if it will result in the inability of an employee to perform the essential functions of the position in which they are employed (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Romanello v Intesa Sanpaolo, S.P.A.*, 22 NY3d 881 [2013]; see also NY Exec. 296[10][d]).

The first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the individual and the reasonableness of the accommodation requested (New York City, N.Y., Code 8-107[28][a]; *Hosking v Mem’l Sloan-Kettering Cancer Ctr.*, 186 AD3d 56 [1st Dept. 2020]). The interactive process continues until, if possible, an accommodation reasonable to the employee and employer is reached (*Id.*). Unlike the State Human Rights Law where the employer must engage in interactions with the employee revealing at least some deliberation upon the viability of an

accommodation, the City Human Rights Law requires a more rigorous individualized interactive process (*Hosking* at 64; *Phillips v City of New York*, 66 AD3d 170 [1st Dept. 2009]). The determination that no reasonable accommodation would enable the person requesting an accommodation to satisfy the essential requisites of a job or enjoy the right or rights in question may only be made after the parties have engaged in or the covered entity has attempted to engage in cooperative dialogue (New York City, N.Y., Code 8-107[28][e]).

In *Marsteller v City of New York*, 217 AD3d 5443 (1st Dept. 2023), the Appellate Division First Department held that the city respondents were compliant with the cooperative dialogue requirements of the NYCHRL by publicly offering information on its process for reviewing accommodation requests and informing employees on how to submit applications and appeal denials. Further, the court held that because the city respondents received a voluminous number of requests for accommodations that needed to be resolved under a constrained timeline during the ongoing pandemic, that the petitioner failed to allege facts demonstrating that under the unique circumstances of the pandemic, that he required “a more robust or individualized dialogue” than the process he received (*Id.*).

Here, the court finds that the denial of the Petitioner’s medical exemption or accommodation request was not arbitrary and capricious, error of law, or an abuse of discretion. Petitioner availed himself of the City’s accommodation procedure and engaged with Respondents throughout the process. Contrary to Petitioner’s contentions that Respondents issued “boiler plate denial forms that did not analyze applications on a case-by-case basis, nor did it provide evidence that it conducted an individualized assessment of Petitioner’s request or a rational explanation for its assertion of potential undue hardship,” an agency does not need to state with specificity its detailed analysis or point to any contemporaneously created record that demonstrates that it considered all relevant factors (see *Hogue v Bd. of Educ. of City School Dist. of City of New York*, 220 AD3d 416, 417 [1st Dept 2023]; citing *Matter of Acosta v New York City Dept. of Educ.*, 16 NY3d 309 [2011]). Respondents’ denial forms state that it has carefully reviewed the agency’s determination and all of the documentation submitted to the agency and the additional information submitted in connection with the appeal and ultimately concluded that Petitioner’s medical condition did not qualify as a contraindication from receiving the COVID-19 vaccine. Thus, no further individualized dialogue was required given the high volume of requests received. Further, the affidavit submitted by Nguyen and the affirmation of Eichenholtz also provide the overall process of how applications are submitted, reviewed, and decided by the agency and reiterate that Petitioner did not qualify for an exemption or reasonable accommodation.

With respect to Petitioner’s claim seeking damages for constructive discharge, Petitioner alleges that his retirement amounts to a constructive discharge or termination because the Respondents deliberately created working conditions that were so difficult or unpleasant that a reasonable person in his

shoes as an employee would have felt compelled to resign since he had to choose to either take a vaccine which posed health risks or be placed on LWOP and/or terminated. To establish a constructive discharge, petitioner must demonstrate that their employer “deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign” (see *Short v Deutsche Bank Securities, Inc.*, 79 AD3d 503 [1st Dept. 2010]; *Mascola v. City Univ. of N.Y.*, 14 AD3d 409, [1st Dept. 2005], citing *Stetson v. NYNEX Serv. Co.*, 995 F2d 355, 361 [2d Cir.1993]). Here, the court finds that Respondents sufficiently complied with the City’s accommodation procedure and engaged with Petitioner throughout the process. Petitioner has failed to sufficiently plead a cause of action for constructive discharge and has not submitted any evidence to support what, if any, additional actions Respondents deliberately created that were so difficult or unpleasant that compelled him to resign other than enforcing the vaccine mandate.

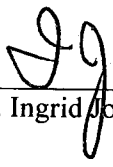
Accordingly, it is hereby,

ORDERED, that this action is dismissed as against the Fire Department of New York, Laura Kavanagh, as Acting Commissioner of the New York City Fire Department, and Eric Adams as Mayor of the City of New York, and it is further,

ORDERED, that Respondents’ denial of Petitioner’s request for a medical exemption or accommodation was not arbitrary and capricious, an error of law, or an abuse of discretion, and it is further,

ORDERED, that the Petitioner’s cause of action sounding in constructive termination/discharge is dismissed.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**