20-456 (L);

20-650 (CON)

United States Court of Appeals
for the Second Circuit

SALIK BEY, TERREL JOSEPH,
STEVEN SEYMOUR, CLYDE PHILLIPS,

Plaintiffs-Appellees/Cross-Appellants,

against

CITY OF NEW YORK, FIRE COMMISSIONER DANIEL A. NIGRO,
NEW YORK CITY FIRE DEPARTMENT, JOHN AND JANE DOES
1–10, KAREN HURWITZ, SHENECIA BEECHER,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANTS/CROSS-APPELLEES

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PRELIMINARY STATEMENT

In this action, four current or former FDNY firefighters challenge the agency's safety-based policy requiring them to be clean shaven in the areas where the seal of the respirator that every firefighter must use meets the face to ensure that the seal is airtight. The United States District Court for the Eastern District of New York (Weinstein, J.) granted plaintiffs summary judgment on their claims under the Americans with Disabilities Act (ADA). This Court should reverse.

New Yorkers count on FDNY firefighters to respond to emergencies and protect the public by extinguishing fires, rescuing people, responding to biological and chemical threats, and more. To do these vital tasks, they need the right equipment, and that equipment needs to be used safely. As relevant here, fighting fires indoors requires wearing a tight-fitting respirator. A regulation promulgated by the Occupational Safety & Health Administration (OSHA) requires safe use of that kind of respirator by prohibiting any firefighter from wearing one unless he is clean shaven where the respirator's seal meets his face. Otherwise, a respirator may leak, and a firefighter may end up battling the effects of smoke inhalation instead of fighting a fire.

To avoid this danger and comply with the regulation, the FDNY's grooming policy incorporates the regulation's prohibition. In its summary judgment decision, however, the district court disregarded the regulatory text and the safety concerns underlying it. It ruled that the FDNY should have allowed plaintiffs to maintain closely cropped facial hair as a medical accommodation—which the FDNY had previously done for a time but then properly rejected as unlawful and unsafe.

Despite the district court's tortured reading of the applicable regulation, the regulation's prohibition on any facial hair between the respirator seal and the face is plain as day. And that prohibition isn't some pointless bureaucratic restriction. It is intended to prevent life-threatening respirator leakages from occurring—an objective that the FDNY, after extensive research and analysis, determined could not be achieved any other way. Because the accommodation that plaintiffs seek is unreasonable as a matter of law, this Court should reverse the district court's injunction requiring it and direct entry of judgment for defendants.

JURISDICTIONAL STATEMENT

Plaintiffs invoked the jurisdiction of the district court by asserting claims arising under Title VII, the ADA, and 42 U.S.C. § 1983 (Joint Appendix ("A") 26-33, 35-36). This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1291, because the district court issued a final judgment after granting summary judgment to plaintiffs on some claims and to defendants on other claims, and dismissing the two remaining claims without prejudice (Special Appendix ("SPA") 19-26).

ISSUE PRESENTED FOR REVIEW

Are defendants entitled to summary judgment on plaintiffs' ADA failure-to-accommodate and disability-discrimination claims, given that an indisputably applicable OSHA regulation unambiguously requires full-duty firefighters to be clean shaven where a respirator seal meets their faces and that failing to follow this regulation would endanger the lives of plaintiffs, their fellow firefighters, and New Yorkers as a whole?

STATEMENT OF THE CASE

A. The FDNY's requirement that plaintiffs be clean shaven for federally mandated safety reasons

1. The regulatory framework requiring that firefighters be clean shaven to ensure a tight respirator seal

Firefighters who fight fires in urban areas need to be protected from the smoke and fumes that quickly fill the air of a building that is on fire. As a result, OSHA regulations contain a number of provisions to protect against so-called IDLH atmospheres—atmospheres that are immediately dangerous to life and health.[1] 29 CFR § 1910.134(b), (g). Under those regulations, a firefighter who fights fires within buildings must wear a self-contained breathing apparatus, or SCBA, which refers to a tight-fitting respirator that provides its own atmosphere from a source of breathable air carried by the firefighter. 29 CFR § 1910.134(b), (g)(4)(iii); *see also* 29 CFR § 1910.155(c)(28).

These regulations also include 29 CFR § 1910.134(g), a critical safety provision which, as the provision itself indicates, ensures that a

[1] OSHA regulations apply to the FDNY by virtue of the New York State Public Employees Safety and Health Act. *See* N.Y. Labor Law § 27-a(4)(a).

respirator doesn't leak and endanger its wearer.[2] Under that provision, which indisputably applies here, employers like the FDNY "shall not permit" employees who have "[f]acial hair that comes between the sealing surface of the facepiece and the face" to wear tight-fitting respirators. 29 CFR § 1910.134(g)(1)(i)(A).

OSHA has elaborated on the purpose of this requirement, stating that "when a respirator must be worn to protect airborne contaminants, it has to fit correctly," which "require[s] the wearer's face to be clean shaven where the respirator seals against it" (A94). OSHA referred to "research … demonstrat[ing] that even modest facial hair growth can have a significant adverse impact on" SCBA respirators (A94).

In addition, before using a tight-fitting respirator, an employee must be fit-tested using OSHA-approved protocols, to ensure that the facepiece fits properly and a proper seal can be obtained. *See* 29 CFR § 1910.134(f). According to those protocols, a fit test "shall not be conducted if there is any hair growth between the skin and the facepiece sealing surface." App. A to 29 CFR § 1910.134: Fit Testing

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[2] The entire text of 29 CFR § 1910.134, including its appendices, is reproduced at SPA28-67.

Procedures (Mandatory), Part I.A.9. OSHA has stated that a fit test that violates this requirement is "not considered to be compliant" with the regulation (A164).

The results of any fit test conducted under these circumstances are unreliable, OSHA has explained, because "[t]he fit that is achieved with a beard or facial hair is unpredictable" and "may change daily depending on [the] growth … and position of the hair at the time the fit is tested" (*id.*). Because employees with proscribed facial hair cannot ensure that they will get a proper seal—and therefore cannot use respirators to begin with—they cannot even perform a proper fit test.

Notably, 29 CFR § 1910.134(d) requires that firefighters use respirators that have been approved by the National Institute for Health and Safety (NIOSH). And NIOSH itself has recently stated that "[f]acial hair that lies along the sealing area of the respirator," including "even a few days growth of stubble, should not be permitted" (A176). It explained that facial hair "between the wearer's skin and the sealing surfaces of the respirator will prevent a good seal" (*id.*). NIOSH has even posted a graphic online showing that having stubble is not safe when wearing a respirator. *See* NIOSH, *Facial Hairstyles and Filtering*

Facepiece Respirators, available at https://perma.cc/X4GM-SRHS; *Force v. Facebook, Inc.*, 934 F.3d 53, 59 n.5 (2d Cir. 2019) (this Court may "tak[e] judicial notice of content of website whose authenticity [i]s not in question").

2. Plaintiffs' temporary receipt of a medical accommodation that was inconsistent with federal law and safety requirements

The FDNY has issued a written grooming policy whose stated purpose is, among other things, to ensure compliance with the respirator-safety provisions of 29 CFR § 1910.134 (A122). Under this written policy, full-duty firefighters cannot have any facial hair other than a closely trimmed mustache that does not extend beyond the mouth's corners or below the lower lip (A122, 124, 210, 257). The policy limits sideburns, too, which also have to be neatly trimmed and cannot extend beneath the ear (A124). No other facial hair is permitted, and firefighters must "otherwise [be] freshly shaven when reporting for duty" (A124, 257).

All four plaintiffs are or were firefighters with pseudofolliculitis barbae (PFB) who sought medical accommodations exempting them from the clean-shaven requirement of the FDNY's written grooming

policy (A19, 246, 248, 250, 252).[3] A person with PFB cannot shave his face with a razor down to the skin without experiencing symptoms ranging from mild or moderate (such as skin irritation, bruises, and boils) to severe (such as facial scarring) (A288, 334, 358, 361-63, 404, 408-09, 1629).

Despite the provisions of 29 CFR § 1910.134 and the attendant safety concerns, the FDNY's EEO office granted plaintiffs an accommodation permitting them to maintain closely cropped facial hair (A246-53, 257, 2717-18). The EEO office began granting this accommodation in August 2015 (A246-53).

3. The review by FDNY leadership concluding that all full-duty firefighters, without exception, must be clean shaven to comply with federal law and protect public safety

Around the end of 2017, Don Nguyen, the FDNY's Assistant Commissioner of EEO, learned about a probationary firefighter entering the firefighting academy who had requested to wear facial hair (A213, 216). Assistant Commissioner Nguyen had been unaware of any

[3] On information and belief, one plaintiff is no longer employed by the FDNY.

safety issues with the accommodation that plaintiffs had received, and raised the probationary firefighter's request with Fire Commissioner Daniel Nigro (A213-16, 258). They determined that the request had to be reviewed to ascertain whether it could be safely accommodated (*id.*).

To do so, the FDNY reviewed 29 CFR § 1910.134, OSHA opinion letters, and applicable caselaw (A258-59). It also reviewed documents from a number of government agencies, including the U.S. Department of Labor, the U.S. Department of the Navy, the New York State Department of Labor's Public Employee Safety and Health Bureau, and the CDC (*id.*). And it reviewed a number of other authorities, including journal articles on the use of facepiece respirators and documents issued by the National Fire Protection Association, whose fire codes prohibit firefighters with "facial hair at any point" between the respirator seal and the face from using a respirator (A183, 193, 258-59).

In addition to reviewing these sources, the FDNY consulted with the manufacturer of the SCBA respirator that the FDNY uses, did its own research on facepiece seal performance and facial hair, and held a number of meetings to discuss what the proper policy would be (A214-16, 258-59, 2524, 2532-33). Assistant Commissioner Nguyen and

Joseph Jardin, the FDNY's Chief of Safety, also investigated whether a respiratory "hood" could permit full-duty firefighters to maintain facial hair (A220, 259). But they determined that, because SCBAs are required for interior structural firefighting, a hood design would not comply with federal law (*id.*). *See* 29 CFR § 1910.134(g)(4)(iii).

Ultimately, Commissioner Nigro determined that the FDNY could no longer allow closely cropped facial hair, even as a medical or religious accommodation, because federal and state safety regulations required that all full-duty firefighters be clean shaven between the respirator seal and the face (A214, 216, 259, 265-67, 2644). Commissioner Nigro testified that those federal and state requirements exist because "one cannot get an adequate seal with facial hair," that the FDNY "was compelled to abide by" those requirements, and that "safety outweighed" all other considerations (A266-67). Thus, beginning in May 2018, the FDNY's written policy prohibiting facial hair where the respirator seal meets the face was applied without exception (A124, 216-18).

Full-duty firefighters who had previously received medical or religious accommodations were advised that they now had to adhere to

the grooming policy and be clean shaven or else be placed on light duty (A201, 216-19, 233, 270-77). Unlike firefighters on full duty, firefighters on light duty do not fight fires and thus do not don SCBAs (A201-03, 233). While light-duty firefighters may have reduced opportunities for overtime or to trade shifts with colleagues, they keep the same title, salary, and benefits that they had on full duty (A260, 290, 370-72, 443-44).

After being informed that their medical accommodation was no longer available, three of the plaintiffs initially elected to go on light duty, while one immediately chose to become clean shaven and stayed on full duty (A270-77, 347-49, 360, 367, 411-16, 443-44). Every plaintiff ultimately chose to shave and return to full duty (A261, 373-74, 413, 435-37).

B. Plaintiffs' lawsuit and the district court's decision directing the FDNY to restore the legally noncompliant medical accommodation

Plaintiffs brought a lawsuit in the Eastern District asserting a variety of federal-, state-, and city-law claims alleging that the FDNY had discriminated against them on the basis of race, color, national origin, and sex, since PFB affects only men and largely affects

African-Americans (A25-26, 30-33, 35-36, 214, 288). They also asserted two ADA claims, and parallel state- and city-law claims, alleging that the FDNY had discriminated against them on the basis of their disability and failed to provide them with a reasonable accommodation (A26-29, 32-36). They sought an exemption allowing them to remain on full duty while maintaining closely cropped facial hair for themselves and those similarly situated (A36).

After discovery, the parties cross-moved for summary judgment (A5-6, 9-11). The district court granted summary judgment to plaintiffs on their ADA claims, dismissed their state and city claims without prejudice, and granted summary judgment to the FDNY defendants on all of the remaining claims (SPA19-25).

Despite the apparently clear language of the applicable OSHA regulation, the district court ruled that the regulation actually permits full-duty firefighters to have facial hair between the respirator seal and the face (SPA17-18). The court did so based on a May 2016 OSHA interpretive letter—even though that letter, too, states that facial hair cannot "come[ ] between the sealing surface of the facepiece and the face" (SPA18 (quoting A169)). The court also discounted any safety

hazard that facial hair could cause because, during the brief period that plaintiffs received an exemption, there were no reported safety incidents (SPA18-19).

On this basis, the district court found that the FDNY had denied plaintiffs a reasonable accommodation and discriminated against them based on their disability (SPA17-21). It ordered the FDNY to reinstate the medical accommodation previously in effect allowing plaintiffs and others with PFB to maintain closely cropped facial hair while on full duty (SPA7, 25). After noticing this appeal, the FDNY moved to stay the district court's injunction pending the appeal's disposition, and this Court granted the stay (Dkt. Nos. 25, 99).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews a district court's grant of summary judgment de novo. *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 224 (2d Cir. 2006). Here, plaintiffs brought ADA claims for failure to accommodate and disability discrimination, alleging that the FDNY should have continued to give them a medical accommodation allowing them to have closely cropped facial hair instead of placing them on light duty. Defendants are entitled to summary judgment on both claims.

A mandatory OSHA regulation requires every full-duty firefighter to be clean shaven where a respirator's seal meets his face, so that the respirator doesn't leak and let in smoke and other hazardous fumes. Because, based on the expertise of federal regulators and the FDNY's independent analysis, failing to follow this requirement would endanger the FDNY's firefighting corps and the general public, the accommodation proposed by plaintiffs would impose an undue hardship. That defeats their failure-to-accommodate claims as a matter of law. By the same token, their disability discrimination claims also fail as a matter of law, because following the OSHA safety regulation was a legitimate, nondiscriminatory reason for the FDNY to place plaintiffs on light duty.

ARGUMENT

THE MEDICAL ACCOMMODATION THAT PLAINTIFFS SEEK IS UNSAFE, UNLAWFUL, AND UNREASONABLE

To prevail on their ADA claims, plaintiffs would have to show that they can perform the essential functions of their jobs either with or without reasonable accommodation. But the medical accommodation that they propose—being permitted to wear closely cropped facial hair

while serving as full-duty firefighters—would violate a mandatory federal safety regulation and endanger their own safety, as well as the safety of their fellow firefighters and the public. The proposed accommodation is therefore unreasonable, and plaintiffs' claims fail as a matter of law.

A. The applicable OSHA regulation clearly and unambiguously requires that firefighters be clean shaven where the respirator seal meets the face.

Tight-fitting SCBA respirators are required for interior structural firefighting—that is, for firefighting or fire rescue within "buildings or enclosed structures," which FDNY firefighters engage in every day (*see* A127, 2524). 29 CFR § 1910.134(b), (g)(4)(iii). And the OSHA provision at issue in this case, which governs the use of tight-fitting respirators, could not be clearer. It states that employers may not allow respirators with tight-fitting seals "to be worn by employees who have … [f]acial hair that comes between the sealing surface of the facepiece and the face." 29 CFR § 1910.134(g)(1)(i)(A). Thus, if a firefighter has any facial hair beneath the respirator's seal—that is, if he is not clean shaven there—his fire department cannot let him use a tight-fitting respirator.

That requirement is echoed in the protocol governing mandatory fit tests for use of tight-fitting respirators. *See* 29 CFR § 1910.134(f). Fit-testing is prohibited if an employee has "any hair growth" where the skin meets the seal. App. A to 29 CFR § 1910.134: Fit Testing Procedures (Mandatory), Part I.A.9; *see also* 29 CFR § 1910.134(f) (mandating the protocols in App. A). The testing protocol thus confirms the facial-hair restriction: it would make no sense to preclude fit-testing of a firefighter who has any hair growth under the seal if he could use a respirator that way.

The district court disregarded the regulation's plain language, however, mistakenly reading a May 2016 interpretive letter issued by OSHA as construing its regulation to permit closely cropped facial hair between the respirator seal and the face (SPA18 (quoting A169)). Based on that error, the district court deferred to the agency's supposed construction of the regulation under *Auer v. Robbins*, 519 U.S. 452 (1997).

As an initial point, *Auer* deference cannot override the regulation's plain language. Courts should not defer to an agency's interpretation of its own regulation "unless the regulation is genuinely ambiguous."

Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019). Indeed, a court must empty its "legal toolkit" in construing a regulation, including examining its structure, before concluding that the regulation is ambiguous and thus a potential candidate for *Auer* deference. *Id.* Since the regulation's plain text unambiguously permits no facial hair at all where the seal meets the face, and the regulatory structure underscores that requirement, no contrary interpretation set forth in agency guidance could warrant deference.

Perhaps more fundamentally, the district court misread the May 2016 interpretive letter, because the letter actually *supports* the FDNY's reading of the regulation. Thus, even if *Auer* deference were to come into play, it would cut in the FDNY's favor. In language nearly identical to the regulation's, the May 2016 letter states that "respirators shall not be worn when facial hair comes between the sealing surface of the facepiece and the face" (A169). Once again, the meaning is clear: no facial hair is allowed between the seal and the face.

The district court latched onto the letter's next sentence, in which OSHA states that facial hair that "does not protrude under the respirator's seal, or extend far enough to interfere with the device's

valve function," is permitted (A169, quoted in SPA18). But the district court wrongly assumed that the word "protrude" refers to facial hair of a certain (unspecified) length, rather than referring, as it does, to any facial hair either growing in or reaching areas where the seal meets the face. The letter's statement is thus entirely consistent with the regulation's plain text, rather than contradicting it.

The letter does not purport to permit short facial hair that is located in areas where the respirator seal meets the face. Its examples of allowed facial hair further demonstrate this: it refers to "[s]hort mustaches, sideburns, and small goatees," because those types of facial hair are not located where a respirator seal would meet the face (*id.*). And, according to the letter, even those types of facial hair are allowed only if they are kept "neatly trimmed" to ensure that no hair extends to locations on the face that "would compromise the seal" (*id.*). That, in turn, explains OSHA's statement about hair not "protrud[ing]" under the seal (*id.*); an untrimmed goatee, for example, could do just that. The letter in no way suggests that any facial hair—neatly trimmed or otherwise—can be where the seal meets the face.

This point is driven home by a separate OSHA interpretive letter, which the May 2016 letter explicitly and approvingly references (A169). That earlier letter states that the regulation "does not ban facial hair on respirator users, per se," but rather requires that users be "clean-shaven where the respirator seals against" the face (A94). *See also* NIOSH, *Facial Hairstyles and Filtering Facepiece Respirators*, available at https://perma.cc/X4GM-SRHS (government graphic visually depicting "stubble" and "long stubble" in the seal area and indicating that both are prohibited). The FDNY has never contended that the regulation prohibits all facial hair—just that it prohibits any facial hair in parts of the face that plaintiffs' proposed accommodation would permit. OSHA's body of guidance—like the regulation's plain text and structure—confirms the FDNY's understanding.

B. Plaintiffs' proposed accommodation is unreasonable because it violates the OSHA regulation and would endanger the safety of firefighters and the general public.

To establish a prima facie failure-to-accommodate claim, a plaintiff must show, among other things, "that with reasonable accommodation, he could perform the essential functions of the position

sought." *Stone v. City of Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997). A plaintiff claiming disability discrimination must likewise show that "he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation." *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d Cir. 2006).[4] An accommodation is not reasonable, however, if it would impose an undue hardship on the employer's operations. *Stone*, 118 F.3d at 98 (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995)); *see also* 42 U.S.C. § 12112(b)(5)(A) (employer has burden to show undue hardship).

Thus, an employee's claims for failure to accommodate and disability discrimination cannot succeed if his employer shows that an accommodation would entail "significant difficulty or expense," 42 U.S.C. § 12111(10)(A), based on enumerated factors, *Stone*, 118 F.3d at 98-99 (quoting, inter alia, 42 U.S.C. § 12111(10)(B)). These factors include the nature of the accommodation, its impact on the employer's

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[4] Disability-discrimination claims are, of course, analyzed under the *McDonnell Douglas* burden-shifting framework. *Sista*, 445 F.3d at 169 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Where, as here, there is no evidence of pretext, and assuming for the sake of argument that a plaintiff has a *prima facie* case on disability discrimination, this analysis hinges on whether the employer had a legitimate, nondiscriminatory reason for denying an accommodation. *See generally id.*

operations, and the functions of the employer's workforce. 42 U.S.C. § 12111(10)(B); *see also, e.g.*, *Rodal v. Anesthesia Group of Onandoga, P.C.*, 369 F.3d 113, 121-22 (2d Cir. 2004).

Here, as already established, the applicable regulation prohibits any facial hair between the respirator seal and the face, 29 CFR § 1910.134(g)(1)(i)(A), to avoid potentially life-endangering respirator leakage, *see* 29 CFR § 1910.134(g). In support of its regulation, OSHA has explained that "even *modest* facial hair growth can have a significant adverse impact on" respirator sealing (A94 (emphasis added)). Put simply, granting plaintiffs and others an exemption allowing them to have closely cropped facial hair would violate a safety prohibition that federal regulators have deemed essential.

And not only federal regulators. Consider, for instance, the fire codes that the National Fire Protection Association has promulgated, which do not allow "facial hair at any point" between the respirator seal and the face (A183, 193, 258-59). The FDNY reviewed documents from this association, as well as many other sources, in its independent review which determined that safety considerations required there to be no exceptions to its clean-shaven requirement (*see* pp. 8-10 *supra*). Even

if plaintiffs may wish to disregard the regulatory requirement, following it protects not just their safety but that of other firefighters (who might otherwise have to save them during a fire) and other New Yorkers (whom they otherwise might not be able to save from a fire).

In short, analyzing the statutory factors here yields a clear result. Given the nature of the proposed accommodation, the effect that it would have on firefighter safety, and the essential role that the FDNY plays in the safety of New York City communities, the accommodation would impose an undue hardship on the FDNY under the ADA. *See* 42 U.S.C. § 12111(10)(B)(i)-(ii), (iv); *see also Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383-84 (9th Cir. 1984) (keeping employee who is "unable to use a respirator safely" due to facial hair in a position where he could be exposed to toxic gases constitutes undue hardship); *cf. Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 466 (3d Cir. 2002) (proposed accommodation would impose hardship on a township because it would "compromis[e] the safety of [the township's] residents"). As a result, plaintiffs' proposal does not qualify as a reasonable accommodation, *see Stone*, 118 F.3d at 98, and their ADA claims therefore fail as a matter of law.

In holding otherwise, the district court cited testimony indicating that the medical accommodation didn't impose monetary costs on the FDNY when it was in effect (SPA16-17). But monetary cost is far from the only factor in assessing undue hardship. *See generally* 42 U.S.C. § 12111(10). And no caselaw requires an employer to show that a proposed accommodation would cost a lot of money when that accommodation would, in any event, be *illegal*. *Cf. Bhatia*, 734 F.2d at 1383 (risking liability under health and safety regulations because employee's facial hair would compromise respirator seal a significant factor in undue hardship).

The district court also suggested that the FDNY's safety concerns were misplaced because, during the approximately two and a half years when the medical accommodations were in effect, no safety issues arising from the accommodations were reported (SPA18-19). But that logic is obviously faulty; just because a risk doesn't materialize does not mean that it doesn't exist. That is doubly true when looking at only a brief period of time, as we are here. Not to mention that the safety risks here have consequences so grave and profound—including serious injury and death—that every fire department should aspire to lower

those risks to as close to zero as possible. Any occurrence of seal leakage could be tragic, for not just one person but many. And, as already discussed, the court's only other reason for discounting hardship—that the applicable OSHA regulation fails to support the FDNY's position—is just wrong (*see* pp. 15-19 *supra*).

Finally, the district court mistakenly claimed that plaintiffs' ability to perform the essential functions of full-duty firefighters, with or without reasonable accommodation, was "undisputed" (SPA19). Not so. Through their recognition that the OSHA regulation imposing limits on facial hair applies, plaintiffs implicitly acknowledge that a full-duty FDNY firefighter must be able to safely wear a respirator while fighting fires. Because they misinterpret the regulation, however, they fail to see that no reasonable accommodation allowing them to do so actually exists. Since it does not, they cannot perform the essential functions of the job. *Cf. Shannon v. N.Y.C. Trans. Auth.*, 332 F.3d 95, 99-100, 102-03 (2d Cir. 2003) (colorblind bus driver cannot perform essential functions of job with or without reasonable accommodation because transit agency can require bus drivers to be able to differentiate between stoplight colors for safety reasons).

In sum, because the accommodation that the district court ordered would violate the law and impose an undue hardship, the portion of the court's order that granted summary judgment to plaintiffs on their ADA claims should be reversed.

CONCLUSION

The portion of the district court's order granting summary judgment to plaintiffs on their ADA claims should be reversed, the permanent injunction should be vacated, and the district court should be directed to enter judgment on those claims in defendants' favor.

Dated: New York, NY
May 19, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 4,618 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/ D. Alan Rosinus, Jr.
D. ALAN ROSINUS, JR.