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

REPLY BRIEF FOR APPELLANTS/CROSS-APPELLEES

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PRELIMINARY STATEMENT

This case rises, and ultimately falls, on the plain language of the OSHA regulation prohibiting a firefighter from wearing the kind of tight-fitting respirator that all parties agree is essential to fighting fires in New York City unless he is clean shaven where the respirator seal meets the face. Whether thought of in terms of undue hardship (vis-à-vis plaintiffs' failure-to-accommodate claims under the ADA), a legitimate and nondiscriminatory reason to deny an accommodation (vis-à-vis their disability-discrimination claims under the ADA), or business necessity (vis-à-vis their disparate-impact claims under Title VII), the result is the same: the OSHA regulation is an insurmountable obstacle to plaintiffs' case.

For all of plaintiffs' efforts to move the attention elsewhere, the regulation is clear: the FDNY "shall not permit" a firefighter who has "[f]acial hair that comes between the sealing surface of the facepiece and the face" to wear a tight-fitting respirator. 29 CFR § 1910.134(g)(1)(i)(A). According to OSHA, that means that a firefighter must be "clean-shaven" under the seal, and the FDNY cannot even conduct the required fit test if a firefighter has "any hair growth" there.

This regulation should be followed not only because it is the law. It is also a matter of basic safety. OSHA regulators have determined that even a modest amount of facial hair beneath the seal can lead to safety problems. And the National Institute for Occupational Safety and Health (NIOSH), the CDC institute that certifies respirators under the regulation, has stated that facial hair in the sealing area should not be allowed because *any* seal degradation may decrease respiratory protection, by wasting the breathable air that flows out of a leak and decreasing a respirator's service time.

It is agonizing—"painful," as the FDNY Commissioner put it when deposed in this case—that this regulation falls so hard on African-American men with pseudofolliculitis barbae (PFB). Nevertheless, the fact remains that it would be not only unsafe, but unlawful, for the FDNY to pretend as if plaintiffs were not covered by the regulation. The FDNY is entitled to judgment as a matter of law on all of plaintiffs' claims.

SUPPLEMENTAL JURISDICTIONAL STATEMENT

As explained in our opening brief, because the district court entered a final judgment, this Court has jurisdiction under 28 U.S.C. § 1291 (Brief for Appellants/Cross-Appellees ("App. Br.") 3). While plaintiffs agree that the Court has jurisdiction, they claim that jurisdiction arises under § 1292(a)(1), which concerns injunctive relief (*see* Brief for Appellees/Cross-Appellants Salik Bey, Terrel Joseph, Steven Seymour, Clyde Phillips ("Cross-App. Br.") 4).

We agree that § 1292(a)(1) would be a basis to exercise jurisdiction over our appeal, as the district court issued a permanent injunction running to the FDNY. But it is less clear whether § 1292(a)(1) supports plaintiffs' cross-appeal. Regardless of how the court resolved plaintiffs' claims, it granted all of the injunctive relief that plaintiffs sought, so it is hard to see how plaintiffs are aggrieved in a way relevant to § 1292(a)(1).

More to the point, the premise of plaintiffs' argument that § 1291 does not apply—that the district court could not have entered a final judgment because it granted them no damages—is mistaken (Cross-App. Br. 4 n.2). After indicating at a hearing that plaintiffs were

likely not entitled to damages as a matter of law (Joint Appendix ("A") 3088), the district court entered a "Judgment" (among other things) that plainly reflects a final determination on all claims (Special Appendix ("SPA") 2, 25). While plaintiffs may be dissatisfied with the district court's conclusion not to award damages, their dissatisfaction does not render a final judgment nonfinal. Nor does it matter, as plaintiffs claim (Cross-App. Br. 4 n.2), that the court did not adhere to the separate-paper requirement. *See United States v. Interlink Sys.*, 984 F.2d 79, 82 (2d Cir. 1993). This Court has jurisdiction to review the final judgment under § 1291.

ISSUE PRESENTED ON THE CROSS-APPEAL[1]

Did the district court correctly grant summary judgment to defendants on plaintiffs' disparate-impact claims under Title VII, where the FDNY's safety-based grooming policy mirrors an OSHA regulation in requiring full-duty firefighters to be clean shaven in the areas where tight-fitting respirators meet the skin?

[1] The issue presented on defendants' appeal appears on page 3 of defendants' opening brief. Point II.B of this brief constitutes defendants' reply on this issue.

STATEMENT OF THE CASE

A. The OSHA regulation's unambiguous prohibition on facial hair beneath a respirator seal, and the FDNY's corresponding policy

Defendants respectfully refer the Court to pages 4-13 of their opening brief for the factual background and procedural history of this case. The key question, however, can be summarized in a sentence: whether 29 CFR § 1910.134(g) prohibits the medical accommodation that plaintiffs demand. Here, then, is a recapitulation of the regulation and the FDNY's policy conforming to its requirements.

Subsection 1910.134(g) is part of an OSHA regulation that applies to public employers in New York State by virtue of New York Labor Law § 27-a(4)(a). In subsection (g), the regulation states that these employers "shall not permit" employees who have "[f]acial hair that comes between the sealing surface of the facepiece and the face" to wear the kind of tight-fitting respirators that FDNY firefighters must routinely wear (App. Br. 4-5). 29 CFR § 1910.134(g)(1)(i)(A). Noting that "research has demonstrated that even modest facial hair growth" can significantly affect the safety of a respirator (A94), OSHA has stated that a correct respirator fit "require[s] the wearer's face *to be*

clean-shaven where the respirator seals against it" (*id.* (emphasis added)).

To use a tight-fitting respirator, a firefighter must be fit-tested. 29 CFR § 1910.134(f). Under the OSHA-approved protocols that govern these tests, 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 Procedures (Mandatory), Part I.A.9 (emphasis added).

The FDNY adopted a written grooming policy that was consistent with this regulatory framework, prohibiting all facial hair except for a closely trimmed mustache that does not extend beyond the mouth's corners or below the lower lip, or neatly trimmed sideburns that don't extend below the ears (A122, 124, 210, 257). Despite the OSHA regulation and this departmental policy, however, the FDNY's EEO office gave plaintiffs an accommodation permitting them to wear closely cropped facial hair for a limited time, beginning in August 2015 (A246-53).

But in December 2017, when the FDNY's Assistant EEO Commissioner, Don Nguyen, learned about the safety issues that these

accommodations entailed, the FDNY conducted a thorough review of them (A213-16, 258). After the FDNY reviewed a number of authorities on the subject and consulted with the manufacturer of the tight-fitting respirator that the FDNY uses, Commissioner Daniel Nigro concluded that plaintiffs' PFB could not be safely and lawfully accommodated by exempting them from the grooming policy (A138, 193, 216, 258-59, 265-67, 2644; App. Br. 9-10). Thus, beginning in May 2018, the FDNY revoked their accommodations and required that all full-duty firefighters without exception be clean shaven (A124, 216-18). Plaintiffs could either comply with this requirement or be placed on light duty (A201, 216-19, 233, 270-77).

In deposition testimony, Commissioner Nigro acknowledged that PFB predominantly affects African-American men, and said that that "made the change more painful" (A265). He explained that one of the reasons he came to the FDNY "was to increase the number of African-American men in the department" (*id.*). But, he said, he could not disregard firefighter safety or federal and state guidelines, even if following those guidelines "would affect one segment of our department more harshly" (A266).

B. The district court's decision granting summary judgment to defendants on plaintiffs' Title VII disparate-impact claims

As discussed in defendants' opening brief (*see* App. Br. 12-13), the district court granted summary judgment to plaintiffs on their ADA claims (SPA10-21). But it granted summary judgment to defendants (and denied it to plaintiffs) on plaintiffs' other federal claims, including their disparate-impact claims under Title VII (SPA21-25).[2]

With respect to those claims, the court ruled that plaintiffs never actually alleged disparate impact, instead alleging that the FDNY was intentionally trying to thin the ranks of African-American firefighters (SPA23). Because plaintiffs alleged only disparate treatment, the court found, defendants were entitled to summary judgment on plaintiffs' disparate-impact claims (SPA23-24).

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[2] In their opening brief in this Court, plaintiffs do not make any arguments in support of their disparate-treatment claims under Title VII, or their 42 U.S.C. § 1983 claims, so those claims should be deemed abandoned. *See, e.g.*, *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005).

SUMMARY OF ARGUMENT

All three sets of plaintiffs' claims—for failure to accommodate under the ADA, disability discrimination under the ADA, and disparate impact under Title VII—fail in light of OSHA's safety-based regulation. The clear language of the regulation, 29 CFR § 1910.134, requires that all firefighters be clean shaven where the seal of their tight-fitting respirators meets the face, because that bright-line rule helps ensure the safety of firefighters and the public that they serve.

Plaintiffs do their best to distract from the regulation. But it reflects the expert judgment of federal workplace safety regulators, and it coincides with the FDNY's own safety assessment. The regulation brooks no exception. By demanding one, plaintiffs ask the FDNY to violate the law, a clear and undue hardship that defeats their failure-to-accommodate claims under the ADA. Meanwhile, adhering to the law and protecting firefighters' safety are perfectly legitimate and nondiscriminatory reasons for the FDNY's conduct, defeating plaintiffs' disability-discrimination claims under the ADA, and reflect business necessity, defeating plaintiffs' disparate-impact claims under Title VII even assuming that those claims were properly pleaded.

ARGUMENT

POINT I

THE APPLICABLE OSHA REGULATION UNAMBIGUOUSLY PROHIBITS GRANTING PLAINTIFFS THE EXEMPTION THAT THEY DEMAND

The applicable OSHA safety regulation plainly prohibits firefighters from using the tight-fitting respirators that FDNY firefighters must use if they have any facial hair between the respirator seal and the face. The exemption that plaintiffs seek, however, would permit them to have facial hair everywhere, including under the respirator seal. Thus, the regulation forbids it.

As explained below, plaintiffs' attempts to respond to defendants' arguments about the proper interpretation of 29 CFR § 1910.134(g) fall short. But what plaintiffs ignore is much more striking. They ignore the fact that 29 CFR § 1910.134 prohibits fit testing any employee who has "any hair growth" where the skin meets the seal, even though this prohibition would make no sense under plaintiffs' reading of the regulation (*see* App. Br. 16). 29 CFR § 1910.134(f), (f)(5); App. A to 29 CFR § 1910.134: Fit Testing Procedures (Mandatory), Part I.A.9. They ignore the text of an April 2011 OSHA interpretive letter, which says

(in the context of discussing 29 CFR § 1910.134(g)) that for a tight-fitting respirator to "fit correctly," the wearer's face must be "*clean-shaven* where the respirator seals against it" (A94 (emphasis added); *see* App. Br. 19). And they ignore the fact that a May 2016 interpretive letter—which was the sole basis for the district court's erroneous interpretation of the regulation (SPA17-18), and which plaintiffs continue to rely on in this Court (Cross-App. Br. 23)—approvingly cites that very April 2011 letter as an authority on the interpretation of the regulation (A94, 169; *see* App. Br. 19).

One can't entirely fault plaintiffs for ignoring these things. They are devastating to plaintiffs' case, and there is no plausible way to respond to them. So plaintiffs' tactic is to hope that these materials are forgotten. But they cannot be forgotten. And when they are acknowledged, they all show what plaintiffs try, in vain, to deny: that the regulation prohibits firefighters who wear tight-fitting respirators from having *any* facial hair where the respirator seal meets the face.

Plaintiffs also ignore the pertinent text of the regulation, other than quoting it without discussion in a footnote of their brief (Cross-App. Br. 21 n.8). They therefore do not explain how a regulation

that prohibits "[f]acial hair that comes between the sealing surface of the facepiece and the face" can, in their view, actually *permit* facial hair that comes between the sealing surface of the facepiece and the face. *See* 29 CFR § 1910.134(g)(1)(i)(A).

Plaintiffs assert that defendants do not cite any caselaw interpreting the regulation to forbid closely cropped facial hair (Cross-App. Br. 27). Of course, plaintiffs do not cite any caselaw supporting *their* interpretation either, other than the district court decision that's on appeal here. More to the point, the regulation is not ambiguous, so no caselaw is needed to decipher it. Its text is plain for all to see.

Plaintiffs also repeatedly assert that the FDNY *reinterpreted* the regulation away from an accommodation-friendly interpretation (Cross-App. Br. 2, 13, 22, 36). But plaintiffs cite only the FDNY letters approving their medical accommodations (*id.* 22 (citing A246-53)), and those letters do not even mention the regulation (A246-53). In any event, even if the FDNY had previously misinterpreted or overlooked the regulation, that would not allow it to ignore the regulation now.

In addition, plaintiffs argue that, if the regulation means what it says, then many men would have to shave more than once a day "to prevent a five-o'clock shadow from forming" (Cross-App. Br. 22). It is not entirely clear what plaintiffs believe follows from this observation. And they cite no evidence indicating that a typical man's five-o'clock shadow is equal to or greater than the facial hair length that plaintiffs wish to maintain. In any event, there is a clear practical difference between starting a tour of duty clean shaven and starting it with closely cropped facial hair. The regulation supplies a bright-line rule that is easy to administer and that optimizes employee safety.

In a final effort to salvage their atextual interpretation, plaintiffs point to yet another OSHA interpretive letter, and to an OSHA bulletin, which each indicate that beards that are trimmed back so that they do not interfere with the respirator seal are allowed (*id.* 22-23). But that is completely consistent with defendants' interpretation of the regulation. The regulation allows an employee to have a short beard—such as a well-trimmed goatee—as long as the employee is clean shaven where the respirator seal meets his face and his beard is short enough not to protrude under the seal (*see* App. Br. 18-19).

For all of these reasons, the OSHA regulation—according to both its plain text and all available supporting materials—unambiguously prohibits plaintiffs from receiving the exemption that they are demanding. Plaintiffs have given this Court no reason to rule otherwise.

POINT II

THE OSHA REGULATION DEFEATS PLAINTIFFS' TITLE VII AND ADA CLAIMS

A. The regulation's clean-shaven requirement establishes a defense against plaintiffs' Title VII claims as a matter of law.

On their cross-appeal, plaintiffs assert that they, rather than defendants, should have been granted summary judgment on their Title VII disparate-impact claims (Cross-App. Br. 28-38). But because the applicable OSHA regulation—which is firmly rooted in important safety considerations—requires the FDNY to follow the policy that plaintiffs challenge, the district court correctly granted summary judgment in defendants' favor on those claims.

1. Complying with the regulation is a business necessity under Title VII, and plaintiffs propose no viable alternative.

To establish a prima facie case for disparate-impact liability under Title VII, a plaintiff must identify an employment practice that

produces disparities, and then produce statistical evidence of disparate impact based on a protected category. *See, e.g.*, *EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 117 (2d Cir. 1998). An employer can rebut that showing by demonstrating that the practice is "job related for the position in question and consistent with business necessity." *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 274 (2d Cir. 2012) (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)). If an employer successfully demonstrates that, a plaintiff can prevail only by showing that there is an alternative way to achieve the same end with a less discriminatory effect. *United States v. Brennan*, 650 F.3d 65, 90 (2d Cir. 2011).

There is no dispute that PFB disproportionately affects African-American men, and that they will be affected more by the FDNY's clean-shaven requirement than other groups (A265-66). But applying this requirement across the board is a business necessity for the FDNY because that is precisely what 29 CFR § 1910.134(g) compels. The regulation clearly states that an employer "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).[3] Operating within the bounds of the law is such an obvious business necessity that it is almost awkward to apply the business-necessity framework, because unlike some industry- or company-specific needs, it requires no detailed analysis beyond understanding the law itself.

Likewise, because the law here does not allow the FDNY to both adhere to the regulation and grant plaintiffs an exemption, plaintiffs cannot establish a less discriminatory alternative to compliance. In their brief before this Court, plaintiffs do not even try to propose an alternative. In the court below, they proposed the use of a respiratory hood or similar respiratory apparatus (A305-07). But these are not viable alternatives, because they do not do not seal on the face and are not NIOSH-certified, as they must be under the OSHA regulatory scheme (A107, 110-11). *See* 29 CFR § 1910.134(d)(1)(ii), (d)(2).

While that is enough to defeat plaintiffs' disparate impact claims, the fact remains that violating this safety regulation would endanger

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[3] While plaintiffs intimate that the OSHA regulation is of questionable value because it is over 20 years old (Cross-App. Br. 2, 8), plaintiffs have presented no evidence that it is any less relevant to the state of respirator technology today. In any event, the fact is that the regulation remains in full force and effect.

the lives of firefighters and those that they rescue, in situations that are already extremely dangerous for everyone involved. As OSHA safety regulators have explained, a correct respirator fit "require[s] the wearer's face to be clean-shaven where the respirator seals against it," to avoid the adverse safety effects of "even modest facial hair growth" (A94).

Other regulatory bodies and safety associations echo OSHA's safety determination. For instance, the national fire codes of the National Fire Protection Association (NFPA) prohibit firefighters with beards or facial hair from using a tight-fitting respirator "in hazardous or potentially hazardous atmosphere" (A183, 193). And NIOSH, a subdivision of the CDC, has noted that no facial hair that "lies along the sealing area of the respirator" is permitted on employees who must wear tight-fitting respirators (A176). "*Any* degradation to the respirator seal" may decrease respirator safety, NIOSH has stated (A177 (emphasis added)), explaining that even positive-pressure respirators (like those used by the FDNY) "will suffer from reduced service time along with wasting breathing air during use" (A177, 2837).

Basic workplace safety is undoubtedly a job-related business necessity. *See, e.g.*, *N.Y.C. Trans. Auth. v. Beazer*, 440 U.S. 568, 587 & n.31 (1979); *see also Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) (a business necessity is "necessary to safe and efficient job performance"). That is particularly so in a profession as dangerous and essential to the public good as firefighting. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993) (noting, in the context of firefighters with PFB challenging a clean-shaven requirement, that "protecting employees from workplace hazards … has been found to quality as an important business goal for Title VII purposes").

Ensuring that firefighters do not become incapacitated—or worse—while fighting fires is a quintessential business necessity. So, although the effect of the FDNY's policy on plaintiffs' ability to be full-duty firefighters may be "regrettable," applying it across the board is justified. *Id.* at 1118.

2. Plaintiffs make no argument that defeats defendants' business-necessity defense.

Plaintiffs argue that defendants' business-necessity defense rests on their interpretation of the OSHA regulation (Cross-App. Br. 13).

Quite right. Given the regulation's plain-as-day statement that "[f]acial hair that comes between the sealing surface of the facepiece and the face" is not permitted, 29 CFR § 1910.134(g)(1)(i)(A)—and for the other reasons discussed in Point I of this brief and in defendants' opening brief—nothing more is required to conclude that defendants are entitled to summary judgment as a matter of law on plaintiffs' disparate-impact claims.

Plaintiffs cite *Fitzpatrick v. City of Atlanta*, an Eleventh Circuit case, for the proposition that defendants had to produce expert testimony to show that their employees would face a safety hazard if the clean-shaven requirement were not applied across the board (Cross-App. Br. 34 (citing *Fitzpatrick*, 2 F.3d at 1119 n.6)). But there, the court determined that Atlanta had met its burden by producing an expert whose affidavit discussed the health and safety standards of, among others, NIOSH and OSHA (including 29 CFR § 1910.134). *Fitzpatrick*, 2 F.3d at 1119-20. Thus, the court had no occasion to consider whether referring to those standards alone would be enough even without an expert witness.

It certainly should be. After all, the opinions of neutral governmental experts—and, in the case of an association like the NFPA (discussed on p. 17 above), neutral private experts—are, if anything, more reliable on their face than the opinion of an expert hired by one side to testify in adversarial litigation. And defendants did submit evidence of those opinions and their basis (A94, 169, 176-77, 183, 193). So, despite plaintiffs' contentions to the contrary (Cross-App. Br. 37-38), and even assuming for the sake of argument that some evidence beyond the regulation itself was necessary, defendants met their burden of production on the validity of their safety concerns.

There is an additional reason that plaintiffs cannot avoid summary judgment, notwithstanding the opinions of their experts (*id.* 18, 35): following the law is not optional. Even if the FDNY had determined that the regulation was unnecessarily stringent (which, to be sure, it did not), it could not just opt out. The arguments of plaintiffs' experts are, at best, arguments to change the OSHA regulation, or to change state law so that the regulation no longer applies to the FDNY. They are not reasons that plaintiffs should win this case.

Plaintiffs evidently disagree, citing the D.C. Circuit's decision in *Potter v. District of Columbia*, 558 F.3d 542 (D.C. Cir. 2009), for the proposition that the applicable OSHA regulation cannot, on its own, rebut the evidence that they have offered (Cross-App. Br. 24-27).[4] This is strange logic indeed, since the majority's decision in *Potter* does not even mention 29 CFR § 1910.134, and a concurring opinion indicates that that regulation does not apply to defendant District of Columbia. *See Potter*, 558 F.3d at 544-51; *id.* at 553 (Williams, J., concurring).

The *Potter* majority, moreover, ruled in favor of firefighters challenging a clean-shaven policy only because the District had failed to present critical pieces of evidence in its summary judgment opposition, instead raising them belatedly on appeal. *Id.* at 547-51 (majority opinion). In fact, the concurrence strongly suggests that the District would have prevailed but for its "muddled litigation strategy." *Id.* at 551-52 (Williams, J., concurring). So much, then, for plaintiffs' contention that *Potter* can help them here, where the regulation does apply and defendants timely raised all of their arguments.

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[4] Plaintiffs discuss *Potter* in the ADA portion of their brief, but their analysis applies equally to their Title VII claims.

Nor does Title VII act as a trump card that nullifies duly-adopted safety regulations. Safety regulations are not so lightly cast aside. That is why, in the ADA context, the Supreme Court has described the prospect of compelling an employer to choose whether to follow a safety regulation with respect to an employee with a disability as an obligation with "no comparable example in our law." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999). The Court explained that the employer "would be required … to justify de novo an existing and otherwise applicable safety regulation issued by the Government itself." *Id.* As the Court suggested, that is just not how our legal system works.

Adhering to OSHA's regulation by applying a clean-shaven policy to all full-duty firefighters is a business necessity, and no viable alternative exists. This Court should therefore affirm the district court's grant of summary judgment to defendants on plaintiffs' disparate-impact claims.

B. Not following the regulation would impose an undue hardship under the ADA.

As discussed in defendants' opening brief (*see* App. Br. 20-23), failing to follow the applicable OSHA regulation and subjecting

plaintiffs, their firefighting colleagues, and the general public to the risk of firefighter incapacitation during emergencies would impose an undue hardship on the FDNY. Plaintiffs do not successfully dispute this conclusion.

Plaintiffs argue that the exemption they seek would not impose undue hardship because FDNY policy officials testified that the FDNY did not suffer hardship when it was granting that accommodation (Cross-App. Br. 20 (citing A2450-51, 2487, 2525, 2628, 2726-27, 2831-32)). But there is less here than meets the eye. Each of these witnesses was asked some variation of whether the accommodation led to any hardship for the FDNY, not to whether it imposed *undue* hardship *within the meaning of the ADA*. The latter question went unasked. And even if it had been asked, a fact witness's answer cannot substitute for a legal determination on a question of law. *See Cameron v. City of New York*, 598 F.3d 50, 62 & n.5 (2d Cir. 2010).

Plaintiffs also suggest that the FDNY did not "incur any costs" when it allowed a small number of exemptions in the past, and that this kind of exemption thus does not "cost the Department anything" (Cross-App. Br. 16-18). To the extent that plaintiffs suggest that the

costs incurred must be monetary to count under the ADA, that is plainly wrong.[5] The ADA defines "undue hardship" to mean "an action requiring significant difficulty *or* expense." 42 U.S.C. § 12111(10)(A) (emphasis added). And, as defendants have previously noted (App. Br. 20-21), the ADA specifies that what constitutes significant difficulty should be evaluated in light of factors that include the nature of the accommodation and the functions of the employer's workforce. 42 U.S.C. § 12111(10)(B)(i), (iv).

These non-monetary factors clearly support defendant's position here. Plaintiffs nevertheless suggest that defendants have not undertaken a sufficiently refined analysis (Cross-App. Br. 25). But an employer need not "analyze the costs and benefits of proposed accommodations with mathematical precision." *Stone v. City of Mount Vernon*, 118 F.3d 92, 99 (2d Cir. 1997) (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995)). And even setting aside that compliance with the law is a baseline requirement of all employers,

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[5] Even if monetary costs were all that mattered, plaintiffs ignore the fact that every unabated violation of the state law incorporating the OSHA regulation may result in monetary penalties of up to $200 per day. N.Y.S. Dep't of Labor, *DOSH Public Employee Safety and Health*, available at https://perma.cc/PP65-KDA6.

the safe operation of a fire department is "an important concern in a matter of public safety" under the ADA's undue hardship factors. *Id.* at 100. Given that OSHA, NIOSH, and other safety organizations have all indicated that tight-fitting respirators are unsafe when the wearer has facial hair between the respirator seal and the face (A94, 169, 176-77, 183, 193), defendants have established an undue hardship here.[6]

Finally, plaintiffs resort to the suggestion that, because firefighters—including plaintiffs—have at times had facial hair but not had safety incidents, the safety risk posed by facial hair must not exist (Cross-App. Br. 17-19, 21). Plaintiffs have not referred to any statistically significant data on the risks posed by facial hair, however, noting only 20 firefighters who were allowed to maintain facial hair here and referring to about 20 more in Washington, D.C. (*id.* 8, 18 (citing *Kennedy v. District of Columbia*, 654 A.2d 847, 855 (D.C. 1994)). And even assuming that the risk is small, OSHA and the FDNY are

[6] To the extent plaintiffs argue that defendants needed to produce expert testimony to prevail under the ADA (Cross-App. Br. 21, 34), defendants have addressed that argument on pp. 19-20 above.

entitled to guard against risks that are small but potentially catastrophic.

For all of these reasons, the proposed accommodation would impose an undue hardship on the FDNY and endanger the safety of FDNY firefighters and New Yorkers more broadly. These reasons likewise establish that defendants had a legitimate, nondiscriminatory basis to deny plaintiffs an exemption to the FDNY's policy. *See Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). This Court should therefore reverse the district court's decision granting summary judgment to plaintiffs on their failure-to-accommodate and disability-discrimination claims, and direct that summary judgment be granted to defendants instead.[7]

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[7] Plaintiffs argue that, if this Court remands any federal claims for trial, it should direct the district court to reinstate their state-law claims (Cross-App. Br. 38). But since all of plaintiffs' federal claims should be dismissed, the district court correctly dismissed all of their state-law claims (SPA25). *See* 28 U.S.C. § 1367(c)(3).

CONCLUSION

This Court should reverse the portion of the district court's order granting summary judgment to plaintiffs on their ADA claims, vacate the permanent injunction that the district court issued, and direct the district court to enter judgment on those claims in defendants' favor, and it should otherwise affirm the district court's order.

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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 4,915 words, not including the table of contents, table of authorities, this certificate, and the cover.

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