No. 20-0456 (L) & 20-0650 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALIK BEY, TERRELL JOSEPH, STEVEN SEYMOUR, and CLYDE PHILLIPS,

Plaintiffs – Appellees – Cross-Appellants,

v.

CITY OF NEW YORK, FIRE COMMMISSIONER DANIEL A. NIGRO, NEW YORK CITY FIRE DEPARTMENT, JOHN AND JANE DOE 1-10,

KAREN HURWITZ, and SHENECIA BEECHER,

Defendants – Appellants – Cross-Appellees.

On Appeal from the U.S. District Court for the Eastern District of New York

REPLY BRIEF FOR APPELLEES – CROSS-APPELLANTS
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INTRODUCTION

In its latest brief, the New York City Fire Department (FDNY) asserts that this case "rises, and ultimately falls, on the plain language" of the Occupational Safety and Health Administration's (OSHA) "respiratory protection" regulation. FDNY Response Br. 1.[1] Although FDNY previously construed that "plain language" to permit the accommodation that Plaintiffs are seeking in this lawsuit, FDNY now contends that the regulation precludes that same accommodation. *Id.* at 10. FDNY was right the first time. As the district court properly recognized, the regulation's text does not prohibit FDNY from reinstating its prior accommodations and OSHA itself has construed the regulation to permit small amounts of facial hair. For these reasons and others set forth below, FDNY's reliance on the regulation is misplaced.

ARGUMENT

I. This Court has jurisdiction over Plaintiffs' cross-appeal.

FDNY suggests in its response brief that this Court lacks jurisdiction over Plaintiffs' cross-appeal under 28 U.S.C. § 1292(a). *See* FDNY Response Br. 3 ("[I]t is hard to see how plaintiffs are aggrieved in a way relevant to § 1292(a)(1)."). It is not clear whether FDNY's position is that this Court lacks jurisdiction over Plaintiffs' cross-appeal altogether or, instead, that this Court's jurisdiction arises under § 1291 rather than § 1292(a). But, in either case, FDNY is incorrect: as Plaintiffs previously

[1] For simplicity, this brief refers to FDNY's latest brief as its "response brief" (rather than FDNY's "response and reply brief").

explained, this Court has jurisdiction over their cross-appeal under § 1292(a). *See* Plaintiffs' Opening Br. 3–4.

Section 1292(a)(1) creates "an exception to the general prohibition against appealing non-final orders." *Grant v. Local 638*, 373 F.3d 104, 107 (2d Cir. 2004). In particular, the statute grants the courts of appeals jurisdiction to review "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions." Plaintiffs' cross-appeal falls squarely within the scope of this provision because it seeks review of an interlocutory order "refusing" to grant injunctive relief under Title VII. Although FDNY contends that § 1292(a)(1) does not apply here, all of its arguments to that effect are unpersuasive.

First, FDNY attempts to characterize the district court's summary-judgment order as a "final judgment" rather than an interlocutory order. But that characterization cannot be squared with the terms of the order itself. Not only does the order fail to reference any "final judgment," but it also fails to resolve Plaintiffs' damages claims. An order that leaves a party's damages claim unresolved cannot be final. As this Court has repeatedly recognized, "[w]here only liability has been determined, a [district] court cannot execute the judgment before it has assessed the damages." *Cooper v. Salomon Bros. Inc.*, 1 F.3d 82, 85 (2d Cir. 1993); *see also, e.g.*, *Coe v. Town of Blooming Grove*, 328 F. App'x 743, 744 (2d Cir. 2009) ("In this case, no final judgment has issued because the amount of damages remains unresolved.").

FDNY asserts that the district court implicitly rejected Plaintiffs' damages claims because it "indicat[ed] at [the summary-judgment] hearing that plaintiffs were *likely* not entitled to damages." FDNY Response Br. 4 (emphasis added). But a district court's speculation about its "likely" ruling on an issue does not constitute a final judgment. And, here, the district judge explicitly stated at the hearing that his views were merely "tentative[]" at that stage, A3084, and expressly referred to the question before him as "preliminary," A3085; *see also* A3089 ("I will probably issue a preliminary opinion so you will know where we are with respect to the various theories of the plaintiff and what theories should apply in this case."). Moreover, the court's other comments at the hearing demonstrate that he never intended to render any "final" decisions from the bench. At one point, for example, he explicitly told the parties, "I am not going to grant summary judgment," A3082—a statement directly at odds with his subsequent ruling.

The procedural history of this case confirms that the district court never decided Plaintiffs' damages claims; indeed, it shows that those claims were never even before the court at the time of its summary-judgment ruling. Plaintiffs' summary-judgment motion made clear that they were seeking a ruling as to liability only. Their motion explicitly requested an order "entering judgment for the Plaintiffs on all *liability*" and—separately—asked the court to "set[] this matter down *for trial on*

damages." A478 (emphases added).[2] If the district court had intended to reject Plaintiffs' damages claims *sua sponte* without any briefing on the issue—as FDNY suggests—then it is doubtful that the court would have done so without memorializing the ruling anywhere in writing. Federal Rule of Civil Procedure 58(a) explicitly provides that a district court must enter "[e]very judgment" in writing. The district court's decision not to do that here reaffirms that it never issued a final judgment on damages. *See* A12–14 (District Court Docket).

At any rate, even if the record below were ambiguous as to whether the district court actually decided Plaintiffs' damages claims, that ambiguity would have to be resolved against finality. Appellate courts are (rightly) reluctant to treat a district court's order as "final" when it is unclear that the district court actually intended it as such. *See, e.g.*, *Harris v. Rivera Cruz*, 20 F.3d 507, 512 (1st Cir. 1994) ("[W]e are reluctant to construe a judgment ambiguous on its face as a final judgment where it could plausibly be read as non-final, where extrinsic evidence does not wholly resolve the uncertainty, and where reading it as final could unfairly forfeit the rights of a party.").

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[2] Plaintiffs also captioned their brief in support of the motion as a "Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment *on Liability* and Setting a *Trial for Damages*." Dist. Ct. ECF No. 42, at 1 (emphases added). And their complaint likewise made clear that they intended to seek damages on each claim. *See* A36–37 (requesting "[c]ompensatory, consequential, and special damages" as well as "[d]amages for emotional distress, lost wages, back pay, front pay, statutory damages, medical expenses").

FDNY itself has implicitly acknowledged that the district court's summary-judgment order was non-final—at least with respect to the court's ruling on Plaintiffs' Americans with Disabilities Act (ADA) claims. In its response brief, FDNY openly admits that § 1292(a)(1) provides "a basis to exercise jurisdiction over [FDNY's] appeal" of the court's ADA ruling. FDNY Response Br. 3. And an order that is appealable under § 1292(a)(1) cannot, by definition, be final. *See* 28 U.S.C. § 1292(a)(1) (providing appellate jurisdiction over "[i]nterlocutory orders" only). FDNY never explains how the district court's summary-judgment order can be interlocutory for the purposes of its own appeal but final for the purposes of Plaintiffs' cross-appeal.[3]

FDNY's only remaining jurisdictional argument is similarly flawed. FDNY argues that the district court "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)." FDNY Response Br. 3. But a plaintiff's success on one claim for injunctive relief does not preclude it from cross-appealing an adverse ruling on another claim for injunctive relief. To the contrary, "[a] party who has won an injunction . . . is well advised to take a cross-appeal if it wishes to argue an alternative basis for injunctive relief." 15A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 3904 (2d

[3] Although Federal Rule of Civil Procedure 54 permits a district court to enter final judgment with respect to "fewer than all" claims in an action, the district court in this case never did so. This Court should therefore instruct the district court that, on remand, it must assess the amount of damages before entering final judgment.

ed. 1987). In fact, many courts—including this one—will refuse to consider a plaintiff-appellee's arguments on a distinct legal issue unless the plaintiff-appellee files its own cross-appeal. *See, e.g.*, *Pacific Capital Bank v. Connecticut*, 542 F.3d 341, 349 (2d Cir. 2008) (holding that "without cross-appealing, [the plaintiff-appellee] may not advance a theory that challenges some aspect of the lower court's judgment"). Thus, Plaintiffs' cross-appeal is not only jurisdictionally proper, but necessary for Plaintiffs to challenge the district court's Title VII ruling on appeal.

II. FDNY cannot rely on the OSHA regulation as its sole basis to satisfy Title VII's "business necessity" requirement.

FDNY concedes that Plaintiffs have made out a prima facie case of Title VII disparate-impact liability. *See* FDNY Response Br. 15 ("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."). It argues, however, that its decision to rescind Plaintiffs' prior accommodations was justified by "business necessity." As explained below, that argument—which rests entirely on FDNY's reinterpretation of the OSHA regulation—is unavailing.[4]

[4] FDNY suggests in its "Statement of the Case" that "plaintiffs alleged only disparate treatment" in district court. FDNY Response Br. 8. To the extent that FDNY intended this statement as a waiver argument, the record below plainly refutes it. Plaintiffs' summary-judgment brief included an entire section entitled, "Plaintiffs are entitled to summary judgment on their disparate impact claims." Dist. Ct. ECF No. 42 (Memorandum in Support), at 14; *see also id.* at 15 (arguing that "Defendants knew that their facial hair policy would affect predominantly African American firefighters" and that "Defendants do not have a legitimate business reason for the

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A. FDNY's "plain language" argument is untenable.

FDNY contends that the text of 29 C.F.R. § 1910.134 (g)(1) "unambiguously prohibits granting Plaintiffs the accommodation that they demand." FDNY Response Br. 10. But FDNY itself previously construed that regulation—for nearly three years—to permit the exact same accommodation. *See* A246–53 (Accommodation Letters). FDNY's prior interpretation of the regulation therefore undercuts its "plain language" argument and demonstrates that the regulation can reasonably be read to permit the accommodation Plaintiffs seek. FDNY Response Br. 1.

FDNY's attempt to distance itself from its prior reading of the OSHA regulation is unconvincing. At one point in its response brief, for instance, FDNY appears to deny that it ever previously construed the OSHA regulation. FDNY Response Br. 12 (citing the fact that "the FDNY letters approving [the prior] accommodations . . . do not even mention the regulation"). But the regulation had been in effect for *over fifteen years* by the time that FDNY provided Plaintiffs with their original accommodations in 2015. FDNY's suggestion that it was somehow unaware of the OSHA regulation when it provided those accommodations is implausible.[5]

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clean-shave policy"). And Plaintiffs similarly pled a standalone disparate-impact claim in their complaint. *See* A35–36.

[5] To the extent that FDNY really did learn of the OSHA regulation in 2018 when it rescinded Plaintiffs' accommodations—a full twenty years after the regulation was adopted—that would cast doubt on FDNY's business-necessity defense for a

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In any event, the text of the regulation does not "unambiguously prohibit" the accommodation at issue. As Plaintiffs explained in their opening brief, the regulation's ban on "[f]acial hair that comes between the sealing surface of the facepiece and the face," 29 C.F.R. § 1910.134 (g)(1)(i)(A), is susceptible to multiple interpretations due to the inherent ambiguity of the term "facial hair." *See* Plaintiffs' Opening Br. 22–24. That ambiguity is reflected not only in FDNY's own inconsistent interpretations of the regulation but also in FDNY's description of its process for rescinding the prior accommodations. *See* A258–59 (Nguyen Decl.) (identifying the OSHA regulation as fifth in a list of two dozen factors that FDNY purportedly considered in rescinding the prior accommodations).

The regulation's ambiguity is also precisely why OSHA has had to issue so many guidance documents over the years explicating what the regulation actually means. As the district court properly recognized, that guidance clarifies that the regulation does not require respirator users to remove *all* facial hair but, rather, requires them to "*trim* their beards so that they do not interfere with the sealing surface of the respirator." OSHA, Letter to Hon. Carl Levin (Mar. 7, 2003) (emphasis added), *available at* https://perma.cc/8XTF-WGTS; *see also, e.g.*, *OSHA Bulletin: General Respiratory Protection Guidance for Employers and Workers*, https://perma.cc/PNL6-6Y83 (last visited July 1, 2020) ("If your respirator requires a tight fit, you must trim back

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different reason: simply put, a regulation that can be ignored for nearly two decades without *any* consequences cannot reasonably be characterized as a business necessity.

your beard so that it will not interfere with the face-facepiece seal.").[6] In sum, it is not just FDNY's earlier interpretation that demonstrates the inherent ambiguity of OSHA's regulation but also OSHA's *own* earlier interpretation.

B. FDNY's reliance on the fit-testing regulation is misplaced.

FDNY next seeks to justify its reading of the OSHA regulation by pointing to a separate regulatory provision that prohibits employees from being fit-tested "if there is any hair growth between the skin and the facepiece sealing surface." 29 C.F.R. § 1910.134, App. A. Just like with the main "respiratory protection" provision at issue, *id.* § 1910.134(g)(1), FDNY never previously considered the fit-testing provision to be a barrier to Plaintiffs' proposed accommodation; indeed, FDNY administered multiple fit tests to Plaintiffs (and over a dozen other firefighters) during the prior accommodations period—all of which they passed. *See* A246–53 (acknowledging that each Plaintiff "successfully passed the 'mask fit' test with close-cropped facial hair"). But, even setting aside FDNY's own past practices, FDNY's current reading of the fit-testing provision does little to advance its cause.

[6] Other fire departments' grooming policies reflect that same understanding of the regulation, as Plaintiffs pointed out in their opening brief. *See, e.g.*, *Chino Valley Fire District, Policy 1004: Personal Clothing, Grooming and Appearance Standards*, https://perma.cc/JCZ6-5MWR (last visited June 15, 2020) ("Any member who has a condition due to a protected category (e.g., race, physical disability) which affects any aspect of personal hygiene covered by this policy may qualify for an accommodation[.]"). FDNY declined to address any of those other policies in its response brief.

As an initial matter, all of OSHA's prior guidance concerning the scope of the main "respiratory protection" provision apply with equal force to the fit-testing protocols. As previously explained (and as the district court found), that guidance makes clear that respirator users may maintain a minimal amount of facial hair, provided that it does not interfere with the facemask seal. The same standards apply in the fit-testing context. FDNY has not offered any cogent explanation for why the fit-testing provision (which governs the *annual* fit-testing process) would alter OSHA's interpretation of the main "respiratory protection" provision (which governs *day-to-day* activities).

To the extent that FDNY seeks to rely on the textual differences between the fit-testing provision and the main "respiratory protection" provision, those textual differences only undermine FDNY's reading of the main provision. Unlike the main "respiratory protection" provision in subsection (g)(1), the fit-testing provision prohibits "*any* hair growth between the skin and the facepiece." 29 C.F.R. § 1910.134, App. A (emphasis added). FDNY's contention that these two provisions—with different language—should be read identically contravenes basic rules of textual construction. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship."); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read

naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (citation omitted)).

C. Even if FDNY's reading of the OSHA regulation were correct, it still would not establish business necessity.

Finally, even if this Court were to accept FDNY's reading of the OSHA regulation—and it should not—the regulation still would not suffice to establish business necessity, for two reasons: first, FDNY's clean-shave policy is more restrictive than the OSHA regulation requires (even under FDNY's reading of the regulation); and, second, the evidentiary record in this case demonstrates that FDNY does not enforce the clean-shave policy consistently.

1. Even under FDNY's (incorrect) interpretation of the OSHA regulation, the Department's current clean-shave policy remains overbroad. FDNY's assistant commissioner stated in his declaration that the clean-shave policy "prohibit[s] full duty Firefighters from having beards, goatees, or any form of facial hair beneath the lower lip." A257 (Nguyen Decl.); *see also id.* ("FDNY Safety Standards require full duty firefighter to be clean-shaven on their cheeks, chin, neck and jaw.").[7] In its response brief, however, FDNY concedes (for the first time in this litigation) that the OSHA 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

[7] FDNY's commissioner likewise testified during his deposition that "the policy as it exists, allows a mustache but not below the lip and sideburns to a certain level, and that's it." A2815 (Nigro Dep.).

face." FDNY Response Br. 13. In short, FDNY admits that the OSHA regulation permits certain types of facial hair, such as short beards and goatees, that FDNY's clean-shave policy expressly prohibits.

The disconnect between FDNY's clean-shave policy and its reading of the OSHA regulation has major implications for this case. Besides casting doubt on FDNY's claim that it adopted the clean-shave policy in order to comply with the regulation, the disconnect directly undermines FDNY's business-necessity defense. After all, an employer cannot rely on a federal regulation as its sole justification for a policy that the *employer itself* admits is not required by that regulation. Thus, even if this Court accepts FDNY's latest reading of the OSHA regulation, Plaintiffs would still be entitled to summary judgment that FDNY's current policy violates Title VII by prohibiting firefighters from maintaining (in FDNY's own words) "a short beard—such as a well-trimmed goatee." FDNY Response Br. 13.

FDNY's overly restrictive clean-shave policy has concrete consequences for firefighters who suffer from PFB, like Plaintiffs, and disproportionately affects Black firefighters. By barring Plaintiffs from maintaining even a small beard or goatee, FDNY is effectively forcing them to shave more than FDNY itself believes is necessary to ensure compliance with the OSHA regulation. FDNY has not offered to any evidence—and cannot offer any evidence—to justify imposing that hardship on Plaintiffs (or other PFB-afflicted firefighters) and forcing them to endure such needless pain and suffering.

2. An employer's failure to enforce a policy in a consistent manner provides evidence that the policy is not justified by business necessity. *See Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 102 (2d Cir. 2003) (explaining that, "if the policy is applied inconsistently, [the employer] will find it more difficult to prove business necessity" under the ADA); *see also, e.g.*, *Wright v. Ill. Dep't of Children & Family Servs.*, 798 F.3d 513, 524 (7th Cir. 2015) (holding that an employer's "inconsistent application of its evaluation procedures provided objective evidence that the evaluation order was not consistent with business necessity" under the ADA); *accord Adair v. City of Muskogee*, 823 F.3d 1297, 1309 (10th Cir. 2016) (holding that a fire department's physical-strength requirement was justified by business necessity under the ADA where "[n]othing suggests that the City has enforced the . . . requirement unreasonably or not applied it consistently across the [d]epartment").[8]

Here, the record contains undisputed evidence that FDNY has failed to enforce its clean-shave policy consistently since 2018, when it rescinded its earlier accommodations. As previously noted, Plaintiffs testified at their depositions that they have personally witnessed several other firefighters wearing facial hair out in the field. *See, e.g.*, A2271 (Seymour Dep.) (stating that "guys in other battalions would be just, like, rocking a full, thicker beard than I would"); A801–04 (Joseph Dep.)

[8] The disparate-impact analysis under the ADA mirrors the analysis under Title VII, and courts frequently treat the two inquiries as the same. *See generally* H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 4 (1991) (noting that "disparate impact claims under the ADA should be treated in the same manner as under Title VII").

(identifying a firefighter in his unit whom he had seen wearing facial hair); *see also* A2391–92 (Hamilton Dep.) ("I go in the field and I'm seeing facial hair that looks like they haven't shaved and nobody is saying anything to them."). Another firefighter, who is not a party to this case, similarly testified that she, too, had seen other firefighters wearing facial hair in violation of the clean-shave policy. *See* A1278–82 (Wilson Dep.) (recounting incidents in which she observed white firefighters with facial hair). This testimony—which FDNY has not attempted to refute—illustrates FDNY's recognition that firefighters need not be clean shaven to perform their jobs safely or effectively.

The testimony also undercuts FDNY's claim that it could face monetary penalties under state law if it were to reinstate Plaintiffs' prior accommodations. FDNY has not produced any evidence to suggest that it has ever been subject to such penalties since 2018, despite its failure to enforce the clean-shave requirement consistently over that period. Nor has FDNY offered any evidence to suggest that it was ever subject to such penalties prior to 2018, when it openly provided accommodations to Plaintiffs and others. The absence of any such penalties over the past five years—despite the fact that FDNY is the largest fire department in the state—casts doubt on FDNY's claim that it would face liability if it were to reinstate Plaintiffs' accommodations.

CONCLUSION

For the foregoing reasons, and those set out in Plaintiffs' opening brief, the district court's order granting summary judgment to FDNY and denying summary judgment to Plaintiffs on their Title VII disparate-impact claim should be reversed; the district court's order dismissing Plaintiffs' state-law claims should be reversed; and the case should be remanded for resolution of damages and attorneys' fees.

Respectfully submitted,

/s/ Nicolas Y. Riley

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AUGUST 11, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume requirements of Federal Rule of Appellate Procedure 32(a)(7) because the brief contains 3,640 words. I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared using Microsoft Word 2016 and is written in 14-point Garamond font, a proportionally spaced typeface.

/s/ Nicolas Y. Riley
NICOLAS Y. RILEY

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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