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EASTERN DISTRICT OF NEW YORK

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(SL- 3778)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 13

2418

UNITED STATES OF AMERICA,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

COMPLAINT

Civil Action
No.

MATSUMOTO, J.

(, J.)

(, M.J.)

POHORELSKY, M.J.

The UNITED STATES OF AMERICA (“United States”), by its attorney, LORETTA E. LYNCH, United States Attorney for the Eastern District of New York, Scott R. Landau, Assistant United States Attorney, of counsel, for its complaint against defendant the City of New York, alleges as follows:

INTRODUCTION AND JURISDICTION

1. This action is brought by the United States against the City of New York to enforce the statutory and regulatory provisions of Title I of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12111 *et seq.*, which prohibits discrimination in employment against individuals with disabilities. As described below, the Fire Department of the City of New York (“FDNY”) has violated the ADA by failing to reasonably accommodate Gerald Snell, a firefighter who suffered permanent lung damage after September 11, 2001, and by forcing him to retire from the FDNY.

2. This Court has jurisdiction under 42 U.S.C. § 2000e-5(f), 28 U.S.C. §§ 1331 and 1345. This Court has authority to grant a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, and authority to grant equitable relief and monetary damages pursuant to 42 U.S.C. § 12117.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and 1391(c) because the violations took place in this district and the FDNY has its principle place of business in this district.

4. Defendant City of New York is a municipal government and a political subdivision created pursuant to the law of New York. It is a person within the meaning of 42 U.S.C. § 12111(7) and 42 U.S.C. § 2000e(a), an employer within the meaning of 42 U.S.C. § 12111(5) and 42 U.S.C. § 2000e(b) and a covered entity within the meaning of 42 U.S.C. § 12111(2).

5. The FDNY is an agency of the City of New York, with headquarters at 9 Metrotech Center, Brooklyn, New York. The FDNY employs firefighters who, among other things, are responsible for protecting individuals and property in the City of New York. Defendant City of New York is responsible for establishing the terms, conditions, and other practices which bear upon the employment of FDNY personnel.

6. Gerald Snell (“Snell”) is an individual with a disability within the meaning of 42 U.S.C. § 12102. Snell is a former fire Captain in the FDNY who suffered irreversible lung damage while participating in search, rescue, recover, and cleanup operations at the World Trade Center site in New York City after September 11, 2001. He is substantially limited in the major life activity of breathing.

STATUTORY AND REGULATORY BACKGROUND

7. The ADA states that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a).

8. Under the ADA, the definition of discrimination includes, among other things, “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity” 42 U.S.C. § 12112(b)(5)(A).

9. Reasonable Accommodation under the ADA includes “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, or other similar accommodations for individuals with disabilities” 29 C.F.R. § 1630.2(o)(2)(ii).

10. Upon receiving requests for reasonable accommodations from otherwise qualified employees with disabilities, employers must make a reasonable effort to determine the appropriate accommodation, which may require a flexible, interactive process that involves the employer and the individual with a disability.

FACTUAL BACKGROUND

A. FDNY Medical Review And Involuntary Retirement Process

11. The FDNY periodically reviews the medical status of all uniformed members to determine fitness for duty. All uniformed members are accorded a duty status, including full

duty, light duty, and medical leave. A uniformed member who is on full duty status is considered capable of performing firefighting duties. A uniformed member who is on light duty status is considered not capable of performing firefighting duties, but able to perform other duties. A uniformed member who is unable to perform either full duty or light duty is placed on medical leave.

12. If the FDNY determines that a member has a disability which permanently prevents him from serving in full duty status, the FDNY will file a retirement application on behalf of that member with the New York City Fire Department Pension Fund (the "Pension Fund"). This forcible retirement process is colloquially known as "boarding."

B. Gerald Snell

13. Gerald Snell became an FDNY firefighter with the FDNY on February 24, 1979. He was promoted to the rank of Lieutenant on January 6, 1996 and became a fire Captain on June 28, 2003.

14. In the days, weeks and months, following the September 11, 2001 attacks on the World Trade Center, Snell participated in rescue, recovery and cleanup operations at Ground Zero and ran a counseling operation at Ground Zero for firefighters. As a result of inhaling toxic materials during the course of his duties at Ground Zero following the September 11, 2001 attacks, Snell developed a significant pulmonary condition and breathing difficulties.

15. A medical examination in 2003 revealed that Snell had pneumonia, fluid on his lungs, and four nodules on his lungs, all of which significantly and adversely affected his ability to breathe. As a result, Snell was placed on light duty status and was assigned to work as the primary supervisor of the FDNY's substance abuse counseling unit within the FDNY's Counseling Services Unit ("CSU"). Snell is a certified alcohol and substance abuse counselor

(“CASAC”), and had previously worked in the CSU drug treatment and counseling unit periodically on a full time basis from 1994 to 1998, and part-time and on an overtime basis from 1998 to 2003.

16. As supervisor of the CSU substance abuse counseling unit, Snell was responsible for responding to the needs of active and retired FDNY personnel in distress and/or suffering with substance abuse and addiction issues, including providing services including assessment, development of treatment plans, and follow up. In his capacity as supervisor of the CSU substance abuse counseling unit, Snell oversaw two other uniformed members, one emergency medical technician, three civilian counselors, and two civilian administrative employees. In addition to providing and overseeing counseling services, Snell also supervised uniformed unit staff with respect to the submission of time records, work attendance, and leave from work.

17. Snell was not required to engage in firefighting duties or act as a first responder in his position in CSU’s substance abuse counseling unit. His medical conditions did not prevent him from engaging in any of the duties required of him as supervisor of CSU’s substance abuse counseling unit.

18. Throughout the time that he served in the CSU substance abuse counseling unit, Snell perform his duties satisfactorily.

19. On May 19, 2004, the FDNY declared Snell permanently disabled from firefighting duties due to “clinical asthma with airway hyperactivity,” exacerbated by his inhalation of toxic materials at Ground Zero following September 11, 2001.

20. On May 28, 2004, the Fire Commissioner “boarded” Snell, filing a retirement application with the Pension Board for his involuntary disability retirement.

21. The Pension Fund Board of Trustees was scheduled to consider Mr. Snell's involuntary retirement application in December 2005. Snell did not want to retire, however, and in November 2005, after speaking to his supervisor, requested an "administrative hold" to postpone final action on his retirement application by the Pension Fund Board of Trustees. The request was granted, and consideration of Snell's retirement application was postponed.

22. In or about July 2006 – when Snell's Administrative hold was about to expire – Snell submitted a request to extend his Administrative Hold. The Fire Commissioner denied Snell's request.

23. On July 24, 2006, the Pension Fund Board of Trustees postponed final action on Snell's retirement application until September 2006, and Snell was permitted to continue to work through the summer of 2006. Snell was not, however, permitted to earn overtime pay following the Pension Fund Board of Trustees July 24, 2006 meeting.

24. On July 25, 2006, Snell filed a request for a reasonable accommodation with the FDNY.

25. By letter dated August 30, 2006, the FDNY denied Snell's request for a reasonable accommodation.

26. The FDNY's policies and procedures do not include a mechanism for engaging in an interactive process with members who request reasonable accommodations, nor does the FDNY uniformly engage in an interactive process with members who are otherwise qualified. Upon information and belief, the FDNY denied Snell's request for a reasonable accommodation without engaging in any interactive process with Snell to attempt to identify a suitable alternate assignment for Snell within the FDNY.

27. On September 29, 2006, the Pension Fund Board of Trustees voted to involuntarily retire Snell from the FDNY on an accidental disability pension.

28. Snell timely filed a formal charge of employment discrimination with the EEOC (Charge Number 520-2006-03046) on July 25, 2006, just after he was told that the Pension Board would proceed with his involuntary retirement.

29. The EEOC subsequently investigated Snell's charge of discrimination, found reasonable cause to believe that the allegations of discrimination on the basis of disability were true, and attempted unsuccessfully to conciliate a voluntary resolution of the charge.

FIRST CLAIM FOR RELIEF (VIOLATION OF THE ADA)

30. Paragraphs 1 through 29 above are repeated and realleged as if set forth fully herein.

31. The FDNY discriminated against Snell on the basis of his disability in regard to the terms and conditions of his employment, in violation of the ADA, 42 U.S.C. § 12112, and the regulations promulgated thereunder, by failing to provide Snell with a reasonable accommodation after failing to engage in an interactive process to, *inter alia*, identify any limitations resulting from Snell's disability as well as potential reasonable accommodations, in positions that do not involve firefighting duties, that could overcome those limitations.

32. As a result, the United States respectfully requests that the Court award Snell compensatory damages.

SECOND CLAIM FOR RELIEF (VIOLATION OF THE ADA)

33. Paragraphs 1 through 32 above are repeated and realleged as if set forth fully herein.

34. The FDNY discriminated against Snell, in violation of the ADA, 42 U.S.C. § 12112, and the regulations promulgated thereunder, by altering the terms and conditions of Snell's employment and forcing him to retire, all on the basis of his disability.

35. As a result, the United States respectfully requests that the Court award Snell compensatory damages.

WHEREFORE, the United States respectfully requests that this Court grant the following relief:

(A) Award compensatory damages to Snell as would fully compensate him for injuries caused by the City of New York and/or FDNY's discriminatory conduct; and

(B) Order the FDNY to adopt and implement a reasonable accommodation policy that complies with the ADA and the regulations promulgated thereunder, and which, *inter alia*, requires the FDNY to engage in an interactive process with disabled members who request reasonable accommodations to, *inter alia*, identify any limitations resulting from their disabilities as well as potential reasonable accommodations, in positions that do not involve firefighting duties, that could overcome those limitations.

(C) Order the FDNY to comply with the ADA and the regulations promulgated thereunder by engaging in an interactive process and offering reasonable accommodations, including, where appropriate, reassignment, to individuals with disabilities who are otherwise qualified;

(D) Award such other additional relief as justice may require.

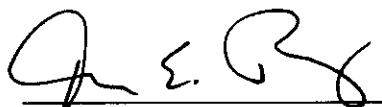
Dated: Brooklyn, New York

April 17, 2013

Respectfully submitted,

ERIC H. HOLDER, JR.
Attorney General

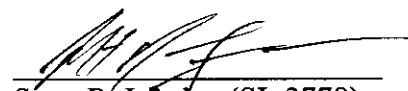
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