

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES PHILLIPS,
DANIEL CARIONE,
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Plaintiffs, :

v. :

CITY OF NEW YORK, *et al.*,
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:
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Defendants. :
:
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11 Civ. 6685 (KPF)

ORDER

KATHERINE POLK FAILLA, District Judge:

On March 9, 2015, the first day of the scheduled jury trial in this matter, the parties reached a settlement agreement. That agreement is reflected on the official transcript attached to this Order.

SO ORDERED.

Dated: March 18, 2015
New York, New York



KATHERINE POLK FAILLA
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JAMES PHILLIPS and DANIEL
4 CARIONE,

5 Plaintiffs,

New York, N.Y.

6 v.

11 Civ. 6685 (KPF)

7 CITY OF NEW YORK, et al.,

8 Defendants.

9 March 9, 2015
10 9:15 a.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES VIA TELEPHONE

15 MEENAN & ASSOCIATES, LLC
16 Attorneys for Plaintiffs
17 BY: COLLEEN M. MEENAN
18 STUART J. SEABORN

19 ZACHARY W. CARTER
20 Corporation Counsel of the
21 City of New York
22 Attorney for Defendants
23 BY: LAWRENCE J. PROFETA
24 CHRISTOPHER S. BOURIAT
25

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1 THE COURT: Please be seated. Thank you.

2 (Case called)

3 MS. MEENAN: Good morning, Judge.

4 Colleen Meenan for Jim Phillips and Dan Carione.

5 THE COURT: Good morning.

6 MR. SEABORN: Stuart Seaborn for the plaintiffs.

7 THE COURT: Mr. Carione, good morning. Mr. Phillips,
8 good morning to you as well.

9 MR. PROFETA: Good morning, your Honor.

10 Lawrence Profeta for the City of New York.

11 THE COURT: Good morning.

12 MR. BOURIAT: Good morning, your Honor.

13 Christopher Bouriat for the City of New York.

14 THE COURT: We're going to have a bit of a wait this
15 morning because, as you know, on Mondays the jury panel first
16 gets a couple of preliminary questions asked and then they get
17 to watch a video and then, then they are picked in panels to
18 come over.

19 For your information, and I'll let the jury know this
20 as well, there are four trials beginning today: One criminal,
21 three civil. The criminal gets preference. They get the first
22 group of jurors. After that -- looking at the list that I saw
23 it may be in alphabetical order so F comes before a couple of
24 other letters in the alphabet but we'll get them soon enough.

25 I wanted at this time to talk to you about a couple of

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1 housekeeping issues please and then I think we might go off the
2 record for a little bit.

3 So let me talk about these things. I got the
4 defendants' objections to the voir dire. And they were to two
5 different sections and I wanted to let you know I've thought
6 about them. I haven't changed the questions. Let me just
7 explain why. On the accommodation issue, I have no easier way
8 of saying it. It is an issue that matters. And I did want to
9 ask those questions. On the second set of questions I
10 appreciate the concerns that you've raised about potential
11 prejudice or concern about tainting or infecting somehow the
12 jury pool. Those questions are not themselves going to be the
13 basis for a for-cause challenge. I want to meet with anyone
14 who answers yes to those because my concern is if these people
15 are willing to be open-minded, listen to the evidence and then
16 still believe that this is something for which these gentlemen
17 are not suited, then that's fine. But I do think they have to
18 be open at least to consideration of the evidence in this case
19 before making that determination.

20 So that's why I did what I did on those things.

21 Today's schedule we'll have to play it by ear. We may
22 go a little bit beyond our 2:30 depending on how long it takes
23 to pick a jury.

24 Do the parties know -- and I think the answer to this
25 has to be yes -- who is opening.

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1 Ms. Meenan, you or Mr. Seaborn?

2 MS. MEENAN: I am, Judge, I'm opening.

3 THE COURT: Okay.

4 MR. PROFETA: Your Honor, I am.

5 THE COURT: Okay. Thank you. I just wanted to note
6 that for myself because at some point I'm going to have to ask
7 someone to step up and start to open. So now I know.

8 I am assuming that the parties know that all of their
9 witnesses need to be available because if you run out of
10 witnesses we rest. I have not had that happen to me personally
11 but I've heard of it happening in other cases. It's not a
12 pleasant thing for the party who still has a couple of folks to
13 put on.

14 The parties have stipulated to certain facts. Is it
15 your contemplation that there will be a stipulation that is
16 read to the jury? Is it your contemplation that I will simply
17 tell the jury there are certain things that have been
18 stipulated to and here they are? And if so, when would you
19 like that or is there something else that the parties had in
20 mind for communicating what has been stipulated to the jury?

21 Ms. Meenan.

22 MS. MEENAN: Judge, I think it was our understanding
23 that that would be part of the jury charge that you read in
24 essence depending upon what you believe is the proper jury
25 charge. For example, we've agreed that both plaintiffs are

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1 disabled. So in our proposed jury charge we don't think that
2 that should be an issue that goes to the jury at all and I
3 guess it would depend upon your -- whether or not you adapt the
4 version that we have suggested or not.

5 THE COURT: The only issue with that that I would have
6 is that means that the first time they're hearing about these
7 agreements is after the close of evidence. To my mind
8 stipulations are themselves evidence. They have evidentiary
9 significance so I'm a little bit concerned about them not
10 knowing -- it may just be a question of semantics because what
11 you're really saying is the parties are not disputing that
12 certain requirements have been met. But to the extent that
13 there are actually stipulated facts, and that's what I saw in
14 what was presented to me in the pretrial order, it seems to me
15 the jury ought to be made aware of them during someone's case
16 while evidence is open and being collected.

17 So do you want to talk to Mr. Profeta about that and
18 see if there's a time you'd like me to read it or Mr. Profeta
19 do you want to weigh in on this?

20 MR. PROFETA: I think it's going to be very clear from
21 the beginning of the case that there's not going to be any
22 dispute that the two plaintiffs are severely hearing impaired.
23 So we're not going to make that some kind of dispute during the
24 case. It's going to be very obvious from the outset. My
25 feeling is that as part of the jury charge I think it's

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1 appropriate for the Court to walk through what the elements of
2 each side's burdens are. And as stating them you can say that
3 there is no question that the city's an employer under the law
4 and there is no question that these two plaintiffs are hearing
5 impaired. But you, jurors, you're going to have to now resolve
6 the following issues. And do it that way. I don't think it's
7 necessary to have a statement on the record of what's been
8 stipulated.

9 I tried to agree to stipulated facts to try and make
10 clear that that's not -- we're not contesting those elements of
11 the case.

12 THE COURT: Then maybe there is no need.

13 Yes, Ms. Meenan.

14 MS. MEENAN: Judge in consideration of what you've
15 just said I'd like to refer to it in the opening that there is
16 no dispute in the case that both of the plaintiffs are not
17 severely hearing disabled but they are hearing disabled so I'd
18 like to reference that in the opening. I think your point was
19 well made so that the jury knows that right up front.

20 THE COURT: Mr. Profeta.

21 MR. PROFETA: Well Ms. Meenan can put in her opening
22 statement whatever she wants. I'm going to say that they are
23 hearing impaired. So whether they are hearing disabled,
24 hearing impaired.

25 THE COURT: Whether the word severely comes in.

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1 MR. PROFETA: Yes.

2 THE COURT: That's fine. I do understand.

3 MR. PROFETA: So, your Honor, it's going to be clear.

4 THE COURT: Mr. Profeta while you're standing.

5 MR. PROFETA: Sure.

6 THE COURT: Do you wish to submit a request to charge
7 regarding the New York City human rights law or do you believe
8 it's covered by your other charge?

9 MR. PROFETA: I believe it's covered by the other
10 charge.

11 THE COURT: Mr. Bouriat I'll talk to you, sir. I
12 suppose you think I'm picking on Mr. Profeta because I'm
13 certainly not.

14 MR. BOURIAT: Please continue to pick on Mr. Profeta.

15 MR. PROFETA: Your Honor, I object.

16 THE COURT: The Defendants' Exhibits, several of them,
17 are duplicative of Plaintiffs' Exhibits. My understanding is
18 to the extent that the Plaintiffs' Exhibits are admitted you're
19 not going to then admit these with another designation; that
20 you'll simply refer to them as they are admitted.

21 MR. BOURIAT: Absolutely, your Honor.

22 THE COURT: Perfect. Okay. That is all I have on my
23 list for today. I was made aware prior to taking the bench
24 that I think Mr. Profeta wants --

25 MR. PROFETA: Your Honor, I want to say something on

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1 the record and then I'd like to go off the record.

2 THE COURT: Okay.

3 MR. PROFETA: We've become aware that the plaintiffs
4 are planning some media event at 4:00 today on the courthouse
5 steps. And I have a concern twofold. One is that the jurors
6 are not being sequestered. I think maybe there should be some
7 instruction to the jurors to --

8 THE COURT: I'm sorry.

9 MR. PROFETA: I don't want the jurors to be leaving
10 the courtroom today, I don't know what the timing is, and walk
11 in to something that's going on at 4:00.

12 THE COURT: Nor do I.

13 MR. PROFETA: I'm also concerned that things may be
14 said during the press conference that could bear on the
15 disputes here and also the settlement posture that was made
16 during negotiations and to discuss that I'd like to go off the
17 record, your Honor.

18 THE COURT: Okay.

19 MR. SEABORN: Your Honor, there is a press event being
20 planned.

21 THE COURT: Where?

22 MR. SEABORN: We had planned to do it on the
23 courthouse steps. We actually called the clerks to see if
24 there was an issue. And we certainly don't want to do anything
25 that would interfere with the jury.

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1 THE COURT: No, nor do I. So let's hope that
2 they've -- we might still be hearing openings at that point.
3 That's what concerns me. So whatever we have, I wouldn't --
4 don't begin until they've left.

5 MR. SEABORN: Certainly, your Honor.

6 THE COURT: Okay.

7 MR. SEABORN: Just to address Mr. Profeta's concern we
8 will not be addressing anything that was raised in the context
9 of settlement. That we keep confidential so I want to ease
10 those concerns right away.

11 THE COURT: All right.

12 Let's go off the record please and let's go to the
13 robing room. Thank you.

14 (Discussion off the record in the robing room)

15 (Proceedings resumed; time noted: 2:05 p.m.)

16 THE COURT: Thank you. I have been advised by the
17 parties that they have settled this matter in principle. And
18 so what I'm going to do is I'm going to read the terms of what
19 I understand to be the essential terms of the agreement between
20 the parties and I understand further, and the parties will
21 correct me to the extent I've misstated anything, that these
22 terms will be included in what has been affectionately referred
23 to as the city's usual written agreements, which I understand
24 to include an affidavit of no liens, general releases, a W9
25 certification, a stipulation or stipulations of discontinuance

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1 or dismissal as appropriate, and a settlement agreement.

2 So this is what I understand the essential terms of
3 the agreement to be, and I'd ask the parties to listen very
4 carefully. I understand that the above-referenced action,
5 which is this case, will be dismissed -- I'm sorry -- will be
6 dismissed and discontinued with respect to all claims for
7 damages and discontinuance or dismissal will be with prejudice.

8 2. The city will conduct a reevaluation of the New
9 York City Police Department's hearing requirements for
10 incumbent members to ensure that it has a policy that is
11 compliant with the Americans with Disabilities Act as Amended
12 and the New York City Human Rights Law as Amended. The
13 reevaluation will be conducted no later than six months from
14 the date of a final settlement agreement. The review of the
15 NYPD's policy with respect to the evaluation of incumbent
16 members of the department who have hearing impairments will
17 include consideration of a policy of conducting a case-by-case
18 evaluation of such members while wearing hearing aids.

19 3. The parties agree that the claims for injunctive
20 and declaratory relief are not dismissed. And the Court will
21 retain jurisdiction for a period of nine months to ensure that
22 the city's reevaluation of the New York City Police
23 Department's hearing aid policy occurs in good faith and in a
24 timely matter. If the Court certifies the referred to -- that
25 the review referred to in paragraph two above has occurred, the

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1 claims for injunctive and declaratory relief shall then be
2 dismissed with prejudice. And while this is an agreement
3 between the parties, I am agreeing to keep jurisdiction of this
4 matter at least for this nine-month period to ensure that this
5 takes place.

6 4. While the NYPD's review of its hearing aid policy
7 is underway incumbents will be permitted to be tested wearing
8 hearing aids at the Center For Hearing Communication. They
9 will not be forced to retire for failing to meet the hearing
10 standards without their hearing aids and the city agrees to pay
11 for this testing.

12 5. Plaintiff Daniel Carione agrees to be tested while
13 wearing his hearing aid at the Center for Hearing
14 Communication. The city agrees to pay for this testing.

15 6. Plaintiff Daniel Carione agrees to any retraining
16 deemed appropriate for reinstatement.

17 7. Defendants agree to reinstate plaintiff Carione as
18 a deputy inspector within the New York City Police Department
19 within ten days of receiving the Center for Hearing
20 Communication or CHC test results that establish that with a
21 hearing aid he meets the current NYPD hearing standards.

22 The defendant further agrees to restore to plaintiff
23 Carione all backpay, benefits, and seniority for the period of
24 June 24, 2011 until the date of reinstatement less appropriate
25 payroll taxes and pension contributions. All pension payments

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1 Mr. Carione has received subsequent to the termination of his
2 employment shall be returned or shall be an offset against his
3 backpay.

4 8. Mr. Carione shall be awarded as well the
5 additional sum of \$50,000 with a 1099 miscellaneous form issued
6 by the City of New York.

7 9. After being reinstated pursuant to paragraph
8 seven, Mr. Carione shall not be required to be tested again
9 under the reevaluated or newly developed policy unless he
10 incurs additional hearing loss.

11 10. If Daniel Carione does not meet current NYPD
12 hearing standards with hearing aids he will be awarded the
13 appropriate backpay for the period from June 24, 2011 to the
14 date of his reinstatement.

15 11. Plaintiff James Phillips shall be awarded the sum
16 of \$213,000 in backpay less applicable payroll deductions with
17 a W2 form issued by the city.

18 12. Mr. Phillips shall also be awarded the additional
19 sum of \$150,000 with a 1099 miscellaneous form issued by the
20 city.

21 13. The city shall pay all reasonable attorneys' fees
22 and costs for both plaintiffs.

23 Ms. Meenan, do you understand that to be the essential
24 terms of the settlement agreement between the parties?

25 MS. MEENAN: Yes, I do, Judge.

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1 THE COURT: Mr. Carione, do you understand that to be
2 the essential terms of the agreement you have reached with the
3 city?

4 MR. CARIONE: Yes, I do, your Honor.

5 THE COURT: Mr. Phillips, do you understand that to be
6 the essential terms of the agreement you have reached with the
7 city?

8 MR. PHILLIPS: Yes, I do, your Honor.

9 THE COURT: Thank you, sir.

10 Mr. Profeta, do you understand these to be the
11 essential terms of the agreement?

12 MR. PROFETA: No. We need a quick moment. Can we see
13 the term sheet a second?

14 (Pause)

15 THE COURT: Mr. Profeta, are those indeed the
16 essential terms of the agreement into which you've entered with
17 the plaintiffs in this case?

18 MR. PROFETA: Yes, your Honor. The only thing is with
19 paragraph ten it would be backpay for the period of June 24,
20 2011 to the date that he didn't pass the hearing standards. It
21 shouldn't be reinstatement because it wouldn't be
22 reinstatement, right?

23 MS. MEENAN: Can I see?

24 MR. PROFETA: Sure.

25 (Pause)

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1 MR. PROFETA: So there is one little correction.

2 THE COURT: I think the parties understand it better
3 now. So this is -- if it happens that Mr. Carione does not
4 pass the hearing aid test, he would continue to be awarded the
5 backpay from June 24, 2011 through the date that it was
6 determined that he could not be reinstated.

7 Ms. Meenan, is that correct?

8 Please talk to Mr. Profeta if you need to.

9 (Pause)

10 MS. MEENAN: No, Judge. It's going to be up to the
11 date of this agreement he's awarded his backpay.

12 MR. PROFETA: He's awarded -- before it referred to
13 reinstatement which wouldn't happen if he didn't pass.

14 THE COURT: So then tell me what the date is for
15 paragraph ten.

16 MS. MEENAN: The date of the execution of this
17 settlement date.

18 THE COURT: Not today's date. The date of the
19 execution of the final settlement agreement?

20 MS. MEENAN: Yes.

21 THE COURT: All right.

22 MR. PROFETA: Just to be clear. In the event that
23 happens just as with Mr. Phillips -- right, because --

24 (Pause)

25 We're okay. Yes.

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1 THE COURT: What is the date, counsel?

2 MS. MEENAN: On paragraph ten, Judge, is from the
3 period of June 24, 2011 until the date of the execution of the
4 settlement agreement.

5 THE COURT: All right.

6 Mr. Bouriat, do you agree?

7 MR. BOURIAT: Yes, your Honor.

8 THE COURT: Mr. Profeta, do you agree?

9 MR. PROFETA: Yes, your Honor.

10 THE COURT: All right. Mr. Carione, that paragraph
11 pertains to you, sir. Do you understand the change that we've
12 made and do you agree with it as it's now been explained?

13 MR. CARIONE: I do, your Honor.

14 THE COURT: What is left then I think from my
15 perspective is I would ask someone sitting in front of me to
16 get me the contact information for the assistant at the Eastern
17 District of New York with whom folks have been in contact. I
18 believe it's Rachel Balaban.

19 MR. SEABORN: Yes, your Honor.

20 THE COURT: Secondly. Ms. Meenan let's set a schedule
21 for your fee application. Thirty days?

22 MS. MEENAN: Yes, Judge that will be fine, assuming we
23 can't otherwise work out something with the city with respect
24 to the fees and costs for 30 days, yes.

25 THE COURT: I would not stop you if you worked out

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1 something with the city. All right. So 30 days.

2 Mr. Profeta, if my dreams are not realized and you
3 cannot come to agreement, 30 days to respond?

4 MR. PROFETA: That would be fine, your Honor, if that
5 happens.

6 THE COURT: Okay. Ms. Meenan, do you need a reply on
7 that? I don't think so.

8 MS. MEENAN: No, Judge.

9 THE COURT: If I have both sets of papers I'll call
10 the parties in as appropriate.

11 Ms. Meenan, is there anything else we should be
12 talking about this afternoon?

13 MS. MEENAN: No, Judge, nothing at all.

14 I do want to say, Judge, on behalf of my clients, and
15 with your permission Mr. Carione would like to briefly address
16 you, but I do want to say on behalf of our side of the table
17 how much we greatly appreciate your input, your graciousness
18 and your patience with us. I think in large part you were very
19 instrumental in helping us get to this point today. So I just
20 want to say I know that you and your staff put in a great deal
21 of work in this case, including working this weekend. I do
22 apologize that we couldn't have done this on Friday and saved
23 you a weekend. But in any event.

24 THE COURT: It sounds like all of our weekends were
25 consumed.

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1 MS. MEENAN: I just want to extend my heartfelt thanks
2 to you and your staff for all of your hard work in this case
3 and for helping us to what I think is a very good result.

4 THE COURT: Mr. Carione, did you want to say
5 something?

6 MR. CARIONE: Yes, your Honor. I just want to openly
7 thank the Court for your assistance. To my legal team, Colleen
8 Meenan and her associates and the DRA. Thank you. And I
9 cannot begin to mention in detail the debt I owe this legal
10 team and the help they have given Jim Phillips and myself to
11 get to this moment. I just want that on the record. Thank
12 you.

13 THE COURT: We hope that when you are reinstated it is
14 everything that you want it to be and that you, again, have the
15 happiness that you mentioned in your prior life as a police
16 officer.

17 Mr. Phillips I know you've moved on to other things
18 but thank you very much as well, sir.

19 MR. PHILLIPS: Thank you, your Honor.

20 THE COURT: And Mr. Profeta, you need not say
21 anything.

22 MR. PROFETA: I just want to thank the Court. I share
23 in the sentiments.

24 THE COURT: Thank you. Mr. Bouriat, thank you for
25 getting up to speed in the case only to not actually get to

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1 cross-examine anyone. Hopefully you did not spend a tremendous
2 amount of time working on your summation. I have 85 percent of
3 a charge done upstairs that I can share with you but that's
4 okay.

5 Thank you as well to everyone else on the team. I
6 know Ms. Quilty-Lake, we were in constant contact. Ms. Rogers,
7 thank you as well. Let's go now and enjoy the rest of our day
8 because I hear the weather is much better.

9 (Adjourned)

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