

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

Civil Action

No. 13-CV-2416

(Matsumoto, J.)

(Ponchinsky, M.J.)

STIPULATION OF SETTLEMENT

WHEREAS, this Stipulation of Settlement resolves a civil action brought by the United States of America ("United States") against defendant the City of New York ("City"), regarding the Fire Department of the City of New York's ("FDNY") compliance with the provisions of Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12111 *et seq.*, and its implementing regulations, 29 C.F.R. § 1630.1 *et seq.*; and

WHEREAS, the United States alleges that the FDNY, an agency of the City, discriminated against Gerald Snell ("Snell") and other firefighters, in violation of 42 U.S.C. §§ 12112(a) and, 12112(b)(5)(A) and 29 C.F.R. § 1630.2(o)(3), by denying their requests for reasonable accommodation without engaging in an interactive process 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; and

WHEREAS, this matter was initiated by the charge filed by Snell (Charge Number 520-2006-03046) with the U.S. Equal Employment Opportunity Commission ("EEOC") on July 27, 2006; and

WHEREAS, the EEOC investigated Snell's charge and found reasonable cause to believe that discrimination occurred, and after the EEOC's attempts at conciliation failed, the EEOC referred the charge to the United States Department of Justice, United States Attorney's Office for the Eastern District of New York ("USAO-EDNY"); and

WHEREAS, the City denies having discriminated against Snell or other firefighters on the basis of disability or other classification protected under the foregoing laws and regulations; and

WHEREAS, as a result of ongoing discussions, the United States and the City (collectively, "the Parties") have reached an agreement that is in the Parties' best interests, and the United States believes that it is in the public interest, to resolve this matter on mutually agreeable terms without further litigation. Accordingly, the parties agree, based on this Stipulation of Settlement, to the entry of a judgment without trial or adjudication of any issues of fact or law raised in the United States' complaint.

#### JURISDICTION AND VENUE

1. This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f), 28 U.S.C. §§ 1331 and 1345. The parties agree that venue is appropriate pursuant to 28 U.S.C. § 1391.

2. The United States has authority to initiate legal proceedings to enforce Title I of the ADA through litigation pursuant to 42 U.S.C. § 12117.

3. The City is a municipal corporation and a political subdivision created pursuant to the laws 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).

4. The FDNY is an agency of the City, with its headquarters located at 9 MetroTech Center, Brooklyn, New York. FDNY employs firefighters who, among other things, provide firefighting, emergency rescue and other emergency response services in New York City.

5. 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 determined by the New York Fire Department Pension Fund to have been permanently disabled from firefighting duties as a result of pulmonary injuries relating to the search, rescue, recovery and/or cleanup operations at the World Trade Center site in New York City on or after September 11, 2001.

6. The "effective date" of this Stipulation of Settlement shall be the date on which it is "so ordered" by the Court. The parties shall not ask the court to "so order" this Stipulation of Settlement unless each of the following three conditions have been met: a) the parties have executed it; b) Snell has executed each of the documents described in paragraph 14 hereof and has returned the executed documents to the City's counsel; and 3) Snell has not revoked his general release prior to the expiration of its revocation period.

7. FDNY agrees that it will comply with all of the requirements of the ADA, and that it will not discriminate against qualified firefighters with disabilities, in violation of the ADA.

8. FDNY agrees that, among other things, it will offer reasonable accommodations, including, where appropriate, reassignment, to firefighters with disabilities who are otherwise qualified, consistent with applicable law and in accordance with the reasonable accommodation procedures set forth in Attachment 1 hereto.

9. FDNY agrees to designate an EEO Office employee to address ADA compliance matters. This EEO Office employee shall hold the title of "Disability Rights Coordinator."



10. The FDNY will ensure that all training manuals or written materials addressing its policies and practices relating to reasonable accommodations for a disability shall be consistent with the provisions of this Stipulation of Settlement.

11. Within ninety days of the effective date of this Stipulation of Settlement, FDNY will provide to current management employees two hours of training on the ADA. FDNY will also provide to newly-hired or newly-promoted management employees, within four months of hiring or promotion, two hours of training on the ADA.

#### **INDIVIDUAL RELIEF**

12. In settlement of his claims of discrimination, and subject to the provisions of Paragraphs 13 and 14 below, the City will pay to Snell within sixty (60) days of the effective date of this Stipulation of Settlement, the sum of \$7,049.06 in back pay, minus all applicable payroll deductions including pension contributions, which shall be deemed to have been earned in Calendar Year 2006, and which shall be pensionable.

13. Within one hundred twenty (120) days of the effective date of this Stipulation of Settlement, and subject to the provisions of Paragraph 14 below, Snell's accidental disability pension will be adjusted to reflect the additional FDNY income in Calendar Year 2006 from the back pay award (\$7,049.06). This pension adjustment will be retroactive to the date of Snell's retirement (September 30, 2006).

14. Within fifteen (15) days of the parties' execution of this Stipulation of Settlement, the City will send to Snell a copy of the signed Stipulation of Settlement, along with a Release of All Claims and a W-9 form to be executed by Snell. In order to accept the relief offered by the City, Snell must execute and return the Release of All Claims and the W-9, to the City, within thirty (30) days of his receipt of these documents and the Stipulation of Settlement. The City

will not be required to pay any of the individual relief described herein in the event that Snell fails to sign or revokes his Release of All Claims

15. The City will send, by email, to the United States copies of the Stipulation of Settlement, the Release of All Claims, the W-9 form, and any cover letter under which they are sent, on the same day that they are sent to Snell.

16. If Snell accepts the City's remedial relief offer outlined in Paragraphs 12 and 13 above, the City will make the payments set forth in Paragraph 12 and 13 above within the timeframes set forth therein.

17. All consideration paid to Snell is inclusive of all attorney's fees and costs, and will constitute the entirety of the payments to which Snell shall receive as a result of his claims of discrimination.

#### **IMPLEMENTATION AND ENFORCEMENT**

18. Six months following the effective date of this Stipulation of Settlement, and every six months thereafter for the duration of this reporting provision, FDNY will provide the USAO-EDNY with a written report regarding compliance with it. These written reports shall include the number of reasonable accommodation requests made by firefighters during the previous six months, a description of the interactive process engaged in with respect to each such request, the status and/or disposition of each such request, and a copy of the FDNY's most recent "Off-Line Position Database." The duration of this reporting provision shall be for three (3) years from the effective date of this Stipulation of Settlement.

19. If the United States believes that this Stipulation of Settlement or any portion of it has been violated, it will raise its concerns in writing addressed to the Law Department (Attention: Kathleen M. Comfrey) and the Parties will attempt to resolve those concerns in good faith. If the parties are unable to resolve the concerns raised by the United States within thirty

(30) days of FDNY's receipt of the United States' written statement of concerns, the USAO-EDNY may conduct an audit, limited to the concerns it has raised in writing, to ensure compliance with this Stipulation of Settlement. The United States will give FDNY thirty (30) days from the date it notifies the FDNY of any possible breach of this Stipulation of Settlement to cure that breach before seeking Court intervention and/or instituting an enforcement action. The duration of this auditing provision shall be three (3) years from the effective date of this Stipulation of Settlement.

20. This Stipulation of Settlement shall be binding upon the City, its agents, officials and employees, including FDNY and its agents, officials, and employees, and the New York City Fire Department Pension Fund and its agents, officials, and employees.

21. The individuals signing this Stipulation of Settlement represent that they are authorized to bind the Parties to it.

22. This Stipulation of Settlement constitutes the entire agreement between the United States and the City and FDNY on the matters raised herein and no other statement, promise or agreement, either written or oral, made by any party or agents of any party, that is not contained in this written agreement, including its attachments, shall be enforceable.

23. Nothing contained herein shall be deemed to be an admission by the City that it has in any manner or way violated Snell's or any firefighter's rights in connection with the ADA.

24. This Stipulation of Settlement does not purport to remedy any other potential violations of the ADA or any other law that is not specifically addressed herein, nor does it affect the FDNY's continuing responsibility to comply with all aspects of the ADA.



25. Nothing contained herein or in the allegations set forth in the complaint shall be deemed to constitute an admission that the City or the FDNY engaged in a pattern, policy or practice of the city or FDNY or either.


26. This Stipulation of Settlement shall remain in effect for three (3) years from its effective date. This Court shall retain jurisdiction over this Stipulation of Settlement for a period of three (3) years from the effective date.

AGREED AND CONSENTED TO:

Dated: Brooklyn, New York  
April 8, 2013

LORETTA E. LYNCH  
United States Attorney  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201  
*Attorney for Plaintiff*

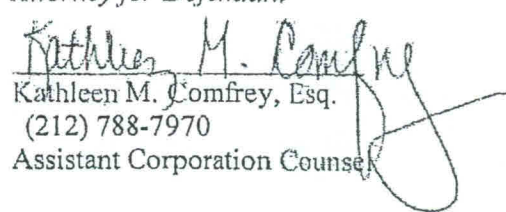
By:

  
\_\_\_\_\_  
Scott R. Landau  
Assistant U.S. Attorney  
(718) 254-7035  
Scott.Landau@usdoj.gov

Dated: New York, New York  
April 8, 2013

MICHAEL A. CARDOZO  
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City of New York  
100 Church Street  
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*Attorney for Defendant*

By:

  
\_\_\_\_\_  
Kathleen M. Comfrey, Esq.  
(212) 788-7970  
Assistant Corporation Counsel

SO ORDERED:

  
\_\_\_\_\_  
MAY 8, 2013  
UNITED STATES DISTRICT JUDGE

## **ATTACHMENT 1**

### **FDNY REASONABLE ACCOMMODATION PROCEDURES**

#### **1. DEFINITIONS**

**BHS.** FDNY Bureau of Health Services.

**Firefighting Duty.** Firefighting or other emergency response (field) duties.

**Full Duty Status:** A designation of a uniformed member's fitness, based upon a determination by BHS that a uniformed member possesses the physical and mental fitness to perform firefighting duty.

**Light Duty Assignment:** Administrative or other tasks performed by a uniformed member with a Light Duty Status, in lieu of paid sick leave. Light duty assignments are temporary in nature, and do not necessarily require firefighting knowledge, skills or abilities. Light duty assignments are not actual funded positions in which a uniformed member can be permanently assigned.

**Light Duty Status:** A designation of a uniformed member's fitness, based upon a determination by BHS that a uniformed member presently does not possess the physical and mental fitness to perform firefighting duty, but is capable of performing administrative or other tasks while recovering from illness or injury.

**Line Position:** Any FDNY position or detail involving firefighting duty. Line positions require full duty status.

**Off-Line Position:** A FDNY position or detail not involving firefighting duty but requiring the knowledge, skills and abilities of a uniformed member. The duties of each off-line position determine whether the position can be performed only by a uniformed member with full-duty status, or can be performed by a firefighter with Light Duty Status. To be assigned to an off-line position, the uniformed member must be otherwise qualified for the position, including possessing the required experience, knowledge and/or skills, and being physically able to perform the duties of the position.

**Uniformed Member.** A member of FDNY's uniformed firefighting force.

#### **2. PROCEDURES FOR IMPLEMENTING FDNY'S EMPLOYEE REASONABLE ACCOMMODATION POLICY**

(a) **Light Duty Assignments.** Uniformed Members placed on Light Duty Status shall be placed in Light Duty Assignments in accordance with FDNY light duty policies and procedures and applicable law.



(b) **Reasonable Accommodation Process.** FDNY agrees that it will offer reasonable accommodations, including, where appropriate, reassignment to an off-line position, to Uniformed Members with disabilities, who are otherwise qualified. FDNY shall comply with the procedures for requests for reasonable accommodation for disabilities set forth in the Americans with Disabilities Act of 1990 ("ADA"), as amended, 42 U.S.C. §§ 12111 *et seq.*, its implementing regulations, New York State Human Rights Law, N.Y. Exec. Law § 296 *et seq.*, N.Y.C. Admin. Code § 8-107 *et seq.*, and FDNY's EEO Policy Booklet and its Employee Reasonable Accommodation Policy (collectively, "FDNY Reasonable Accommodation Policies"), as they may be amended from time to time, consistent with applicable law, and the following procedures:

(1) **Application Form.** FDNY will make available a Reasonable Accommodation Request Form, substantially in the form annexed hereto as Attachment 1 ("Reasonable Accommodation Request Form") on the FDNY Intranet at [www.fdney.org/forms/pdf/eo/eo\\_add\\_08.pdf](http://www.fdney.org/forms/pdf/eo/eo_add_08.pdf), or such other URL as may be designated by FDNY.

(2) **Notification of Reasonable Accommodation Process.** FDNY will annually notify all Uniformed Members of the FDNY's reasonable accommodation policies, and that the Reasonable Accommodation Request form is available on-line. In addition, upon a determination by BHS that a Uniformed Member is permanently disabled from Full Duty Status (such uniformed members being presumed to be covered by the ADA), FDNY shall notify the Uniformed Firefighter, in writing, that he or she is eligible to apply to the FDNY EEO Office for a reasonable accommodation for his or her disability in the form of reassignment to an off-line position.

(3) **Submission of Application.** Any Uniformed Member may apply for a reasonable accommodation for a disability by completing the Reasonable Accommodation Request Form, and submitting it to the FDNY EEO Office. The FDNY EEO Office may require submission of relevant medical documentation for purposes of determining the member's disability and physical limitations and in connection with implementation of any reasonable accommodation that may be granted. All such documentation will be maintained separately from the Uniformed Member's personnel records and access to such medical information will be limited except as may be required for said purposes.

(4) **Initiation of the Interactive Process.** FDNY shall initiate an interactive process (the requirements of which are set forth more fully in Paragraph (5) below) with Uniformed Members whose disability prevents them from performing firefighting duty and who are in need of a reasonable accommodation, under the following circumstances:

(a) Upon receipt of a Uniformed Member's Reasonable Accommodation Request Form and, where applicable, acceptable documentation of the need for the accommodation; or

(b) When BHS determines that the Uniformed Member is permanently disabled from firefighting and the Uniformed Member subsequently submits a Reasonable Accommodation Request Form; or

(c) When the FDNY has independent knowledge (actual or constructive) that a Uniformed Member is permanently disabled from firefighting duty and desires a reasonable accommodation.

(5) **The Interactive Process.** Upon initiation of the interactive process, the FDNY shall identify the precise limitations resulting from the Uniformed Member's disability at issue, and potential reasonable accommodations that could overcome those limitations. If the Uniformed Member is an individual with a disability under the ADA and/or has been determined by BHS to be permanently disabled from Full Duty Status and seeks a reasonable accommodation in the form of reassignment, the FDNY EEO Office shall determine whether there are vacant off-line positions available in which the Uniformed Member can be reasonably accommodated. If such vacancies exist, the Uniformed Member is otherwise qualified for any of those positions, and such reassignment would not create undue hardship for the FDNY, the FDNY EEO Office shall notify the Uniformed Member of the availability of the positions and offer the Uniformed Member the opportunity to be assigned to any such positions. If there are no suitable vacant offline positions available, the Uniformed Member will be advised of the availability of vacant positions in other civil service titles within the FDNY.<sup>1</sup> If the Uniformed Member declines the opportunity to be assigned to the vacant off-line and/or other civil service positions offered as reasonable accommodation, FDNY will not be obligated to offer the Uniformed Member additional reasonable accommodation positions.

(6) **Written Response to Request for Reasonable Accommodation.** FDNY will provide Uniformed Members with a written response to a request for reasonable accommodation within 45 days of receipt of a Reasonable Accommodation Request form, subject to the timely submission by the Uniformed Member of all required information and documentation.

(7) **Maintenance of Off-Line Position Database.** FDNY will maintain a database of all off-line positions, containing the title, description and qualifications for each position. The number of positions and qualifications for such positions will be determined by FDNY based on operational needs and budgetary considerations. The FDNY EEO Office will be provided access to the off-line position database for purposes of determining whether there are vacant off-line positions in which Uniformed Members can be reasonably accommodated.

(8) **Off-Line Posting and Selection Process.** If an off-line position becomes available, it shall be posted on the Off-Line Position Database, the FDNY Intranet, and such other means as FDNY may determine. The EEO Office

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<sup>1</sup> The transfer to a position in a civil service title other than firefighter will be subject to the salary and pension fund rules applicable to the new title.



shall notify any disabled Uniformed Members seeking reasonable accommodation in the form of reassignment who have not yet been accommodated in an off-line position and who appear to meet the requirements of the position, of the availability of the position so that they may be considered for the position. The Bureau of Human Resources and the EEO Office shall monitor the process by which off-line positions are filled to ensure that appropriate consideration is given to Uniformed Members desiring reasonable accommodations.

(9) **Reassignment as Reasonable Accommodation.** Reassignment to an off-line position as a reasonable accommodation for a disability shall have no specific term of duration, unless specified in the position description (such as in the case of a grant-funded or other project-related position). A Uniformed Member granted a reasonable accommodation in the form of reassignment will be expected to remain in the off-line position in which such member has been reasonably accommodated unless and until s/he or she retires or resigns from employment, or is removed from the position for one of the following reasons: (a) the position is eliminated for budgetary or operational reasons; (b) the Uniformed Member is no longer able to perform the essential functions of the position, with or without a reasonable accommodation; (c) the Uniformed Member is removed from the position for disciplinary reasons; or (d) the Uniformed Member no longer requires a reasonable accommodation for a disability.

(10) **Reassignment and Transfer.** A Uniformed Member no longer able to perform the essential functions of the off-line position in which such member has been reasonably accommodated, with or without a reasonable accommodation, or whose off-line position is eliminated for the reasons set forth above in Paragraph (6), can request a reasonable accommodation in the form of a reassignment to another off-line position in accordance with FDNY Reasonable Accommodation Policies and the procedures set forth herein. A Uniformed Member in an off-line position in which such member has been reasonably accommodated may apply for other vacant off-line positions in accordance with FDNY's regular policies and procedures and the procedures set forth herein.

(11) **Overtime.** A Uniformed Member granted a reasonable accommodation in the form of reassignment to an off-line position is eligible to work overtime, subject to the availability of suitable overtime opportunities, applicable collective bargaining agreement provisions, and individual authorization to work overtime in accordance with regular City and FDNY overtime policies and procedures. Uniformed Members in off-line positions will not be authorized to perform overtime assignments involving firefighting duty, or in off-line settings requiring Full Duty Status.

(12) **Retirement or Separation from Employment.** A Uniformed Member permanently disabled from firefighting duty may either be retired in accordance with regular FDNY retirement procedures, if eligible for retirement, or separated from employment in accordance with applicable laws, rules and regulations, after notice of the opportunity to request a reasonable accommodation and consideration of any such request, as follows:

- (a) the Uniformed Member is notified by FDNY that he or she



is permanently disabled from firefighting duty and is advised of the opportunity to request a reasonable accommodation in the form of a reassignment to an off-line position, and the Uniformed Member either:

(b) does not timely submit a Reasonable Accommodation Request Form; or

(c) the Uniformed Member (1) timely submits a Reasonable Accommodation Request Form or FDNY gains independent knowledge that a Uniformed Member desires a reasonable accommodation; (2) FDNY in good faith engages in the interactive process with the Uniformed Member (as set forth in Paragraph 2(b)(5) above); and (3) FDNY determines that the Uniformed Member is not qualified for any available offline positions, those positions have all been filled by other disabled Uniformed Members, or the Uniformed Member declines the available off-line position(s) offered.

**3. NO OBLIGATION TO CREATE OFF-LINE POSITIONS.**

FDNY is not required to create or maintain positions solely for the purpose of providing reasonable accommodations for Uniformed Members, or, if such positions are currently filled by full-duty firefighters, to require that such positions be vacated for the purpose of providing such an accommodation.

**4. NO OTHER CATEGORIES OF POSITIONS.**

While these procedures are in effect, FDNY will categorize each position that may be filled by a Uniformed Member as a line or offline position and will not establish or utilize any other category of positions for Uniformed Members that would materially affect these Reasonable Accommodation Procedures. This provision shall not be construed to impair FDNY's right to: (a) assign Uniformed Members to Light Duty Assignments, as that term is defined herein; (b) establish the civil service title or qualifications for any line or offline position; or (c) assign Uniformed Members with Full Duty Status to temporary details.