A Timely Analysis of Legal Developments

ASAP®

October 28, 2013

# New York City Employers Face Tougher Disability Accommodation Standards

**By Terri Solomon and Jennie Woltz**

In *Romanello v. Intesa Sanpaolo, S.p.A.*,[1] the New York Court of Appeals adopted the broad reading of an employer's duty to accommodate a disabled employee under the New York City Human Rights Law (City HRL), as initially set forth by a lower court in *Phillips v. City of N.Y.*[2] The court acknowledged that the standards for a plaintiff to prove, and a defendant to defeat, a claim of disability discrimination are different under the City HRL from those set forth under the Americans with Disabilities Act (ADA) and the New York State Human Rights Law (State HRL). Indeed, the court found that under the City HRL, there is no requested accommodation that is per se unreasonable, including a request for indefinite leave. Finally, the court held that the burden of proving that a requested accommodation would pose an undue hardship rests squarely on the employer.

## Decision in *Phillips*

In *Phillips*, the Appellate Division, First Department found that the City HRL, originally enacted in 1955, needed to be reinterpreted in view of New York City's Civil Rights Restoration Act (Restoration Act), enacted by the New York City Council in 2005. In passing the Restoration Act, the city council declared that the provisions of the City HRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws . . . have been so construed."[3] The *Phillips* court found that the Restoration Act had altered the established standards for disability discrimination and accommodation litigation by effectively placing the burden on the employer to prove that it did not discriminate against its employee.

The plaintiff in *Phillips* was employed as a community assistant with the City of New York's Department of Homeless Services (DHS), a "noncompetitive title" in the civil service system. After being diagnosed with breast cancer, the plaintiff requested and was granted a three-month medical leave of absence pursuant to the federal Family and Medical Leave Act (FMLA). While on leave, she requested a full year off to receive additional treatment. DHS denied her request based on its leave policy, which rendered employees in noncompetitive titles ineligible for additional

1 No. 152, 2013 N.Y. LEXIS 2755; 2013 Slip Op 6600 (Oct. 10, 2013).

2 66 A.D.3d 170 (N.Y. App. Div. 2009).

3 *Id.* § 8-130.

unpaid medical leave after FMLA leave is exhausted. When the plaintiff did not return to work at the conclusion of her approved FMLA leave period, her employment was terminated. She subsequently sued, alleging that DHS discriminated against her on the basis of her disability. The trial court dismissed the case, concluding that the plaintiff's request for what was essentially an indefinite leave of absence was unreasonable, and that she had failed to allege she could perform the essential functions of her job with a reasonable accommodation or that DHS's decision to terminate her employment was based on any factor other than her noncompetitive title.

The appellate division reversed, finding DHS could be liable for failing to engage in a good faith interactive process with the plaintiff to determine if a reasonable accommodation could have been found and for failing to accommodate her disability. It held that both the State HRL and the City HRL require employers to "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested."[4] That process must continue "until, if possible, an accommodation reasonable to the employee and employer is reached."[5] According to the court, an employer's failure to consider requested accommodations or to engage in the interactive process will violate both the State HRL and the City HRL, the relief for which "will depend upon whether the process could have yielded a substantive accommodation that was reasonable."[6]

More significantly, the court opined that, under the City HRL, "there are no accommodations that may be unreasonable if they do not cause undue hardship" and the burden of proving "undue hardship" is on the employer.[7] Further, unlike claims brought under federal ADA and New York State law, where the employee has traditionally borne the burden of proving that she could perform the essential functions of her job with a reasonable accommodation, the court held that the City HRL no longer imposes this burden on the employee. Rather, it was the employer's burden to plead and prove, as an affirmative defense, that the employee could not perform the essential requisites of her job with a reasonable accommodation.

After the appellate division's dramatic departure from prior interpretations of the City HRL, the parties presumably resolved the *Phillips* litigation and it was not appealed to New York's highest court.

## Decision in *Romanello*

In the four years after *Phillips*, there was a dearth of legal authority on the City HRL's standards for establishing disability discrimination and reasonable accommodation. However, in *Romanello*, the Court of Appeals erased any doubt about the viability of *Phillips*, citing it approvingly throughout the decision.

The plaintiff in *Romanello* had been employed as an executive of a financial services firm for 25 years when he was diagnosed with major depression that rendered him unable to work. After the plaintiff had been out of work for almost five months, the company's attorney sent his attorney a letter stating, among other things, the plaintiff's "FMLA expires on June 3, 2008 and the bank would appreciate knowing whether he intends to return to work or to abandon his position."[8] The plaintiff's attorney responded, in part, that the plaintiff "has, since on or about January 9, 2008, been suffering from severe and disabling illnesses that have prevented him, and continue to prevent him, from working in any capacity, let alone in the capacity in which he had been serving"[9] and that he "has not at any time evinced or expressed an intention to 'abandon his position' . . . Rather, he has been sick and unable to work, with an uncertain prognosis and a return to work date that is indeterminate at this time."[10] Without asking for additional medical information or engaging in the interactive process with the plaintiff, the company terminated his employment. The plaintiff eventually received long-term disability payments under the company's insurance plan.

The plaintiff brought disability discrimination claims against the company under the State HRL and City HRL. Lower courts granted and affirmed the employer's motion to dismiss the complaint. The Court of Appeals also affirmed the dismissal of the State HRL claims, but reversed and reinstated the City HRL claims.

4 *Phillips*, 66 A.D.3d at 176.

5 *Id.*

6 If so, the court held, the full panoply of remedies is available under both statutes, but, if not, the City HRL provides limited, unspecified remedies "designed to respond only to the failure to engage in the interactive process." *Id.* at 176 n.6.

7 *Id.* at 182.

8 *Romanello*, 2013 N.Y. Lexis 2755 at * 1-2.

9 *Id.* at *2

10 *Id.*

With regard to the State HRL claims, the court held the plaintiff had essentially sought an indefinite leave of absence, which "is not considered a reasonable accommodation under the State HRL."[11]

However, citing *Phillips*, the court noted that the City HRL "affords protections broader than the State HRL" and "unlike 'the State HRL (as well as the ADA) . . . there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation' under the City HRL."[12] After stating that the City HRL requires that an employer "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job",[13] the court held that the burdens of proof under the City HRL differ from those under the State HRL, as follows:

> Contrary to the State HRL, it is the employer's burden to prove undue hardship. And, the City HRL provides employers an affirmative defense if the employee cannot, with reasonable accommodation, "satisfy the essential requisites of the job." Thus, the employer, not the employee, has the "pleading obligation" to prove that the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job."[14] [internal citations omitted]

Finding that the employer, in its motion to dismiss, did not meet its obligations under the City HRL to plead that the plaintiff could not perform his essential job functions even with an accommodation, the court held that the City HRL claim should not have been dismissed.

## What Does This Mean for Employers Doing Business in New York City?

By expansively interpreting the City HRL, the Court of Appeals has created a virtual minefield for employers. It must be kept in mind that a disability under the City HRL is defined broadly to include "any physical, medical, mental or psychological impairment, or a history or record of such impairment,"[15] that an employer must accommodate if the "disability is known or should have been known" to the employer.[16] That accommodation obligation now includes a potentially lengthy interactive process and careful consideration of every employee-requested accommodation unless the employer is confident it can prove at trial, often years later, that any accommodation would have created an undue hardship[17] or would have been ineffective.

Similarly, an employer needs to exercise caution in terminating an employee whose disability the employer seems unable to accommodate before it has exhausted all possibilities of accommodation. This could include taking certain precautions, such as trying a proposed accommodation and documenting that such accommodation is ineffective and/or having one last conversation with an employee before termination to assure the employee that the employer has considered all the employee's proposed accommodations and exhausted all possibilities of accommodation. At a minimum, an employer should carefully document its efforts to reach an accommodation with a disabled employee, and its reasons for determining that a particular requested accommodation will be ineffective or constitute an undue hardship.

---

11 *Id.* at *4.

12 *Id.* at *4-5.

13 *Id.* at *6.

14 *Id.* at *6-7.

15 N.Y. City Admin. Code § 8-102(16)(a).

16 *Id.* § 8-107(15)(a).

17 Whether a potential accommodation would create an undue hardship for purposes of the City HRL depends largely on:

> The nature and cost of the accommodation;
> The overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
> The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities; and
>
> The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

*Id.* § 8-102(18).

One common trap to avoid is terminating an employee who is unable to return to work at the end of his/her FMLA leave. Under the ADA, State HRL and certainly under the City HRL, the guaranteed 12 weeks of FMLA leave is a floor, and it is well-established under all three statutes that an employer must consider as an accommodation additional unpaid leave beyond the FMLA leave. Indeed, as the Court of Appeals held in *Romanello*, an employee's request for an indefinite leave is not per se unreasonable under the City HRL, and an employer who refuses it will be required, if suit is brought, to prove that such request for indefinite leave is unreasonable and would pose an undue hardship.

## What Can Employers do to Limit Liability?

To help ensure compliance, the following steps are suggested:

1. Determine, to the extent possible, whether the City HRL may apply to the decision at issue.
2. Assure that job descriptions clearly identify all essential job functions.
3. Revise policies and procedures for accommodating disabilities to reflect that: (1) there must be an individualized interactive process; (2) the process continues until all efforts at resolution have been exhausted; (3) no requested accommodation is categorically unreasonable; and (4) an accommodation is reasonable if it enables the employee to perform the job in a reasonable fashion and is not an undue hardship.
4. Establish a clearly defined procedure for employees to request accommodations for their disabilities.
5. Document accommodation requests, including specific facts regarding an employee's circumstances, specific requests for accommodations, and specific limitations where appropriate.
6. Establish, and train staff to follow, an interactive process protocol that requires documenting such items as: (a) dates and length of meetings; (b) accommodations requested; (c) discussion specifics; (d) specific reasons why a requested accommodation would be ineffective or an undue hardship; and (e) alternate accommodations proposed and discussed.
7. Arrange for independent medical exams when the extent of a disability is in question.
8. Establish procedures for assessing whether provided accommodations are effective. If the provided accommodation does not enable the employee to perform the essential job functions of his position, that should not end the matter; the interactive process should be initiated once again.
9. When a requested accommodation is denied, communicate such decision to the impacted employee and continue a dialogue regarding alternatives and ways to minimize hardship.

Terri M. Solomon is a Shareholder and Jennie Woltz is an Associate in Littler Mendelson's New York office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Solomon at tsolomon@littler.com, or Ms. Woltz at jwoltz@littler.com.