

# LABOR AND EMPLOYMENT LAW INFORMATION MEMO

JULY 7, 2021

## Must an Employer Offer a Reasonable Accommodation if a Federal Safety Regulation Prohibits Such Accommodation?

In a decision of interest to New York State employers subject to federal safety regulations, the Second Circuit Court of Appeals recently answered that question in the negative. In *Bey v. City of New York*<sup>1</sup>, the Court concluded that where a federal safety regulation expressly prohibits a requested medical accommodation, that regulation trumps the requirements imposed by the Americans with Disabilities Act (the ADA) and Title VII and shields the employer from liability under those statutes.

New York law requires compliance with OSHA regulations. OSHA regulations require that firefighters exposed to dangerous smoke and toxic fumes wear a self-contained breathing apparatus. Because the apparatus must fit snugly against the firefighter's face to be effective, OSHA regulations require that there be no facial hair between the sealing surface of the breathing apparatus and the firefighter's face. To comply with the OSHA regulations, FDNY adopted a policy that required firefighters to be clean-shaven in the neck, chin and cheek area, and restricted the length of sideburns and mustaches.

The *Bey* plaintiffs were four Black FDNY firefighters who suffer from a skin condition that results in irritation and pain following shaving. Initially, subject to a "fit test," the FDNY offered medical accommodations to individuals with the referenced condition, including the plaintiffs. However, after learning that OSHA regulations prohibited such accommodations, the policy was rescinded. Those that had received the accommodation were instructed that they had to be clean shaven or would be placed on light duty. Plaintiffs sued, claiming disability discrimination and disparate treatment and impact.

The Second Circuit dismissed their claims. As to the ADA claim, the Court held that "[a]n accommodation is not reasonable within the meaning of the ADA if it is specifically prohibited by a binding safety regulation promulgated by a federal agency." The Title VII claim was dismissed upon similar rationale, *i.e.*, "Title VII cannot be used to require employers to depart from binding federal regulations."

*Bey* informs employers subject to OSHA or safety regulations imposed by another federal agency that compliance with such regulations is paramount and that they "cannot be held liable for failing to offer an accommodation that is expressly prohibited by federal law."

If you have any questions about the information presented in this memo, please contact [Richard S. Finkel](#), any [attorney](#) in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

<sup>1</sup> (2d Cir. June 9, 2021).

