Index No. 85035/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

STEPHANIE DI CAPUA, MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, SASHA DELGADO, JOAN GIAMMARINO, ROBERT GLADDING, CAROLYN GRIMANDO, BENEDICT LOCARRINO, NWAKAEGO NWAIFEJOKU, INGRID ROMERO, TRINIDAD SMITH, NATASHA SOLON, AMARYLLIS RUIZ-TORO, DENNIS STRK, and TEACHERS FOR CHOICE, individually and on behalf of its members,

Petitioners,

-against-

THE CITY OF NEW YORK, and THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR CLASS CERTIFICATION

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, N.Y. 10007

Of Counsel: Bilal Haider and Lora Minicucci
Tel: (212) 356-2078
Matter #: 2023-019394

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Cases **Pages**

Statutes

Other Authorities

PRELIMINARY STATEMENT

Petitioners seek to certify a class of "all current or former employees or contractors of the DOE who submitted a request for religious accommodation from the COVID-19 vaccine mandate at any times prior to termination." (See Notice of Petition dated February 22, 2023, NYSCEF No. 41.) Petitioners' motion fails because (1) their proposed class definition is overbroad, (2) certification of this proposed class would require mini-trials for each class member, and (3) Petitioners fail to meet the commonality, typicality, and adequacy requirements of CPLR 901. Accordingly, Petitioners' motion must be denied.

STATEMENT OF FACTS

On August 23, 2021, Mayor de Blasio and the New York City Commissioner of Health and Mental Hygiene, David A. Chokshi, announced that DOE employees were required to receive an initial COVID-19 vaccination by September 27, 2021. (See Verified Petition, NYSCEF No. 40, ¶ 71.) On September 10, 2021, following an impasse arbitration hearing between the United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT") and the DOE, the assigned arbitrator issued an order that included a process for reviewing and determining requests for religious exemptions to the vaccine mandate. (Id., ¶ 75).

On September 21, 2021, Petitioners initiated a lawsuit in the Southern District of New York, Kane v. De Blasio, and on October 4, 2021 moved for a temporary restraining order and preliminary injunction. See Kane v. De Blasio, 19 F.4th 152, 161 (2d Cir. 2021). Both motions were denied by the District Court. Id. On October 25, 2021, Petitioners appealed to the Second Circuit Court of Appeals. The Second Circuit held that the vaccine mandate was neutral and generally applicable, and vacated and remanded the denial of injunctive relief as to the named plaintiffs only. Id. at 162, 164. The Second Circuit merits panel further ordered that the Petitioners receive "fresh consideration" of their requests for a religious accommodation by a central citywide

panel consisting of representatives of the Department of Citywide Administrative Services, the City Commission on Human Rights, and the Office of the Corporation Counsel, with that panel adhering to standards established by Title VII of the Civil Rights Act of 1964, the New York Human Rights Law, and the New York City Human Rights Law. Id. at 162.

Consistent with the Second Circuit panel's Order, the Citywide Panel[1] reviewed Petitioners' applications for religious exemptions from vaccination. (See Verified Petition, NYSCEF No. 40, ¶ 13.) Moreover, the DOE exceeded the Second Circuit's Order by allowing *all* employees who had applied for a religious exemption and been denied through the arbitration award and appeal process to reapply through the Citywide Panel. See Kane, at 173. The Citywide Panel granted Petitioner Castro's accommodation request, and denied the remainder of the Petitioners' applications. (See Verified Petition, NYSCEF No. 40, ¶ 135.) The Citywide Panel issued explanations for their decisions regarding each of the named petitioners. (See Verified Petition, NYSCEF No. 40, ¶ 181; Exhibit 9, NYSCEF Doc. No. 10.) With just one exception,[2] in each instance in which a Petitioner's request was denied,[3] the Citywide Panel explained that

[1] The Citywide Panel was created in response to the DOHMH Commissioner's October 20, 2021 Order requiring all City employees to show proof of at least one dose of a COVID-19 vaccine by 5:00 p.m. on October 29, 2021. The Citywide Panel considers appeals filed by employees whose accommodation requests have been denied by the City agency for which they work.

[2] With respect to Petitioner Clark, the Citywide Panel voted to affirm the DOE's denial of Petitioner Clark's accommodation request because it determined that Clark's religious beliefs, which the panel "d[id] not question," were "not preventing [her] from vaccination." Rather, Clark's "decision not to vaccinate [came] from non-religious sources," and "[s]upplemental questions further support[ed] the conclusion, at bottom, that [Petitioner Clark] [made] fact-based choices about foods and medicines." (See Exhibit 9, NYSCEF Doc. No. 10, at 3.) The panel further indicated that "[o]ne panel member would also [have] den[ied] the reasonable accommodation on the grounds of undue hardship," and "[o]ne panel member . . . would vote to grant the accommodation sought." Id.

[3] Petitioner Ruiz-Toro's appeal was granted by the arbitrator, and therefore no appeal was heard on her behalf.

regardless of the individual's religious beliefs, granting the request would pose an "undue hardship" on DOE. (Id.) As the Citywide Panel explained, each of these individuals was a classroom teacher who "could not physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population." (See id.; Verified Petition, NYSCEF No. 40, ¶¶ 239, 261, 305, 341, 365, 394, 431, 528, 551, and 600.)

ARGUMENT

POINT I

PETITIONERS' MOTION FOR CERTIFICATION CANNOT BE RESOLVED UNTIL RESPONDENTS' CROSS-MOTION TO DISMISS IS DECIDED

On May 3, 2023, Respondents cross-moved pursuant to CPLR Sections 3211(a)(2), 3211(a)(5) and 3211(a)(7), to dismiss the Verified Petition on the grounds that (1) Petitioners' Article 78 Claims are barred because they failed to commence an Article 78 proceeding within the four-month statute of limitations set forth in CPLR § 217; (2) Petitioners' NYCHRL, NYSHRL, and New York State Constitution claims against the DOE are barred because they failed to file notices of claims as required by New York Education Law § 3813(1); (3) Petitioners' claims are barred by *res judicata* or collateral estoppel; (4) the City of New York is not the proper Respondent; (5) Petitioners do not have a private right of action to bring claims against Respondents under the New York State Constitution; and (6) Petitioner Teachers for Choice lacks organizational standing to bring this proceeding on behalf of its purported members. (See NYSCEF No. 71.)

To the extent Respondents' cross-motion to dismiss is granted, Petitioners' motion for class certification would be moot. Even if the Court were to only partially grant Respondents' motion, this decision would bear directly on the scope of the class claims for which certification

is sought. Therefore, as a preliminary matter, Petitioners' motion for certification cannot be resolved until the Court decides Respondents' motion to dismiss.

POINT II

PETITIONERS' CLASS DEFINITION IS OVERBROAD

"As a general proposition, in a class action, 'the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated; rather, it must be restricted to individuals who are raising the same claims or defenses as the representative.'" Klein v. Robert's Am. Gourmet Food, Inc., 28 A.D.3d 63, 71 (2d Dep't 2006) (citing 7A Wright, Miller & Kane, Federal Practice and Procedure § 1760 (1986))

For the reasons stated herein, Petitioners' class definition is not workable.

A. Petitioners' Class Definition is Overbroad

A court should not certify an overbroad class. See Klein, 28 A.D.3d 63 at 71; see also Batas v Prudential Ins. Co. Of Am., 37 A.D.3d 320, 321 (1st Dep't 2007) (class definition overbroad when it included members with no cause of action). "In other words, the class cannot be so broad as to include individuals who have not been harmed by the defendants' allegedly wrongful conduct." Klein, 28 A.D.3d 63 at 71 (citations omitted). Petitioners purport to represent a class of "all current or former employees or contractors of the DOE who submitted a request for religious accommodation from the COVID-19 vaccine mandate at any times prior to termination." (See Notice of Petition dated February 22, 2023, NYSCEF No. 41.) This class definition is clearly overbroad.

Petitioners' proposed overbroad definition includes (1) employees or contractors who do not have any sincerely held religious beliefs and (2) employees or contractors whose sincerely held religious beliefs were not violated or infringed upon by the COVID-19 vaccine

mandate. First, the mere fact that an employee submitted a religious accommodation request does not imply that the employees had a sincerely held religious belief. This overbroad definition would thus permit employees with no sincerely held religious beliefs to be a member of this purported class. Second, the fact that someone has a sincerely held religious belief does not suggest that compliance with the COVID-19 vaccine mandate would violate those beliefs. Therefore, this overbroad definition would allow individuals whose rights were not violated to be members of this purposed class.

Put simply, because Petitioners have not proposed an appropriate targeted class, Petitioners have failed to present a workable class definition.

B. Certification of this Class Would Require Mini-Trials

The proposed class is also not amenable to certification because the Court would be required to engage in individualized inquiries tantamount to mini-trials on the merits of each putative class member's case in order to determine who is appropriately part of the class. This process would undermine the very purpose of a class action. Courts reject class definitions that "require addressing the central issue of liability" in a case to determine membership since the membership inquiry "essentially require[s] a mini-hearing on the merits of each [plaintiff's] case." Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995); see also e.g. Haus v. City of New York, 03 Civ. 4915, 2011 U.S. Dist. LEXIS 155735 at **279-280 (S.D.N.Y. Aug. 31, 2011) (proposed false arrest class not ascertainable where the court would have to inquire into the justification for each separate arrest).

Because of Petitioners' overbroad class definition, the Court will be forced to engage in mini-trials of each putative class member's allegations and those individuals who fall within Petitioners' current class definition. In order to determine class membership, the Court

would have to conclude that (1) the individual had a sincerely held religious belief and (2) the individual's sincerely held religious beliefs were violated by the COVID-19 vaccine mandate.

Should either of these questions be answered in the negative, it would disqualify that member from the class. This two-pronged inquiry weighs heavily against Petitioners' motion to proceed as a class, as it would certainly defeat the economic-savings that is a principle justification for the use of a class action. See e.g., Sanneman v. Chrysler Corp., 191 F.R.D. 441, 446 & 454-57 (E.D. Pa. 2000).

POINT III

PETITIONERS ARE NOT ENTITLED TO CLASS CERTIFICATION BECAUSE THEY HAVE NOT MET ALL OF THE REQUIREMENTS OF CPLR §§ 901 AND 902

A. Standard for Class Certification

CPLR § 901(a) outlines the "prerequisites to a class action," providing that members of a class may sue as representatives of the class if:

> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4. the representative parties will fairly and adequately protect the interest of the class; and 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Id. "These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." City of New York v. Maul, 14 N.Y.3d 499, 508 (2010). "CPLR 902 provides that the court may permit a class action to be maintained only if it finds that **all** of the prerequisites under CPLR 901 have been satisfied." 3 Weinstein-Korn-

Miller, NY Civ Prac P 902.06 (emphasis added). For the reasons set forth below, Petitioners have failed to meet the above-cited standard, and their motion for class certification must be denied.

B. Application of Class Certification Standard

1. Petitioners Cannot Raise Predominant Common Questions of Law or Fact

Petitioners plainly fail to meet the commonality prong required under Article 9 of the CPLR because each application for religious accommodation was considered separately based on several individualized factors including whether the employee could do their job remotely without subjecting the DOE to an undue burden and whether an applicant's beliefs prevented them from being vaccinated. CPLR § 901(a)(2) requires that a common question of law or fact predominate over any questions affecting only individual members. However, "the existence of a common issue does not by itself suffice to establish the predominance of issues common to the putative class necessary to justify a class action." Gordon v. Ford Motor Co., 260 A.D.2d 164, 165 (1st Dep't 1999). "[P]redominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods. v Windsor, 521 US 591, 623 (1997). The United States Supreme Court applied the predominance test in Amchem, supra, stating: "[G]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard." Id. at 624.

Here, each applicant for religious accommodation set forth their application based on specific personal reasons and each applicant held different positions at the DOE which either allowed them to work remotely or not. The disparity among the Petitioners in outcomes also attests to the fact that there are no common questions of fact among the class. No common question of law or fact exists among the proposed members of the class; indeed, the prototypical denial of a

religious accommodation is an individualized inquiry. Indeed, Petitioner Castro exemplifies the staggering lack of commonality, even just among the Petitioners themselves, and likely within any prospective class, because he was granted a religious exemption.

2. Petitioners Have Not Met the Typicality Requirement

Petitioners cannot meet the typicality requirement because their applications were considered separately from most DOE employees based on their participation in a federal lawsuit. Petitioners seek to represent a class of individuals who were either DOE employees or contractors who applied for and were denied religious accommodations, but several of the named Petitioners in this action would not fit into that class, namely Castro and Ruiz-Toro. Petitioners also claim that all DOE employees who had their applications reviewed by the Citywide Panel received autogenerated emails, but Petitioners themselves did not. Indeed, because of the Petitioners' participation in the Kane federal matter, they had their applications reconsidered by the Citywide panel at the direction of the Second Circuit Court of Appeals and, with the matter *sub judice*, they received narrative reports stating the reasons for the denial of their religious accommodations.

CLPR § 901(a)(3) requires the claims of the representative parties to be typical of the claims of the class. "Typicality is satisfied when the named plaintiffs' and the class's claims derive from the same course of conduct and are based on the same legal theory." Dugan v. London Terrace Gardens, L.P., 986 N.Y.S.2d 740, 756 (Sup. Ct. N.Y. Co. 2013). Here, Petitioners have claimed that they all received denials with "no analysis or reasoning, no discussion" (See Petitioners' Memo of Law in Support of Class Certification, NYSCEF No. ___ at 8.) This statement is false. (See Exhibit 9, NYSCEF Doc. No. 10.) The decisions set forth by the Citywide Panel in the Kane/Keil case thoroughly explain why their appeals were denied. Id. Petitioners' own exhibit thus contradicts Petitioners' claim that all applicants were given no analysis. (See Exhibit 9, NYSCEF Doc. No. 10.)

In the instant case, there are no Petitioners who had their religious accommodation request reviewed by the Citywide Panel and not receive a summary decision detailing why they were denied their accommodation. Therefore, Petitioners' claims are not typical of their proposed class. See Alix v. Wal-Mart Stores, Inc., 16 Misc. 3d 844, 859, 838 (Sup. Ct. N.Y. Co. 2007), aff'd 57 A.D.3d 1044 (3rd Dep't 2008) ("Where a nominative plaintiff's claims are not typical of the class, certification of a class action is unavailable.") (citing Small v Lorillard Tobacco Co., 94 N.Y.2d 43, 53, 720 (1999); and Dimich v Med-Pro, Inc., 34 A.D.3d 329, 826 (1st Dep't 2006)).

3. Petitioners Have Not Met the Adequacy of Representation Requirement

Petitioners cannot adequately protect the interests of the members of the proposed putative class. "The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel." Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.3d 129, 144 (2d Dep't 2008). Here, Petitioners do not have personal characteristics of the proposed class. Petitioners have not demonstrated familiarity with the bases for any other individual's basis for applying for a religious accommodation. As such, Petitioners do not adequately protect the interest of the members of the proposed class.

Additionally, counsel for Petitioners does not have the proper experience to adequately represent the proposed class. There is no record of counsel for Petitioners, Sujata Gibson, ever litigating a class action. Although annexed to the motion for class certification is the affirmation of Michael Sussman, filed on April 7, 2023, which states that a notice of appearance for Mr. Sussman's representation for Petitioners would be filed "promptly," no such notice has been filed. (See NYSCEF Doc. No. 46.) Furthermore, despite Mr. Sussman's resume, in 2002, he

was suspended from the practice of law in the State of New York for a period of one year. See In re Sussman, 744 N.Y.S.2d 183 (2nd Dep't 2002).

Thus, Petitioners' counsel is not qualified to serve as class counsel in this action. Because their counsel lacks experience representing disparate impact class action claims or claims under CPLR § 901, the portion of the motion seeking appointment as class counsel must be denied. See Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.3d 129, 144 (2d Dep't 2008) ("In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions.").

4. Petitioners Have Not Met the Superiority Requirement

Lastly, a class action is not the superior method for adjudicating putative Petitioners' claims. CPLR § 901(a)(5) provides that a class may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CPLR § 902 continues to outline that:

> Among the matters which the court shall consider in determining whether the action may proceed as a class action are: (1) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) The impracticability or inefficiency of prosecuting or defending separate actions; (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; (5) The difficulties likely to be encountered in the management of a class action.

CPLR § 902. Here, a class action is not the superior method for adjudication because it is impracticable and inefficient, and litigation has already commenced concerning this controversy. See Geiger v. Am. Tobacco Co., 696 N.Y.S.2d 345, 353 (Sup. Ct. Queens Co. 1999) ("The predominance criterion (CPLR 901 [a] [2]) and the superiority criterion (CPLR 901 [a] [5]), to

which the court now turns, obviously overlap since the greater the number of individual issues the less likely superiority can be established.").

CONCLUSION

For the foregoing reasons, Petitioners' motion for class certification should be denied in its entirety, with prejudice, together with such other and further relief as the Court deems appropriate.

Dated: New York, New York
May 23, 2023

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007-2601
(212) 356-2549
bhaider@law.nyc.gov

By: */s/ Bilal Haider /s/ Lora Minicucci*
Bilal Haider and Lora Minicucci
Assistant Corporation Counsels

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court, the enclosed brief is produced using 12-point Times New Roman type and including footnotes and excluding the cover page, captions, table of authorities, and table of contents, contains approximately 3401 words, which is less than the total words permitted by the rules of the Court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: New York, New York
May 23, 2023

/s/ Bilal Haider
Bilal Haider
Assistant Corporation Counsel