

No. _____

In the
Supreme Court of the United States

CRAIG ROTH,
Petitioner,
v.

COUNTY OF NASSAU,
Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Second Circuit**

PETITION FOR WRIT OF CERTIORARI

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
(888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Are lower courts correctly applying the affirmative defense of collateral estoppel to bar federal claims under the Americans with Disabilities Act?

PARTIES TO THE PROCEEDINGS

Petitioner Craig Roth was the plaintiff in the District court and the appellant in the Court of Appeals. Respondent County of Nassau was the defendant in the District court and the appellee in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions this Court for a writ of certiorari to review the January 17, 2019 Order and Decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The January 17, 2019 Summary Order and Memorandum Opinion of the Court of Appeals appears at Appendix A and is unpublished. The March 27, 2018 Memorandum and Order of the District court appears at Appendix B and is unpublished. The May 3, 2016 Article 78 decision by the New York Supreme Court appears at Appendix C and is unpublished.

JURISDICTION

The Order of the Court of Appeals was entered on January 17, 2019. (App. A). This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

42 U.S.C. § 12112 of the ADA provides, “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

STATEMENT OF THE CASE

Petitioner was diagnosed with juvenile Type I diabetes when he was seven years old. But he has led a full, unrestricted life. He has worked as a police officer for the New York City Police Department and for the University of Connecticut.

In 2014, Petitioner sought a position closer to home with defendant Nassau County. Hiring for the County's Police Department is pursuant to New York Civil Service Law and open competitive examinations. Nassau County's Civil Service Commission oversees the process for candidates on the list of potential hires.

Petitioner scored high on the exam and was asked to interview. Petitioner was psychologically approved for the police officer job. The County placed him on a "medical hold," however, because of his diabetes. The County then disqualified Petitioner from the police officer job entirely and removed him from the candidates list because of his diabetes. The County cited to the opinions of Dr. Marlaine Tapply, Medical Director of the Civil Service Commission, and Dr. David Rosenthal, who examined Petitioner once per the County's request, to conclude that Petitioner's insulin-dependent diabetes "precludes [his] ability to fulfill the physical requirements of a Police Officer."

The Legal Actions Taken by Petitioner

On May 3, 2015, Petitioner brought an Article 78 proceeding in New York Supreme Court challenging as arbitrary and capricious the Commission's executive-branch decision to disqualify him from the police officer position. At the same time, Petitioner filed a discrimination charge with the Equal Employment

Opportunities Commission. The EEOC dismissed the charge but issued Petitioner a Notice of Right to Sue on October 15, 2015. Petitioner commenced this action in the District court a few weeks later (on November 5), alleging that the County violated Petitioner's rights under the ADA and New York's State Human Rights Law.

The Article 78 proceeding was resolved first, on May 3, 2016. The state court noted that its inquiry was limited to whether the County Commissioner acted arbitrarily and capriciously -- "without any sound basis in reason." "This discretion is particularly broad in the hiring of persons for position in law enforcement, to whom high standards must be applied." "In the instant matter, respondents have clearly presented a rational basis for their determination to disqualify petitioner -- respondents relied upon expert recommendations from Dr. Tapply and Dr. Rosenthal... The Court, having examined the proof submitted by both petitioner and respondents, finds that respondents' determination was not irrational, but rather supported by substantial evidence. There is no basis for the Court to conclude that the actions of respondents were not in conformance with the policy and procedures that are part of the normal course of business within respondent Nassau County Civil Service Commission ... Accordingly, respondents' determination is upheld."

The County's Summary Judgment Motion and District Court's Ruling

After the state court dismissed the Article 78 lawsuit, the County moved for summary judgment in the District court in this case, contending that Petitioner's ADA and analogous state law claim was

barred by *res judicata* and collateral estoppel. The District court ruled that collateral estoppel precluded Petitioner from pursuing his ADA claims in this case:

Plaintiff is attempting to relitigate issues necessarily decided in the Article 78 proceeding. The facts underlying both this action and the Petition are identical. In both cases, Plaintiff argues that the County's disqualification was based on determinations made after review of medical records, the same records forming the basis of Plaintiffs argument here. He raises no new facts that were not before the state court. Moreover, he raised the same legal arguments in both courts—that the County's conduct was discriminatory under both the ADA and the NYSHRL. A plaintiff is barred from relitigating issues where the state court has "held against appellant on factual issues that are central to the constitutional claims he now asserts in federal court." *Genova v. Town o/Southampton*, 776 F.2d 1560, 1561 (2d Cir. 1985); *see also Leo v. New York City Dep't of Ed.* 2014 WL 6460704, at *5 (E.D.N.Y. Nov. 17, 2014) (federal action precluded by collateral estoppel where "[a]ll of the facts alleged in [plaintiffs] complaint suggesting bad faith conduct, retaliation, or discrimination were also offered at the Article 78 proceeding."). Here, **the Commission disqualified Roth because it found that he was not able to perform the duties of the position, and the Article 78 judge found that this decision was supported by substantial evidence.** As such, the factual issue of whether Plaintiff was qualified to

perform the essential functions of his job, an essential element of a claim under the ADA and the NYSHRL, has been decided, and he is precluded from relitigating that issue here. Accordingly, Defendant's motion for summary judgment is granted. [Appendix B (emphasis added)]

The Court of Appeals' Ruling

In his appeal below, Petitioner acknowledged that he is collaterally estopped from arguing that he can perform the “essential functions” of a police officer’s job; but he is not collaterally estopped from arguing that he can perform the essential functions of the job “with reasonable accommodation” – the essential inquiry of the ADA claim. The state court Article 78 proceeding did not address the accommodation issue. The District court thus erred in applying collateral estoppel to preclude Petitioner’s lawsuit. The Court of Appeals affirmed, however, ruling that the Article 78 proceeding “fully and fairly decided” the legal element of the ADA claim: “Roth’s discrimination claims fail because he is precluded under the doctrine of collateral estoppel from arguing that he was able to perform the essential functions of a police officer with or without a reasonable accommodation.” (Appendix A).

REASONS FOR GRANTING THE PETITION

The Court should clarify for lower courts correct application of the affirmative defense of collateral estoppel to bar claims under federal discrimination statutes such as the ADA.

The burden is on the party asserting collateral estoppel (here, the County) to demonstrate that the issue in the prior and current proceedings is “identical” and was “actually litigated and decided in the prior proceeding” (Leather v. Eyck, 180 F.3d 420, 425–26 (2d Cir. 1999)). The District court misapplied the “identical” requirement because the issue in the state court proceeding – whether Petitioner “was qualified to perform the essential functions of” the police officer job, is not the same issue in this ADA case – whether the disabled plaintiff can perform the job “with reasonable accommodation.” McMillan v. City of New York, 711 F.3d 120, 125 (2d Cir. 2013). As this Court has stressed, “[i]f the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation.” Comm'r v. Sunnen, 333 U.S. 591, 600, 68 S. Ct. 715, 720, 92 L. Ed. 898 (1948); Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308 (1980). That is the case here: even if Petitioner cannot perform the essential functions of the police officer job, the County may have unlawfully discriminated against him by failing to offer reasonable accommodations before disqualifying him from the job. See, e.g., McBride v. BIC Consumer Prod. Mfg. Co., 583 F.3d 92, 96 (2d Cir. 2009) (“Discrimination in violation of the ADA includes, *inter alia*, ‘not making reasonable accommodations to the known physical or mental

limitations of an otherwise qualified individual with a disability”).

The Court of Appeals misapplied the “actually litigated and decided” requirement. The prior proceeding was a state court review of an executive branch decision (to disqualify Petitioner from the candidates list). Kremer v. Chem. Const. Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) holds that federal courts should give preclusive effect to state agency decisions that have been reviewed by a state court. But the state court process must satisfy the requirements of the Due Process Clause. Id. at 482. The Court of Appeals said that the Article 78 state court “acknowledged Roth’s discrimination argument” and this was sufficient to satisfy the “actually litigated and decided” requirement. “Given the particular nature of those functions, and Roth’s conceded failure to request accommodations (or to suggest any in his briefing to the New York Supreme Court), we think that—absent a clear indication to the contrary—the New York Supreme Court reasonably concluded that there was ‘substantial evidence’ to support a determination that it would have been impossible to provide any reasonable accommodation for those particular essential functions...” (App. A).

This Court should stress that the “actually litigated and decided” requirement must be strictly construed and clearly demonstrated by the party asserting collateral estoppel so that the plaintiff truly had the “full and fair opportunity” to litigate the federal claim sought to be precluded. Here, Petitioner had been employed as a police officer for years. He sought the same position with the County. He scored in the top one percent on the Civil Service exam and passed the

Physical and Psychological portions of the County's interview process. All of Petitioner's treating physicians certified to the County that Petitioner was fit to be a police officer (as shown by Petitioner's performance of the frankly more rigorous New York City police officer job, for instance).

Yet Petitioner's federal ADA claim is now precluded based on a state court's "arbitrary and capricious" review of a executive-branch decision. Where in the Article 78 decision did the state court "actually decide" the "essential functions" of the police officer job that Petitioner could not perform "with reasonable accommodation"? Where in the Article 78 decision does it even recite which of the police officer job's "essential functions" the County said Petitioner could not perform? Where in the decision does the court reference what "reasonable accommodations" were or could have been offered to Petitioner that, the County presumably claims, still does not enable Petitioner to perform the essential function or functions the County says he cannot perform? These hotly contested issues weren't even referenced let alone "actually decided" in the Article 78 case. *The state court judge did not cite let alone discuss or apply governing federal disability discrimination law under the ADA; the judge cited only administrative law*, which does not contain anything akin to the "with reasonable accommodation" standard that the ADA provides to protect those with disabilities from discrimination.

Applying collateral estoppel too broadly to block federal lawsuits brought by victims of discrimination, as the courts have in this case, deprives plaintiffs of federal statutory rights. This Court should correct the overly broad application of the collateral estoppel

defense by the courts below and stress that unless the defendant clearly demonstrates that the plaintiff had the “full and fair opportunity” to litigate an identical “issue” that was “actually resolved” in a prior proceeding, the plaintiff’s federal claim cannot be dismissed. Allen, 449 U.S. at 95; Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found., 402 U.S. 313, 328–329, 91 S. Ct. 1434, 1442–43, 28 L. Ed. 2d 788 (1971); Kremer, 456 U.S. at 480–81. It is particularly important to ensure strict adherence to collateral estoppel’s required showing where the prior action arises from a state court’s review of an administrative or other executive-branch decision, which typically entails a highly-deferential arbitrary and capricious or similar standard of judicial review. Cf. Montana, 99 S. Ct. at 979, n.11, Gibson v. Berryhill, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (“Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation”).

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
(888) 963-8864 (fax)
mc@heggelaw.com

Counsel for Petitioner

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