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COURT OF APPEALS

STATE OF NEW YORK

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ROMANELLO,

Appellant,

-against-

No. 152

INTESA SANPAOLO S.P.A., ET AL.,

Respondents.

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20 Eagle Street  
Albany, New York 12207  
September 09, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 152. Counselor, would you like any  
3 rebuttal time?

4 MR. JOSEPHSON: I - - - yes, please. Two  
5 minutes.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
7 Go ahead.

8 MR. JOSEPHSON: Good afternoon. If it  
9 please the court, my name is Maury Josephson. And I  
10 represent the plaintiff-appellant, Guiseppe  
11 Romanello.

12 CHIEF JUDGE LIPPMAN: Counsel, how would  
13 you describe the exchange of correspondence between  
14 Intesa and - - - were you the lawyer who wrote the -  
15 - -

16 MR. JOSEPHSON: I was, indeed. And we - -  
17 -

18 CHIEF JUDGE LIPPMAN: Okay, and how - - -  
19 how would you describe the tone, the nature, the  
20 purpose of the correspondence in both directions:  
21 the one that came to you and how you responded?

22 MR. JOSEPHSON: Sure. The letter that came  
23 to Mr. Romanello was - - - the way I would describe  
24 it, particularly in light of the history leading up  
25 to that, which is pled in detail in the complaint,

1 was a precursor to an immediate termination of his  
2 employment. It was not, as the Appellate Division  
3 inferred it to be, and I think drawing an inference  
4 against Mr. Romanello, as opposed to for him on a  
5 motion to dismiss - - - it was not an invitation to  
6 any sort of dialog. Instead - - -

7 JUDGE PIGOTT: What was the proper response  
8 to your letter, in your view? What - - - what should  
9 they have done?

10 MR. JOSEPHSON: What they should have done  
11 is - - - is simply what - - - what the law requires  
12 and the regulation require - - - regulations require  
13 and what common sense requires - - -

14 JUDGE PIGOTT: Right. But what is - - -  
15 what is that - - - in your view, after you wrote the  
16 letter, what ex - - - what response did you expect?

17 MR. JOSEPHSON: The simple response would  
18 be, if you can't come back on Tuesday, when can you  
19 come back?

20 JUDGE GRAFFEO: Well, I was going to ask  
21 you that. Because in the Phillips case, the employee  
22 there did send a letter saying that she was asking  
23 for a one-year leave of absence. Was there ever any  
24 communication from your client as to what period of  
25 time they were asking for?

1 MR. JOSEPHSON: There was not - - -

2 JUDGE GRAFFEO: And is there anything in  
3 the record that says they were a - - - that he was  
4 asking for six months or nine months or one year or  
5 whatever?

6 MR. JOSEPHSON: There - - - there is not a  
7 specific request, because the respon - - - number  
8 one, the response that we received back from the  
9 letter is well, you know your client's rights and  
10 obligations. If your - - - if - - - since he's not  
11 coming back on Tuesday, he's fired.

12 JUDGE SMITH: Well, it didn't say on  
13 Tuesday. I mean, you - - - hadn't you sort of  
14 answered in advance the question of when is he coming  
15 back by saying it's indeterminate?

16 MR. JOSEPHSON: That did - - - it did not -  
17 - - it did not answer the question in advance. What  
18 - - -

19 JUDGE SMITH: I mean, is there anything - -  
20 - is there anything anywhere in the record that  
21 suggests he's ever coming back to that job?

22 MR. JOSEPHSON: Yes, there is. And again,  
23 looking at - - - at the events and the - - - the  
24 allegations that are pleaded concerning what led up  
25 to that correspondence, is initially, in accordance

1 with the - - - with the bank's policy, he was placed  
2 on a six-month leave of absence, which he was plucked  
3 off of because of Prudential's determination, later  
4 reversed - - -

5 CHIEF JUDGE LIPPMAN: So are you saying  
6 he's entitled to the six months - - - was that your  
7 proposal - - - and you don't know what after that? I  
8 mean, what ex - - -

9 MR. JOSEPHSON: Our proposal - - -

10 CHIEF JUDGE LIPPMAN: - - - what do you - -  
11 -

12 MR. JOSEPHSON: - - - what I'm saying - - -

13 CHIEF JUDGE LIPPMAN: - - - perceive what  
14 you were trying to say to them?

15 MR. JOSEPHSON: - - - what we were saying  
16 is, I've been an executive at this bank for twenty-  
17 five years. I went out sick in January. You're  
18 telling me come back immediately or you'll be deemed  
19 to have abandoned your position.

20 JUDGE PIGOTT: Well - - -

21 MR. JOSEPHSON: Ours is, let's talk about  
22 this - - -

23 JUDGE PIGOTT: - - - didn't - - -

24 MR. JOSEPHSON: - - - let's determine when  
25 he can come back.

1                   JUDGE PIGOTT: - - - didn't it - - - didn't  
2                   it say, you know, we have given you full pay for six  
3                   months, you know, are you coming back? And wasn't  
4                   your response that he's disabled from working in any  
5                   capacity, let alone his work at ISP? Isn't that what  
6                   you said in your - - - in your letter?

7                   MR. JOSEPHSON: His response was, I don't -  
8                   - - I've been here twenty-five years. You're saying  
9                   if I don't come back by a specific date - - - and I'm  
10                  referring to Tuesday, generically, but it was three  
11                  business days. I can't come back in three days, but  
12                  I have no intention to abandon my position.

13                  CHIEF JUDGE LIPPMAN: Were you saying that  
14                  you - - - you have to be out at least the six months?  
15                  I mean, was that what you're saying?

16                  MR. JOSEPHSON: No, I'm not saying he needs  
17                  to be out for at least the six months. What I'm  
18                  saying in the context of reasonable accommodation,  
19                  the bank - - - the issue, particularly under the city  
20                  statute, is that Mr. Romanello was - - - was entitled  
21                  to such accommodation as could be made, subject to  
22                  proof of undue hardship by the bank.

23                  CHIEF JUDGE LIPPMAN: Do you believe that  
24                  the - - - that the tone of the two letters are  
25                  consistent? In other words, was theirs a business-

1 type letter and yours a business-type response? Was  
2 either of them wrong-headed, sort of missing what the  
3 dialog is supposed to be? Or do you think they're  
4 kind of parallel in terms of what was sent to you and  
5 what you sent back?

6 MR. JOSEPHSON: Well, I think they're  
7 parallel. But with - - - the starting point from the  
8 bank as opposed to what its obligations are under the  
9 city statute and under the state statute, the  
10 starting point from the bank was basically your leave  
11 is over, you're fired unless you're back on Tuesday.

12 CHIEF JUDGE LIPPMAN: What about back to  
13 Judge Pi - - - what about back to Judge Pigott's  
14 question? So - - - so getting your response, what  
15 should they have done? What was the next thing that  
16 they should have done?

17 MR. JOSEPHSON: They - - - the answer is,  
18 you - - - you've said you don't want to abandon - - -  
19 you've said you're disabled. Prudential has said  
20 you're not disabled. Give us some information. We  
21 had already given, you know, through Intesas (sic),  
22 extensive information to be transmitted to  
23 Prudential. But we're getting word from the  
24 insurance company. They're saying you're not  
25 disabled. You say you are - - - you are. What is -

1 - - what is going on?

2 JUDGE PIGOTT: Could that have happened  
3 through you? I mean, in your view, could the bank  
4 have talked to your client without talking to you?

5 MR. JOSEPHSON: Could they have? There are  
6 any number of ways that communication could have  
7 happened. One of - - -

8 JUDGE PIGOTT: No, I understand that. But  
9 what I'm saying is, you have a bank that paid him  
10 full wages for six months, wrote him a letter, and  
11 you say it was a very curt letter, saying, you know,  
12 are you abandoning your job or not? You've been off  
13 for six months.

14 And then - - - then they get a letter from  
15 a lawyer saying - - - saying as far as we're  
16 concerned, he's disabled from working in any  
17 capacity, let alone his work at ISP. Should they  
18 have turned that letter over to their lawyers? I  
19 mean, are we all of a sudden into that type of a  
20 situation? Or in your view, could the bank have  
21 ignored your letter and called him up and said, you  
22 know, let's see what's going on here?

23 MR. JOSEPHSON: Could - - - it's speculat -  
24 - - speculative to say could they have, but they  
25 certainly could have. They certainly could have

1 opened up a dialog in any of a number of ways:  
2 through counsel, through communications with Mr.  
3 Romanello, through communications with his family.

4 JUDGE ABDUS-SALAAM: Counsel, do you  
5 believe that the letter that you received from the  
6 employer's lawyer was a beginning of a dialog of any  
7 sort on a reasonable accommodation?

8 MR. JOSEPHSON: Your Honor, absolutely not.  
9 It should have been, but that's not what we - - -

10 JUDGE ABDUS-SALAAM: How long - - - how  
11 long had the bank known about - - - they'd known for  
12 a while about his disability?

13 MR. JOSEPHSON: They had known since  
14 January of 2008. And they had collected his medical  
15 information and so forth over the course of March and  
16 April. The history leading up to that, what the bank  
17 knew was they knew of his disability, they knew of  
18 his need for insurance benefits. And - - -

19 JUDGE ABDUS-SALAAM: So if they hadn't  
20 gotten this letter from Prudential saying that  
21 Prudential found him not to be disabled, then  
22 ostensibly, he would have been off for about six  
23 months on short-term disability? Is that - - - is  
24 that true?

25 MR. JOSEPHSON: He would have been off on

1 short-term disability. And there - - - there should  
2 have been - - - and what the bank's letter, I think,  
3 was, is that's the letter that should come at the end  
4 of a process that has failed.

5 JUDGE SMITH: Aren't there - - -

6 MR. JOSEPHSON: But that's not the type of  
7 letter that you would expect to receive at the  
8 beginning of the process.

9 JUDGE SMITH: Aren't there some situations  
10 that are so extreme that you don't need an  
11 interactive process? I mean, suppose - - - suppose,  
12 God forbid, Eli Manning loses his right arm, do they  
13 have to do an interactive process to see whether he  
14 can be accommodated to play quarterback?

15 MR. JOSEPHSON: The - - - the answer to  
16 that question is - - - off the cuff, is probably not,  
17 but that's not the typical situation - - -

18 JUDGE SMITH: Well, but here - - -

19 MR. JOSEPHSON: - - - that the statutes are  
20 directed at.

21 JUDGE SMITH: - - - I mean I realize that  
22 this case isn't - - - well, this case isn't the  
23 typical situation, either. Here's a man who's very,  
24 very - - - I mean, your letter couldn't make clear -  
25 - - clearer how serious his problems are. Was it

1 ever, at any point, realistic to think that any  
2 accommodation could be made to make him a bank  
3 executive again?

4 MR. JOSEPHSON: Yes, Your Honor.

5 JUDGE SMITH: And where - - - where in the  
6 record do we find that?

7 MR. JOSEPHSON: Where in the - - - in the -  
8 - - in the well-pleaded allegations of the complaint.

9 JUDGE SMITH: Which one?

10 MR. JOSEPHSON: The ones concerning his - -  
11 - his being out. The ones concerning the bank having  
12 a leave policy, first of all, with respect to the  
13 six-month salary continuance. And its leave of  
14 absence policy, which, with respect to disability  
15 leave, is open-ended in terms of the bank's  
16 willingness to engage with the employee.

17 It says there's no guarantee, but the fact  
18 that there's no guarantee - - -

19 CHIEF JUDGE LIPPMAN: Okay, counselor.

20 MR. JOSEPHSON: - - - doesn't mean that - -  
21 -

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. JOSEPHSON: - - - there's not an  
24 obligation to accommodate.

25 CHIEF JUDGE LIPPMAN: You'll have your - -

1 - you'll have your rebuttal. Let - - -

2 MR. JOSEPHSON: Thank you.

3 CHIEF JUDGE LIPPMAN: - - - let's hear from  
4 your adversary.

5 MR. LAMBERT: Good afternoon, Your Honors.  
6 May it please the court, Michael C. Lambert for the  
7 defendants and respondents.

8 CHIEF JUDGE LIPPMAN: Counsel, why wasn't -  
9 - - why can't we consider both letters to be part of  
10 a dialog that - - - that then was ended after their  
11 response to you?

12 MR. LAMBERT: Well - - -

13 CHIEF JUDGE LIPPMAN: What's - - - what's -  
14 - - is it a terrible thing that the employee got a  
15 lawyer? Is that a problem here?

16 MR. LAMBERT: No, it's not a problem. But  
17 it was their choice to get a lawyer.

18 CHIEF JUDGE LIPPMAN: Yeah, but did that  
19 end the conversation and the dialog, once you get a  
20 lawyer? How many times have we all seen in our life  
21 where someone says, oh, get a lawyer to write - - - a  
22 lawyer's letter; that'll - - - why is it unreasonable  
23 for the employee getting the letter that you had,  
24 which is not all, you know, mushy and, you know, user  
25 friendly, why wouldn't he get a lawyer, send a letter

1 back, and then the dance begins? Why did it end - -  
2 - I guess my question to you is, why did it end after  
3 their letter back to you - - - the lawyer's letter?

4 MR. LAMBERT: Because we tried to start a  
5 dialog with them by asking this - - - by writing this  
6 letter, which is - - - one of the lower courts said,  
7 and we cited it in our brief - - - it's not  
8 unreasonable for an employer to ask when an  
9 employee's about to come back to work.

10 CHIEF JUDGE LIPPMAN: And you got a - - -  
11 and you got a lawyer's - - -

12 MR. LAMBERT: To the - - -

13 CHIEF JUDGE LIPPMAN: - - - and you got a  
14 lawyer's letter back that said, and you know what, if  
15 you fire him, you're going to be responsible. But  
16 why - - - did that cut off all dialog, and more  
17 importantly, under the law, remove your obligation to  
18 have - - - to try to accommodate - - - to have an  
19 interactive conversation? Why did their letter end  
20 that discussion?

21 Was it the tone? Was it that it will - - -  
22 was from a lawyer? Was it what they said in the  
23 letter? Why did that letter end the discussion as  
24 far as you were concerned?

25 MR. LAMBERT: It's what they said and the

1 tone; not necessarily that it was from a lawyer.

2 CHIEF JUDGE LIPPMAN: Okay. Tell us - - -  
3 tell us how and why that, in effect, ended the  
4 conversation in your mind.

5 MR. LAMBERT: Sure. We asked - - - we  
6 asked - - -

7 CHIEF JUDGE LIPPMAN: Or ended your  
8 obligation in your mind?

9 MR. LAMBERT: Correct. We started the  
10 dialog by asking him whether he intends to come back  
11 to work. The response we get was that I have a  
12 client that has an uncertain prognosis - - - which  
13 means, I'm sick, not too sure what's wrong with me,  
14 but I have an uncertain prognosis. I have an  
15 indeterminate time period for coming back to work. I  
16 can't work in any capacity - - - which he says twice  
17 in the letter. I don't intend to quit. But if you  
18 fire me, I'm going to sue you.

19 So in our opinion that - - - you know, what  
20 were we supposed to say?

21 CHIEF JUDGE LIPPMAN: Why - - - why  
22 wouldn't you just - - - well, maybe you could say,  
23 gee, when do you think you could - - - I understand  
24 you say it's indeterminate. Do you have any sense -  
25 - - in other words, engage in a dialog like we're - -

1 - we're having now, where the next comeback would be,  
2 gee, do you have any sense - - - you're telling us -  
3 - - you know, to inquire further as to what's going  
4 on, whether directly to the employee or to the  
5 lawyer.

6 Don't you have an obligation to push it  
7 further? Or do you not?

8 MR. LAMBERT: I think we do not under these  
9 circumstances, because we were entitled, I think,  
10 under these circumstances, to take him at his word.  
11 He said he was too sick to work. I don't think it's  
12 incumbent upon us to - - -

13 JUDGE ABDUS-SALAAM: Didn't he say - - -

14 MR. LAMBERT: - - - I'm sorry, Judge.

15 JUDGE ABDUS-SALAAM: Didn't he say, "at  
16 this time", which means that maybe there's another  
17 time that he would be able to come back to work?

18 MR. LAMBERT: In the - - -

19 JUDGE ABDUS-SALAAM: Doesn't the letter say  
20 "at this time" - - -

21 MR. LAMBERT: In the - - -

22 JUDGE ABDUS-SALAAM: - - - I'm too sick?

23 MR. LAMBERT: I'm sorry, Judge. Judge, in  
24 theory, yes. But it seems to me, it's incumbent on  
25 him to say look, you know, I can't work now, but I'm

1 going to see the doctor in three months, at which  
2 point, maybe, you know, I'll be able to go back to  
3 work - - -

4 JUDGE SMITH: Didn't he - - - didn't he, in  
5 fact, say that the time was indeterminate?

6 MR. LAMBERT: He says it's indeterminate  
7 and gives us no future time frame on which he can  
8 reassess that - - -

9 JUDGE GRAFFEO: It was - - -

10 JUDGE RIVERA: Wasn't what you should be  
11 exploring? Isn't that your burden?

12 MR. LAMBERT: Pardon?

13 JUDGE RIVERA: Isn't that your burden to  
14 explore?

15 MR. LAMBERT: I think that - - - I think we  
16 met our burden by initiating the dialog. And I  
17 think, as the Appellate Division majority said, I  
18 think he slammed the door shut on any meaningful co -  
19 - - he made it clear he can't work. The statutes  
20 protect only people who can do their job with a  
21 reasonable accommodation. And he's saying to us - -  
22 -

23 JUDGE READ: By the way - - - by the way,  
24 is - - - do you think, is the standard any different  
25 under the state law and the city law?

1 MR. LAMBERT: I don't think the standard is  
2 any different. I realize that the city has some  
3 policy statements that they're supposed to interpret  
4 their statutes very liberally - - -

5 JUDGE SMITH: Isn't the burden of proof  
6 different?

7 MR. LAMBERT: - - - but I think the  
8 standards are the same.

9 JUDGE SMITH: Isn't there a different  
10 burden? Isn't the burden of proof on you, under the  
11 city law, to show that no reasonable accommodation is  
12 possible?

13 MR. LAMBERT: It is an affirmative defense.  
14 And we think that - - - though what the Appellate  
15 Division says - - -

16 JUDGE SMITH: Isn't - - - isn't there a  
17 procedural problem here? This was a 3211 motion,  
18 right?

19 MR. LAMBERT: That's correct, Your Honor.

20 JUDGE SMITH: It was based on the - - - how  
21 can you establish - - - how can you get a case  
22 dismissed where you - - - on 3211, when you have the  
23 burden of proof?

24 MR. LAMBERT: Well, I think that - - - that  
25 the court is entitled, even on a motion to dismiss,

1 to say that there is no objectively reasonable  
2 interpretation of Mr. Josephson's letter, the June  
3 letter that we're talking about, which makes their -  
4 - -

5 JUDGE SMITH: We can - - - we can read the  
6 letters as though they were part of the complaint,  
7 because they were put in?

8 MR. LAMBERT: Well, they were referred to  
9 in the complaint, and they were put in on the motion  
10 to dismiss.

11 JUDGE SMITH: You say - - - you say,  
12 essentially, that those letters, on their face,  
13 establish the affirmative defense?

14 MR. LAMBERT: Yes, we do.

15 JUDGE PIGOTT: Judge Sweeney says that the  
16 majority takes the - - - treats the employer's letter  
17 in a light most favorable to the employer, and  
18 paradoxically, treats the plaintiff's counsel's  
19 letter in a light least favorable to the employee.

20 MR. LAMBERT: Well, I think - - - I beg to  
21 differ. Because I think what - - - if you - - - if  
22 you look at the letter, the letter nowhere by its  
23 terms asks for any accommodation. The only way that  
24 you get to the point that that letter is asking for  
25 an accommodation, which is an indefinite leave, is to

1 read it in a way that's most favorable to Mr.  
2 Romanello.

3 JUDGE SMITH: Does he have - - - does he  
4 have to ask for an accommodation, or does there just  
5 have to be - - - I mean, if the employer knows that  
6 some accommod - - - or has reason to think that an  
7 accommodation is possible, doesn't the employer have  
8 to have a dialog, whether it's been asked for or not?

9 MR. LAMBERT: I don't think that the - - -  
10 the case law is clear that the employee doesn't  
11 necessarily have to be the first one to ask for an  
12 accommodation. What we're saying is, is that letter  
13 made it clear that there's no accommodation that  
14 would have worked. And in fact, in this record,  
15 there's another letter from Mr. Josephson written to  
16 the insurance company, eight and a half months later,  
17 in which he said his client is still unable to work.

18 JUDGE PIGOTT: In the - - - in the - - -

19 JUDGE GRAFFEO: Well, did you owe - - -

20 JUDGE RIVERA: Doesn't it - - -

21 JUDGE GRAFFEO: - - - did you owe - - -

22 JUDGE RIVERA: Sorry.

23 JUDGE GRAFFEO: - - - him six months with  
24 pay? Because he was out, what, four months, when  
25 these letters were exchanged, right?

1 MR. LAMBERT: He was out about - - - almost  
2 five full months. And we did have a six-month salary  
3 continuation. But there is an - - - there is an  
4 extant cause of action in this complaint - - -

5 JUDGE GRAFFEO: But how - - - how does that  
6 obligation - - - you know, the six-month policy - - -  
7 factor into the reasonable accommodation?

8 MR. LAMBERT: It does - - - in a sense - -  
9 - the only way it factors in, is there's an existing  
10 cause of action that's still there with the contract  
11 claim. He claims that by not giving him the full six  
12 months - - - we paid him for five months when he was  
13 out on disability; once we fired him, we didn't pay  
14 him for the rest of that six-month period.

15 CHIEF JUDGE LIPPMAN: Counselor, could that  
16 - - -

17 MR. LAMBERT: It's our claim that that's -  
18 - - we didn't - - - that's not a breach of contract.

19 CHIEF JUDGE LIPPMAN: Are you interpreting  
20 their letter to be that in actuality what they're  
21 saying is, I'm not coming back and I'm going to sue  
22 you, and that's why you ended the dialog?

23 MR. LAMBERT: Yes, I - - -

24 CHIEF JUDGE LIPPMAN: And if so, what in  
25 that letter tells you that that is what they're

1 saying?

2 MR. LAMBERT: Because they don't an - - -  
3 you know, they don't - - - they just say that I can't  
4 work; I don't know what's really wrong with me;  
5 there's an indeterminate time frame for coming back  
6 to work; and they don't give me just - - - any  
7 indication to think that that is ever going to  
8 change. And in fact, it didn't change. Eight months  
9 later, he still couldn't work in any capacity.

10 CHIEF JUDGE LIPPMAN: But he - - - but to  
11 cut off the dialog here, given your obligation, given  
12 your burden, doesn't that have to be really concrete  
13 to be able to say that you're interpreting this  
14 letter, which you say that's the way you're  
15 interpreting it, I'm not coming back; we are going to  
16 sue you. Is that, from the - - - the clear meaning,  
17 the plain meaning of the letter, is that what it  
18 means?

19 MR. LAMBERT: Yes, we believe that is the  
20 clear meaning of that letter, that it was entitled to  
21 be resolved in that way on a motion to dismiss.

22 JUDGE PIGOTT: If you assume that, sir, the  
23 - - - obviously, in your practice, you must get  
24 letters from people that say I slipped and fell on  
25 the bank's steps and we're going to sue you for the

1 injuries. Do you then take that to mean there's no -  
2 - - no sense in talking to anybody about possibly  
3 resolving it, short of a lawsuit?

4 MR. LAMBERT: It's not just the threat of  
5 the litigation. It's the fact that he says he can't  
6 work in any capacity, and he doesn't give us any  
7 indication that that is ever, in fact, going to  
8 change.

9 JUDGE PIGOTT: In your handbook, you say  
10 that you'll give them - - - you know, you'll  
11 entertain any job, you know, within - - - I think,  
12 within the bank, right, if they're unable to do the  
13 one for which they're - - -

14 MR. LAMBERT: It says we'll attempt to keep  
15 your job open. But, you know, if we have to replace  
16 you, will replace you.

17 JUDGE RIVERA: I'm having difficulty with  
18 your argument. If - - - if in the letter he not only  
19 says I'm uncertain when I can return - - - I don't  
20 know when that is - - - it strikes me that that's  
21 candor based on whatever medical information that the  
22 particular individual has - - - but he says, "I am  
23 not giving up my job." How does that foreclose any  
24 further negotiation as to what might be an  
25 appropriate accommodation?

1 MR. LAMBERT: Well, I just think at that  
2 point, in the real world, Your Honor, you know, he  
3 tells us he's too sick to work. We take him at his  
4 face value. I mean, it's not up to us, it seems to  
5 me, to come back and say we don't think you're too  
6 sick to work. He - - - that's what he tells us.

7 I mean, we have nothing else to go on. He  
8 doesn't give us any indication it's ever going to  
9 change, and that, you know, that he's intending not  
10 to quit his job and if we fire him, we're going to  
11 pay the consequences.

12 JUDGE RIVERA: You haven't given the  
13 opportunity to have that dialog, have you?

14 MR. LAMBERT: Well, it seems to me that if  
15 he really wanted to keep his job, it was more  
16 incumbent on him to say look, here's the  
17 circumstances, I think I can come back to work. But  
18 if you look at this complaint, Your Honor, and  
19 despite what Mr. Josephson said, this complaint  
20 nowhere alleges that he was able to do his job if we  
21 gave him a reasonable accommodation. It's simply not  
22 in his complaint. And his letter confirms that - - -

23 JUDGE SMITH: Yeah, but of course, the  
24 burden - - -

25 MR. LAMBERT: - - - he couldn't do his job.

1 JUDGE SMITH: - - - but the burden's on you  
2 under the city law, isn't it?

3 MR. LAMBERT: On the what law? Sorry.

4 JUDGE SMITH: City law.

5 MR. LAMBERT: The burden is on us to - - -  
6 yes. On the reasonable accommodation. Correct.

7 JUDGE SMITH: Yeah, he - - - I mean, he - -  
8 - he doesn't even have to allege that, does he?

9 MR. LAMBERT: I think he does have to  
10 allege it, that he could have done his job with - - -  
11 because the statute doesn't protect him unless that  
12 is the case. Under the city law, which is an  
13 affirmative defense, that there was no reasonable  
14 accommodation that was available.

15 JUDGE RIVERA: You're saying he has to  
16 plead your affirmative defense, or did I  
17 misunderstand?

18 MR. LAMBERT: No, you didn't - - -

19 JUDGE RIVERA: I'm sorry.

20 MR. LAMBERT: - - - I didn't - - - if I  
21 meant - - - if I said that, I'm - - -

22 JUDGE RIVERA: I'm sorry.

23 MR. LAMBERT: - - - if I said that, I was  
24 in error - - -

25 JUDGE RIVERA: I'm sorry.

1 MR. LAMBERT: - - - Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay, counsel,  
3 thanks.

4 MR. LAMBERT: Thank you, Judge.

5 CHIEF JUDGE LIPPMAN: Rebuttal, counselor.

6 MR. JOSEPHSON: Briefly in rebuttal. First  
7 of all, I think that counsel's argument, to put it  
8 generously, downplayed the - - - downplays the extent  
9 of protection and the extent of the reasonable  
10 accommodation obligation - - -

11 JUDGE PIGOTT: Has your client - - -

12 MR. JOSEPHSON: - - - and procedural  
13 requirements.

14 JUDGE PIGOTT: - - - ever been able to go  
15 back to work? I mean, the point's being made that he  
16 didn't allege it. But I mean, is - - - is he ready,  
17 willing, and able now, and says, you know, because of  
18 this, you know, I can't get back there?

19 Or are we - - - I mean, are we just  
20 spinning our wheels, because now it's been all these  
21 years and he's still not able to get back to work?

22 MR. JOSEPHSON: No, we're not sp - - -  
23 we're not spinning our wheels, Your Honor.

24 JUDGE SMITH: How has your client been  
25 injured, in other words?

1 MR. JOSEPHSON: He was - - - he was injured  
2 by - - - by the termination of his employment without  
3 any consideration being given for the - - -

4 JUDGE SMITH: How can - - -

5 MR. JOSEPHSON: - - - additional - - -

6 JUDGE SMITH: - - - that - - - how can that  
7 be an injury, unless he could somehow have come back  
8 to it?

9 MR. JOSEPHSON: Well, if he - - - if a reas  
10 - - - if he could have been - - - if he were  
11 reasonably accommodated through extension of his  
12 leave, through the time when he was better and  
13 released to return to work - - -

14 JUDGE SMITH: Did that time - - - has there  
15 - - - is there any indication in the - - - in the  
16 record that that time ever came or was ever in  
17 prospect?

18 MR. JOSEPHSON: Yes, within several months,  
19 or within the time period when - - - you know,  
20 through which his long-term disability benefits  
21 continued, and then he was released to return to  
22 work.

23 JUDGE SMITH: But no, but my question - - -  
24 was there - - - is there any indication anywhere in  
25 the record that there was ever a time or there was

1 ever a foreseeable time when he could be a bank  
2 executive again?

3 MR. JOSEPHSON: Yes, there is. It's - - -

4 JUDGE SMITH: Where is that in the record?

5 MR. JOSEPHSON: - - - it's pleaded - - -  
6 it's in - - - in his complaint where it's  
7 specifically alleged that by October of 2008, he had  
8 recovered sufficiently to return to work.

9 JUDGE SMITH: But there's a - - - there's a  
10 letter from February 2009 saying that he had reco - -  
11 - that he was not sufficiently recovered to do bank  
12 executive work. It was that he was - - - he was  
13 doing - - - he was working as a laborer.

14 MR. JOSEPHSON: What - - - it indicated  
15 that he was, at the time, working - - -

16 JUDGE SMITH: See, that's your letter - - -

17 MR. JOSEPHSON: - - - as a laborer, but  
18 that his psychiatrist had indicated that a  
19 determination of whether he could return to work as a  
20 bank executive should be - - -

21 JUDGE SMITH: Doesn't - - -

22 MR. JOSEPHSON: - - - considered through a  
23 trial work period.

24 JUDGE SMITH: - - - doesn't your letter - -  
25 - doesn't your letter of February 2009 say he cannot

1 do the work of a bank executive?

2 MR. JOSEPHSON: It says that in order to  
3 assess that, a trial work period would be needed, and  
4 a trial work period is yet another example of a  
5 reasonable accommodation that was not - - - that was  
6 not considered in this case.

7 JUDGE SMITH: I mean, maybe we're thinking  
8 of two different letters. I - - - the - - - yeah,  
9 "Mr. Romanello's ability to engage in employment  
10 improved to a limited degree, although not to a level  
11 consistent with being able to resume employment as an  
12 executive for a major bank." That's February 2009.

13 MR. JOSEPHSON: Right, but the - - - in the  
14 letter, it also indicates that his psychiatrist had  
15 indicated that in order to determine that, a trial  
16 work period would be needed. So that - - - what I'm  
17 arguing is, that ties back to the reasonable  
18 accommodation issue, saying well, if you can't come -  
19 - - come back today, what - - - when can you come  
20 back? What can you do? What are your capabilities?  
21 That is the type of thing that the reasonable  
22 accommodation dialog is supposed to encompass.

23 CHIEF JUDGE LIPPMAN: Okay - - -

24 MR. JOSEPHSON: Can you do the former job,  
25 or can you not? Can we do a trial work period?

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CHIEF JUDGE LIPPMAN: Okay, counselor.

Thank you. Thank you both. Appreciate it.

MR. LAMBERT: Thank you, Your Honors.

MR. JOSEPHSON: Thank you, Your Honor.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Romanello v. Intesa Sanpaolo S.p.A., No. 152 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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