UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ADAM SIMMS, Plaintiff v. CITY OF NEW YORK, FIRE DEPARTMENT OF THE CITY OF NEW YORK, and THOMAS VON ESSEN, in his official capacity as Fire Commissioner of the New York City Fire Department, Defendants	CV-98-7988-SJ

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

In this action, Plaintiff Adam Simms, a firefighter with diabetes, alleges that his employer, the New York City Fire Department ("the Department"), unlawfully removed him from full duty in violation of the Americans with Disabilities Act, 29 U.S.C. § 12101 *et. seq.* ("the ADA"), the Federal Rehabilitation Act, 29 U.S.C. § 794 ("the Rehabilitation Act"), and New York Human Rights Law, N.Y. Exec. Law §§ 292 et. seq. Plaintiff now moves for summary judgment on these claims because the undisputed facts show that the Department's action was unlawful.[1] In fact, this case is virtually identical in all respects--except for the names of the parties--to another recent case in which this very Court granted summary judgment to a plaintiff in a safety-sensitive job

[1] Plaintiff has recently added supplemental claims of retaliation to his complaint, on which he is not moving for summary judgment.

whose duties had been severely restricted, not because he had demonstrated that he posed any risk to himself or others, but simply because he was diabetic. *See Dipol v. The New York City Transit Authority*, 999 F.Supp. 309 (E.D. N.Y. 1998) (Johnson, J.).

I. FACTUAL BACKGROUND

The relevant facts, as described below, are not in dispute in this case.

Plaintiff Adam Simms has worked for the New York City Fire Department since 1989.[2] He began with the Department as a firefighter and was promoted in 1996 to fire lieutenant.[3] From the time he began with the Department in 1989 until April 1998, Plaintiff worked in full duty assignments for a variety of Department ladder and engine companies. Throughout his employment with the Department, Plaintiff has never experienced any difficulty performing his full duty job responsibilities and has suffered only minor injuries that are typical of firefighters.[4]

In 1991, Plaintiff was diagnosed with diabetes mellitus.[5] Since his diagnosis, he has been in full control of his diabetes, through a careful regimen of diet and medication, under the care of Dr. Andrew Drexler, an endocrinologist at Mount Sinai Medical Center, who is a prominent specialist in the field of diabetes

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[2] *See* Deposition Transcript of Adam Simms ("Simms Deposition"), Exhibit A, at 16.

[3] *See* Simms Deposition, Exhibit A, at 27. Plaintiff has passed the exam for promotion to Captain and is currently on a list waiting to receive this promotion. *See id.* at 146.

[4] *See* Deposition Transcript of Dr. Kerry Kelly ("Kelly Deposition"), Exhibit E, at 49.

[5] *See* Simms Deposition, Exhibit A, at 44.

management. Plaintiff has never experienced any diabetes-related medical problems or any difficulty performing his job duties because of his diabetes.[6]

The Department learned of Plaintiff's diabetic condition in 1998 when it received an anonymous note alerting it to the fact that Plaintiff has diabetes.[7] Upon learning that Plaintiff has diabetes, the Department immediately removed him from full duty and placed him in a light duty desk job.[8] Despite Plaintiff's repeated requests to return to full duty, the Department has refused to allow him to perform anything other than mundane clerical tasks and has relegated him to permanent light duty status solely because he takes medication to treat his diabetes.[9]

The Department's physicians testified that they placed Plaintiff on light duty status pursuant to the Department's diabetes policy, which automatically excludes firefighters from full duty assignments if they are diabetic and use

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[6] *See* Deposition Transcript of Dr. Andrew Drexler ("Drexler Deposition"), Exhibit B, at at 12 ("Mr. Simms diabetes has been under excellent control"); Simms Deposition, Exhibit A, at 80 ("I haven't experienced any [diabetes-related] complications due to the amount of effort, education and time, planning and strategy that I have been putting into my health").

[7] Plaintiff believes that his former father-in-law, with whom he was having a financial dispute, sent the note to the Department. *See* Simms Deposition, Exhibit A, at 112.

[8] After receiving the note, the Department scheduled an appointment for Plaintiff to see the Department's Chief Medical Officer, Dr. Kerry Kelly. Dr. Kelly testified that blood work done that day revealed that Plaintiff had an "excellent" blood sugar level. *See* Kelly Deposition, Exhibit E, at 65. Nevertheless, because the Department had received notice that Plaintiff was diabetic, he was immediately placed on light duty. *See id.* at 64.

[9] Plaintiff has made at least twelve requests, which have all been denied, to transfer to full duty assignments at ladder and engine companies. *See* Simms Deposition, Exhibit A, at 124. In addition, in response to Plaintiff's recent request to transfer to a firefighter instructor position in the Department's training unit, Plaintiff was told that he could not make this transfer because he is on light duty, even though the instructor position does not involve any actual firefighting responsibilities. *See* Letter from Kevin Smith, Assistant Corporation Counsel, to Shannon Liss-Riordan, Attorney for Adam Simms, Exhibit H.

medication to control their diabetes.[10] The Department's physicians did not undertake any individualized assessment of Plaintiff's ability to perform his firefighting duties; instead, their only assessment was to ascertain whether or not Plaintiff uses medication to control his diabetes.[11]

Had the Department assessed Plaintiff's ability to work as a full duty fire lieutenant, it would have learned that Plaintiff's diabetes in no way prevents him from safely performing his job duties. The most clear indication of this fact is shown by Plaintiff's record of experiencing no diabetes-related problems on the job during the seven years that elapsed from the time he was first diagnosed with diabetes to the time the Department removed him from full duty status. Indeed, the Department's physicians testified in their depositions that they have no knowledge of Plaintiff's diabetes ever interfering with his ability to perform his full

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[10] *See* New York City Fire Department Diabetes Mellitus Policy, Paragraph 3, Exhibit D ("Members are to remain on light duty while requiring oral medicine or insulin"); Kelly Deposition, Exhibit E, at 81-82 ("Q. [I]s that a strict policy that if a diabetic uses insulin he or she is not allowed to work on full duty? A. Yes."); Deposition of Dr. David Prezant ("Prezant Deposition"), Exhibit F, at 41-42 ("Q. Are there any circumstances in which a firefighter taking insulin can be on full duty? A. Given the current definition of full duty, no.").

[11] The Department's medical unit has required Plaintiff to appear for numerous appointments, but at each appointment, Plaintiff has simply been asked whether he is using medication to control his diabetes. When the Department did conduct blood work on Plaintiff, the first test revealed that Plaintiff had an "excellent" blood sugar level. *See* Kelly Deposition, Exhibit E, at 65. A later test done by the Department revealed his blood sugar level to be "an acceptable amount" and his diabetes to be in "reasonable control." *Id.* at 74. Dr. Prezant testified that he understood Plaintiff to be "an incredibly well controlled diabetic." Prezant Deposition, Exhibit F, at 76.

The Department's physicians did not request Plaintiff's full medical records from his endocrinologist, Dr. Drexler, nor did they ever speak to Dr. Drexler to inquire about Plaintiff's condition. Instead, the physicians simply asked Plaintiff to convey several questions to Dr. Drexler. Plaintiff did so and submitted Dr. Drexler's responses to the Department's medical board. In these responses, Dr. Drexler addressed the physicians' concerns and indicated that there was no reason that Plaintiff's diabetes would interfere with his ability to perform his job. *See* Exhibits 2-4 to Drexler Deposition, Exhibit B.

duty firefighting responsibilities.[12] In addition, Plaintiff's endocrinologist, Dr. Drexler, who is one of the country's leading diabetes care specialists, affirms that there is no reason why Plaintiff cannot perform full duty responsibilities for the Department.[13] Plaintiff has also engaged another endocrinologist expert in diabetes management, Dr. Daniel Lorber, who affirms that Plaintiff is perfectly capable of safely performing the responsibilities of a full duty firefighter.[14]

In making their decision to exclude Plaintiff from full duty, the Department's physicians did not even consult an endocrinologist--neither Plaintiff's specialist nor one of their own choosing.[15] Instead, they relied entirely on the Department's diabetes policy, which automatically excludes from full duty any firefighter who uses medication to control his diabetes. This policy was formulated entirely by the Department's physicians, who are not specialists in diabetes care or endocrinology.[16]

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[12] *See* Kelly Deposition, Exhibit E, at 43-51. In her deposition, Dr. Kelly described the injuries Plaintiff has had during his years as a firefighter, which she agreed are the types of injuries that firefighters encounter in their duties. *See id*. at 49. When asked whether any of these injuries are related to Plaintiff's diabetes, she replied, "I can't be sure." *Id.* When asked whether Plaintiff has ever been unable to perform his duties as a firefighter due to his medical condition, Dr. Kelly stated only the obvious, that during the times when Plaintiff has been on injury leave, he was unable to work as a firefighter. *See id.* at 46. Dr. Kelly also testified that she has no knowledge of Plaintiff ever having servere hypoglycemia or hyperglycemia. *See id.* at 97.

[13] *See* Drexler Deposition, Exhibit B, at 17-20 (Adam Simms poses no greater risk to himself or to others as a firefighter than non-diabetic firefighters), and Exhibits 2-4 to Drexler Deposition.

[14] *See* Report of Dr. Daniel Lorber, Exhibit C ("there is no medical reason that he cannot carry out the physical requirements of an active duty firefighter").

[15] *See* Kelly Deposition, Exhibit E, at 80-81.

[16] *See id.* at 111 (Chief Medical Officer not aware that any Department doctors consulted with any outside specialists in forming diabetes policy); Prezant Deposition, Exhibit F, at 53. On November 29, 1999, the day before the summary judgment deadline and one month after the close of discovery, the Department for the first time attempted to designate an expert witness to defend the Department's diabetes policy, which Plaintiff contends facially violates the federal and state antidiscrimination laws, since it creates a *per se* exclusion from full duty for any firefighter

The Department's Chief Medical Officer has testified that Plaintiff will never be allowed to return to full duty so long as he uses medication for his diabetes and she therefore does not anticipate that he will ever return to full duty.[17] Since Plaintiff must use medication to control his diabetes for the rest of his life, the Department has in effect permanently removed Plaintiff from full duty.

As a result of being removed from full duty status, Plaintiff has lost substantial overtime, which is not available to him while he is on a light duty clerical assignment.[18] Even more significantly, Plaintiff has become depressed and has experienced feeling a loss of self-worth from being relegated to a mundane desk job sorting mail, which has halted his promising and successful career as an officer for the New York City Fire Department.[19] Plaintiff has sought counseling from a clinical psychologist for the severe emotional distress and loss

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who takes medication to control diabetes. Since Plaintiff just received this attempted designation from the Department today, the day he is submitting this Motion, Plaintiff's counsel has not even had the opportunity to review the report. In any event, Plaintiff opposes the Department's belated attempt to designate an expert, both because this designation is too late and because this designation is legally irrelevant, since the Department admits to taking its action against Plaintiff in reliance on a strict diabetes exclusion policy and not through an individualized assessment of Plaintiff's ability to perform his job duties, other than the assessment that Plaintiff uses medication to control his diabetes.

Discovery, which was extended on account of the Department's repeated failure to respond to Plaintiff's discovery requests, closed on October 29, 1999. (The Department has still not responded to Plaintiff's last written discovery requests, served on September 29, 1999. Although Plaintiff was able to prepare this summary judgment motion without the Department's responses to those requests, Plaintiff will need those responses if this motion is denied and the case goes to trial.) By a letter to the Court, the Department requested an extension of the discovery deadline in order to designate an expert, Plaintiff opposed this request, and no action has been taken on the request. Since the Department did not obtain permission to make this designation late, this attempted designation should be stricken. If the Department believes that it is unable to respond to this Motion for Partial Summary Judgment without the use of an expert, the Department should be required to justify its need for an expert and explain why it was not able to obtain the evidence it needed before the close of discovery, pursuant to Fed.R.Civ.P. 56(f).

17 *See* Kelly Deposition, Exhibit E, at 80.

18 *See* Simms Deposition, Exhibit A, at 132-33.

19 *See id.* at 43-44.

of identity he has suffered from being precluded from using his firefighting knowledge and skills and being precluded from working in the position that has been his career for ten years.[20]

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment bears the burden of showing that no genuine factual dispute exists. *See Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202 (2d Cir. 1995). Once the moving party has made a showing that there are genuine issues of material fact to be tried, the burden shifts to the non-moving party to raise triable issues of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Dipol*, 999 F.Supp. at 312.

In order to prevail on his claims of discrimination under the ADA, Rehabilitation Act, and New York Human Rights Law, Plaintiff must first establish a prima facie case, for which he must show that: (1) he is a disabled person; (2) he is otherwise qualified to perform his job; and (3) he suffered an adverse employment action because of his disability. *See Dipol*, 999 F.Supp. at 312 (citing *Ryan v. Grae & Rybicki, P.C.,* 1996 WL 680256, *3 (E.D.N.Y. Nov. 13, 1996), *aff'd*, 135 F.3d 867 (2d Cir. 1998)).

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[20] *See id.* at 135, 139.

If Plaintiff satisfies his prima facie burden, then the burden to shifts to the Department to "prove that although it relied on the plaintiff's handicap in taking the adverse action, it was a permissible and appropriate factor to consider with respect to the employee's qualifications under the circumstances." *Dipol*, 999 F.Supp. at 313 (citing *Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511, 515 (2d Cir. 1991)). In making this consideration, the Department had the duty to make an "individualized assessment of [Plaintiff's] ability to perform safely the essential functions of the job." *Dipol*, 999 F.Supp. at 316 (quoting *Equal Employment Opportunity Comm'n v. Chrysler Corp., 917 F.Supp. 1164,* 1170 *(E.D.Mich.1996)).*

If the Department claims that Plaintiff is not capable of safely performing his job, then the Department bears the burden to prove that Plaintiff was a direct threat to the health or safety of other individuals in the workplace. *Dipol*, 999 F.Supp. at 316 (citing *Chrysler Corp.*, 917 F.Supp. at 1171). A "direct threat" is defined as a "significant risk" to the health or safety of others. 42 U.S.C. § 12111(3); *Dipol*, 999 F.Supp. at 316. "A slightly increased risk is not enough to constitute a direct threat; there must be a high probability of substantial harm. . . a mere speculative or remote risk is not sufficient." *Dipol*, 999 F.Supp. at 316 (citing *Chrysler Corp.*, 917 F.Supp. at 1170).

III. ARGUMENT

A. PLAINTIFF'S PRIMA FACIE CASE

As described above, in order to prevail on his discrimination claims, Plaintiff must first establish a prima facie case, for which he must show that: (1)

he is a disabled person; (2) he is otherwise qualified to perform his job; and (3) he suffered an adverse employment action because of his disability. In this case, there is no dispute regarding the third prong, since the Department's express reason for placing Plaintiff on light duty was because of his diabetes. The following arguments describe why Plaintiff also clearly satisfies the first two prongs of his prima facie burden.

1. Plaintiff's Disability

a. Federal Law

Under the ADA and Rehabilitation Act, Plaintiff may prove that he is disabled by showing one of the following: (1) that he has a physical impairment that substantially limits one or more of his major life activities; (2) that he has a record of such an impairment; or (3) that he is regarded as having such an impairment. 42 U.S.C. § 12102(2). As described below, Plaintiff is disabled under all three prongs of this definition. Indeed, there is no genuine issue of material fact which could necessitate a trial on the question of whether Plaintiff is disabled.

As in *Dipol*, Plaintiff Adam Simms is disabled under the third prong of this definition because the Department regarded him as substantially limited in the major life activity of working. In *Dipol*, this Court concluded that the plaintiff was disabled under this prong because the New York City Transit Authority ("NYCTA") placed work restrictions on him which severely limited the types and amount of work he could perform at the NYCTA. *See Dipol*, 999 F.Supp. at 313-

14.[21] Similarly, here, the New York City Fire Department has prohibited Plaintiff from performing any assignments that could possibly involve firefighting duties; this prohibition has effectively restricted him from all but clerical assignments.[22] As a result, like the plaintiff in *Dipol* who had his work reduced because of his restrictions, Plaintiff's hours have been cut back substantially since he no longer receives any overtime. Thus, the Department regards Plaintiff as substantially limited from a broad class of jobs within his field, namely all active duty firefighting jobs.[23]

Plaintiff is also disabled under the third prong of the ADA definition because, even though he uses insulin, the Department regards him as substantially limited in the major life activity of maintaining stable blood sugar levels. At their depositions, the Department's physicians testified that they do not

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[21] In *Dipol*, the Court explained that:

> [the] restrictions effectively precluded [Dipol] from not only his particular job, but also a wide range of other jobs within the NYCTA. . . . This Court finds that the NYCTA regarded Plaintiff as having a physical impairment which foreclosed employment opportunities in Plaintiff's field. In effect, the NYCTA believed that Plaintiff was significantly restricted in his ability to perform a broad range of jobs. Accordingly, Plaintiff has shown that he is a disabled person under the ADA.

Dipol, 999 F.Supp. at 314.

[22] *See* Deposition of Michael Vecchi, NYC Fire Department Chief of Staff, Exhibit G, at 29-31.

[23] *See* Kelly Deposition, Exhibit E, at 105-06. Indeed, the Department's Chief Medical Officer testified at her deposition that she did not believe that Plaintiff could even perform assignments at the Department that do not require actual fire suppression work, including instructor positions in the Department's training unit. *See id.* As described in Plaintiff's Supplemental Complaint, the Department has denied Plaintiff an instructor position in its training unit, even though this position does not involve fire suppression duties.

believe that insulin-dependent diabetics can serve as full duty firefighters because of their risk for hypoglycemia and other severe medical complications.[24]

In addition, Plaintiff is disabled under the first and second prongs of the ADA definition of disability because he has an impairment that substantially limits him in the performance of a major life activity and because he has a record of such an impairment. Plaintiff is disabled under the first prong of this definition even under the new interpretation of disability recently established in *Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139 (1999), in which the Supreme Court ruled that the determination of whether the individual is disabled under the first prong of the ADA definition requires consideration of the individual's impairment in its mitigated, or medicated, state.[25] Even under this new ruling, Plaintiff is disabled under the first prong of the ADA definition because he is substantially limited in the manner in which he performs the major life activity of maintaining stable blood sugar levels.[26] As he described in his deposition, in order to perform this activity, Plaintiff must follow an extremely disciplined regimen of coordinating his

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[24] *See* Kelly Deposition, Exhibit E, at 87; Prezant Deposition, Exhibit F, at 57-58 (Deputy Chief Medical Officer testified that, in putting together Department's diabetes exclusion policy, he was influenced by articles describing "a lot of end organ problems relating to diabetes, peripheral vascular disease, eye disturbance, renal failure, cardiac disease").

[25] Since *Sutton* involved a close textual interpretation of the ADA, it is not clear that this new ruling applies to the Rehabilitation Act. Indeed, Plaintiff contends that it does not, since the Supreme Court's decision focused on the preamble language to the ADA, which is not contained in the Rehabilitation Act, and the Rehabilitation Act covers federal employers and employers receiving federal funds which Congress may have intended to hold to a higher standard than other employers. However, Plaintiff need not elaborate further on this argument at this time since it appears unlikely that this distinction will have an impact on the case at bar.

[26] In the ADA regulations, an impaired individual is "substantially limited" if he is either: "(i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, *manner* or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." *Dipol*, 999 F. Supp. at 313 n.3 (citing 29 C.F.R. § 1630.2(j)(1)) (emphasis added).

diet and medication.[27] Plaintiff is also disabled under the second prong of the ADA definition because he has a record of this impairment.[28]

b. State Law

As described in the previous section, Plaintiff is clearly disabled under the ADA and Rehabilitation Act, and the Department will not be able to raise a genuine issue of material fact which could necessitate a trial on this question. Even the Supreme Court's new restrictive interpretation of the ADA definition of disability in *Sutton v. United Airlines* does not affect this conclusion; nothing in the decision affects this Court's previous analysis in *Dipol* that a similarly situated plaintiff was disabled because his employer regarded him as so impaired that it restricted him from performing all job duties that contained any element of risk.[29]

However, in the event that this Court finds *Sutton* to affect its analysis in *Dipol* and to render Plaintiff in the case at bar not disabled under the ADA, Plaintiff contends that he is still disabled, and thus eligible to sue the Department for placing him on light duty, because he is without question disabled under the New York Human Rights Law. The state law definition of disability is worded

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[27] *See* Simms Deposition, Exhibit A, at 67-70.

[28] It is not clear from the Supreme Court's ruling in *Sutton* whether the "record of" prong of the definition of disability also requires consideration of the impairment in its mitigated state. Whether or not it does, Plaintiff qualifies as disabled under this prong because, without his insulin, he has a record of an impairment that substantially limits him from maintaining his blood sugar levels, and, with his insulin, he has a record of an impairment that substantially limits him in the manner in which he does maintain his blood sugar levels.

[29] *Sutton* stands simply for the proposition that the determination of whether an individual is disabled under the first prong of the ADA definition requires consideration of the individual's impairment in its mitigated state. The ruling does not apply to the interpretation of the "regarded as" prong of the ADA definition. However, even if it did, it would not affect this Court's analysis in *Dipol*, nor would it affect this case because the Department regards Plaintiff as substantially limited even with his use of medication.

entirely differently from the ADA definition and cannot in any way be interpreted to be affected by the Supreme Court's interpretation of the ADA in *Sutton.*

Whereas the first prong of the ADA definition defines disability as an impairment that substantially interferes with the performance of a major life activity, the first prong of the New York Human Rights Law definition defines disability as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function *or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.*" New York Human Rights Law, N.Y. Exec. Law § 292 (21) (emphasis added).[30] Plaintiff is clearly disabled under this definition, since his diabetes is a physiological condition that is demonstrable by medically accepted clinical or laboratory diagnostic techniques.

Even if the Supreme Court's decision in *Sutton* were to apply to the interpretation of the New York law,[31] it would logically only apply to the first part of this definition, meaning that mitigating measures would have to be taken into account in determining whether a condition prevents the exercise of a normal

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[30] The complete definition of disability under the New York law is as follows:

> The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

New York Human Rights Law, N.Y. Exec. Law § 292 (21).

bodily function. Logically, however, the *Sutton* decision could have no impact on the portion of the New York definition of disability that allows a plaintiff to demonstrate disability on the basis of a condition that is demonstrable by medically accepted clinical or laboratory diagnostic techniques.

Thus, Plaintiff is clearly disabled under New York Human Rights Law, and the Department will not be able to raise any genuine issue of material fact necessitating a trial on this threshold issue.

2. Plaintiff's Qualifications

Plaintiff Adam Simms is clearly qualified for the fully duty position from which his employer removed him. In *Dipol*, the Court concluded that the plaintiff was qualified for his job based on its observations that "Plaintiff has been a diabetic for forty years and has been in control of his diabetes. Moreover, Plaintiff has never experienced any problems on the job related to his diabetes." *Dipol*, 999 F. Supp. at 315. Similarly, Plaintiff Adam Simms is in full control of his diabetes and, during the seven years from the time he was diagnosed with diabetes until the time the Department removed him from full duty, he ably performed his full duty job and had no difficulty whatsoever in his job attributable to his diabetes.[32]

Arguably, Plaintiff Simms is even better qualified for his position than the plaintiff in *Dipol*, since the record in *Dipol* indicated that the plaintiff experienced

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[31] Although New York antidiscrimination law generally follows federal law in the absence of any reason to distinguish the state and federal law, New York law is not bound by federal law when there are clear differences in the text of the state and federal law.

[32] By comparison, the Court concluded that Dipol was able to perform his job safely based on just one and a half years in which worked for the NYCTA before his job duties were restricted.

some medical problems related to his diabetes[33]; in contrast, Plaintiff Simms has never experienced any medical complications from his diabetes and is in excellent control of his diabetes.[34]

The Department's physicians removed Plaintiff from full duty simply because he has diabetes and have kept him off full duty simply because he uses insulin. As described earlier, the Department's physicians have no evidence that Plaintiff has experienced any difficulties at work from his diabetic condition.[35] Thus, the most the Department will be able to show in defense of its action will be to raise speculations that Plaintiff's condition could pose a safety risk in the future. However, such speculation is not sufficient, as a matter of law, to justify removing Plaintiff from full duty. *See Dipol*, 999 F.Supp. at 315 ("Although Defendant speculates as to possible safety concerns posed by Plaintiff's condition, no evidence has been produced demonstrating that Plaintiff's diabetes rendered him incapable of performing his job responsibilities").

Since Plaintiff has proven that he is disabled and that he is qualified for his job as a full duty firefighter, and since there is no dispute that he suffered

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[33] The NYCTA learned that Dipol had diabetes during an examination in which he was observed to be "in poor control of his diabetes and . . . there was a problem with his vision." *Dipol*, 999 F. Supp. at 311.

[34] *See* Deposition Transcript of Dr. Andrew Drexler ("Drexler Deposition"), Exhibit B, at at 12 ("Mr. Simms diabetes has been under excellent control"); Simms Deposition, Exhibit A, at 80 ("I haven't experienced any [diabetes-related] complications due to the amount of effort, education and time, planning and strategy that I have been putting into my health").

[35] As in *Dipol*, the "restrictions were placed on Plaintiff by Defendant without any knowledge of whether he displayed any symptoms which have and/or might affect his job performance." *Dipol*, 999 F.Supp. at 311. Also as in *Dipol*, the Defendant's "physicians never inquired of Plaintiff's supervisors as to whether Plaintiff displayed any symptoms in his job performance demonstrating that he was not qualified." *Id*. at 315.

adverse action--being removed from full duty--because of his diabetes, Plaintiff has established a prima facie case of disability discrimination.

B. DEFENDANT'S CONSIDERATION OF PLAINTIFF'S CONDITION

As the Court explained in *Dipol*, "if a plaintiff establishes a prima facie case, the defendant then has the burden of rebutting the inference that it improperly considered the plaintiff's disability." 999 F. Supp. at 315. Again, as with the prima facie case, the facts of this case are practically identical to *Dipol*, and the Department cannot show that its action against Plaintiff was proper.

As in *Dipol*, the Department's physicians in this case claim "that Plaintiff may have posed a safety risk and possibly a direct threat to others, thereby necessitating [their] precautionary measures of restricting Plaintiff's work duties." *Dipol*, 999 F.Supp. at 315. However, these speculations failed to create a genuine issue of material fact in *Dipol*. Based upon the same justifications offered by the NYCTA as the Department has in this case, the Court in *Dipol* held that the NYCTA had not created a triable issue on the question of whether the plaintiff posed a "direct threat" if allowed to continue in his full duties. The Court noted that "the only information on which Defendant based its action is the speculative conclusions of [Defendant's doctors] and the possibility that there may be future manifestations of symptoms of diabetes and complications related thereto." *Dipol*, 999 F. Supp. at 316. Since the doctors in *Dipol* did not make their decision based upon an assessment of the plaintiff's actual job performance--indeed they were not aware that the plaintiff had ever had any diabetes-related problems on the job in the past--the Court concluded that the

NYCTA had failed in its duty to perform an individualized assessment of Plaintiff's condition to determine whether it posed a direct threat. *See id.*

Similarly in this case, the Department's doctors placed Plaintiff Simms on light duty, not based on any difficulties he had experienced on the job, but based solely upon their learning that Plaintiff has diabetes and takes medication for it and their speculation that anyone who must take medication for diabetes poses a direct threat as a full duty firefighter. The doctors' medical examinations of Plaintiff consisted primarily of asking him whether he still took medication to control his diabetes. This is not the individualized assessment required by law. When they did take blood from Plaintiff, they found him to be in control of his blood sugar. They did not even speak to Plaintiff's physician, Dr. Drexler, or request Plaintiff's medical records.[36] They did have, however, Dr. Drexler's answers to their questions about Plaintiff's condition, which explained why Plaintiff's diabetes would not affect his ability to perform his job safely.[37]

As in *Dipol*, the evidence shows that Plaintiff clearly does not pose a direct threat to himself or others. Plaintiff has not experienced any diabetes-related problems on the job requiring that he be permanently removed from full duty status. "Mere speculation is insufficient to allow Defendant to take the adverse action it took in this case. . . . Plaintiff [has been] severely restricted in his duties which was not warranted in light of his condition and satisfactory performance."

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[36] *See* Kelly Deposition, Exhibit E, at 80-81; Drexler Deposition, Exhibit B, at 20.

[37] *See* Exhibits 2-4 to Drexler Deposition, Exhibit B.

Dipol, 999 F. Supp. at 317. As in *Dipol*, the Department cannot raise a genuine issue of material fact which would necessitate a trial on this defense.

IV. CONCLUSION

Because Plaintiff has proven that he was discriminated against on the basis of his disability, Plaintiff is entitled to a judgment as a matter of law on his discrimination claims.[38] Plaintiff respectfully requests that the Court enter partial summary judgment on his behalf and order the Department to reinstate him to full duty status immediately.

Respectfully submitted,

ADAM SIMMS,
By his attorneys,

/s/ Shannon Liss-Riordan
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DATE: November 29, 1999

[38] The only issues remaining are Plaintiff's retaliation claims and damages on Plaintiff's discrimination claims.

Certificate of Service

This is to certify that on November 29, 1999, a copy of the foregoing document was served upon Kevin Smith, Assistant Corporation Counsel of the City of New York, 100 Church Street, Room 2-169, New York, NY 10007, by overnight delivery.

/s/ Shannon Liss-Riordan

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Shannon Liss-Riordan, Esq.