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 OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

For the reasons set forth more fully below, the Court should grant Plaintiff Adam Simms' Motion for Partial Summary Judgment (hereinafter "Plaintiff's Motion") and deny Defendants' Cross-Motion for Summary Judgment. In their Opposition and Cross-Motion (hereinafter "Opposition"), Defendants argue that Plaintiff is not disabled, that Plaintiff is not a qualified individual with a disability, and that Plaintiff has not suffered an adverse employment action.[1]

On the contrary, Plaintiff, who uses insulin to treat his diabetes mellitus, is clearly disabled. Although Plaintiff recognizes that, in the wake of *Sutton v. United Airlines, Inc.*, 119 S.Ct. 2139 (1999), reasonable minds could differ on the

[1] Defendants also argue that the Court should dismiss a state law claim for intentional infliction of emotional distress. However, this section of Defendants' Motion is superfluous since Plaintiff has not raised such a claim.

issue of whether Plaintiff is disabled under the federal Americans With Disabilities Act ("ADA"), there is no question that Plaintiff is disabled under the New York Human Rights Law ("NYHRL"), which defines disability differently from the ADA and which has specifically been interpreted by the New York Court of Appeals and the Second Circuit to provide broader coverage than the ADA.

As for the issue of whether Plaintiff is a qualified individual with a disability, nothing in Defendants' Opposition undermines Plaintiff's argument that, under the reasoning of *Dipol v. The New York City Transit Authority*, 999 F.Supp. 309 (E.D. N.Y. 1998), Plaintiff has proven himself, over the course of seven years as a diabetic full duty firefighter, to be qualified for his job. In their Opposition, Defendants offer no evidence that Plaintiff's diabetes has interfered with his ability to perform his job safely. Instead, while acknowledging that Plaintiff is "an incredibly well controlled diabetic,"[2] they offer merely speculation that his condition may cause problems in the future.

Finally, Defendants' argument that Plaintiff has not suffered an adverse employment action is patently incorrect. There is no dispute that Plaintiff was removed from full duty status because of his diabetes. His transfer to light duty has caused him to suffer a significant change in and reduction of his responsibilities in addition to loss of overtime.

I. PLAINTIFF IS DISABLED

As set forth in Plaintiff's Motion for Partial Summary Judgment, Plaintiff contends that he is disabled under the ADA because, as in *Dipol*, Defendants

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[2] *See* Deposition of Dr. David Prezant ("Prezant Deposition"), Exhibit F to Plaintiff's Motion, at 76.

regarded him as so disabled that they have prohibited him from performing any job duties at the Fire Department other than menial clerical tasks. Thus, the Department has not allowed him to work in any position for which his training has prepared him, even an instructor position training other firefighters, a job assignment that does not involve actual fire suppression.[3] This Court's reasoning in *Dipol* is not in conflict in any way with the Supreme Court's later ruling in *Sutton*, and Plaintiff contends that, even after *Sutton*, he continues to be disabled under the ADA.[4]

However, recognizing the impact *Sutton* has made in this area of the law, Plaintiff urges the Court that it is not necessary to engage in a detailed analysis of whether and how *Sutton* might affect this case. This is because Plaintiff is indisputably disabled under the New York Human Rights Law.

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[3] *See* Exhibit H to Plaintiff's Motion. Plaintiff also contends that he is disabled under the first and second prongs of the ADA's definition of disability because he suffers an impairment that substantially limits a major life activity and because he has a record of such an impairment. In their Opposition, Defendants argue that Plaintiff's diabetes does not qualify as such an impairment because maintaining stable blood sugar levels is not a major life activity. Defendants contend that maintaining stable blood sugar levels is not a major life activity because it is an activity that is only important to Plaintiff and not to others; Defendants seek to analogize this activity to "everyday mobility," an activity the Second Circuit rejected as a major life activity in *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998). However, this argument fails because Defendants' assertion on which it is based is incorrect. Defendants claim that "maintaining stable blood sugar levels is not a major life activity engaged in by people in general. It is an activity that is engaged in only by diabetics like plaintiff." Defendants' Opposition, at 11. In fact, maintaining stable blood sugar levels is an activity that non-diabetics perform continuously at every moment throughout the day without thinking about it. Diabetics like Plaintiff, on the other hand, are substantially limited in the performance of this activity because they must accomplish it through a completely different manner, namely through keeping close track of their food consumption and injecting insulin. The activity of maintaining stable blood sugar levels is thus far more comparable to the major life activity of breathing than to the non-major life activity of "everyday mobility," which was a failed attempt by the plaintiff in *Reeves* to create a construct specifically tailored to his impairment. Like breathing, maintaining stable blood sugar levels is an activity that unimpaired people perform continuously and automatically and which, if not performed, will lead to death.

In their Opposition, Defendants incorrectly state that claims under the NYHRL are subject to the same analysis as claims under the ADA. As described in Plaintiff's Motion, the NYHRL employs a definition of disability that is notably distinct from the one used in the ADA. Whereas the first prong of the ADA defines disability as an impairment that substantially interferes with the performance of a major life activity, the first prong of the NYHRL 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).

Both the New York Court of Appeals and the Second Circuit have specifically noted that this state law definition of disability is broader than the federal law. In *State Division of Human Rights v. Xerox Corp.*, 491 N.Y.S.2d 106 (1985), the New York Court of Appeals explained that "in New York, the term 'disability' is more broadly defined" than it is under federal law and held that a grossly obese person was disabled under state law, even if not under federal law, since "the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future." *Id.* at 109. In *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2d Cir. 1998), the Second Circuit similarly

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[4] At best for Defendants, there may be a fact issue as to whether Plaintiff is disabled under the ADA. However, Defendants have not established as a matter of law that Plaintiff is not

held that an individual with agoraphobia, a diagnosable illness, was disabled under the NYHRL even though he could not show that this impairment interfered with a major life activity and thus that he was not disabled under the ADA. *See also Franklin v. Consolidated Edison Company of New York, Inc.*, 1999 WL 796170, *10, 14 (S.D. N.Y. Sept. 30, 1999) (definition of disability is broader under NYHRL than under ADA); *Hazeldine v. Beverage Media, Ltd.*, 954 F.Supp. 697, 706 (S.D. N.Y. 1997) ("an individual can be disabled under the [NYHRL] if his or her impairment is demonstrable by medically accepted techniques; it is not required that the impairment substantially limit that individual's normal activities").

Thus, under the NYHRL, the Court should grant summary judgment for Plaintiff on the issue of whether he is disabled since there is no dispute in this case that Plaintiff is diagnosed with diabetes.[5]

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covered by the federal law and therefore are not entitled to summary judgment on this ground.

[5] In a footnote, Defendants argue that Plaintiff's NYHRL claim should be dismissed for failure to file a notice of claim, which New York law requires for tort actions brought against a municipality. However, as Defendants themselves point out, the more recent cases to address this issue have held that this requirement does not apply to NYHRL claims. *See Dortz v. The City of New York*, 904 F.Supp. 127, 141 (S.D. N.Y. 1995) ("New York courts have limited the application of General Municipal Law 50-e to tort actions. Since both federal and New York State courts do not regard an action brought under Executive Law 296 to be a tort action, such claims are not subject to the notice of claim requirements of General Municipal Law 50-e"); *Morrison v. NYPD*, 214 A.D.2d 394 (1st Dep't 1995) ("Actions against a municipality to recover damages for unlawful discriminatory practices brought under Executive Law 296 are not subject to the notice of claim requirement set down in General Municipal Law 50-e for tort claims involving personal injury, wrongful death or property damage"); *Alaimo v. New York City Dept. of Sanitation*, 203 A.D.2d 501 (2d Dep't 1994); *Davis v. New York City Dept. of Mental Health*, 1994 WL 669494, *1 (S.D. N.Y. Nov. 29, 1994); *Majors v. New York City Dept. of Sanitation*, 1993 WL 336949, *2 (S.D. N.Y. Sept. 3, 1993); *Peart v. City of New York*, 1991 WL 206315, *4 (S.D. N.Y. Sept. 27, 1991). However, in the event that this Court decides that such a notice of claim should have been filed, the Court should allow Plaintiff the opportunity to file the notice (or apply with the state Supreme Court to file the notice) now, since this issue is merely a technicality and Defendants have suffered no prejudice as a result of Plaintiff's failure to file a notice of claim. *See Air Line Pilots Association v. Continental Airlines*,125 F.3d 120, 129 (2d Cir. 1997) ("rules of procedure should be liberally construed . . . mere technicalities should not stand in the way of consideration of a case on its merits") (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988)).

II. PLAINTIFF PROVED BY HIS PERFORMANCE OVER SEVEN YEARS THAT HE IS A QUALIFIED INDIVIDUAL WITH A DISABILITY

In their Opposition, Defendants contend that Plaintiff should not be granted summary judgment, and they instead should be, because Plaintiff is not a qualified individual with a disability. In support of this argument, they point to the report of their expert physician, Dr. Kenneth Hupart, who states that it is his opinion that, because Plaintiff treats his diabetes with insulin, he should not be fighting fires on the front line.

Defendants' argument is essentially that, because Plaintiff is a diabetic who uses insulin, he is automatically not qualified to work as a full duty firefighter. This argument contains no individualized assessment of Plaintiff's abilities and physical condition and therefore confirms Plaintiff's argument that Defendants violated the law by enforcing against him the Fire Department's automatic exclusion from full duty for diabetics who use medication.[6]

As set forth in Plaintiff's Motion, Plaintiff has shown that he can safely perform the essential functions of his job through the fact that, in seven years during which Plaintiff had diabetes and worked full duty, he experienced no diabetes-related difficulties in his work. Defendants have produced no evidence in opposition to Plaintiff's Motion to show that Plaintiff has in the past had any diabetes-related difficulties on the job.[7] Their proffered evidence is therefore

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[6] Defendants make abundantly clear in their Opposition that they are enforcing a *per se* exclusion by their statement that "[i]t would be irresponsible for the Fire Department to assign Plaintiff to [full duty] so long as he is insulin dependent." Defendants' Opposition, at 18.

[7] Defendants claim that Plaintiff mischaracterizes Dr. Kelly's testimony on the issue of whether Plaintiff experienced any difficulties related to his diabetes while on full duty. Plaintiff, in his Motion, merely pointed out correctly that Dr. Kelly's testimony does not provide any evidence that Plaintiff *did* experience any such difficulties. When asked whether Plaintiff's injury history,

limited to their expert's speculation that Plaintiff may have difficulties relating to his diabetes in the future. Such speculation is not sufficient for Defendants to meet their burden of showing that Plaintiff constitutes a direct threat to himself or others if allowed to work once again as a full duty fire lieutenant. *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").

Moreover, Defendants' expert's analysis of why Plaintiff may pose a threat in the future as a full duty firefighter fails to address Dr. Drexler's solution to the potential hazard Plaintiff's diabetes might otherwise cause. As Dr. Drexler explained in his deposition, he has prescribed for Plaintiff a type of insulin, Humalog, that can be taken after eating. Thus, the Department's fear that Plaintiff may take his insulin and then be called away quickly to respond to a fire before he has had the opportunity to eat—which could produce a hypoglycemic episode—will not happen while Plaintiff is on this regimen. Since Plaintiff can take his insulin *after* eating, he will not experience the possibility of taking insulin (which lowers blood sugar) without the corresponding food (which is necessary to bring blood sugar back up). *See* Drexler Deposition, Exhibit B to Plaintiff's Motion, at 19.[8]

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which Dr. Kelly testified was typical of firefighters, was related to Plaintiff's diabetes, Dr. Kelly replied that she did not know. *See* Kelly Deposition, Exhibit E to Plaintiff's Motion, at 43-49.

[8] In the event, however, that Plaintiff eats, but is then called away quickly before he has the opportunity to take his insulin, no short term danger exists. As Plaintiff explained in his deposition, the use of insulin is necessary for his long-term health, but occasionally missing a dose will not have any short-term repercussions.

Dr. Hupart's report simply states that Plaintiff, like all diabetics who use insulin, is at risk for hypoglycemia, which would be a dangerous condition for Plaintiff if he were in a fire. This observation, however, does not take into account any individualized assessment of Plaintiff's particular condition and medical regimen, as required by law.[9]

Dr. Hupart's report also contains the conclusory speculation that Plaintiff may become hypoglycemic in a fire but, because of the length of time he is required to be in the fire and because of his breathing apparatus, he may be unable to treat the hypoglycemia, by consuming a small amount of sugar. This hypothetical is unsupported by evidence that such a situation has occurred or would occur in which Plaintiff would not have the opportunity to place a small piece of food in his mouth, such as a piece of candy, in time for it to prevent a dangerous hypoglycemic episode from occurring.[10] Instead, it is merely

[9] Dr. Hupart claims that Plaintiff's medical records show several instances of low blood sugar episodes in the past, and Defendants infer that such episodes indicate that Plaintiff could suffer from such instances in the future. *See* Report of Dr. Hupart, Exhibit H to Defendants' Opposition, at 1-2; Defendants' Opposition, at 17. However, there is no evidence that these events ever occurred while Plaintiff has been on duty as a firefighter. On the contrary, Plaintiff, who keeps careful track of his blood sugar, has never experienced low blood sugar while at work. *See* Simms Deposition, Exhibit A to Plaintiff's Motion, at 67; Exhibit 2 to Drexler Deposition, Exhibit B to Plaintiff's Motion. The fact that he may have experienced low blood sugar at times outside of work, when he is free to be somewhat less strict in his food and medicine regimen and occasionally to experiment trying new foods for which he is uncertain of the exact dose of insulin they will require, is not evidence that he has ever been, or may ever be, hypoglycemic while at work, where he would be careful only to eat known foods for which he knows the appropriate insulin dosage.

[10] Although Dr. Kelly and Dr. Prezant attempted to represent in their depositions that a firefighter may spend an entire 24 hour shift responding to a single emergency without any break whatsoever for food, it is not believable that any firefighter would be subjected to, or expected to withstand, such a situation. Defendants have certainly not produced any evidence that such a situation has ever occurred.

Defendants have attached as Exhibit I to their Opposition a Declaration by Daniel Nigro, Chief of Operations for the Fire Department, which also makes a conclusory statement that firefighters may spend an entire 24 hour shift responding to a single emergency. In his Declaration, Chief Nigro makes other assertions regarding the essential functions of a full duty

speculation and is not sufficient to satisfy Defendants' burden of showing that Plaintiff in particular, and not just the average diabetic, would pose a direct threat as a full duty firefighter. Again, Plaintiff's seven year track record in which he ably performed his job as a diabetic full duty firefighter shows that Defendants can present no more than speculation as to the risk Plaintiff could pose.

Because Defendants have failed to provide evidence that Plaintiff has ever experienced hypoglycemia while on the job in the past or that Plaintiff, despite this after-eating insulin regimen that Dr. Drexler has put him on while at work, is at real risk for experiencing hypoglycemia on the job in the future, Defendants have failed to create a genuine issue for trial regarding whether Plaintiff's diabetes poses a direct threat to himself or others.[11]

Since Plaintiff has presented undisputed evidence that he is qualified to perform the essential functions of his job, and Defendants' evidence fails to create a genuine factual question as to whether Plaintiff in particular—and not

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firefighting position. Plaintiff notes that the Declaration states that Chief Nigro has only held his current position since October 1999, which was after the close of the regular discovery period in this case. In addition, Chief Nigro attests to issues that Plaintiff noticed in a Fed.R.Civ.P. 30(b)(6) Notice of Deposition. For these reasons, Plaintiff requests that Chief Nigro's Declaration be stricken, since he was apparently not available to be deposed in his present position and on these issues during the regular discovery period and since Defendants failed to produce him in response to Plaintiff's Fed.R.Civ.P. 30(b)(6) Notice of Deposition. In the alternative, Plaintiff requests that, in the event that this case goes to trial, Plaintiff be permitted to depose Chief Nigro prior to trial.

[11] Even if Defendants have produced evidence of a slightly increased risk of harm, that would still not be sufficient to defeat Plaintiff's Motion for Partial Summary Judgment. As this Court explained in *Dipol*, "[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.

diabetics in general—poses a direct threat as a full duty firefighter, Plaintiff is entitled to summary judgment on his discrimination claim.[12]

Even if the Court were to reject Plaintiff's assertion that he has shown, without meaningful contradiction, that he can safely engage in full duty fire suppression activities, the Court should still grant Plaintiff's Motion for Partial Summary Judgment on the ground that Defendants denied Plaintiff an instructor position in the Department's training unit because of his diabetes, even though that position entails no fire suppression duties. This position is primarily a classroom assignment involving little or no field work whatsoever. In fact, at least one other firefighter has served in this position while on light duty and has not engaged in any hands-on field work in this assignment since he has been on light duty. *See* Deposition of Joseph Callan, Exhibit A to this Opposition, at 19-22. Since this position does not require a firefighter to engage in fire suppression activities, or even participate in field simulation exercises, Dr. Kelly and Dr. Prezant's concerns regarding Plaintiff's condition would not apply. Nevertheless, according to Defendants' counsel, Defendants denied Plaintiff this position

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[12] In the alternative, Defendants have at best created a factual issue as to whether Plaintiff is a qualified individual with a disability, in which case the Court would have to deny both parties' summary judgment motions. Defendants clearly have not established as a matter of law that Plaintiff is not qualified for the job of full duty firefighter. Such a result would mean that employers could automatically disqualify diabetics as posing too much danger without any individualized assessment of their condition and capabilities, a result in patent conflict with the law. *See, e.g., Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999) (abandoning *per se* rule that diabetics can be automatically excluded from safety-sensitive positions—in this case, police officer—and holding that individualized assessment must be made of their qualifications to perform the job safely). Plaintiff has produced evidence that he can safely perform the job of a full duty firefighter from two leading endocrinologists who testified that they understand—what is Defendants' main contention regarding the essential function a firefighter's job—that a firefighter may be called unexpectedly and on a moment's notice to enter dangerous situations in which lives are at stake. In the face of this expert evidence and Plaintiff's successful seven-year track record as a diabetic full duty firefighter, Defendants' Motion for Partial Summary Judgment must be denied.

because of his diabetes. *See* Exhibit H. to Plaintiff's Motion. Thus, Plaintiff is clearly entitled to summary judgment on this point.

III. PLAINTIFF HAS SUFFERED AN ADVERSE EMPLOYMENT ACTION

Finally, Defendants contend that Plaintiff's discrimination claims must fail because he has not suffered an adverse employment action. However, even the authorities cited by Defendants on this point belie the inaccuracy of this argument.

As described in Plaintiff's Motion, being removed from full duty and being placed on permanent light duty status has significantly diminished Plaintiff's responsibilities and career prospects. Whereas Plaintiff previously held significant responsibility as an officer in a number of engine and ladder companies, since being removed from full duty, Plaintiff's responsibilities have been limited to a mundane desk job in which he sorts mail.[13] Defendants' actions have effectively halted Plaintiff's promising and successful career as an officer in the New York City Fire Department.

Defendants argue that no adverse action occurred because Plaintiff has kept his title and base pay rate. Defendants do not refute, however, Plaintiff's testimony that he has lost substantial overtime as a result of his restriction to light duty.[14] In any event, it is not necessary for a plaintiff to suffer economic loss in

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[13] *See* Simms Deposition, Exhibit A to Plaintiff's Motion, at 43-44.

[14] Defendants claim that Plaintiff makes only a conclusory statement that he has lost overtime. Since the amount of damages is not at issue in the pending summary judgment motions, it is not necessary for Plaintiff to provide specific evidence regarding the amount of overtime he has lost at this stage of the proceedings. He has testified that, while on full duty, he received overtime (he estimates overtime income of $13,000 in 1997), and that on light duty there is no overtime available. *See* Simms Deposition, Exhibit A to Plaintiff's Motion, at 132-33. This

order to be subject to an adverse employment action. Defendants themselves state that "[a] materially adverse change might be indicated by . . . significantly diminished material responsibilities" or "diminished opportunities for professional growth." Defendants' Opposition, at 22. In *De Silva v. New York City Transit Authority*, the court pointed out that an adverse employment action does not require that a plaintiff suffer a decrease in salary, 1999 WL 1288683 (E.D. N.Y. Nov. 17, 1999) (citing *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) ("adverse action" is a flexible notion not defined "solely in terms of job termination or reduced wages and benefits . . . less flagrant reprisals by employers may indeed be adverse"). *See also De La Cruz v. New York City Human Resources Admin. Dept. of Social Services*, 82 F.3d 16, 21 (2d Cir. 1996) ("the protections provided by Title VII are not limited to instances of discrimination in pecuniary emoluments"); *Sacay v. The Research Foundation of the City University of New York*, 44 F.Supp.2d 505, 509 (E.D. N.Y. 1999) ("A lateral transfer involving similar pay and benefits but a change in responsibilities can be found to represent an adverse employment action").

Defendants have offered no evidence to create a genuine issue of material fact as to whether Plaintiff's removal from full duty has not diminished his responsibilities or deprived him of overtime. The Court should therefore grant Plaintiff summary judgment on the issue of whether he suffered an adverse employment action and deny Defendants' motion on this ground.

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evidence is sufficient to show that he has suffered economic losses due to Defendants' action against him.

IV. CONCLUSION

For the reasons described above, the Court should grant Plaintiff's Motion for Partial Summary Judgment and deny Defendants' Cross-Motion for Partial Summary Judgment. Defendants have failed to produce evidence creating a material issue of genuine fact on any of the issues they have raised in their Opposition, namely whether Plaintiff is disabled, whether he is qualified for the job of a full duty firefighter, and whether he suffered an adverse employment action by being placed on permanent light duty.

Respectfully submitted,

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DATE: January 14, 2000

Certificate of Service

This is to certify that on January 14, 2000, 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.

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Shannon Liss-Riordan, Esq.