

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ADAM SIMMS,)
Plaintiff)
v.)
CITY OF NEW YORK, FIRE) CV-98-7988-SJ
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)

**PLAINTIFF’S LOCAL RULE 56.1 STATEMENT OF UNDISPUTED FACTS AND
PLAINTIFF’S DISPUTES WITH DEFENDANT’S STATEMENT OF
UNDISPUTED FACTS**

**I PLAINTIFF’S LOCAL RULE 56.1 STATEMENT OF UNDISPUTED
FACTS**

Pursuant to Rule 56.1 of the Local Civil Rules of this Court, Plaintiff Adam Simms submits that there does not exist any genuine issue to be tried with respect to the matters set forth below and that Plaintiff is therefore entitled to summary judgment as a matter of law with respect to his disability discrimination claims.

1. Plaintiff Adam Simms has worked for the New York City Fire Department since 1989.¹
2. Plaintiff began with the Department as a firefighter and was promoted in 1996 to fire lieutenant.²

¹ See Deposition Transcript of Adam Simms (“Simms Deposition”), Exhibit A, at 16.

² 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.

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.

4. 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.³

5. In 1991, Plaintiff was diagnosed with diabetes mellitus.⁴

6. 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 management.

7. Plaintiff has never experienced any diabetes-related medical problems or any difficulty performing his job duties because of his diabetes.⁵

8. 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.⁶

9. Upon learning that Plaintiff has diabetes, the Department immediately removed him from full duty and placed him in a light duty desk job.⁷

³ See Deposition Transcript of Dr. Kerry Kelly ("Kelly Deposition"), Exhibit E, at 49.

⁴ See Simms Deposition, Exhibit A, at 44.

⁵ See Deposition Transcript of Dr. Andrew Drexler ("Drexler Deposition"), Exhibit B, 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").

⁶ 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.

10. 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.⁸

11. 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 medication to control their diabetes.⁹

12. 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.¹⁰

⁷ 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.

⁸ 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.

⁹ 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.").

¹⁰ 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

13. During the seven years that elapsed from the time Plaintiff was first diagnosed with diabetes to the time the Department removed him from full duty status, Plaintiff experienced no diabetes-related problems on the job.

14. 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 duty firefighting responsibilities.¹¹

15. 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.¹²

16. Dr. Daniel Lorber, another endocrinologist expert in diabetes management, affirms that Plaintiff is perfectly capable of safely performing the responsibilities of a full duty firefighter.¹³

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.

¹¹ 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 severe hypoglycemia or hyperglycemia. See *id.* at 97.

¹² 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.

¹³ 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").

17. 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.¹⁴

18. Instead, the Department's physicians relied entirely on the Department's diabetes policy, which automatically excludes from full duty any firefighter who uses medication to control his diabetes.

19. This policy was formulated entirely by the Department's physicians, who are not specialists in diabetes care or endocrinology.¹⁵

20. 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.¹⁶

21. 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.

22. 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.¹⁷

23. Even more significantly, Plaintiff has become depressed and has experienced feeling a loss of self-worth from being relegated to a mundane desk

¹⁴ See Kelly Deposition, Exhibit E, at 80-81.

¹⁵ 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.

¹⁶ See Kelly Deposition, Exhibit E, at 80.

¹⁷ See Simms Deposition, Exhibit A, at 132-33.

job sorting mail, which has halted his promising and successful career as an officer for the New York City Fire Department.¹⁸

24. Plaintiff has sought counseling from a clinical psychologist for the severe emotional distress and loss 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.¹⁹

II PLAINTIFF'S DISPUTES WITH DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts contains a number of assertions with which Plaintiff disagrees. Although not all of these factual assertions are relevant to the pending motions, Plaintiff wishes to dispute, for the record, the following assertions²⁰:

20. Defendants assert that Plaintiff's use of insulin is associated with the risks of hypoglycemia. However, as Dr. Drexler testified, Plaintiff is at "quite low" risk of hypoglycemia. See Drexler Deposition, Exhibit B to Plaintiff's Motion, at 18.

21. Defendants state that Plaintiff has retained the "attendant benefits" of a lieutenant in the Fire Department. However, as Plaintiff testified, his removal from full duty has not only significantly diminished his responsibilities, it has also cost him considerable overtime. See Simms Deposition, Exhibit A to Plaintiff's Motion, at 132-33.

¹⁸ See *id.* at 43-44.

¹⁹ See *id.* at 135, 139.

²⁰ These points are numbered in accordance with the numbering from Defendants' Rule 56.1 Statement of Undisputed Facts.

22. Plaintiff did testify that high blood sugar could be detrimental to his health by causing eye problems, circulatory problems, or kidney problems. However, these problems are possible long-term complications that may occur only in the event that Plaintiff does not properly manage his diabetes. They are not current problems, and they are not problems likely to occur anytime soon, given Plaintiff's careful management of his disease. See Simms Deposition, Exhibit A to Plaintiff's Motion, at 80; Drexler Deposition, Exhibit B to Plaintiff's Motion, at 12; Report of Dr. Lorber, Exhibit C to Plaintiff's Motion.

32. Defendants state that Plaintiff performs his insulin and diet-planning regimen four times a day, for a total of one hour, while he is at work for the Fire Department. However, Plaintiff did not testify that he spends a full one hour on this regimen while at work. Instead, depending on his shift, some repetitions of this regimen may occur while he is at home, leaving less than an hour that he spends on it at work.

36. Defendants have presented no more than conclusory evidence in support of their claim that an emergency call may last an entire 24 hours.

38. Dr. Kelly and Dr. Prezant's decision that Plaintiff's condition is incompatible with full duty firefighting is based on the Department's *per se* policy of prohibiting diabetics from working full duty, not from any individualized assessment of Plaintiff's condition. See Kelly Deposition, Exhibit E to Plaintiff's Motion, at 81-82; Prezant Deposition, Exhibit F to Plaintiff's Motion, at 41-42.

46. As described in a letter from Dr. Drexler to the Department, the release of adrenaline, which would occur during an emergency, would raise blood sugar, which would counteract the effects of hypoglycemia. See Exhibit 3

to Drexler Deposition, Exhibit B to Plaintiff's Motion. Dr. Hupart himself acknowledges this in his report. See Dr. Hupart Report, Exhibit H to Defendants' Opposition, at 3.

49. Dr. Drexler explained that, due to Plaintiff's conscientiousness in his diabetes management and due to the type of insulin he uses, his risk of hypoglycemia is "quite low." See Drexler Deposition, Exhibit B to Plaintiff's Motion, at 18.

Respectfully submitted,

ADAM SIMMS,
By his attorneys,

Harold L. Lichten
Shannon Liss-Riordan
PYLE, ROME & LICHTEN, P.C.
90 Canal Street, 4th Floor
Boston, MA 02114
(617) 367-7200

Daniel Engelstein
Veronica Villanueva
Levy, Ratner & Behroozi, P.C.
80 Eighth Avenue, 8th Floor
New York, NY 10011
(212) 627-8100

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.

Shannon Liss-Riordan, Esq.