State of Connecticut
Commission on Human Rights and Opportunities
Office of Public Hearings

Commission on Human Rights and Opportunities ex rel. Mark Demmerle, Complainant

CHRO No. 1730020

v.

New England Stair Co., Respondent

January 3, 2019

Ruling on Respondent's Motion to Dismiss for Lack of Jurisdiction

Procedural History

On July 13, 2016, the complainant filed an affidavit of illegal discriminatory practice with the commission. In his affidavit, he claims that the respondent retaliated against him, in violation of General Statutes § 46a-60 (a) (4), [1] for filing an employment discrimination complaint against the respondent on November 4, 2015, alleging age discrimination and harassment. The alleged act of retaliation was in the form of an email which the complainant received on March 23, 2016, and found threatening. In the email, the respondent's owner said:

> "Mark, What in god's name are you trying to do anyway? I am astonished by your uncalled for and adversarial actions against me and my very small family company. Are you that unemployable in any architectural field that you must resort to extortion? Do you have any idea whatsoever of the extent of the damage that you did to my small family company? Lord willing, after you have had your fun ... I am going to sue you for malicious prosecution and bring in some people who know your global history far better than I. Yours Truly, Bill Sylvia, Senior VP Sales". Complaint ¶ 4.

On July 24, 2017, the commission transferred the case to this office directly for a public hearing pursuant to the early legal intervention program. On September 27, 2016, respondent filed an answer denying any discriminatory or retaliatory conduct.

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[1] General § 46a-60 (a) (4) provides in relevant part that it is a discriminatory practice under the Connecticut Fair Employment Practices Act "[f]or any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84."

Effective October 1, 2017, General Statutes § 46a-60 (a) (4) was recodified as § 46a-60 (b) (4). When the present complaint was filed, the statutory citation was § 46a-60 (a) (4). As there was no substantive change to the provision, and to avoid confusion, the references herein will be to the citation in effect when the complaint was filed. *Angelsea Productions, Inc. v. Commission on Human Rights & Opportunities*, 236 Conn. 681, 683, n. 1 (1996).

The complaint also alleges violations of General Statutes § 46a-58 (a), if applicable, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (ADEA).

Pending before the tribunal is the respondent's motion to dismiss the complaint, arising from an alleged act of employment retaliation against the complainant for exercising his protected right to complain to others about discriminatory employment practices of the respondent. By motion filed on December 19, 2018, the respondent moves to dismiss the complaint on the ground that the Office of Public Hearings is deprived of subject matter jurisdiction over post-employment actions of a former employer with respect to a former employee, and because the adverse action complained of involves the exercise of protected constitutional or statutory rights and privileges of the respondent, the complainant's former employer. In response, the commission filed an objection and memorandum of law in support of the objection.

The respondent states, and the commission does not dispute, that the respondent employed the complainant for a brief period from June 15, 2015, through September 10, 2015; the complainant separated from his employment voluntarily; and the employment discrimination complaint against the respondent filed by the complainant on November 4, 2015, was dismissed by the commission on July 28, 2017. Hence, the circumstances of the termination of the employment relationship and the merits and disposition of the complaint against the respondent alleging age discrimination and harassment are not at issue here.

Legal Standard

Section 44a-54-88a (d) (1) and (d) (2) of the Regulations of Connecticut State Agencies [2] authorizes the presiding referee to dismiss a complaint for, among other reasons, lack of subject matter jurisdiction, or for failure to state a legally cognizable cause of action.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Sousa v. Sousa,* 322 Conn. 757, 770 (2016). "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong ... A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it." (Citations omitted. Internal quotation marks omitted.) *Henry F. Raab Connecticut Inc. v. J.W. Fisher Co.*, 183 Conn. 108, 111-12 (1981). "When the subject matter jurisdiction of the adjudicatory body is challenged, cognizance of it must be taken and the matter passed on before it can move one further step in the cause, as any movement is necessarily the exercise of jurisdiction .... The issue is not whether a [complainant] will ultimately prevail but whether the [complainant] is entitled to offer evidence to support the claims." (Citations omitted; internal quotation marks omitted.) *Horn v. Department of Correction*, 2012 WL 1576049, *1, OPH/WBR No. 2011-156 (March 27, 2012) (Ruling on motion to dismiss).

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action, "essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the [tribunal]." (Citation omitted; internal quotation marks omitted.) *Caruso v. Bridgeport*, 285 Conn 608, 627 (2008); *Gurliacci v. Mayer,* 218 Conn. 531, 544-45 (1991); *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622 (1983).

[2] Section 46a-54-88a (d) (1) and (2) of the Regulations of Connecticut State Agencies, in relevant part, provides that: (d) "The presiding officer may, on his or her own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant or the commission: ... (1) Fails to establish jurisdiction [or] (2) Fails to state a claim for which relief can be granted ...."

The moving party bears a substantial burden to sustain a motion to dismiss. A motion to dismiss admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corp.*, 44 Conn. App. 446, 451-52, cert. denied, 241 Conn. 906 (1997). In evaluating the motion, every presumption in favor of subject matter jurisdiction should be indulged. *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 266, 777 (2001); *Kelly v. Albertsen*, 114 Conn. App. 600, 606 (2009). The complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant; every reasonable inference is to be drawn in his favor. *Conboy v. State,* 292 Conn. 642, 651 (2009); *May v. Coffey,* 291 Conn. 106, 108–09 (2009); *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998).

A similarly deferential standard applies where the legal sufficiency of a complaint is challenged on a motion to dismiss, or strike, a claim for failure to state a cause of action. The legal standard on consideration of the legal sufficiency of a complaint to state a claim upon which relief can be granted is a familiar one. The sufficiency of the allegations of any complaint to state a legally cognizable claim is tested by the facts provable under the allegations of the pleading being challenged. *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498 (2003); *Poach v. Doctor's Associates, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV 0740233906S (September 22, 2008) (2008 WL 4634559, *1-2); *Commission on Human Rights & Opportunities ex rel. Perri v. Peluso*, 2008 WL 323662, CHRO No. 0750113 (January 11, 2008). In determining the legal sufficiency of the complaint, all well-pleaded facts, and those facts necessarily implied from the allegations, are deemed to be admitted and they must be construed most favorably to the complainant. *Violano* v. *Fernandez*, 280 Conn. 310, 318 (2006); *Murillo v. Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 476 (2003); *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580 (1997). If any facts alleged in the complaint would support a cause of action, the complaint is not vulnerable to be stricken (dismissed). *Sullivan v. Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117-18 (2006); *Bouchard* v. *People's Bank,* 219 Conn. 465, 471-72 (1991).

Discussion

The gravamen of the respondent's motion to dismiss is that the protections of the Connecticut Fair Employment Practices Act, including its anti-retaliation provisions, do not extend to any post-employment actions, in this case retaliation in the post-employment context, thus depriving the tribunal of subject matter jurisdiction. The respondent also appears to argue that application of § 46a-60 (a) (4), which prohibits employment retaliation, would, under the circumstance of the case, abridge the respondent's constitutionally protected right to free speech, also depriving the tribunal of jurisdiction.

Retaliation in the post-employment context

In its motion and memorandum in support of the dismissal motion, respondent argues that the present charge does not involve workplace retaliation because the complainant was no longer an employee of respondent when he filed his discrimination complaint on November 4, 2015 (a protected activity), or when he received the allegedly retaliatory email from the respondent on March 23, 2016 (the adverse action), and therefore the commission, and by extension this tribunal, lacks jurisdiction to hear and determine the complaint. According to the argument, once an employee is no longer in its employ, an employer no longer has any duty under § 46a-60 (a) (4) ***not*** to retaliate against a former employee for engaging in protected conduct, which in the broad sense may include complaining about discrimination, opposing discrimination, or participating in other proceedings opposing prohibited discriminatory

employment practices.

In its opposition to the motion, the commission correctly points out that under *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006), the scope of the anti-retaliation provisions of Title VII – and by extension its state counterpart, General Statutes § 46a-60 (a) (4) – are not limited to discriminatory actions that affect the terms and conditions of a plaintiff's employment. Id., 68. *Burlington Northern* held that to prevail on a claim for retaliation, a plaintiff must show that "a reasonable employee would have found the challenged action materially adverse" which means that the action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Internal quotation marks omitted; citations omitted.) Id., 68. See, e.g., *Farrar v. Stratford*, 537 F. Supp.2d 332, 355-56 (D. Conn. 2008); *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 583-84 (2012); *Perez v. State Judicial Department*, Superior Court, judicial district of Windham, Docket number WWMCV 156009136 (January 16, 2018) (2018 WL 793980, *23); *Tosado v. State of Connecticut Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, *5-6).

"[T]he means by which an employer can retaliate against an employee are not limited to discriminatory actions that affect the terms and conditions of employment.... Instead, retaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct ... such as hiring, firing, change in benefits, or reassignment .... Again, the plaintiff must show that [his] employer's actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, 537 F. Supp.2d 332, 355-56 (D. Conn. 2008); *Tosado v. State of Connecticut, Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, supra, 2007 WL 969392.

Under *Burlington Northern*, in the retaliation context a materially adverse action may be an action that has no tangible effect on employment, and may take place outside of work, as long as it might dissuade a reasonable person from engaging in a protected activity. The Supreme Court observed that prohibiting only employment related actions would not achieve the goal of avoiding retaliation because "an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Burlington Northern & Santa Fe Railway Co. v. White,* supra, 63. And although the substantive anti-discrimination provisions seek elimination of discrimination that affects employment opportunities because of an employee's protected status, the anti-retaliation provisions seek to secure that objective "by preventing an employer from interfering (through retaliation) in a materially adverse way with an employee's efforts" to enforce the civil rights law's basic guarantees. Id., 63-64.

The *Burlington Northern* court further noted: "We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids uncertainties and unfair discrepancies that can plague a judicial effort to dertemine a plaintiff's unusual subjective feelings." Id., *68*-69.

In the *Burlington Northern* decision, the Supreme Court built upon *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), in which the court concluded that Title VII's anti-retaliation provision should be read broadly to encompass former employees. In analyzing the term "adverse action" on a claim for retaliation, the *Burlington Northern* court reasoned that "[a] provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence such a limited construction would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely '[m]aintaining unfettered access

to statutory remedial mechanisms." (quoting *Robinson v. Shell Oil Co.*, supra, 519 U.S. 337.) *Burlington Northern & Santa Fe Railway Co. v. White,* supra, 64.

The holding in *Burlington Northern* has been applied to our state anti-retaliation laws in determining the scope of what constituted an adverse action in both the employment retaliation context; e.g., *Perez v. State Judicial Department*, Superior Court, judicial district of Windham, supra, Docket number WWMCV 2018 WL 793980; *Tosado v. State of Connecticut Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, supra, 2007 WL 969392; *Commission on Human Rights & Opportunities ex rel. Ellis v. ACE International*, 2010 WL 4388343 (CHRO No. 0620372) (September 13, 2010) (Ruling on motion to dismiss); and in the whistleblower protection context. *Eagen v. Commission on Human Rights & Opportunities*, supra, 135 Conn. App. 563, 583-84 (2012); *Kisala v. Malecky*, Superior Court, judicial district of New Britain, Docket No. HHBCV 1350157605 (October 7, 2013) (2013 WL 584793, *6-7); *Department of Mental Health & Addiction Services v. Saeedi,* Superior Court, judicial district of New Britain, Docket No. CV 1060043333 (February 25, 2011) (2011 WL 695512, *13), aff'd in part, rev'd in part on other grounds sub nom. *Commissioner of Mental Health & Addiction Services v. Saeedi*, 143 Conn. App. 839 (2013).

Contrary to the respondent's argument, former employers have been found to have engaged in actionable retaliation against their former employees in a variety of contexts. For example, in *Robinson v. Shell Oil Co.*, supra, 519 U.S. 337, the plaintiff alleged that while his discrimination complaint was pending against his former employer, the former employer gave him a negative reference in retaliation for his having availed himself of Title VII's protections by filing the discrimination complaint. The *Robinson* court held that the term "employees" in § 704 (a) of Title VII includes former employees as well as current employees. Id., 340–46. The Supreme Court explained that to restrict the statutory antidiscrimination provision to current employees would undermine Title VII's effectiveness "by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining...." Id., 346. The United States Court of Appeals for the Second Circuit also has found retaliatory conduct where a former employer provides a negative job reference. *Jute v. Hamilton Sundstrand Corp.*, 420 F. 3d 166, 168 (2d Cir. 2005).

Recognizing that "a lawsuit ... may be used by an employer as a powerful instrument of coercion or retaliation and such suits can create a chilling effect on the pursuit of discrimination complaints"; *EEOC v. Outback Steakhouse of Florida, Inc.,* 75 F. Supp. 2d 756, 757-58 (N.D. Ohio 1999); some courts have held that an employer's post-employment filing against complainants in discrimination cases can constitute retaliation under federal anti-retaliation laws. See, e.g., *Durham Life Insurance Co. v. Evans,* 166 F. 3d 139, 157 (3d Cir. 1999); *Arthur Young & Co. v. Sutherland,* 631 A. 2d 354, 367 (D.C Ct. Appeals 1993).

Courts also have found meritless opposition to a former employee's application for unemployment benefits to constitute retaliatory conduct. *Liverpool v. Con-Way, Inc.*, et al., (E.D.N.Y. 2009) not reported in F. Supp. 2d, 2009 WL 1362965, *11-12. In a former employee's whistleblower retaliation claim under General Statutes § 4–61dd, our Appellate Court held that a state university's adverse personnel action, in withholding and failing to return a former employee's personal items to him following termination, was in retaliation for the former employee's whistleblowing activities. *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 579-81 (2012).

In addressing the issue of retaliatory conduct against a former employee, the Supreme Judicial Court of Massachusetts, in *Psy–Ed Corp. v. Klein,* 459 Mass. 697, 699, 947 N.E.2d 520 (2011), after looking to federal law for guidance, held that a former employer may be held liable under Mass. Gen. Laws c. 151B,

§ 4(4) and (4A) of the Massachusetts antidiscrimination law "for retaliatory or interfering conduct that occurs after the employment relationship has terminated."

Former employers thus may be found to have engaged in actionable retaliation against their former employees in a variety of contexts in which reasonable employees, or former employees, might be dissuaded from engaging in protected activity if they knew their employer, or former employer, would take adverse action against them after separation from employment.

Simply put, the narrow interpretation urged by the respondent that would limit the scope of § 46a-60 (a) (4) employment-related actions within the employer-employee relationship is not reflected in the decided case law and "would not deter the many forms that effective retaliation can take.... [and] would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely '[m]aintaining unfettered access to statutory remedial mechanisms." *Burlington Northern & Santa Fe Railway Co. v. White,* supra, 548 U.S. 64.

Based on the foregoing, the tribunal is not deprived of subject matter jurisdiction in the present retaliation claim involving a post-employment action of the respondent, a former employer, with respect to the complainant, a former employee. Without making any determination about the merits, the issue of whether the subject email from the respondent was in retaliation for the complainant's having filed an employment discrimination action is for the finder of fact. See, e.g., *Eagen v. Commission on Human Rights & Opportunities*, supra, 135 Conn. App. 587-88.

First Amendment

The respondent argues that the commission lacks subject matter jurisdiction in this retaliation claim because the respondent's email statement to the complainant is entitled to constitutional protection as free speech under the First Amendment, [3] which he asserts operates as a jurisdictional bar, rendering the adverse action complained of beyond the reach of General Statutes § 46a-60 (a) (4) and preventing the tribunal from hearing the claim.

Stated somewhat differently, in its motion the respondent characterizes the respondent's First Amendment interest as a blanket immunity from employment discrimination or retaliation claims. However, the respondent has cited no cases wherein an employer has been immune from liability, on First Amendment free speech grounds, from a basic civil rights statute protecting employees from retaliation when they oppose or complain about discrimination in the workplace. In its motion and memorandum, the respondent provides no guidance on any of the factors to be taken into consideration in determining whether, and if so how, the statement made to the complainant in the allegedly retaliatory email at issue, and the circumstances under which it was made, are of a character that would trump the protection, to which the complainant is otherwise entitled, against discriminatory retaliation in employment under our civil rights laws. "The protections afforded by the First Amendment are not absolute ...." *State v. DeLoreto,* 265 Conn. 145, 152-53 (2003).

Under our atate anti-discrimination laws, employers have been held liable for the conduct of their employees, including for discriminatory comments. See, e.g., *Patino v. Birken Manufacturing Co.*, Superior Court, judicial district of Hartford, Docket No. CV054016120S (May 15, 2009) (2009 WL 1624365, *13-14), aff'd, 304 Conn. 679 (2012).

[3] As adopted by the Due Process Clause of the Fourteenth Amendment.

In *Burnell v. Gates Rubber Co.,* 647 F. 3d 704, 709-10 (7th Cir. 2011), as part of the complainant's prima facie retaliation claim under Title VII of Civil Rights Act, using the direct method of proof, evidence that the employer's plant manager stated that the complainant, an African American employee, was "playing the race card" was sufficient for the employee to survive summary judgment on his claim of retaliatory discharge for opposing instances of real and perceived racial discrimination.

And in *Abbott v. Crown Motor Co.*, 348 F. 3d 537, 544 (6th Cir. 2003), the court ruled that summary judgment for the employer on a retaliation claim was improper where the evidence showed that the employee's supervisor had said that he would "get back at those who had supported the charge of discrimination" and that the employee was being discharged "because he had put his nose in other people's business" by testifying in support of coworker's discrimination allegations.

Notably, in its answer the respondent did not plead a First Amendment interest as an affirmative defense to an otherwise cognizable claim. In the absence of more complete analysis and support for the assertion that constitutional protections apply to the subject email, I discern no constitutional implications that would warrant dismissal on jurisdictional grounds because the adverse action complained of involves the exercise of protected constitutional or statutory rights and privileges of the respondent, the complainant's former employer. I conclude therefore that the tribunal has jurisdiction in the matter and the authority to consider and determine the retaliation claim on the merits.

The Complaint States a Claim of Retaliation

Although the respondent articulates the primary basis of the motion as one of subject matter jurisdiction, it also proposes that the complaint fails to state a cause of action under § 46a-60 (a) (4) and the ADEA, because the complainant did not allege all of the elements of a prima facie case of retaliation. In particular, the respondent argues that no causal connection between the protected activity and the adverse action can be established because the adverse responsive action did not follow the protected activity closely enough in time.

Similar to claims for discrimination, claims for retaliation under § 46a-60 (a) (4) are analyzed under the same three-step burden-shifting framework established for Title II cases In *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). See, e.g., *Darden v. Stratford,* 420 F. Supp.2d 36, 45-46 (D. Conn 2006); *Samakaab v. Department of Social Services*, 178 Conn. App. 52, 62 (2017). To prove a claim of employment retaliation under § 46a-60 (a) (4), a complainant must establish a prima facie case of discrimination, or, as in the present matter, of retaliation. *Feliciano v. AutoZone, Inc.,* 316 Conn. 65, 73-74 (2015); *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 705 (2006). If the complainant is able to establish a prima facie case, then once that is done, the burden of production shifts to the employer to provide a legitimate nondiscriminatory reason for the employment action. Once the employer does so, then the complainant must prove that the employer's proffered legitimate reason(s) were not the true reasons, but were a pretext for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981); *Feliciano v. Autozone, Inc.* supra; *Jacobs v. General Electric Co.*, 275 Conn. 395, 401 (2005); *Board of Education of Norwalk v. Commission on Human Rights & Opportunities,* 266 Conn. 492, 510 (2003).

Under the *McDonnell Douglas* pretext model, in order to establish a prima facie case of employment retaliation, an employee must show that (1) he was engaged in statutorily protected activity; (2) the

employer was aware of the activity; (3) the employee suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Phadnis v. Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 94-95 (2017); *Marasco v. Connecticut Regional Vocational-Technical School System, 153 Conn. App. 146*, 163-64 (2014), cert. denied 316 Conn. 901; *Ayantola v. Board of Trustees of Technical Colleges,* 116 Conn. App. 531, 537-38 (2014).

It should be noted, in connection with the fourth prima facie prong of a retaliation claim, that temporal proximity between the protected activity and the adverse action only provides circumstantial evidence of causation. It is not a separate element of the prima facie case. There will be cases in which a complainant can demonstrate a causal connection between the protected activity and the adverse action directly. There may be cases in which a causal connection can be shown circumstantially, despite a substantial lag in time.

The commission correctly points out that inherent in the respondent's argument is a fact-specific question. In *Ayantola v. Board of Trustees*, supra, 533-34, in discussing the elements of a retaliation case, the court noted that "[t]he inquiry into whether temporal proximity establishes causation is factual in nature."

I conclude that the facts alleged, and those necessarily implied from the allegation, are sufficient to state a cause of action which is provable under the allegations of the complaint, and the complainant is entitled to offer evidence on the subject of his claim.

Conclusion and Order

For the reasons set forth herein, the present charge of unlawful retaliation falls within the general class of complaints which the tribunal is statutorily authorized to adjudicate, and states a legally cognizable cause of action for employment retaliation which the tribunal has jurisdiction to hear and determine as a matter of law and of fact. Having determined that the tribunal has jurisdiction to adjudicate the matter, the respondent's motion to dismiss the complaint is **DENIED**.

It is so ordered this 3rd day of January 2019.

Elissa T. Wright

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