

XXXX v United Health Services Hospitals, Inc.

2004 NY Slip Op 30131(U)

July 6, 2004

Supreme Court, Broome County

Docket Number: 0002982/0021

Judge: Jeffrey A. Tait

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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York, on the 14th day of May, 2004

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

XXXX,

Plaintiff,

DECISION AND ORDER

vs.

Index No. 2002-0298
RJI No. 2002-1582-M

UNITED HEALTH SERVICES HOSPITALS,
INC., a New York Corporation,

Defendant.

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on defendant United Health Services Hospitals, Inc.'s ("UHS") motion for summary judgment seeking dismissal of plaintiff's complaint.

The complaint alleges that a male registered nurse¹ employed by UHS and assigned to care for the plaintiff sexually assaulted her after she underwent a diagnostic procedure under anaesthesia at the hospital. The plaintiff claims that UHS was, "negligent in the hiring, training, supervision, and monitoring of the . . . male nurse." Plaintiff's complaint alleges that UHS, "knew or should have known that the said male nurse had engaged in similar sexual assaults on a patient or patients, and had a propensity to commit such assaults upon female patients receiving medical procedures at its facilities."²

In support of its motion, UHS submits the affidavit of its attorney, its Vice-President of Human Resources, and a registered nurse employed by another area hospital as a Clinical Nurse Specialist, together with several exhibits, including the pleadings, discovery material, the deposition transcripts of the plaintiff, a friend of the plaintiff (who was also an employee of the defendant), the defendant's Vice President of Human Resources, the defendant's Director of Employee Relations Human Development, and a Nurse Manager employed by the defendant. In opposition, the plaintiff submits her attorney's affirmation and attaches all or a portion of the

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He is not a party to this action.

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There is no evidence or information before the Court that indicates or shows that the male nurse engaged in any similar sexual assaults on any other patient or patients. Rather, in support of and in opposition to this motion, both parties focus on the male nurse's conduct with co-workers.

deposition transcripts of the aforementioned individuals, which were submitted with the defendant's moving papers. UHS also submitted the reply affidavit of its Vice-President of Human Resources regarding the background check conducted by the defendant prior to hiring the employee in question. Both parties have submitted multiple legal memoranda.

Essentially, UHS seeks summary judgment dismissing the plaintiff's complaint on the basis that there is no issue of fact because, as a matter of law, the acts of the employee were beyond the scope of his employment and not in the furtherance of the employer's business and UHS had no notice or knowledge that the employee would, might, or had a propensity to commit the acts alleged. Plaintiff alleges that there were previous acts committed by the employee that, by exercising reasonable diligence, would have lead UHS to recognize the employee's likelihood to commit such acts in the future. Plaintiff contends that the failure of UHS to discover these prior acts before hiring the employee in question and/or the failure to recognize his propensity to commit these acts based on acts he committed while employed by UHS constitutes negligence for which UHS must be held liable.

For UHS to prevail in its motion for summary judgment, it must establish that there are no material issues of fact requiring a trial of plaintiff's claim. Once UHS makes a prima facie showing in that regard, plaintiff need only show that fact issues exist in order to mandate a trial of those fact issues and a denial of this motion.

The issue on this motion is not what the employee in question did to the plaintiff.³ It is beyond dispute and agreed to by the parties that the conduct in question here, namely, sexual

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For purposes of this motion it is assumed that the allegations in that regard are true.

assault of a patient in the care of a hospital, is intolerable and reprehensible. The parties likewise would agree that the individual who engaged in such conduct is liable to the victim for all damages sustained. The parties disagree, however, whether UHS is liable for that conduct. Thus, the inquiry is whether there is a fact issue for trial regarding whether UHS knew or should have known of its employee's propensity to commit the alleged acts and should be held liable for the alleged conduct of its employee. The law is well settled that an employer is only liable for the tortious acts of its employee if those acts are undertaken or committed in furtherance of the employer's business and within the scope of the employee's employment (*see N.X. v. Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *see also Judith M. v. Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; *Riviello v. Waldron*, 47 NY2d 297, 304 [1979]). The courts have made it clear that a sexual assault is not in furtherance of or within the scope of hospital business or employment (*see Cherry v. Utica Dialysis Ctr.*, ___ Misc2d ___, 2003 NY Slip Op 51525, *2 [Sup Ct, Kings County, Dec. 24, 2003], citing *Sisters of Charity Hosp.*, 93 NY2d 932; *Mataxas v. North Shore Univ. Hosp.*, 211 AD2d 762 [2d Dept 1995]; *Nicolette T. v. Hospital for Joint Diseases/Orthopaedic Inst.*, 198 AD2d 54 [1993]; *Cornell v. State of New York*, 46 NY2d 1032 [1979], *affg* 60 AD2d 714 [1977]). However, an individual claiming employer liability for such conduct by an employee can still prevail if he or she can show that the employer knew or should have known of the employee's propensity or likelihood to engage in such acts (*see Sisters of Charity Hosp.*, 93 NY2d at 933-934; *Utica Dialysis Ctr.*, ___ Misc2d ___, *2; *North Shore Univ. Hosp.*, 211 AD2d at 763). This basis of liability is often referred to as negligent hiring or

negligent retention (*see id.*).⁴

Plaintiff cites *Kladstrup v. Westfall Health Care Ctr., Inc.* (183 Misc2d 11 [Sup Ct, Monroe County, Oct. 1, 1999]) for the proposition that UHS has the burden of showing that the employee, “had no history of, or propensity for, sexual misconduct” (*see id.* at 14).⁵ However, in making that statement, the Court in *Kladstrup* is only referencing what the defendant moving party itself claimed its motion papers established. As a general principle, the more accurate statement is that the moving party has the burden of establishing that a reasonable investigation or reasonable supervision would not have revealed any history of or propensity for sexual misconduct. Consequently, the application of *Kladstrup* to this case is limited.

The submittals of the parties raise the following three areas for evaluation regarding the existence or lack of a fact issue: 1) Is there a fact issue regarding the adequacy of the background check performed by UHS prior to hiring the employee in question. A corollary issue is whether, even if there is a fact issue regarding the adequacy of the background check, an

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Another potential basis for liability is where the alleged improper conduct occurred in view of other employees of the defendant (*see Cabrini*, 97 NY2d at 247). However, there is no allegation that the conduct complained of in this case took place in the presence of other employees and accordingly there is no basis for liability under the analysis of *Cabrini* (*see id.*). A thorough analysis of *Cabrini* and related cases can be found in *Fogg v. Bd. of Commrs of the New Hyde Park Fire Dist.* (___ Misc2d ___, 2003 NY Slip Op 51246 [Dist Ct, Nassau County, Aug. 11, 2003]).

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The *Kladstrup* case involved a nurse’s aide, while this case involves a registered nurse licensed by the State of New York. Upon verification that the employee in this case was duly licensed, UHS was entitled to make certain reasonable and logical assumptions about that employee’s background. One such assumption would be that the employee’s background did not contain any complaints that would lead the State of New York to revoke his license to work as a registered nurse.

adequate background check would have revealed anything that would have alerted UHS to the employee's propensity to commit a sexual assault on a sedated female patient; 2) Is a fact issue created by events and conduct occurring after UHS hired the employee in question as to whether UHS knew or should have known that the employee was likely to commit acts such as those complained of by the plaintiff; and 3) Is there a fact issue regarding whether it was negligent for UHS to allow a male employee to be alone with a sedated female patient.

THE BACKGROUND CHECK

In support of its motion, UHS has produced evidence that it conducted a proper and customary background check that revealed no information from which it could foresee that the employee would commit the acts alleged in the complaint. In her deposition testimony, the plaintiff refers to statements she alleges were made to her by an employee of the New York State "Board of Nursing." The memorandum of law submitted by the plaintiff's attorney also refers to a grand jury investigation of the employee. However, neither of these allegations is supported by evidence in admissible form. If reliable, these allegations could presumably have been supported by such evidence directly from the employee or representative of the "Board of Nursing" or the records of the grand jury investigation or the events leading to it. Simply put, the record shows that UHS conducted a background check of the employee in question and that there is no evidence that a more extensive background check would have revealed any information that would have generated concern regarding the employment of the employee in question or revealed a propensity or likelihood to commit a sexual assault. The alleged comment by the "Board of Health" employee and grand jury investigation are speculative at best and do not create a fact issue precluding summary judgment for the defendant.

Certain documents, including information from the employee's personnel file, were found to be privileged in decisions of the Justice previously assigned to this case. At oral argument of defendant's motion, plaintiff's counsel asserted that UHS waived the privilege by making reference to background checks that were or may have been conducted. The issue was whether UHS waived the previously asserted privilege by submitting the affidavit of its Vice President of Human Resources averring that proper background and reference checks were performed. This Court pointed out at oral argument that it had considered that issue and could not find any case law directly on point. After reading the memoranda of the parties submitted on this issue, there is no basis for finding that the privilege was waived. A key point here is that the actions taken by UHS prior to hiring the employee (as opposed to disclosure of the privileged documents) were open for discovery by the plaintiff. In fact, during discovery, some inquiry and answers to questions of that nature occurred. In her deposition, Maryann Palmetier, under questioning from plaintiff's attorney, described the hiring process in general and her actual role in hiring the employee here. Accordingly, while certain documents were privileged, there is nothing showing that plaintiff was precluded from asking defendant's employees about the hiring process in general or the specifics of hiring the employee at issue here. Consequently, it is this Court's view that the privilege was not waived.

THE WORKPLACE ACTIONS

As to the issue of whether UHS knew or should have known that its employee was prone or likely to commit the acts alleged, UHS avers that there is nothing in the employee's actions in the work place or subsequent to his hiring that would lead it to believe that he had a propensity to commit those acts. The plaintiff points out, and UHS does acknowledge, a complaint from

a co-worker that she was sexually harassed by the employee. According to UHS, that complaint was found to be “unsubstantiated.”

UHS asserts that the unsubstantiated complaint by the co-worker and other alleged incidents cited by the plaintiff are not enough to put it on notice that the employee in question might commit the acts alleged by the plaintiff. The plaintiff contends that the complaint from the employee’s co-worker alleging unwelcome physical touching and the anecdotal evidence that the employee would at times place his hands on the shoulders of co-workers and engage in conduct of that nature is sufficient to create a fact issue regarding whether UHS was on notice and knew or should have known that the employee would engage in the sexual assault complained of by the plaintiff.

The substance of the co-worker’s complaint against the employee at issue here is summarized in a memo from Madeline Wessels to Mike McNally, Vice President of Human Resources, which Ms. Wessels prepared after investigating the complaint and is attached to the moving papers as Exhibit “K.” The heart of the incident is related as follows:

She said she was talking to Craig . . . about her relationship with Glenn while taking out the trash. She accidentally bumped into the counter and she said to him, “I think I need to be checked for bruises.” He turned around and said, “What?” She repeated what she had said. She continued saying that she and Craig began talking about her grandmother and her experiences in the GI Lab. They were laughing and joking. Betsy said that her grandmother had commented to her how good looking her physician was. Betsy had seen him earlier that day and also thought he was good looking. One of the RNs came in (Vanessa . . .) and she and Craig went into the hallway. Betsy said she continued taking out the trash in one of the rooms that was not connected to the others. She went to get a red garbage bag and Craig was on the phone and he winked at her. Betsy went back to the private room. As she was putting the red bag in the can she heard him come up behind her. Betsy turned around and said to Craig, “I knew that was you” and turned around to finish putting the bag in the garbage can. Betsy said that Craig put his arms around her and started feeling her breasts and said where

are your bruises? He pushed his hand down her body and touched her genital area. Betsy said she looked down and could not believe what he had done.

According to records maintained by UHS, both the employee and the complaining co-employee were counseled regarding the inappropriateness of this behavior. In addition to the co-worker who made the complaint and the accused employee, seven other UHS employees were interviewed in connection with this alleged incident. The summaries of those interviews are attached to UHS's moving papers as Exhibit "K." None of those interviewed express the view or any concern that the employee is or may be prone to harassment. One individual interviewed was a female RN assigned to the same unit. When questioned about her observations the day of the incident, she stated that she did not see anything "that raised any concerns." When asked if she had been subjected to any inappropriate behavior by the employee, the summary states, "[S]he said that she hadn't nor had she heard that anyone else had either." There is nothing before the Court to indicate that the interviews were skewed or biased. The plaintiff has not come forward with any evidence to challenge this memo and the accuracy of the summaries of the interviews with these employees. Accordingly, the aforesaid summaries represent the information that UHS had regarding what it knew or should have known about the propensities of the employee in question based on the co-worker's complaint.

Taken in the light most favorable to the plaintiff, as it must be on this motion, the record establishes that UHS was aware of a claim of inappropriate behavior in the workplace with a fellow employee that could be fairly categorized as sexual harassment. That complaint, which depended on an evaluation of the credibility of both the complainant and the accused, could not be proven or substantiated. Based upon the evidence in the record and the history of the

employee in question, the Court finds that no fact issue exists as to whether UHS could or should have foreseen the conduct complained of here (which can only be characterized as a sexual assault and a criminal act) from the complaint of the employee's co-worker (which was found to be unsubstantiated after an investigation and for which the male employee was warned that such conduct was highly inappropriate and would result in disciplinary action if there were future complaints - even if found to be unsubstantiated) or the anecdotal evidence referred to earlier.

PROTOCOL WITH PATIENTS

In its Memorandum of Law submitted with its answering papers, the plaintiff contends that UHS,

“could easily have avoided this situation simply by enacting a regulation that only female staff attend female patients; or that a female must be present in all situations where female patients are sedated and vulnerable; or closely monitoring staff members such as {the male nurse} who had a history of inappropriate touching; or assigning staff such as {the male nurse} to treat same-sex patients only; at the very least, the hospital could have ensured that {the male nurse} was not left alone with sedated female patients.”

The plaintiff is, in essence, asserting that UHS failed to apply or adopt a standard regarding male nurse treatment or attendance to female patients. However, there is simply nothing in the record to support any theory of liability based on a departure from an industry standard or customary practice. To create a fact issue in this regard, the plaintiff must come forward with proof in admissible form of such an industry standard or customary practice. In *Diaz v. New York Downtown Hospital* (287 AD2d 357, 358 [1st Dept 2001]), the Court stated:

“Although noncompliance with such a customary practice or industry standard

may be evidence of negligence . . . {citations omitted}, the failure to abide by guidelines or recommendations that are not generally accepted standards in an industry will not suffice to raise an issue of fact as to a defendant's negligence" (*see id.*).

Here, the plaintiff does not even cite to an industry standard or customary practice. Rather, the plaintiff merely asserts, with no support from any source, that a different practice or procedure could have avoided the situation of which she complains, which is simply not enough to create a fact issue regarding the hospital's negligence.

For the foregoing reasons, the defendant's motion for summary judgment is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: July 6, 2004
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion dated April 5, 2004 together with attached:
 - Affirmation of John J. Pollock, Esq., dated April 5, 2004
 - Affidavit of Michael McNally sworn to April 2, 2004
 - Affidavit of Cheryl Meyer, RN, MS sworn to April 5, 2004

- Attorney Affirmation of Mary Jane Murphy dated April 28, 2004

- Reply Affidavit of Michael McNally sworn to May 12, 2004