

Butcher v John T. Mather Mem. Hosp.

2008 NY Slip Op 31125(U)

April 8, 2008

Supreme Court, Suffolk County

Docket Number: 0008286/2006

Judge: Robert W. Doyle

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT - STATE OF NEW YORK
PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-25-08
ADJ. DATE 12-20-07
Mot. Seq. # 001 - MD

-----X		
BARBARA BUTCHER,	:	BROWN & GROPPER, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	275 Seventh Avenue, 25 th Floor
	:	New York, New York 10001
- against -	:	
	:	PUTNEY, TWOMBLY, HALL & HIRSON
JOHN T. MATHER MEMORIAL HOSPITAL,	:	Attorneys for Defendant
	:	520 Fifth Avenue
Defendant.	:	New York, New York 10175
-----X		

Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10 - 16; Replying Affidavits and supporting papers 17 - 22; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint is denied.

Plaintiff commenced this action seeking damages for violation of Labor Law § 741(2) alleging that defendant John T. Mather Memorial Hospital ("Mather Hospital"), her employer, retaliated against her for complaining to supervisors about another nurse's erratic behavior and suspected diversion for his own use of medications prescribed to patients. Discovery has been completed and on June 28, 2007, the note of issue filed. Mather Hospital now moves for summary judgment dismissing the complaint on the grounds that plaintiff has failed to show that she engaged in activity protected by Labor Law § 741(2). Additionally, Mather Hospital argues that it had legitimate, non-retaliatory reasons for all actions taken against plaintiff, including her termination of employment. Mather Hospital maintains the evidence shows plaintiff was discharged for twice violating confidentiality and the Health Insurance Portability and Accountability Act of 1994 ("HIPAA") standards and for creating a disruptive and hostile environment on 3 South.

Plaintiff was employed Mather Hospital from April 6, 1987 to March 28, 2005 as a registered nurse, assigned to Unit 3 South ("3 South"). At the time of her termination, plaintiff's immediate supervisor was Doreen DiGiorgio ("DiGiorgio"), a registered nurse and Unit Nursing Coordinator ("UNC"). DiGiorgio reported to Loretta C. Wagner ("Wagner"), Associate Vice President for Nursing,

who in turn reported to Barbara Farruggia ("Farruggia"), Vice President for Patient Care. Kenneth Roberts ("Roberts") is the President of the Hospital.

Until the events leading to her termination, plaintiff received favorable performance appraisals. In March 2004, the last appraisal plaintiff received before she was terminated, DiGiorgio evaluated plaintiff. The performance appraisal consists of approximately 70 categories, with ratings of "Does Meet", "Does Not Meet" and "N/A". Plaintiff was rated "Does Meet" in every category which applied to her position (only two categories were "N/A"). In the section "Goals identified during last evaluation" DiGiorgio checked the box "Reviewed & met." In the "Collaborative Goals" section, DiGiorgio listed the following:

- (1) To continue to serve as a good role model and leader on the unit.
- (2) To share her knowledge & skills with all new employees.
- (3) To continue to work as a team player to enhance workflow on the unit.

In the "Evaluator Comments" section, DiGiorgio noted:

Barbara continues to give excellent care to her [patients]. She is a great resource for all her peers. Barbara often receives complimentary letters from former [patients] which is a positive experience for herself and also the unit as a whole. Barbara's use of sick time is excellent. Barbara is also very willing, works extra to help cover staffing shortages.

Additionally, in the lobby of Mather Hospital hangs a plaque recognizing plaintiff's "service excellence" for 2004. Similarly, during her deposition, DiGiorgio testified that plaintiff's performance appraisal for 2001-2002 included a comment that "Barbara continues to have excellent leadership skills." In addition, other supervisors/managers of Mather Hospital who were deposed gave plaintiff favorable reviews. For example, Anita Heege ("Heege"), Evening Night Administrator, testified that she supervised plaintiff for 20 to 25 years and "never had any problems with her", that plaintiff was a "good clinician" as well as a "good charge nurse" who provided "good patient care", and that based upon her observations, plaintiff was a "good supervisor to those subordinate to her." Diane Marotta ("Marotta"), Vice President of Human Resources, testified she knew plaintiff's "clinical skills were good. Excellent."

Plaintiff alleges that in April 2004, she began raising concerns to DiGiorgio that a co-worker, a Licensed Practical Nurse, William DeGraw,¹ was exhibiting dangerous, erratic behavior on the job consistent with an individual under the influence of alcohol or drugs which was placing the health and safety of patients in jeopardy. Plaintiff contends that in response, DiGiorgio warned her to "mind her own business."

In June 2004 plaintiff complained to DiGiorgio that DeGraw had left 3 South, returning one half hour later disoriented, with slurred speech and bloodshot eyes. In July 2004 plaintiff complained to DiGiorgio that DeGraw was having temper tantrums, altercations with aides and was leaving the floor frequently, returning with trembling hands and unable to organize his work. In August 2004 plaintiff

¹The co-worker is not identified in the complaint, however, the papers before the Court reveal that the co-worker's identity is William DeGraw.

complained to DiGiorgio that DeGraw was acting as though he was under the influence of drugs, was unable to concentrate on his work, had hand tremors and dilated eyes, and was placing patients at risk by causing them not to receive their medications in a timely fashion. In addition, plaintiff informed DiGiorgio that DeGraw had disclosed to her, in the presence of several staff members, that he was taking Lexapro and Xanax (identified in the papers as anti-depressant medications) and was under psychiatric care. According to plaintiff, on September 5, 2004 she was admonished by DiGiorgio for making complaints about DeGraw and again warned to “mind [her] own business.” Plaintiff contends that also in September, she attempted to put her concerns in writing, but DiGiorgio prevented her from doing so.

On September 26, 2004, DeGraw yelled at plaintiff in front of several staff members, prompting plaintiff to complain about DeGraw to Heege. Plaintiff informed Heege that she had been complaining to DiGiorgio for several months about her suspicions that DeGraw had a substance abuse problem which was placing the patients under his care in danger.

According to plaintiff, DiGiorgio dissuaded her from creating a written record, and informed plaintiff to stop writing unsafe staffing reports/incident reports, known as “HUMs” as such reports were “not going to do anything.” Specifically, on October 26, 2004 plaintiff maintains that she was questioned by DiGiorgio about writing too many HUMs and was told by DiGiorgio that “what happens on this floor stays on this floor” and that plaintiff should “close [her] eyes and walk away.”

On November 21, 2004, plaintiff became aware that narcotics were given to a comatose patient, and upon examining the patient’s chart, observed sloppy handwriting which appeared to read that nine milligrams out of a ten milligram vial of morphine had been wasted.² Plaintiff made a copy of the narcotics sheet to present to the administration of Mather Hospital. On November 23, 2004, plaintiff received a written warning for copying the narcotics sheet in violation of HIPAA. Thereafter, DiGiorgio did not schedule plaintiff for overtime, changed plaintiff’s vacation and days off, and removed plaintiff as the “in charge” nurse. Plaintiff maintains that these acts by DiGiorgio constitute retaliation in violation of Labor Law § 741(2).

On December 10, 2004, plaintiff met with Farrugia and Laurie Wagner, Assistant Vice President for Nursing, to address DeGraw, deficient patient care on 3 South, and DiGiorgio’s harassment and unlawful retaliation. Thereafter, on December 17, 2004, after almost 20 years of working on 3 South, plaintiff was involuntarily transferred and made a floating registered nurse (a registered nurse who is assigned where needed, rather than assigned to a specific unit), and replaced by a less experienced, less qualified registered nurse. It is plaintiff’s contention that this conduct by Mather Hospital also constituted unlawful retaliation in violation of Labor Law § 741(2).

According to plaintiff, she was unable to endure the stress of the ongoing retaliatory treatment and took medical leave at the direction of her personal physician. Upon her return to work on March 28, 2005, plaintiff was terminated. Plaintiff commenced this action against Mather Hospital for violations of

² As explained by the parties deposed, “waste” occurs when a medication is dropped or is otherwise not fit to give a patient. The protocol for a “waste” requires the nurse handling the medication to note the name and amount of the unusable drug on the narcotics sheet and properly dispose of the waste in front of a witness. Both the nurse and witnessing nurse are required to initial the narcotics sheet.

Labor Law § 741(2), seeking reinstatement as a registered nurse with full benefits and seniority, back pay and restoration of other benefits and lost remuneration, as well as costs and attorneys' fees.

Mather Hospital admits that plaintiff advised DiGiorgio about DeGraw's erratic behavior and taking prescription medications but maintains that such information was first brought to DiGiorgio's attention on August 27, 2004, not in April 2004. Mather Hospital alleges that on August 27, 2004, in response to plaintiff's information, Heege observed DeGraw and saw no evidence of impairment. It is alleged, however, that on the same day DeGraw was referred to Mather Hospital's Employee Health Department and cleared to go back to work.

Mather Hospital also admits that plaintiff and DeGraw argued on September 26, 2004, but that it was not until October 13, 2004 that plaintiff and DeGraw received a verbal counseling for inappropriate behavior, i.e., shouting at each other. It is also admitted that DiGiorgio told plaintiff she was using the HUM form for situations where the use of such forms was not appropriate, but denies the other allegations with regard to the HUMs.

Mather Hospital alleges that on the weekend of November 20, 2004 plaintiff violated its confidentiality policy and HIPAA by making a photocopy of a narcotics sheet for which plaintiff was warned. Mather Hospital admits that on November 23, 2004, plaintiff received two warnings: one for changing the schedule without authorization so as to place herself as the "in charge" nurse on the weekend of November 20 and 21, 2004; and the second for copying the aforementioned narcotics sheet and showing and discussing it with other nurses who were on duty at the time.

Mather Hospital admits that during the December 10, 2004 meeting, plaintiff complained of being harassed by DiGiorgio, and alleges plaintiff indicated she had evidence that DeGraw was diverting patients' medications for his own use. Mather Hospital contends that although plaintiff was not confronted during the meeting, Farrugia and Wagner later concluded the evidence was another copy of a narcotics sheet (a contention plaintiff denies) and a second violation of HIPAA. Mather Hospital alleges that on December 17, 2004 plaintiff was advised she was being temporarily assigned to the float pool so that an investigation could be conducted into her allegations as well as into her second violation of HIPAA.

Plaintiff was granted a medical leave on December 18, 2004. Mather Hospital contends that while plaintiff was on medical leave, an investigation was conducted and completed regarding plaintiff's complaints of being harassed by DiGiorgio, DeGraw's erratic behavior and suspected diversion of patient medications, and plaintiff's alleged second violation of HIPAA. As a result of its findings, upon plaintiff's return to work on March 28, 2005, plaintiff was terminated.

To sustain a cause of action under Labor Law § 741(2)(a), the plaintiff must be a health care worker employed by the defendant, who has been unlawfully discharged as a consequence of engaging in certain protected activity (*see, Pipia v Nassau County*, 34 AD3d 664, 826 NYS2d 318 [2006]). An action brought under this statute, protects the health care worker employee who discloses or threatens to disclose an employer's activity or conduct which the employee in good faith reasonably believes "constitutes improper quality of patient care," which is defined as conduct creating "a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient" (*Pipia*

v. *Nassau County*, *supra* at 666, quoting Labor Law § 741[1][d]).

Here, contrary to Mather Hospital's contention, plaintiff's reporting of her suspicions to supervisors and managers that DeGraw's behavior was erratic, consistent with a person under the influence of drugs or alcohol, that she suspected he was wasting and diverting patient medications for his own use, and that he posed a significant threat to patients under his care is sufficient to sustain a Labor Law § 741 claim (see, *Findelstein v Cornell Univ. Med. Coll.*, 269 AD2d 114, 702 NYS2d 285 [2000]; *Kraus v New Rochelle Hosp* 216 AD2d 360, 628 NYS2d 360 [1995]). Moreover, contrary to Mather Hospital's arguments, the evidence is sufficient to support plaintiff's contentions that she engaged in activity protected under the statute by reporting to supervisors and the administration of Mather Hospital conduct, which she in good faith, reasonably believed constituted improper quality of patient care.

DiGiorgio testified that other nurses complained of DeGraw's erratic behavior. Questioning also revealed that on September 21, 2004, a patient's daughter complained that DeGraw appeared "high" while attending to her mother.

Heege also testified that plaintiff complained to her that DeGraw was leaving the nursing floor without informing anyone. Additionally, Heege testified that another nurse contacted her to complain about DeGraw's behavior, namely, that while on the nursing floor DeGraw yelled at plaintiff, that DeGraw left the floor a lot, falls behind on his assignments and that his behavior changed quickly. This nurse also reported to Heege that DeGraw was undergoing therapy and taking Xanax. According to Heege, Wagner was informed of these complaints.

Wagner testified that she had received one notice of plaintiff complaining to DiGiorgio about DeGraw's inappropriate behavior. Wagner testified she also received a note from Heege that another nurse made similar complaints about DeGraw. Questioning also elicited testimony that Wagner was aware of two complaints that DeGraw appeared "high" and that medications administered by him felt different to the patient than when the same medication was administered by other nurses. In response, to the patient complaints, Wagner testified that in September 2004 she reviewed narcotics sheets for the period of time DeGraw was on duty and 3 South was busy. Wagner indicated that as a precautionary measure, she was looking for, among other things, whether DeGraw was diverting medications from patients; Wagner concluded that he was not. After the December 10, 2004 meeting, wherein plaintiff indicated she suspected DeGraw was diverting medications from patients, Wagner again reviewed the same patient records she had previously reviewed in September, and came to the same conclusion that DeGraw was not diverting medications.

Although not dispositive of this court's decision, it is worth noting that in February 2005, after plaintiff was terminated, DeGraw admitted to diverting patient medications which were designated waste, rather than disposing of the medication. As a result of his admission, DeGraw received treatment from Mather Hospital under its employee assistance program. Upon completion of treatment, DeGraw returned to work as an LPN at Mather Hospital without authority to dispense medications. He was never disciplined by the administration of Mather Hospital. However, DeGraw was terminated on April 27, 2006, less than six months after returning to work, for gaining access to the room where patient medications were stored.

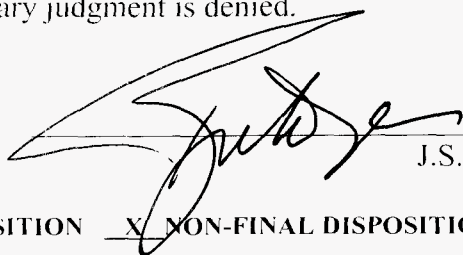
Mather Hospital's response to plaintiff's reporting her concerns about DeGraw, gives rise to the inference that plaintiff was retaliated against. Specifically, among other things, plaintiff was not scheduled for overtime, transferred from 3 South to the float pool, and not designated as the "in charge" nurse.¹ This response by Mather Hospital could constitute an adverse employment action (*see, Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306, 786 NYS2d 382 [2004], quoting *Galabya v New York City Bd. of Edu.*, 202 F3d 636, 640 [2d Cir 2000]) [a materially adverse change in working conditions is "more disruptive than a mere inconvenience or an alteration of job responsibilities [and]...might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished responsibilities, or other indices...unique to a particular situation"]).

Furthermore, Mather Hospital, as the proponent of the motion, has failed to make a prima facie showing of entitlement to judgment as a matter of law (*see, Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985], *Finkelstein v Cornell Univ. Med. Coll.*, *supra*). Mather Hospital suggests its investigation revealed there was no substance to the complaints made by plaintiff. However, Mather Hospital does not support this contention with affidavits or documentation, nor has it asserted that any material relating to the investigation is privileged (*see, Finkelstein v Cornell Univ. Med. Coll.*, *supra*). Moreover, no evidence has been submitted that plaintiff actually violated HIPAA a second time.

Thus, although Mather Hospital has alleged valid non-retaliatory reasons for terminating plaintiff, no evidence has been submitted to support its allegations. As set forth above, plaintiff's appraisals have been favorable and demonstrate that she met, and indeed by 2004, exceeded the expectations of her employer. There is no evidence that plaintiff's job performance was ever discussed with her or that she was ever given any verbal or written warnings with regard to her performance. Finally, no evidence has been submitted that plaintiff violated HIPAA a second time, the main basis upon which Mather Hospital relies to support its decision. Indeed, the evidence before the court indicates that no employee of Mather Hospital has ever been terminated for violating HIPAA. Hence, an issues of fact exist which must be resolved at trial concerning whether the reason advanced by Mather Hospital for the actions it took and plaintiff's termination was, in fact, a valid and necessary business judgment or a pretext as the adverse employment action occurred close in time to the protected activity. Thus, defendant has failed to establish its entitlement to judgment as a matter of law, and plaintiff has raised material issues of fact (*Alvarez v Propect Hosp.*, 68 NY2d 520, 508 NYS2d 923 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, the motion for summary judgment is denied.

Dated: APR 07 2008



J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION

¹At Mather Hospital the "in charge" nurse was paid an additional dollar (\$1.00) per hour.