

Knighton v Municipal Credit Union

2009 NY Slip Op 30204(U)

January 12, 2009

Supreme Court, New York County

Docket Number: 116675/06

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Knigh-ton,

Municipal Credit Union

INDEX NO.

116675/06

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JAN 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/12/09

Lly

LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

----- X

DOLORES KNIGHTON,

Plaintiff,

INDEX NO.
116675/06

-against-

MUNICIPAL CREDIT UNION,

Defendant.

----- X

LOUIS B. YORK, J.:

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendant moves for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint.

This is a wrongful termination action grounded on charges of handicapped discrimination and whistleblower retaliation.

FACTUAL BACKGROUND

Plaintiff suffers from bipolar disorder and various physical ailments caused by the medication she takes for it. She began working as a credit analyst in the autonet/loan operation department of defendant Municipal Credit Union ("MCU") on April 3, 2006. According to plaintiff, she requested accommodation with her schedule so she could receive medical treatment, but her requests were not granted. Nonetheless, according to plaintiff she was doing well at her job, which entailed evaluating loans and making decisions on applications, although she had some problems with two co-workers, Jenny Saunders ("Saunders") and Johnnie Mae

Jones ("Jones"), and had made various complaints about them to her supervisor, Frank McCants ("McCants"), going so far as to request that she be moved to a desk away from them, but to no avail. On July 5, 2006, after plaintiff made a work-related request of these two women, an altercation ensued and Jones, whom plaintiff described as a "400-pound woman," suddenly charged at her with her fist upraised, threatening plaintiff with physical violence. Jones was restrained by other co-workers before she made physical contact with plaintiff, who was nonetheless very shaken up.

Plaintiff complained about the attack by Jones to McCants and then to Kim Thompson ("Thompson"), Vice President of MCU's Human Resources Department. When neither resolved things to her satisfaction, plaintiff telephoned the local office of the federal Occupational Safety and Health Administration ("OSHA") and made a complaint about MCU based on workplace violence. MCU reacted by placing plaintiff on indefinite leave with pay and began an internal investigation of the incident. At the conclusion of that investigation, Jones was placed on probation but remained in her same position at the autonet department and plaintiff was allowed to return to work but was reassigned (without a salary reduction) to a low-level clerical position with no decision-making responsibilities in a different MCU department, Member Services Operations. On October 2, 2006, the day before her probationary period was scheduled to end, plaintiff was fired by MCU, allegedly due to excessive lateness and absenteeism and attitude problems (see 9/28 memorandum to Thompson, exhibit B to MCU's exhibit C).

PROCEDURAL BACKGROUND

At the time of her termination, plaintiff was a probationary, unrepresented at-will employee. As such, MCU had the right to fire her for any reason, or for no reason, as long as it

was not for a legally impermissible purpose (*Kaminski v United Parcel Service*, 120 AD2d 409, 412 [1st Dept 1986])

Plaintiff brought this action alleging that MCU discriminated against her because of her bipolar disorder and related physical conditions, in contravention of Executive Law § 290 and NYC Admin Code § 8-107, *et seq.* While discovery was underway, plaintiff amended her complaint to add a new cause of action for retaliation under New York's whistleblower statute, Labor Law § 740.

On this motion, MCU argues that plaintiff's Labor Law § 740 claim does not state a viable cause of action because plaintiff was fired for reasons other than retaliation, and the remaining causes of action must be dismissed pursuant to Labor Law § 740(7), which provides that once a § 740 claim is asserted all other claims are waived.

The court notes that some of the underlying facts are in dispute. However, since MCU seeks summary dismissal of plaintiff's complaint on facial insufficiency grounds, for purpose of this motion the court will consider the facts to be as stated by plaintiff (see *Butler v Helmsley Spear, Inc.*, 198 AD2d 131 [1st Dept 1993]; *Morone v Morone*, 50 NY2d 481 [1980]). The burden of proof on the motion lies with MCU (see *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

LABOR LAW § 740 CLAIM

Labor Law § 740 prohibits retaliatory personnel action against an employee who "blows the whistle" on an employer whose unlawful conduct endangers the public health or safety. In pertinent part, the statute provides that

An employer shall not take any retaliatory personnel action against an employee because such employee ... discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud

(Labor Law § 740[2][a]). The statute "was enacted to encourage workers to report health or safety hazards to supervisors and then, if no action is taken, to public authorities" (*Bompane v Enzolabs, Inc.*, 160 Misc 2d 315, 317 [Sup Ct, Suffolk Co, 1994], citing practice commentary). "The provisions of Labor Law § 740 regarding retaliatory discharge are to be strictly construed" (*Cotrone v Consolidated Edison Co. of New York, Inc.*, 50 AD3d 354 [1st Dept 2008]).

"To establish a cause of action under Labor Law § 740 ... a plaintiff must plead and prove that his or her employer engaged in an activity, policy, or practice which violated a law, rule, or regulation that presented a substantial and specific danger to the public health or safety" (*Mazzacone v Corlies Associates*, 21 AD3d 1066, 1066-1067 [2d Dept 2005], citations omitted; *Remba v Federation Employment and Guidance Service*, 76 NY2d 801, 802 [1990]). Each of these three components -- conduct, violation and hazard -- must be actual and fall within the narrow scope of the statute.

I. Activity, Policy or Practice

The "activity, policy or practice" disclosed – or threatened to be disclosed (see *Deshpande v TJH Medical Services, P.C.*, 52 AD3d 648, 650 [2d Dept 2008]) – to a public agency, in this case OSHA, must first have been brought by the whistle-blowing employee "to the attention of a supervisor of the employer and ... afforded such employer a reasonable opportunity to correct such activity, policy or practice" (Labor Law § 740[3]). The conduct

alleged by plaintiff herein is MCU's condonation of workplace violence by two employees.

According to plaintiff, the assault by Jones was not the first incident; plaintiff and at least one of her co-workers had complained to McCants on various occasions about Saunders and Jones (see plaintiff's responses to interrogatories 4 and 5, at MCU's exhibit C) and plaintiff had gone as far as requesting on several occasions that her desk be moved away from them because she was uncomfortable in their proximity. Nothing was done as a result of those complaints. MCU had no workplace violence policy at that time and did not institute one prior to the April 2006 incident. McCants' only response was to encourage plaintiff to complain less and be more of a "team player." This is sufficient to satisfy the prior notice requirement.

II. Violation of Law, Rule or Regulation

The second element, that the "activity, policy or practice" at issue violates "a law, rule or regulation," must be alleged with "particularity and specificity" (*Deshpande v TJH Medical Services, P.C., supra*, 52 AD3d at 650). Even when the activity complained of poses a danger to the public, a claim cannot be sustained unless the law or regulation allegedly violated is specified (see *Capobianco v American Stock Exchange*, 233 AD2d 189, 190 [1st Dept 1996], lv den 89 NY2d 810 [1997]). Furthermore, "an actual violation of the [law or] regulation [is] necessary to sustain a cause of action under Labor Law § 740" (*Hookman v Lenox Hill Hosp.*, 241 AD2d 333 [1st Dept 1997], lv den 90 NY2d 812 [1997]). A "reasonable belief that a law, rule or regulation affecting public health and safety has been violated" is not enough (*Bordell v General Electric Company*, 88 NY2d 869, 871 [1996]). "A complaint of workplace violence, even conceding *arguendo* that it constituted a public danger, does not give rise to a claim under Labor Law § 740

unless plaintiff can 'establish a violation of a law, rule or regulation, which violation must be actual and not merely possible'" (*Connolly v Harry Macklowe Real Estate Co., Inc.*, 161 AD2d 520, 522-523 [1st Dept 1990]). Here, plaintiff alleges that by allowing the workplace to be amenable to violence, MCU violated section 5(a)(1) of the federal Occupational Safety and Health Act of 1970 (the "OSH Act"), which provides that every employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (the "general duty clause," 29 USC § 654(a)[1]).

A. Workplace Violence and the General Duty Clause

Plaintiff does not cite any authority for premising a Labor Law § 740(2)[a] claim on a violation of the general duty clause, and this court is unaware of any such case. However, the court finds there is no bar to the assertion of such a cause of action. In reaching this conclusion, the court is mindful that "[n]o private right of action exists to enforce the OSH Act" (Shapiro and Rabinowitz, "Voluntary Regulatory Compliance in Theory and Practice: the Case of OSHA," 52 Admin L Rev 97, 109 [Winter 2000], citing *Taylor v Brighton Corp.*, 616 F2d 256 [6th Cir 1980]). However, the right of action at issue here is not under section 5(a)(1) of the OSH Act (although plaintiff must establish the requisite elements of a violation to prevail), but under Labor Law § 740, which does not require that the statute violated have its own private enforcement mechanism. The whistleblower statute defines "law, rule or regulation" as "any duly enacted statute or ordinance or any rule or regulation promulgated pursuant to any federal, state or local statute or ordinance" (Labor Law § 740[1][c]). 29 USC § 654(a)[1] is a duly enacted federal statute.

Contrary to MCU's contentions, it matters not that no regulations regarding workplace violence have been promulgated under the general duty clause. More than 15 years ago, OSHA stated that although it had no specific "standards which address violent employee behavior in the workplace," section 5(a)(1) of the OSH Act was applicable (12/10/92 interpretation letter, "OSHA policy regarding violent employee behavior"). The fact that employers are expressly required to "comply with occupational safety and health standard promulgated" thereunder (29 USC § 654[a][2]) is meant to strengthen the protections afforded to employees, not to relieve employers of the obligations imposed by the general duty clause.

“[S]ince the fall of 1993, ... OSHA has used its statutory authority against employers for failure to protect employees against workplace violence.... Inspectors are making use of the General Duty Clause to cite workplaces where workers are endangered and to assist in developing appropriate strategies for intervention” (Gray and Wood, “Employees at Risk; Companies Obligated to Provide Safe Workplace,” NYLJ Oct 31, 1994, p S-1, col 2). According to OSHA's workplace violence fact sheet (2002), “[e]mployers who do not take reasonable steps to prevent or abate a recognized violence hazard in the workplace can be cited” for violating the general duty clause

(http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf).

B. Violation of General Duty Clause

Whether plaintiff herein can succeed in stating a tenable cause of action under Labor Law § 740 based on a violation of the general duty clause is a different, much more complex question. First and foremost, plaintiff must be able to establish that MCU actually violated the general duty clause. "There are four requirements in order to establish a violation of the general

duty clause.... First, it must be shown that the employer failed to furnish to its employees a place of employment free of a hazard.... Second, the employer or the industry must recognize the hazard.... Third, the hazard must be causing or likely to cause death or serious physical harm" (*Carlyle Compressor Co., Div. of Carrier Corp. v Occupational Safety and Health Review Commission*, 683 F2d 673, 676 [2d Cir 1982]). Fourth, "feasible means existed to eliminate or materially reduce the hazard" (*Secretary of Labor v Waldon Health Care Center*, 16 OSH Cas (BNA) 1052, 1993 WL 119662 [1993]). However, these are questions of proof.

MCU disingenuously cites *G.B. Goldman Paper Co. v United Paperworkers International Union, Local 286* (957 F Supp 607 [ED Pa, 1997]), in which an employee tried to strike a co-worker with a truck, for the proposition that the general duty clause did not apply to workplace violence. In fact, the court ruled only that an arbitrator had not exceeded his authority in rescinding the offending employee's termination, and contrary to MCU's characterization, the applicability of the general duty clause to violence was not at issue. Rather, the arbitrator determined that "discipline was warranted under the circumstances of this case, [but] he found that the Company had not properly followed its own internal progressive disciplinary procedures" (*id.* at , 613). Neither is *New York State Electric and Gas Corporation v System Council U-7 of the International Brotherhood of Electrical Workers* (328 F Supp 2d 313 [NDNY 2004]) persuasive. Unlike the situation there, another case relied on by MCU where the court was constrained by reluctance to overturn an arbitrator's award, MCU is not being asked to terminate an employee who simply made verbal threats, but rather to rehire the one threatened by the violent employee.

III. Danger to Public Health or Safety

"To sustain a cause of action under the Whistleblower Statute, a plaintiff is required to allege [that a] danger to public health and safety" ensued from defendant's "violation of a law, rule or regulation" (*Finkelstein v Cornell University Medical College*, 269 AD2d 114, 116 [1st Dept 2000]). Mere violation of a law is not enough. Violation of a specific regulation which does "not create a substantial and specific danger to the public health or safety [is insufficient]. The claim that the violation would present such a risk [i]s improper[as] based on mere speculation" (*Cotrone v Consolidated Edison Co. of New York, Inc.*, *supra*, 50 AD3d at 354-355). Labor Law § 740 "clearly envisions a certain quantum of dangerous activity before its remedies are implicated"; the danger to public health must be "substantial" (*Peace v KRNH, Inc.*, AD3d 914 [3d Dept 2004], *lv den* 4 NY3d 705 [2005]). The statute "only cover[s] health and safety threats, and not white collar crime" (*Leibowitz v Bank Leumi Trust Company of New York*, 152 AD2d 169, 176 [2d Dept 1989]). For instance, fraudulent billing is not the type of violation which creates a substantial and specific danger to the public health or safety" (*Remba v Federation Employment and Guidance Service*, *supra*, 76 NY2d at 802). An employee who reports a fraudulent or illegal activity that does not pose "a substantial and specific danger to the public health or safety" is not protected under Labor Law § 740 (*Leibowitz v Bank Leumi Trust Company of New York*, *supra*).

The dispositive question is thus whether workplace violence among co-workers can affect the public health or safety, and if so, whether it did so in the instant case.

A. Workplace Violence as Public Hazard

"Workplace violence" is defined as "violence or the threat of violence against workers. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths. However it manifests itself, workplace violence is a growing concern for employers and employees nationwide" (OSHA's workplace violence fact sheet [2002]). The real issue is how much violence must there be before it can be said to affect the public health or safety.

MCU argues that plaintiff cannot establish that any violation by MCU presented a substantial and specific danger to the public health or safety because a mere altercation between two co-workers has no relevance to the public's health or safety, and MCU "cannot be expected to police social behavior at all times." The court disagrees.

"It is not sufficient to allege in a conclusory manner that [an employee] is capable of erratically violent behavior and, therefore, poses a danger to ... members of the public. The pleading must describe how the supposedly illegal activities in question (which conduct must be contrary to law, rule or regulation), imperil the health or safety of the public" (*Connolly v Harry Macklowe Real Estate Co., Inc.*, *supra*, 161 AD2d at 523). The "illegal activity" alleged by plaintiff herein is MCU's failure to provide a safe workplace. She details through statistics the magnitude of the workplace violence problem and its impact on the working public (plaintiff's response to interrogatory 19, at MCU's exhibit C). Plaintiff also describes in detail how the violence of Jones' assault impacted her personally (*id.*, plaintiff's response to interrogatories 2 and 3). These allegations satisfy the statute.

"With respect to the requirement that a plaintiff establish a danger to the public health or safety, there is no requirement that there be a large-scale threat, or multiple potential victims ...

but rather a threat to any member of the public might well be deemed sufficient.... Further, a threat to workers, obviously a part of the public, can also constitute a legal infraction" (*DeCarlo v. Massachusetts Elec. Const. Co., Inc.*, n.o.r., 1995 WL 122720, 7 [SDNY 1995]). "Office employees are a part of the public and it matters not [if] plaintiff was the only employee of defendant who made complaints" (*Bompane v Enzolabs, Inc.*, *supra*, 160 Misc 2d at 319).

MCU argues that this principle is inapplicable here because *Bompane* dealt with workplace smoking, which is clearly a public health concern, and the issue here is a mere altercation between two co-workers, which is of no moment to the public's health and safety. That distinction is at odds with this state Legislature, which in connection with the enactment of "Labor Law § 27-a, known as the Public Employee Safety and Health Act (PESHA), ... 'to provide individuals working in the public sector with the same or greater workplace protections provided to employees in the private sector under OSHA'" (*Williams v City of New York*, 2 NY3d 352, 367 [2004], citing *Hartnett v New York City Transit Authority*, 86 NY2d 438, 442 [1995]), made the following declaration:

Legislative findings. The legislature finds and declares that workplace assault and homicides are a serious public health problem that demands the attention of the state of New York.... Workplace violence presents a serious occupational safety hazard for workers, but many employers and workers may be unaware of the risk.... It is critical to the maintenance of a productive workforce that employers and workers evaluate their workplaces to determine the risk of violence and to develop, and implement programs to minimize the hazard.... The legislature, therefore, further finds and declares that the public health, safety and welfare would be advanced by enactment of a law to require that employers develop and implement workplace violence protection programs designed to minimize the danger to employees of workplace violence

(L. 2006, c 82, § 1). It is significant that although there is no question that section 27-a applies

only to the public sector, the accompanying declaration does not distinguish between public and private workers and employers.

Based on the foregoing, plaintiff has stated a *prima facie* case of whistle-blower retaliation under Labor Law § 740. Since plaintiff has stated a *prima facie* case,^{and} defendant's motion to dismiss plaintiff's LL §740 claim is that plaintiff has failed to *state* a cause of action (See affidavit in support of motion, p3, par 4),[†] the burden again shifts to MCU to establish a defense which will warrant summary dismissal of plaintiff's claim as a matter of law (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

IV. Defense to Whistleblower Claim

Labor Law § 740(4)[c] provides in pertinent part that "[i]t shall be a defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section (see *DaSilva v Clarkson Arms, Inc.*, 189 AD2d 619, 619-620 [1st Dept 1993]).

According to MCU, plaintiff was terminated based on the recommendation of W. Birnbach ("Birnbach"), her supervisor in the position she occupied from August 7 to October 2, 2006 (see 9/28/06 memorandum from Birnbach to Thompson, exhibit B to plaintiff's response to MCU's request for production of documents, at MCU's exhibit C). Birnbach stated that while plaintiff had been under his supervision her "attendance, punctuality and behavior have been unsatisfactory and, in spite of repeated verbal requests and written documentation, no improvement has been shown." On the contrary, plaintiff "[o]n almost a daily basis ... complained about her job responsibilities, her work schedule, her coworkers, the office environment, or credit union policies and procedures." Birnbach also noted that during her

probationary period plaintiff had been absent eight days, three more than the five allowed by MCU, and late four times in five weeks (*ibid.*). Plaintiff attributes the criticism to MCU's plan to "set her up" to be fired, and the absences and latenesses to MCU's failure to adjust her schedule so she could receive medical treatment for her disabilities, but she does not deny the essence of the memorandum.

Based on the foregoing, the court finds MCU "has established its defense ... that it had a valid reason for plaintiff's termination other than plaintiff's exercise of rights protected by Labor Law § 740" and any claim alleging that plaintiff was fired in retaliation for her complaint to OSHA should be dismissed (*Rodgers v Lenox Hill Hosp.*, 251 AD2d 244, 246 [1st Dept 1998], citations omitted). However, her termination is not the gravamen of plaintiff's Labor Law § 740 claim.

A. Adverse Employment Actions

Plaintiff contends that MCU retaliated against her first by forcing her to take an indefinite leave of absence while her aggressor was allowed to remain at work (amended complaint ¶¶ 26-27; plaintiff's response to interrogatory 9, at MCU's exhibit C), and then upon her return to work by demoting her from a position in which she was called upon to exercise her judgment and make decisions about whether to underwrite clients' loans to a purely clerical position (amended complaint, ¶¶ 31-35; plaintiff's response to interrogatory 11).

MCU offers no reason for reassigning plaintiff other than to deny it was a demotion and characterize it as a transfer made with plaintiff's consent and at her request, since plaintiff "stated that she would not return to work in the Autonet area" (answer to amended complaint,

¶ 17). Plaintiff denies ever making such a statement (plaintiff's response to interrogatory 10).

Although virtually all whistle-blowing cases involve employment terminations, the protection of Labor Law § 740 is not so limited. The statute protects "whistleblowers" from "any retaliatory personnel action" (Labor Law § 740[2]). A "retaliatory personnel action" is defined as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment" (Labor Law § 740[1][e]).

Plaintiff's task is to prove that her transfer was an adverse employment action even though her salary was not reduced. Because of the paucity of whistleblowing cases involving demotions – and to this court's knowledge none involving a "demotion" without an accompanying loss of salary – the court will look for guidance in adverse employment actions occurring in other contexts, such as discrimination.

According to a leading Court of Appeals decision, "[a]n adverse employment action requires a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change 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 material responsibilities, or other indices ... unique to a particular situation'" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004], citing *Galabya v New York City Board of Education*, 202 F3d 636, 640 [2d Cir 2000]; *Messinger v Girl Scouts of the U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]). Under this definition, a decrease in salary is but an indicia of an adverse employment action rather than a prerequisite. This interpretation is consistent with the whistleblower statute, which

is eloquent in its silence on the subject.

"Both Civil Service Law § 75-b and Labor Law § 740 provide a statutory remedy for public employees fired or otherwise subjected to a retaliatory personnel action for disclosing information to a public body regarding a violation of law that creates a danger to the public. Civil Service Law § 75-b (1)(d) defines 'personnel action' as 'an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance,' while Labor Law § 740(1)(e) defines 'retaliatory personnel action' as 'the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment'" (*Higgs v County of Essex*, 232 AD2d 815, 816 [3d Dept 1996]). Based on § 740's failure to specifically mention compensation, the court concludes that the lack of a salary reduction is not fatal to plaintiff.

"[A]n involuntary transfer may constitute an adverse employment action if the plaintiff shows that the transfer created a materially significant disadvantage with respect to the terms of her employment.... If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer an adverse employment action" (*Williams v R.H. Donnelley, Corp.*, 368 F3d 123, 128 [2d Cir 2004], citations omitted). "Because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of adverse. ... At least one court has held that the denial of an office and telephone contributed to an atmosphere of adverse employment action.... But the loss of these services, standing alone, has never been held adverse action. In [that case,] the employee's loss of a phone and office was accompanied by a

loss of status, a clouding of job responsibilities, and a diminution in authority" (*Wanamaker v Columbian Rope Co.*, 108 F3d 462, 466 [2d Cir 1997]).

Here, plaintiff alleges that she was moved from a professional position with a future to a dead-end clerical job for which she was overqualified. Since the determination is to be done on a case-by-case basis depending on the individual facts of each case, the court finds that the question of whether plaintiff sustained an actionable adverse employment action must be determined by the trier of fact.

WAIVER / EXCLUSIVE REMEDY PROVISION

The dispositive question with respect to plaintiff's three other claims is whether the assertion of the Labor Law § 740 cause of action, regardless of how that claim is resolved, mandates the dismissal of the remaining causes of action in the complaint, irrespective of their merit.

The statutory provision at issue is Labor Law § 740(7), which provides that:

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

Each clause is clear and self-explanatory. What is undisputed is that once the protection of the whistleblower law is evoked, the waiver is triggered and remains in effect even if the Labor Law § 740 claim is withdrawn (see *Bones v Prudential Financial Inc.*, 54 AD3d 589 [1st Dept 2008]) or dismissed (see *Pipas v Syracuse Home Association*, 226 AD2d 1097 [4th Dept 1996], lv den 88 NY2d 810 [1996]) – even if the claim was time-barred when first asserted (see *Reddington v Staten Island University Hospital*, 11 NY3d 80, 87-88 [2008]).

Until a few months ago, neither the Court of Appeals nor the First Department had addressed the issue. The Second Department generally held that if a “plaintiff asserted a claim for retaliatory discharge pursuant to Labor Law § 740..., he waived other causes of action relating to the alleged retaliatory discharge” (see, e.g., *Deshpande v TJH Medical Services, P.C.*, *supra*, 52 AD3d at 651, citations omitted). Another Justice of this court held that “[a]lthough [Labor Law § 740(7)] does not bar a separate cause of action, it bars claims which arise out of the same facts as give rise to the claim brought under section 740(2),” and went as far as to dismiss age discrimination claims asserted under Executive Law § 296 even though “neither counsel’s affirmation, nor the complaint, explicitly cite[d] Labor Law § 740 by number” because “the intent to bring the action under the ‘whistle blowing’ statute [wa]s clear” (*Feinman v Morgan Stanley Dean Witter*, 193 Misc 2d 496 [Sup Ct, NY Co, Cahn, J, 2002]). That is too far for this court, particularly since as discussed above the statute is to be strictly construed (see *Cotrone v Consolidated Edison Co. of New York, Inc.*, *supra*, 50 AD3d 354).

In July 2008, the Court of Appeals, ruling in a case that involved Labor Law § 741 (whistleblower protection for health care workers) as well as § 740, skirted the issue. Concluding that “the entire point of section 740(7)’s waiver provision is to prevent duplicative recovery” (*Reddington v Staten Island University Hospital*, *supra*, 11 NY3d at 89), the Court held that section 740(7) was in fact “an election-of-remedies provision, thus contemplating that a plaintiff will choose whether to file a section 740 whistleblower claim or some other claim” (*id.* at 87), although the bulk of the Court’s discussion concerned the relationship between sections 740 and 741 of the Labor Law. In September 2008, the First Department, relying on *Reddington*, held that the plaintiff’s “institution of an action against his former employer ... ‘in accordance

