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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Greenberg, Madelene

- v -

Fielding Graduate

INDEX NO. 600969/07

MOTION DATE 3/30/10

MOTION SEQ. NO. 04

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

It is hereby

ORDERED that the motion by defendant Steinway Child and Family Services, Inc. for summary judgment dismissing the Complaint, is granted; and it is further

ORDERED that defendant Steinway Child and Family Services, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 4/12/10

J.S.C.

HON. CAROL EDMEAD

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MADELINE GREENBERG,

Plaintiff,

Index No.: 600969/07

- against -

FIELDING GRADUATE UNIVERSITY and
STEINWAY CHILD AND FAMILY SERVICES, INC.

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this discrimination/retaliation action, defendant Steinway Child and Family Services, Inc. ("Steinway" or "defendant") moves for summary judgment dismissing the complaint of the plaintiff, Madeline Greenberg ("plaintiff").

Factual Background

Plaintiff began her education at defendant Fielding Graduate University in 1992 seeking her doctorate in clinical psychology. In July of 2005, plaintiff began an unpaid internship at Steinway in order to receive credit from Fielding prior to obtaining her doctorate degree. During her internship, plaintiff was under the supervision of Dr. Stacy Marcus-Phillips ("Dr. Phillips") and Dr. Teri Schwartz ("Dr. Schwartz"). Susan Appelman ("Ms. Appelman") was the program director of the Steinway facility at Howard Beach.

According to her complaint, plaintiff, during the course of her internship, became aware of possible child abuse of a patient, an 11 year old boy (the "patient"). Plaintiff informed her supervisors at Steinway that the matter must be reported to the Association for Child Services ("ACS"). Upon telling her supervisors of the reporting requirement, plaintiff was informed that

she was prohibited from so reporting. Thereafter, at a staff meeting held among all treating therapists and interns, plaintiff again raised the matter in the presence of others not directly involved in the treatment of the patient. After the staff meeting, plaintiff reported the incident of alleged child abuse to ACS. Thereafter, on January 26, 2006, Steinway terminated plaintiff's internship, and plaintiff was dismissed from Fielding as a result of being terminated from her internship with Steinway.

In her complaint, plaintiff alleges that she was aware of Fielding's own "Internship Training Standards and Guidelines" as published by Fielding. Plaintiff alleges that she reasonably relied upon all rules, regulations and standards promulgated by the American Psychological Association ("APA") which are binding upon Fielding and Steinway.[1] In her second cause of action, plaintiff claims that by failing to adhere to the terms and conditions set forth in the APA rules, Fielding's own rules, and the agreement between Fielding and Steinway, both Fielding and Steinway have breached their contract with the plaintiff. In her third cause of action against defendants, plaintiff alleges that she reasonably relied upon, *inter alia*, Fielding and Steinway's agreement regarding internships and Steinway's own rules regulations and policies, and suffered damages as a result of her reliance. In her fourth cause of action, plaintiff alleges that Steinway, as a mental health provider, is a "mandatory reporter" of any instance of possible child abuse of which it may become aware. Yet, Steinway terminated plaintiff from her internship in retaliation for reporting the incident to ACS, and for making statements to others at

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[1] According to plaintiff, plaintiff and Fielding have settled this matter and accordingly, Fielding has not filed a motion seeking summary judgment in anticipation of the action against it being discontinued. The first cause of action directed solely at Fielding's alleged improper dismissal of plaintiff, is unaddressed by the parties and the Court.

Steinway that the incident should be reported to ACS pursuant to New York State Law. Further, Fielding allegedly knew that grounds for her dismissal based upon the incident did not exist. In her fifth cause of action, plaintiff claims that Steinway violated New York State law by refusing to promptly report the incident of suspected child abuse, by terminating plaintiff in retaliation for her insistence on following New York State law in reporting the incident to ACS, for terminating her because of her conduct as a "whistleblower" in violation of New York State law. In her sixth and seventh causes of action, plaintiff alleges that she was also terminated due to her age and for her Catholic faith, respectively, in violation of federal, state, and local laws.

In support of dismissal, defendant argues that plaintiff's claims under New York State's Whistleblower Act §§740 and 741 (the "Whistleblower Act"), waives all other claims stemming from her termination, including claims for retaliatory termination, breach of contract, and age and religious discrimination, and such remaining claims must be dismissed. Labor Law §740 prohibits an employer from retaliating against an employee who discloses, or threatens to disclose to a supervisor or public body an employer's activity or practice that violates a law, rule or regulation which violation presents a substantial and specific danger to the public health or safety. Labor Law §740(7) provides that the institution of an action under this section shall be deemed a waiver of the rights and remedies available under any other contract or under the common law.

Further, plaintiff cannot prove a claim under the Whistleblower Act §740 and §741 because plaintiff was not an employee as defined therein. Labor Law §740(1)(a) defines an employee as "an individual who performs services for . . . wages or other remuneration." The evidence indicates that plaintiff was an unpaid intern at Steinway and that only Fielding provided

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plaintiff with credits, not Steinway. Thus, plaintiff did not receive any remuneration or any other financial benefit from Steinway. Moreover, plaintiff signed and acknowledged that she read and understood Steinway's Policies and Procedures Manual which explicitly distinguished an "employee" and an "'intern."

Even assuming plaintiff was an employee as defined, no facts exist to support her claim that she was terminated for reporting or threatening to report any conduct of Steinway to any authority. The alleged "violation of rule, law or regulation" that allegedly gave rise to plaintiff's Whistleblower claim is the matter of a reported child abuse case to ACS. Essentially, plaintiff is alleging that she was terminated for reporting a case to ACS, not for reporting any policy or conduct of Steinway to any regulatory body or supervisor. Plaintiff's own handwritten notes regarding the instructions provided by Dr. Schwartz indicate that plaintiff was instructed to report the matter to ACS. Dr. Schwartz then instructed plaintiff to follow the Steinway procedures and advise the parent of the patient that Steinway was prepared to report her conduct to the ACS. Dr. Schwartz "did not hear about this case again until the week Nixzmary Brown died." A few weeks later, plaintiff stopped Dr. Schwartz in passing and stated, "we need to report the case," as it had never been reported. It was plaintiff's failure to follow up with the mother that led the case being unreported for a five and a half week period from the time plaintiff first met the patient until the time of the report to ACS. As per the patient's records, plaintiff canceled multiple appointments with the patient and/or the patient's parent since the time instructions were given to plaintiff. Notably, plaintiff does not claim that she was terminated for making this report, or threatening to make this report. Instead, plaintiff alleges that she was terminated for making this report when she did, or failing to make the report sooner. Indeed,

there has been no finding or action taken by any other state agency that Steinway did anything in appropriate or that any conduct, action or policy of Steinway was an actual violation of the law. Plaintiff has nothing to support her claim other than her own self-serving statements, that she was instructed not to report the incident to ACS. Further, even if Steinway instructed her not to report this case, there is no proof that such instruction was illegal or unlawful and plaintiff's reasonable belief is not enough.

Assuming plaintiff's other claims for termination are not waived by virtue of plaintiff's Whistleblower Act claim, no facts exist to support plaintiff's allegations of age and religious discrimination. No evidence supports plaintiff's self-serving statements that she was treated differently than two other interns at Steinway who were younger, or that they "were treated with affection and respect . . . Whereas I was often snubbed, I would say hello, good morning or good evening and they wouldn't return my greeting." Plaintiff admits that numerous other members of Steinway were all approximately plaintiff's age. None of these persons ever claimed that they were discriminated against because of their age. At her deposition, plaintiff referred to only one specific instance, which does not even remotely relate to her age. When plaintiff was fingerprinted in connection with her appointment as an intern, and her fingerprints did not effectively scan immediately, Dr. Phillips "jokingly" stated that plaintiff was trying to avoid detection with her criminal record, which had to do more with the fact that plaintiff used to work in a prison. Other than this instance, plaintiff failed to cite to any more specific examples of age discrimination. Further, plaintiff's supervisors had complaints of her unsatisfactory work performance, not of her age.

Further, plaintiff failed to exhaust her administrative remedies as to her claim for age

discrimination in that she has not initiated her claim under the Equal Employment Opportunity Commission ("EEOC") or before the New York City Commission on Human Rights (NYC Human Rights Commission").

Likewise, plaintiff's claim for termination stemming from discrimination based upon her religion should be dismissed. Plaintiff alleges that the supervisors at Steinway, knowing her Catholic beliefs, tried to impose on her actions that went contrary to her beliefs. Plaintiff testified that in a meeting in August of 2005, where all the therapists were in attendance, Steinway advised her "to push all kinds of condoms for both men and women[] to patients as they sat in the waiting room and as I interacted with them as a therapist." When asked if Steinway made this a requirement or merely suggested the therapists to make recommendations, plaintiff said it "was somewhere in between." Plaintiff could not or refused to set forth all other instances of religious discrimination while interning at Steinway. Plaintiff's mere conclusory allegation of religious discrimination based upon the one meeting described above is disingenuous at best. Plaintiff's termination from Steinway, had nothing to do with her religious belief, but with her unsatisfactory work performance. Further, one of the clinicians working at Steinway at the same time as the plaintiff was Sister Mary-Elise Thompson, a practicing Catholic Nun who was in attendance at the alleged meeting where plaintiff was allegedly religiously discriminated against because of Catholic religion.

Plaintiff did not have an employment contract with Steinway, but was an at-will intern terminable at will, and Steinway did not breach any contractual obligations it had with Fielding. No facts exist to support plaintiff's claim for breach of contract and as such this cause of action should also be summarily dismissed. Plaintiff was aware that contracts existed between Fielding

and Steinway with regards to Steinway being an internship site, but she was not privy to these contracts. When asked to set forth what contracts she is claiming were breached at her deposition, plaintiff admitted to not knowing and requested she be shown a contract to respond. However, it appears that plaintiff claims that defendants breached the Internship Affiliation Agreement, which provides that "the internship site may dismiss the internship student when her/his clinical performance is unsatisfactory or disruptive to the clients/patients." Plaintiff testified to reading this document, understanding the quoted language above, and admits that she attended a meeting regarding her unsatisfactory performance on October 28, 2005. The letter to Fielding setting forth the reasons for terminating plaintiff's internship are duplicative of the reasons given in October 2005. Additionally. Plaintiff received a copy of Steinway's policies and procedures handbook at the beginning of her internship, read through it, and executed it. In addition to agreeing to abide fully with the rules and personnel policies of Steinway," plaintiff agreed that she "further understands that my (her) employment relationship with Steinway will continue only for such period of time as is mutually agreeable to me and the agency." Indeed, the signature page of the Steinway Policies and Procedures Manual specifically states that "nothing in this manual changes the nature of my at-will employment with Steinway." As such, plaintiff cannot argue that she was anything but an at-will, unpaid intern at Steinway, terminable without cause at any time. Steinway's termination of plaintiff due to her unsatisfactory performance was permitted in Steinway's agreement with Fielding, and in fact, Steinway terminated plaintiff when her intern relationship was no longer agreeable to Steinway. Thus, plaintiff's breach of contract claim should be summarily dismissed with prejudice as no question of fact exists to support her allegations.

In opposition, plaintiff argues that since her Complaint does not plead a cause of action based upon Labor Law §§ 740 and 741, her other causes of action are not waived. Defendant refers to plaintiff's fifth cause of action; however, nowhere in that cause of action, or anywhere in the Complaint, does plaintiff allege a violation of either Section 740 or 741. Rather, the fifth cause of action is based upon Steinway's refusal to follow the requirements of the Social Services Law §413 (1).[2] The fifth cause of action alleges that Steinway engaged in precisely this course of conduct and does not allege that plaintiff threatened to report, or did report, Steinway's illegal conduct to any supervisory agency, which would be more applicable to Section 740. While plaintiff (somewhat inartfully) uses the inapplicable term "whistleblower" to describe her conduct, the term "whistleblower" does not appear in either section of the law. Rather, it is a somewhat generic, ill-defined term used to describe persons who report the illegal conduct of their superiors to a supervisory agency or person with authority over such conduct. Plaintiff argues that defendant's arguments with respect to the exclusivity of remedy under Labor Law §§ 740 and 741 are misplaced and inapplicable. Based upon this theory, the motion should be denied.

Even if the court reads the fifth cause of action to plead a cause of action pursuant to Labor Law §§ 740 and 741, plaintiff has pled sufficient facts to establish a claim thereunder. Plaintiff submits that she was treated as an employee for all other purposes and was also compensated for her work, if not by way of a salary. Experience and the completion of her

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[2] Social Services Law §413 (1) provides that psychologists and other designated classes of professionals are required to report suspected cases of child abuse to the State Central Registry. Section 413 (1)(c), most applicable here, provides that "a medical or other public or private institution . . . shall not take any retaliatory personnel action . . . against an employee because such employee believes that he or she has reasonable cause to suspect that a child is an abused or maltreated child and that employee therefore makes a report in accordance with this title."

internship requirement as a step toward receipt of a doctorate is clearly "other remuneration" under Section 740(1)(a)'s definition of employee. Though academic credit is awarded by Fielding, it is earned by working for at Steinway; without her work on behalf of Steinway, she cannot receive the credit. Furthermore, Steinway admits that it treated plaintiff in the same manner it treated all other employees, including its paid interns, even providing her with an employee handbook. In fact, Steinway cites provisions of its employee handbook as applicable to plaintiff, including those purporting to limit the parties' relationship to an "employment at will" arrangement. Steinway cannot have it both ways. Either plaintiff is an unpaid intern to whom the employee handbook has no application, or she is an employee for purposes of the Labor Law. Furthermore, it is against public policy to exclude interns from coverage under both Labor Law §§740 and 741 and the Social Services Law Section 413. The objective of each statute is to protect the public from the illegal and harmful conduct of employers and specific classes of professionals by protecting those in their charge from adverse action for following the law. To conclude that plaintiff's status as an unpaid intern excludes her (and the agency - Steinway) from abuse reporting requirements defeats the purpose of protecting children against abuse when there is reason to suspect its existence. This is equally, if less specifically, true of the protections afforded under Sections 740 and 741.

Further, there is a question of fact whether plaintiff received remuneration under the circumstances of this internship, where the internship was more valuable than any stipend or temporal salary paid to other interns.

Steinway erroneously contends that its refusal to report suspected child abuse was not a breach of its obligations thereunder. Steinway's requirement, admitted in its own moving papers

and throughout Drs. Phillips and Schwartz's depositions, is that plaintiff must first arrange a collateral session with the child's mother or that the matter must be reported to Steinway's risk management director before informing ACS. Placing conditions on reporting suspected child abuse contravenes the explicit requirements of the Social Services Law reporting procedure, which specifically prohibits the imposition of "any conditions, including prior approval or prior notification, upon a member of [the agency's] staff specifically required to report under this title." Essentially, Steinway has admitted violating this mandate, both in its moving papers and through the sworn testimony of its employees. Steinway also misapprehends the nature of any Labor Law claim found in the pleadings; the retaliation occurred because plaintiff reported Drs. Phillips' and Schwartz' inaction to Program Director Susan Appelman. Plaintiff reported the abuse at a staff meeting attended by Ms. Appelman and other Steinway staff members. Dr. Schwartz testified that plaintiff informed her that she suspected child abuse on "the first Tuesday in December [2005]." Plaintiff was not terminated until January 26, 2006, over six weeks after first apprising Dr. Schwartz of her belief that the patient was being abused. Ms. Appelman recalled feeling anger and distress over learning of this situation at a meeting that occurred over a month after plaintiff's initial report to Dr. Schwartz. In fact, Plaintiff testified that on the day after meeting the child, she discussed her observations with Dr. Schwartz, advising her that she "saw the mother berating her child in an out of control way and the boy reacting with great emotional distress. And I also learned from talking to the mother alone with the boy out of the room that there had been a previous complaint of child abuse against her." Dr. Schwartz "said she wasn't interested in pursuing this as a report." Not surprisingly, plaintiff "continued to talk about this to [her] supervisors", informing them that "there is a problem." Though plaintiff "continuously talked to

[her] supervisors about it . . . they never called a meeting just to discuss it." More disturbingly, the child's mother made and cancelled several appointments with plaintiff. Some time in late December plaintiff reported her beliefs to ACS's anonymous hotline. She explained the situation to the agency and was informed that the matter should be reported formally. On January 12, 2006, plaintiff reported the incident, following the meeting attended by Ms. Appelman. On January 26, she was terminated from Steinway. Thus, it is clear that plaintiff's actions are protected. Under subdivision 2 (c), plaintiff clearly objected to Steinway's unlawful refusal (or delay) in reporting suspected abuse as required by Social Services Law Section §413. Her repeated efforts to get supervisor approval to do so were unwelcome and her superiors expressed hostility to her reports of abuse. At the very least, the evidence shows that plaintiff objected to Steinway's practices, specifically to obtaining the approval of the risk management director and the requirement that the mother of the abused child be alerted to plaintiff's suspicions (putting the child at even greater risk) by means of a "collateral" session. During a lecture attended by Steinway staff on reporting abuse, plaintiff revealed her concerns to the Steinway staff by pointedly asking the lecturer, in the presence of Ms. Appelman and other staff members, how to handle a case of suspected abuse when supervisors opposed making the report. This open, public statement is a clear indication that plaintiff objected to her supervisors' failure to report the incident and to their opposition to Plaintiff, a student intern, doing so. Plaintiff's account differs from those provided by Drs. Schwartz and Phillips and Ms. Appelman. Steinway's claims that plaintiff failed to fully document her suspicion of abuse or that her claim relies on nothing more than her own "self-serving statements" go to the weight of the evidence, not its legal sufficiency. Thus, summary judgment is inappropriate.

Issues of fact also exist with respect to plaintiff's claims of age and religious discrimination. Because plaintiff's age and religious discrimination claims are based upon federal law, (Title VII of the Civil Rights Act of 1964) they cannot be precluded by the New York State Labor Law, should the Court find it applicable, by virtue of federal preemption and supremacy. The claims are not precluded by the Labor Law because they are derived from facts separate and apart from those giving rise to any Section 740 cause of action.

Plaintiff's testimony provides a sufficient basis to create an issue of fact whether the disparate treatment she described was based upon age, in violation of the federal, state and local law. First, she establishes that not only was she treated in a hostile manner but that another older person was treated the same way. She then contrasts the manner in which the two younger interns were treated. It is significant that the younger interns' paperwork errors were forgiven since this is one of Steinway's purported basis for plaintiff's termination. It also affects a significant term and condition of plaintiff's employment. Treating plaintiff in an unfriendly, hostile manner is circumstantial evidence of disparate treatment based upon age. While there may have been other staff members who were approximately the same age as plaintiff, she was by far the oldest intern. Further, while exhaustion may be a requirement under Title VII, it is not required under State and City law. Plaintiff's claims under the Human Rights and Executive Laws and the New York City Administrative Code are unaffected by the failure to bring a complaint to the EEOC (a federal agency), the New York State Division of Human Rights (which has dual jurisdiction with the EEOC and investigates complaints under federal and New York law) or the NYC Human Rights Commission. The latter two agencies have jurisdiction to investigate complaints under all anti-discrimination laws, but there is no administrative

exhaustion requirement to bring an action under State law or the New York City Code, and Steinway can cite none.

Plaintiff, testified at her deposition that because of her Catholic beliefs, she refused to distribute condoms. Plaintiff's resume listed her affiliations and publications with a Catholic society. At a meeting with Steinway staff, including supervisors, plaintiff let her opposition be known, when she said "I don't agree with that policy." In response, "it was discussed with a lot of passion by Dr. Marcus who was very enthusiastic about it." Finally, plaintiff was aware that Steinway was not an internship site approved by the APA or the APPIC. Plaintiff, Steinway and Fielding entered into specific agreements setting forth the terms, conditions and other requirements of plaintiff's internship. Fielding entered into the "Internship Affiliation Agreement Form PC-17" with Steinway setting forth the terms and conditions of the internship upon which plaintiff would rely in accepting Steinway as her internship site. The agreement provides that Fielding's standards for the internship site are based upon the policies of the Association of Psychology Postdoctoral and Internship Centers ("APPIC"). As pleaded in the Complaint, APPIC sets forth certain rules, regulations and requirements applicable to agencies, such as Steinway, that accept and supervise interns.[3] However, by contract between Fielding and Steinway, upon which plaintiff justifiably relied, Steinway agreed to be bound by APPIC standards, rules and regulations. The agreement further provides that the internship site (Steinway) "may dismiss the internship student when her/his clinical performance is unsatisfactory or disruptive to the clients/patients." Upon this basis, it is believed, Steinway

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[3] Typically, an agency is reviewed and approved by APPIC before interns are accepted. However, because plaintiff interned during the first year Steinway accepted doctoral interns, APPIC had not yet approved Steinway.

discharged plaintiff from the internship. In addition to the Internship Affiliation Agreement, plaintiff and Steinway executed "Proposed Internship Site Form C-13," an agreement which sets forth both parties duties and responsibilities, including the number of hours per week to be spent in individual and group supervision, time spent on research, participation in 2 hours per week of didactic training, time devoted to administrative duties and a representation that the internship has due process procedures. However, plaintiff contends that her clinical performance was not unsatisfactory, that she was not disruptive to Steinway's clients/patients and that Steinway did not live up to the requirements of Form C-13. In support of her argument is an email in which plaintiff's therapeutic skills and responsiveness to supervision are praised.

In reply, Steinway argues plaintiff's clearly alleges a claim under the Labor Law. In response to Steinway's interrogatory, which requests plaintiff to set forth the New York law referred to by plaintiff when alleging that Steinway terminated her "in retaliation . . . ", plaintiff identified "Labor Law Section 740." Plaintiff subsequently amended her answer to this very Interrogatory, wherein plaintiff further testified that she "also asserts a violation of Labor Law Section 741 in addition. . . ." If plaintiff's opposition is her attempt to withdraw her claims for violation of Labor Law §§740 and 741, all of plaintiff's claims for retaliatory termination are still waived as a result of instituting a claim under Labor Law§§740 and 741. Further, plaintiff's conclusion that "the completion of her internship requirement" or her "experience" equates to "other remuneration" is incorrect.

Steinway also adds that plaintiff failed to identify the specific sections of the Human Rights and Executive Law and the New York City Administrative Code that she alleges were violated.

Additionally, plaintiff's vague religious discrimination claim is that she was asked to recommend condoms to Steinway's patients; however, plaintiff admitted that she was not required to recommend the condoms.

Further, plaintiff's entire age discrimination claim resides in the fact that she believes unnamed persons at Steinway who may have not held any supervisory authority over plaintiff, did not say hello to her. Such conduct is does not equate to age discrimination or a hostile work environment and plaintiff provides no legal support for her position.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup. Ct. New York County 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; Zuckerman, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Once plaintiff instituted an action alleging a violation of Labor Law §740 (fourth and fifth causes of action),[4] plaintiff's state-based claims under Social Services Law and for breach of contract, reasonable reliance, and age and religious discrimination related to her alleged retaliatory discharge were waived pursuant to Labor Law §740 (7) (*Reddington Staten Island Univ. Hosp.*, 373 F Supp 2d 177, 188 [EDNY 2005] ("The waiver provision of § 740 (7) may . . . apply to plaintiff's state and city law discrimination claims because federalism concerns are not implicated")).

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[4] Plaintiff's fourth and fifth causes of action are similar. However, plaintiff's allegation of a violation of Section 740 was in response to defendant's interrogatory 8, which refers to plaintiff's "making statements to others" and the first time plaintiff alleges that she was terminated for, *inter alia*, her "statements to others" is in her fourth cause of action (¶51).

Labor Law §740 (7) provides:

> . . . 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.

As amply stated in *Reddington*:

> Plaintiff's omission of the § 740 claim from her amended complaint does not immunize her claims from the waiver provision in § 740(7). *Nicholls* [*v. Brookdale University Hospital Medical Center*, 2004 WL 1533831, at *1 (E.D.N.Y. July 9, 2004)] held that "Plaintiff's claims based on conduct arising from defendants' retaliatory action cannot be revived merely because the collateral section 740 claims have been dismissed. The language of section 740(7) is clear and leads to a harsh result but not an absurd one. It clearly states that the waiver applies when a plaintiff has instituted an action under section 740(7)." 2004 WL 1533831, at *7 . . . . Therefore, the court held that "having risked filing a time-barred whistleblower action," plaintiff's related claims were waived. Id. See also Gaughan v. Nelson, 1997 WL 80549, at *2 (S.D.N.Y. Feb.26, 1997) (holding "Plaintiff cannot erase his initial waiver by filing the Amended Complaint which omits the dismissed Labor Law § 740 claim. The filing of the Amended Complaint does not change the fact that Plaintiff's original complaint 'institut[ed]' a claim under the meaning of § 740(7)."); McGrane v. Reader's Digest Ass'n, Inc., 1993 WL 525127, at *1 (S.D.N.Y. Dec.13, 1993) ("The election required by the Labor Law provision is not revocable under state law."); Feinman, 193 Misc.2d at 498, 752 N.Y.S.2d 229 (claim under § 740 acted as a waiver with respect to discrimination claim, notwithstanding that it was dismissed as time-barred); Rotwein, 181 Misc.2d at 854, 695 N.Y.S.2d 477 (waiver triggered by the mere institution of an action containing a § 740 claim, so that "a discontinuance of or service of an amended complaint dropping the Labor Law § 740 claim would not invoke a fresh start, nullifying the initial waiver").

Although plaintiff's Complaint does not expressly cite Labor Law, and interrogatories seek evidentiary matter (*Medaris v Vosburgh*, 93 AD2d 882, 461 NYS2d 415 [2d Dept 1983] interrogatories can be used to amplify pleadings (*DeJoe v Village of Fredonia*, 5 AD3d 1035, 773 NYS2d 706 [4th Dept 2004] (complaint can be "amplified by plaintiffs' answers to interrogatories")).

In Steinway's Second Set of Interrogatories, Number 8 requests that plaintiff "Please set forth in detail which New York law you refer to when you allege Steinway terminated Plaintiff

'in retaliation for her statements to others at Steinway that the incident should be reported to ACS in accordance with New York State law.'" In response, plaintiff testified as follows: "See 7 above [which cites to "Social Services Law Section 413, *et seq.*"] Without waiving said objection and while reserving all right to assert all sections of applicable law without limitation, *see New York Labor Law Section 740.*" Based upon plaintiff's allegation in her Complaint that she was terminated for her conduct as a "whistleblower," and her express assertion of Labor Law § 740, plaintiff waived all other claims for wrongful termination, including her claim for retaliatory termination under §413 of the Social Services Law, breach of contract (second), reasonable reliance (third), and age (sixth) and religious (seventh) discrimination claims (see *Feinman v Morgan Stanley Dean Witter*, 193 Misc 2d 496, 752 NYS2d 229 [Sup. Ct. New York County 2002] (dismissing plaintiff's age discrimination claim as waived, even where the "whistleblower" cause of action was dismissed as untimely); *Rotwein v Sunharbor Manor Residential Health Care Facility*, 181 Misc 2d 847, 852, 695 NYS2d 477 (Sup. Ct. Nassau County 1999) (dismissing the plaintiffs claim for breach of contract)). Any attempt by plaintiff to now cast her allegations as falling solely under Social Services Law is unavailing (*Reddington supra* at 86) (legislative history revealed in "documents in the Bill Jacket repeatedly refer to section 740(7) as an election-of-remedies provision, thus contemplating that a plaintiff will choose whether to file a section 740 whistleblower claim or some other claim")). Thus, having instituted a claim under 740 (fourth and fifth), plaintiff's causes of action brought under state and local law for breach of contract (second), reasonable reliance (third), age (sixth) and religious (seventh) discrimination, and allegations of section 741 and Social Service Law 413, are waived, and dismissed. In light of the above, the Court does not reach the merits of plaintiff's breach of

contract claim.

Contrary to Steinway's contention, the institution of a claim pursuant to Labor Law § 740 simultaneously with a claim pursuant to Labor Law § 741 does not trigger section 740(7)'s waiver provision so as to bar plaintiff's section 741 claim (*Reddington v Staten Island University Hosp.*, 11 NY3d 80, 87 [2008]). "This conclusion flows from the uniquely interconnected elements of sections 740 and 741; specifically, every section 741 claim expressly relies on and incorporates section 740 for purposes of enforcement" (*id.* at 88).

As stated by the Court of Appeals,

> . . . section 740(7), as noted previously, is an election-of-remedies provision. Yet no election of remedies is implicated when sections 741 and 740 are pleaded together, or section 741 is pleaded after a plaintiff has instituted a section 740 claim, because section 741 provides no independent remedy. Section 741 sets out substantive legal requirements while explicitly relying on section 740 for their enforcement. Importantly, as the entire point of section 740(7)'s waiver provision is to prevent duplicative recovery, a plaintiff health care employee can only recover damages for a section 741/740 (4) violation (specific) or a section 740 violation (general), but not for both.
> (*Reddington*, 11 NY3d at 89).

Further, to the extent that plaintiff's sixth and seventh causes of action are brought under federal law, such claims are not subject to dismissal based on the waiver provision of Labor Law § 740(7) (*Reddington,* 373 F Supp 2d 177 ("a cause of action under § 740 does not act as a waiver of federal causes of action because "an effort by New York to condition a state law right on the waiver of arguably unrelated federal rights would raise serious constitutional questions")).

Turning to the merits of plaintiff's Labor Law 740 claim (fourth and fifth causes of action), Steinway's contention that there is no proof that Steinway's alleged instructions to plaintiff not to report the child abuse matter was illegal or unlawful ignores Social Services Law § 413, which imposes a statutory obligation upon providers such as Steinway to report suspected

child abuse or maltreatment. Additionally, Steinway's contention that there is nothing to support her claim other than her own self-serving statements, that she was instructed not to report the incident to ACS, is insufficient to warrant dismissal (*see e.g., Signorelli v Great Atlantic & Pacific Tea Co., Inc.*, 70 AD3d 439, 894 NYS2d 409 [1st Dept 2010] (plaintiff's testimony constitutes evidence from someone with personal knowledge of the facts and, whether or not it is regarded as self-serving, it is sufficient to present an issue for trial)).

However, Section 740(1)(a) defines an employee as "an individual who performs services for and under the control and direction of an employer for wages or other remuneration." Like Labor Law §740, the definition of "employee" under Labor Law § 741 includes the requirement that, *inter alia*, the "person who performs health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration." This Court did not locate and the parties did not cite any reported caselaw defining remuneration under Labor Law §740(1)(a). However, when determining whether an individual is an employee by virtue of the "remuneration" received, courts have acknowledged that remuneration need not be salary, but must consist of substantial benefits for the individual's work *(see U.S. v City of New York*, 359 F3d 83 [2004] ("When analyzing whether individual is "employee" under Title VII, individual must first show she was hired by putative employer, and to do so, employee must prove that she received remuneration in some form for her work; such remuneration need not be salary but must consist of substantial benefits not merely incidental to the activity performed)).

In *O'Connor v Davis* (126 F3d 112 [1997]), a college student at Marymount College, sued, *inter alia* Marymount College, New York Sate and the hospital at which she interned,

claiming that a doctor at the hospital subjected her to sexual harassment in violation of Title VII and Title IX, while she worked as volunteer intern. "As a component of her major, O'Connor was required during her senior year to perform 200 hours of field work at one of several Marymount-approved organizations which, in the past, had included schools, daycare centers, community organizations, correctional facilities, and social service . . ." As such, "Marymount arranged for O'Connor to be placed for her senior-year internship with Rockland, a hospital for the mentally disabled operated by New York State." The action was eventually discontinued against Marymount College and Rockland and New York State moved for summary judgment. When deciding what the Court termed as the "preliminary" "dispositive" "question of remuneration", the Court stated that plaintiff was not an employee within the meaning of Title VII where it was "uncontested that O'Connor [plaintiff] received from Rockland, [the hospital] no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation.

While the instant action is not one brought under Title VII, both Title VII and Labor Law provides employees a right of action against their employers where their employers' treatment of them violates the law.

It is uncontested that plaintiff did not receive any pay, wages, salary, bonuses, or benefits from Steinway, and that she only received credit from Fielding for her internship. Plaintiff offers no legal basis for finding that "experience" obtained at Steinway constitutes remuneration from Steinway so as to render her an employee of Steinway. That plaintiff was "treated" by her supervisors at Steinway as an employee, and expected her to meet obligations contained in an employee handbook, does not render her an employee as defined under Labor Law §§ 740 and

741. The legislature included in the definition of "employee" not simply a person who "performs services for and under the control and direction of an employer," but someone who received "wages or other remuneration" for such services, and plaintiff herein received nothing from *Steinway* for her services. Based on the undisputed evidence establishing that plaintiff was not an employee of Steinway, Labor Law §§ 740 and 741 claims asserted against Steinway lacks merit and is dismissed.

As to the merits of plaintiff's federal age discrimination claim under the Federal Age Discrimination in Employment Act, even assuming plaintiff sufficiently asserted facts contrasting the manner in which the two younger interns were treated, in that the younger interns' paperwork errors were forgiven, plaintiff acknowledges that "exhaustion may be a requirement under Title VII" (*see Patrowich v Chemical Bank*, 98 AD2d 318, 470 NYS2d 599 [1st Dept 1984] [the Federal Age Discrimination in Employment Act "require that a potential plaintiff in a lawsuit exhaust his or her administrative remedies before commencing an action . . . Failure to have exhausted the statutory relief before the [EEOC] in both Title VII and ADEA claims requires dismissal of a suit in Federal court"]). It is uncontested that plaintiff did not initiate her age discrimination complaint with the EEOC. Thus, plaintiff's sixth cause of action alleging discrimination based on age is dismissed.

Finally, as to plaintiff's seventh cause of action alleging discrimination based on religion, Title VII of the Civil Rights Act of 1964 (42 USC §§ 2000e *et seq.*), provides that an employer may not "fail or refuse to hire or ... discharge any individual, or otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion" (42 USC § 2000e-2[a][1]; *Hogan v Jet Blue Airways*

Corp., 17 Misc 3d 1137, 856 NYS2d 24 [Sup. Ct. Queens County 2007]).[5] Retaliation claims under Title VII are evaluated based upon the same burden shifting framework used in discrimination cases (*Wenping Tu v Loan Pricing Corp.*, 21 Misc3d 1104, 873 NYS2d 238 [Sup. Ct. New York County 2008] *citing Griffin v Ambika Corp.*, 103 F Supp 2d 297, 311 [SDNY 2000]). In order to establish a *prima facie* case for retaliation, a plaintiff must show: (1) she was engaged in a Title VII protected activity; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) there was an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse action. Id. A causal connection may be established "indirectly by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly through evidence of retaliatory animus directed against a plaintiff by the defendant" (*Wenping Tu citing Davis v Halpern*, 768 F Supp 968, 985 [EDNY 1991]). Once a plaintiff has established a *prima facie* case of retaliation, the burden shifts to defendant to show a legitimate non-discriminatory reason for its action (*Wenping Tu citing Griffin*, 103 F Supp 2d at 311; *Davis*, 768 F Supp at 985). If the defendant meets its burden, the plaintiff must then demonstrate that defendant's proffered reason is pretextual and that its actual reason was retaliation (*Id.*) A plaintiff may accomplish this feat in either of two ways: (1) by persuading the court with direct evidence that a discriminatory reason more likely than the proffered reason, motivated the employer's decision or; (2) by directly persuading the court by showing that the employer's proffered explanation is not worthy of

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[5] The Court notes that Steinway did not claim that plaintiff failed to exhaust her administrative remedies as to her religious discrimination claim.

credence (*Wenping Tu citing Davis*, 768 F Supp at 985 *citing Texas Dep't of Community Affairs v Burdine*, 450 US 248, 256, 101 SCt 1089, 67 L Ed 2d 207 [1981]). Although a plaintiff's burden of establishing a *prima facie* case is *de minimis*, a Title VII plaintiff's claims nevertheless fail if she cannot make out a *prima facie* case of discrimination" (*Williams v R.H. Donnelley, Corp.*, 368 F3d 123, 126 [2d Cir 2004]).

Although the record indicates that Steinway was aware of that plaintiff was a Catholic, according to plaintiff, Steinway's awareness initially arose from the affiliations cited in plaintiff's resume and yet, plaintiff was not denied the internship. Further, although plaintiff later verbally opposed the distribution of condoms to patients, there is no indication that plaintiff was required to do so or that the distribution of condoms was a condition of her internship. When asked if the distribution of condoms was a requirement or suggestion, plaintiff responded "It was somewhere in between." (Plaintiff EBT p. 85). Further, the only additional testimony concerning plaintiff's opposition at the meeting was a response from Dr. Marcus who discussed the topic with "a lot of passion" and was "very enthusiastic about it." (Plaintiff EBT p.85). There is no indication that Steinway made the distribution of condoms a condition of plaintiff's continued employment, or that plaintiff's opposition played a role in the manner in which her supervisor treated plaintiff. There is simply no indication that Steinway took any action toward plaintiff as a result of her opposition expressed at the meeting, or that Steinway's termination of plaintiff was because she voiced her opposition. And, plaintiff's deposition failed to reveal that she was treated differently because of her opposition or her Catholic beliefs. Nor is there any indication that plaintiff's supervisors required the distribution of condoms only of plaintiff; indeed, the discussion was made at a meeting attended by other staff of Steinway.

In any event, Steinway has presented a non-discriminatory basis for plaintiff's termination, *to wit*: that plaintiff was "not learning from supervision"; she "continued to make the same errors over and over again" regarding confidentiality; and plaintiff's "interactions with her patients were sometimes" not in "their best interest" (Dr. Schwartz EBT pp. 66-67). Dr. Schwartz provided examples of plaintiff's alleged breaches of confidentiality. Plaintiff failed to complete charts or write intakes as narratives (Dr. Schwartz EBT p. 117). Dr. Phillips testified that plaintiff would make "paperwork errors" like "leaving her signature off of things, leaving the patients' name off of things, blanks, putting things in the wrong spot," leaving notes in the charts, which could breach the patients' confidentiality in the event such charts were subpoenaed or reviewed by others, and failing to shred certain documents (Dr. Phillips EBT pp. 74, 75, 77). A meeting was held with plaintiff in October 2005, three months before her termination, concerning her performance issues (Dr. Schwartz EBT pp. 88-89), and there was no improvement in plaintiff's performance after the meeting (*Id.* p. 90).

In response, plaintiff failed to demonstrate that Steinway's proffered reasons were pretextual and that its actual reason was retaliation. As there is no indication that plaintiff's termination occurred under circumstances giving rise to an inference of religious discrimination, plaintiff failed to make out a *prima facie* case of discrimination based on religion, and thus, plaintiff's seventh cause of action is dismissed (*Engstrom v Kinney System, Inc.*, 241 AD2d 420, 661 NYS2d 610 [1st Dept 1997] (Where plaintiff alleged that work schedule change was instituted with the express purpose of interfering with plaintiff's religious activities of which supervisors were aware, evidence that the changed work shifts was due to changing business conditions and the absence of any evidence that defendants instituted this change to harm her,

plaintiff failed to make a *prima facie* showing of retaliatory motive as changes in work schedule were applied uniformly to defendants' employees)).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Steinway Child and Family Services, Inc. for summary judgment dismissing the Complaint, is granted; and it is further

ORDERED that defendant Steinway Child and Family Services, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 12, 2010

Hon. Carol Robinson Edmead, J.S.C.