

<b>O'Neill v New York City Univ.</b>
2011 NY Slip Op 33615(U)
June 30, 2011
Sup Ct, NY County
Docket Number: 651322/10
Judge: Alice Schlesinger
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**ALICE SCHLESINGER**

**PART IA PART 16**

PRESENT

Index Number : 651322/2010

**O'NEILL, DAVID**

VS.

**NEW YORK UNIVERSITY**

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

Th

motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

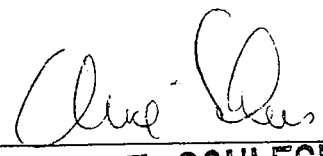
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss this hybrid plenary action/Article 78 proceeding is granted in accordance with the accompanying memorandum decision.

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

JUN 30 2011

Dated: June 30, 2011



**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
DAVID O'NEILL,

Plaintiff-Petitioner,

Index No. 651322//10  
Motion Seq. Nos. 001 and 002

- against -

NEW YORK UNIVERSITY, NYU HOSPITALS  
CENTER, and NYU LANGONE MEDICAL CENTER,

Defendants-Respondents.

-----X  
**SCHLESINGER, J.:**

Plaintiff-petitioner David O'Neill, formerly a research scientist employed by the New York University defendants-respondents (collectively, "NYU") has commenced this hybrid plenary action/Article 78 proceeding challenging the termination of his employment in or about May 2010. Dr. O'Neill insists that he was fired in retaliation for his complaints of research misconduct by another NYU scientist, and he seeks his reinstatement to his former position, as well as an award of back pay and other compensatory and punitive damages based on various theories of law.

NYU has moved to dismiss pursuant to CPLR §3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action on which relief can be granted. NYU insists that the alleged research misconduct was, in fact, only a difference of opinion, and it asserts that it thoroughly investigated O'Neill's concerns and followed all relevant procedures before making a reasonable determination to discharge O'Neill as an at-will employee based on his alleged unprofessional behavior. Needless to say, O'Neill has vigorously opposed the motion. Each side has submitted voluminous papers with extensive exhibits and many and varied arguments, which this Court will address more succinctly here.

### Background Facts

By letter agreement dated July 9, 2002, NYU hired Dr. David O'Neill as a non-tenured, full-time faculty member with a dual appointment as Assistant Director of the Vaccine/Cell Manipulation Core Laboratory for the NYU Cancer Institute and Assistant Professor (Research) in the Department of Pathology (Exh 2). The letter advised Dr. O'Neill that his "annualized School of Medicine starting salary will be \$140,000" and that the "salary in subsequent years" would be determined in the same manner as the salaries of all faculty members. The final condition of employment, stated in ¶10, read as follows:

Your appointment and continuing appointment with the New York University School of Medicine are contingent upon continued employment in good standing with the School of Medicine and compliance with all University and School of Medicine rules and regulations and other contractual obligations.

NYU renewed Dr. O'Neill's appointment annually, with the most recent renewal by letter dated February 23, 2010, confirming the appointment for the 2009-2010 academic year from September 1, 2009 through August 31, 2010 (Exh 3). The evidence uniformly confirms that Dr. O'Neill's work was highly regarded over the years to the point that his supervisors recommended him for a promotion to Associate Professor in the Spring of 2008 (Exh 9). Shortly thereafter, difficulties began to brew.

Among his duties, Dr. O'Neill was charged with overseeing the construction and operation of NYU's Vaccine/Cell Lab. When the Lab was completed in 2005, work began on its initial major project — a clinical trial of a dendritic cell vaccine for malignant melanoma (skin cancer), which compared that relatively new and costly vaccine to an

inexpensive, decades-old mineral oil vaccine known as Montanide. The research team included Dr. O'Neill, his supervisor Dr. Nina Bhardwaj as the co-inventor of the dendritic cell vaccine, and others.

Although both sides agree that the research revealed that the dendritic cell vaccine was less effective than the Montanide vaccine, that finding led to months of debate, e-mail exchanges, conferences, conflict and confrontation, all of which are discussed in the papers in excruciating detail. Suffice it to say, Dr. O'Neill was concerned that Dr. Bhardwaj was attempting to shape the written and oral presentation of the test results in an unethical manner so as to downplay and thereby distort the negative findings about the dendritic cell vaccine. NYU, in contrast, insists that the statistical analysis proposed by Dr. Bhardwaj was consistent with the test results and presented in accordance with widely accepted statistical methods, as confirmed by independent statisticians retained by NYU to review the work.

While all this back and forth was going on, Dr. O'Neill's recommended promotion lingered. Further, as the debates continued, they became more heated, with Dr. O'Neill insisting in the fall of 2009 that NYU was failing and refusing to appropriately investigate his concerns about Dr. Bhardwaj's alleged research misconduct. It was then, in a meeting on November 19, 2009, that Dr. O'Neill was presented with a "warning" letter from Dr. William Carroll, Director of the NYU Cancer Institute, dated November 9, 2009 (Exh 21). There Dr. Carroll stated that:

During the course of our follow up meeting last week, it became clear to me that there is a lingering element of anger and frustration that is clearly impeding progress in your ability to effectively direct the Vaccine and Cell Therapy Core Facility. ... Furthermore, I communicated to you that

members of the community with whom you interact have expressed their concern about the tone of your responses and their discomfort in meeting with you. ... Your continued negative and combative behavior is unacceptable and will not be tolerated. You are expected to behave in a professional and collegial manner at all times. Failure to immediately rectify and sustain an acceptable level of behavior may lead to further disciplinary action including termination of your employment.

The controversy caused by the study continued and came to a head in April 2010. On April 21 Dr. Bhardwaj planned a visit to the Vaccine/Cell Lab for researchers from St. Vincent's Hospital staff who were considering using the Lab after their own facilities closed. According to Dr. O'Neill, he would typically conduct such a tour and he was surprised to learn that he had not been consulted, nor even advised, of the visit. When he realized that the researchers were in the Lab, he joined them and conducted the balance of the tour.

Thereafter, Dr. O'Neill asked Dr. Bhardwaj by e-mail dated April 22, 2010 that she contact him prior to any future site visits. Having heard of the request, Dr. Carroll telephoned Dr. O'Neill to tell him that Dr. Bhardwaj was not obligated to involve Dr. O'Neill in site visits she arranged. The conversation became heated, and Dr. O'Neill admits that he raised his voice "intermittently, often to keep from being interrupted." (Petition ¶72). According to Dr. O'Neill, the call lasted less than five minutes, and it was the only occasion when he raised his voice to Dr. Carroll.

In an April 23 meeting with Associate Dean David Levy, Dr. O'Neill continued to press his concerns about research misconduct and additionally about perceived retaliation by Dr. Carroll and Dr. Bhardwaj. According to Dr. O'Neill, Dean Levy suggested that Dr. O'Neill meet with Dr. Abramson and file a grievance. On the morning

of May 3, 2010, Dr. O'Neill requested an appointment with Dr. Abramson to begin a grievance proceeding. That afternoon, Dr. Carroll called Dr. O'Neill to a meeting and handed him a termination letter dated April 25, 2010, dismissing him "effective immediately" for alleged "unprofessional behavior." (Exh 30). The cited behavior was that Dr. O'Neill 's "tone became very argumentative" and his "voice rose in anger" during the April 22 telephone call with Dr. Carroll.

On May 7 Dr. O'Neill met with Dr. Abramson to request an appeal of his termination and a grievance. In addition to his complaints of research misconduct and retaliation, Dr. O'Neill complained that NYU had failed to follow the disciplinary procedures available to non-tenured faculty, and he retained counsel to assist him in pursuing his claims. Dr. Odom periodically responded to e-mails and telephone calls from counsel until the July 13, 2010 e-mail advising Dr. O'Neill's counsel that there would be no investigation or appeal and that NYU's decision remained unchanged.

This lawsuit followed. In his first cause of action, Dr. O'Neill claims that NYU breached his employment contract by failing to investigate his concerns of research misconduct pursuant to Ethical Conduct Policies and then by firing him in retaliation for his complaints. The second cause of action also sounds in breach of contract, complaining of the termination of Dr. O'Neill's employment without following Disciplinary Policies concerning dismissal, appeals and grievances. The third cause of action alleges defamation. The fourth cause of action is similar to the first in its claim that NYU violated Ethical Conduct Policies, but it asserts that NYU's termination decision must be annulled as arbitrary and capricious under CPLR Article 78. The fifth cause of action is similar to the second in its claim that NYU violated Disciplinary Policies, but it asserts

that NYU's termination decision must be annulled as arbitrary and capricious under CPLR Article 78. As indicated above, Dr. O'Neill seeks reinstatement to his former position, an award of back pay and other compensatory and punitive damages, and an order directing that all negative comments in his personnel records be expunged.

### Discussion

The first issue presented is whether, as NYU claims, Dr. O'Neill is an at-will employee who may be fired at any time for any reason, or whether, as Dr. O'Neill claims, he had a contract for a fixed term requiring just cause for termination. The principles governing at-will employment were clearly articulated by the Court of Appeals in *Lobosco v New York Telephone Company*, 96 NY2d 312, 316 (2001):

Where the employment is for an indefinite period of time, it is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason or even for no reason (*Martin v New York Life Ins. Co.*, 148 NY 117, 121). New York does not recognize the tort of wrongful discharge (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 297). ...

New York does, however, recognize an action for breach of contract when plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment (*Weiner v McGraw-Hill, Inc.*, 57 NY2d 458).

Dr. O'Neill suggests that his employment agreement with NYU was for a fixed term of one year. Although the July 9, 2002 letter appointing him as a non-tenured faculty member does not include any time limitation, Dr. O'Neill argues that the letter must be read in conjunction with the Faculty Handbook, which states that: "Appointment to a non-tenure position shall be for a definite period of time, not exceeding one academic year ...."

Dr. O'Neill's claim must fail. The appointment letter does not mention a one-year term. Rather, it speaks of a "continuing appointment" with a specified "annualized" starting salary and a procedure for increases in "subsequent years." Wholly misplaced is Dr. O'Neill's reliance on the Faculty Handbook to create the desired definite term, for as the *Lobosco* court declared: "Routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment contracts." 96 NY2d at 317. The court went on to reject the employee's reliance on the company's Code of Business Conduct to create an employment contract limiting his termination.

This principle regarding at-will employment has been repeatedly applied by our courts to the same effect in various contexts. Thus, in *DePetris v Union Settlement Ass'n, Inc.*, 86 NY2d 406 (1995), the Court of Appeals held that the lower court had properly dismissed an Article 78 petition claiming wrongful termination of an at-will employee, a staff psychologist at an outpatient mental health services center, who had sought to rely on the Personnel Policies and Practices Manual to limit his discharge. Recently, in *Thomas v MasterCard Advisors, LLC*, 74 AD3d 464, 465 (1<sup>st</sup> Dep't 2010), the Appellate Division affirmed the denial of a petition for pre-action discovery filed by an at-will employee, finding that "petitioner does not have a viable claim against respondents for wrongful termination in violation of its standards contained in the employee handbook."

Particularly compelling is NYU's reliance in the case at bar on *Slue v New York University Medical Center, et al.*, 409 F. Supp. 2d 349 (SDNY 2006). Like Dr. O'Neill here, the plaintiff in *Slue* had been employed by the New York University School of Medicine, but as a pharmacy aide. He commenced an action alleging wrongful

discharge and breach of contract, claiming that the discharge violated the rules and regulations set forth in various NYU manuals and handbooks, including the Faculty Handbook. Relying on the principles of state law discussed above, the court rejected the plaintiff's claim, finding that the plaintiff was an at-will employee who could be discharged at any time for any reason and that the NYU handbooks did not constitute evidence of a contract or agreement of a fixed duration so as to require just cause for the termination of his employment.

The *Slue* court also discussed plaintiff's claim, similar to Dr. O'Neill's claim here, that he had a professional duty to report concerns about research misconduct and that NYU's alleged failure to investigate those claims constituted a breach of contract. The court concluded that such disciplinary policies served as guidelines for employee conduct and an outline of employee rights and remedies should the employee be disciplined. However, the policies did not form a basis for a complaining employee to claim a breach of contract based on the employer's alleged failure to pursue a complaint against another employee. Nor does a physician's professional obligation to follow the Code of Medical Ethics impose an obligation on the employer to terminate only for just cause. *Id.* at 358, citing *Horn v New York Times*, 100 NY2d 85, 97 (2003).

When discussing its analysis of the plaintiff's claims, the *Slue* court also discussed the exception to the at-will employment doctrine recognized by the Court of Appeals in *Lobosco*, quoted above; that is, New York does recognize an action for breach of contract based on employee manuals when the plaintiff can show that the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting

employment. The hallmark case for that exception is *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458 (1982). In *Weiner*, the court permitted an employee terminated from his job to proceed with a breach of contract claim because he had been orally assured that he would be terminated only for cause, he had signed an employment application stating as much, the employee handbook contained an express provision stating that no employee would be discharged without just cause, and the employee had turned down offers of employment in reliance on this assurance.

However, when applying the *Weiner* exception, the courts have strictly applied the criteria, looking for concrete evidence to satisfy each prong of the test. Thus, for example, the *Slue* court found the case was distinguishable from *Weiner* in that the manual did not contain an express statement that employees would only be terminated for cause, no oral assurances to that effect had been made, and plaintiff had offered no evidence of detrimental reliance on any such alleged promises, such as turning down other jobs. Similarly, the Court of Appeals in *Lobosco* and the Second Department in *Fisher-Jackson v LaGuardia Hospital*, 187 AD2d 696 (1992) both distinguished *Weiner* on the ground that the manual did not contain an express limitation on termination without just cause.

These cases compel a finding that the manuals cited by Dr. O'Neill do not create an employment contract that limits his termination to just cause. Whether the manual governs faculty rights and obligations, ethical conduct, or disciplinary proceedings, the result is the same — Dr. O'Neill is an at-will employee whose employment may be terminated at any time for any reason or for no reason at all. The *Weiner* exception does not apply as no concrete evidence exists of a precise written or oral promise by

NYU to limit the terms of employment, nor any express reliance by Dr. O'Neill on any such promise. General language in the manuals or some sort of implicit reliance by Dr. O'Neill based on an ethical duty to report perceived research misconduct without fear of reprisal is simply not enough. Therefore, Dr. O'Neill's first and second causes of action must fail, as no basis exists for finding that NYU breached an employment contract with Dr. O'Neill by terminating him without just cause.

Similarly, the fourth and fifth causes of action must fail, as they rely on the same claims as the first and second causes of action but in the framework of CPLR Article 78. The analysis is essentially the same under Article 78. See, *DePetris, supra*. What is more, courts retain a limited role when reviewing controversies involving academic institutions that involve the exercise of highly specialized professional judgments. See *Maas v Cornell University*, 94 NY2d 87, 92 (1999). With that role in mind, this Court cannot find based on the record here that NYU's decision to terminate Dr. O'Neill's employment based on its finding of unprofessional behavior was so arbitrary and capricious or shocking to the conscience to merit reversal.

The final issue here is Dr. O'Neill's third cause of action alleging defamation. The alleged defamatory remarks are statements made by Dr. Carroll in front of other NYU executives accusing Dr. O'Neill of being inappropriately "angry" and of demonstrating "hostility." In addition, Dr. Carroll based his termination decision on his finding of "unprofessional behavior" by Dr. O'Neill.

As the First Department recently reiterated in *Sandals Resorts International Limited v Google, Inc.*, 2011 WL 1885939, when affirming the denial of pre-action discovery relating to an individual's allegedly defamatory comments posted on the internet accusing Sandals Resorts of racist employment practices:

Defamation is defined as the making of a false statement of fact which "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 4344 U.S. 969 [1977] [citations omitted]). "Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, ... a libel action cannot be maintained unless it is premised on published assertions of fact," rather than on assertions of opinion (*Brian v Richardson*, 87 NY2d 46, 51 [1995]).

While it is often a "difficult task" to distinguish between assertions of fact and nonactionable expressions of opinion (*Brian, supra* at 51), certain factors are considered; that is, (1) whether the statement at issue has a precise meaning so as to give rise to clear factual implications; (2) the degree to which the statements are verifiable, i.e., objectively capable of proof or disproof; (3) whether the full context of the communication in which the statement appears signals to the reader its nature as opinion; and (4) whether the broader context of the communication so signals the reader. *Sandals, citing Ollman v Evans*, 750 F.2d 970 (DC Cir 1984), *cert denied* 471 U.S. 1127 (1985) and *Immuno AG v Moor-Jankowski*, 777 NY2d 235, 243 (1991), *cert denied* 500 U.S. 954 (1991).

Applying these factors here, the Court finds that Dr. Carroll's statements qualify more as opinion than fact, as they are unverifiable, subjective characterizations of Dr. O'Neill's behavior as perceived by Dr. Carroll. This Court rejects Dr. O'Neill's claim that the statements do not qualify as opinion because they suggest underlying negative facts not disclosed to the listener. Dr. O'Neill was in constant communication with various persons at NYU about his concerns of research misconduct, and Dr. Carroll's comments merely expressed his opinion as to how Dr. O'Neill had conducted himself during that controversy.

Even if the comments could be viewed as fact rather than opinion, they are not actionable because "statements between parties with a common interest are afforded a qualified privilege." *Slue*, 409 F. Supp. at 366, citing *Meloff v NY Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir. 2001). As the *Slue* court noted in finding that the comments among the faculty members about Slue's discharge were protected by a qualified privilege, the common interest privilege has been routinely applied to communications among fellow employees so as not to impede discussion. See, e.g., *Loughry v Lincoln First Bank*, 67 NY2d 369, 376 (1986) (statements among employees at a confidential meeting may be privileged); *Stukulus v New York*, 42 NY2d 272, 280 (1977) (privilege would apply to communications between members of a faculty tenure committee); *Dillon v City of New York*, 261 AD2d 34 (1<sup>st</sup> Dep't 1999) (statements made about an employee in an employment context are qualifiedly privileged based on the common interest of the parties involved).

Dr. O'Neill correctly argues that the qualified privilege may be rebutted by proof that the statement is false and that the defendant acted with malice or reckless disregard for the truth or falsity of the statement. *Loughry*, 67 NY2d at 376. However, considering all the circumstances, which were explained to this Court in detail via various affidavits and countless documents, this Court concludes that no basis for such a finding exists, nor even a triable issue of fact.

Whether right or wrong, Dr. Carroll concluded based on the exercise of his professional judgment that Dr. O'Neill's behavior was unprofessional and that the continued unprofessionalism following written and verbal warnings warranted the termination of Dr. O'Neill's employment. Dr. O'Neill has failed to demonstrate that a legal basis exists for this Court to overrule that judgment.

Accordingly, it is hereby

ORDERED that the motion by the defendants-respondents to dismiss the above-captioned hybrid plenary action/Article 78 proceeding is granted; and it is further

ADJUDGED that the Article 78 petition is denied and the proceeding is dismissed without costs or disbursements; and it is further

ORDERED that the complaint in the plenary action is dismissed without costs or disbursements.

Dated: June 30, 2011

**JUN 30 2011**

  
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J.S.C.  
**ALICE SCHLESINGER**