SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 23A

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Alexis Nichole Riley,

Index No.: 22746/2014E

Plaintiff,

-against-

Decision & Order

SOUTH BRONX CLASSICAL CHARTER SCHOOL, SOUTH BRONX CLASSICAL CHARTER SCHOOL BOARD OF TRUSTEES, SOUTH BRONX CLASSICAL CHARTER SCHOOL II, SOUTH BRONX CLASSICAL CHARTER SCHOOL II BOARD OF TRUSTEES, Lester S. Long AS EXECUTIVE DIRECTOR AND INDIVIDUALLY, Leena Konda AS SCHOOL DIRECTOR AND INDIVIDUALLY, C. Stephen Baldwin AS BOARD CHAIR/TRUSTEE AND INDIVIDUALLY, Kathryn M. Heleniak AS BOARD VICE-CHAIR/TRUSTEE AND INDIVIDUALLY,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.

The motion by defendants for an order dismissing the complaint of plaintiff Alexis Nichole Riley ("Riley") pursuant to CPLR §§ 3211(a)(7) and (11), is granted.

Plaintiff Riley worked as Special Projects Manager at defendant South Bronx Classical Charter School ("SBCCS") from February 4, 2013 to June 14, 2013. Plaintiff Riley alleges that defendants wrongful terminated her employment in violation of: (1) New York Labor Law § 740, the so-called "Whistleblower Law," for making internal complaints about defendants restricting student access to bathrooms and drinking water, fraudulent billing practices, and the use of plagiarized tests at SBCCS; (2) New York Labor Law § 215, for discharging plaintiff Riley in retaliation for making a complaint that defendants violated New York Labor Law during the course of her employment with SBCCS; and (3) New York City Human Rights Law ("NYCHRL") § 8-107, which prohibits discriminatory practices by an employer on the basis of gender, gender-stereotyping, or disability.

Defendants move to dismiss the complaint pursuant to CPLR § 3211(a)(7), for failure to state a cause of action. Defendants argue that in choosing to assert a claim under Labor Law § 740, based on her complaints to the school administration about student treatment at the school, Riley has invoked the election of remedies clause found in Labor Law § 740(7) and therefore cannot also argue that her termination was for reasons other than her complaints about student treatment at the school. Additionally, defendants argue that the Labor Law § 740 claim itself fails as a matter of law since: (1) it cannot be supported by the facts alleged in the complaint; (2)

Riley does not specify what rule, regulation or law defendants violated; and (3) there are no allegations that any student suffered an adverse consequence based on defendants' alleged violations. Defendants also move to dismiss the complaint as to defendants South Bronx Classical Charter School Board of Trustees, South Bronx Classical Charter School II Board of Trustees, C. Stephen Baldwin, and Kathryn M. Heleniak (collectively "SBCCS Boards and Individual defendants") pursuant to CPLR § 3211(a)(11), on the ground that those parties are immune from liability under New York Not-For-Profit Corporation Law ("N-PCL") § 720-a.

Plaintiff Riley opposes the instant motion asserting that her complaint contains well-pled factual allegations sufficient to meet her relatively light burden during this early pleading stage. Riley cites to a ruling by the New York Court of Appeals in **Webb-Weber v. Community Action for Human Servs., Inc., 23 N.Y.3d 448 (2014)**, which holds that a plaintiff no longer needs to specify the actual law, rule or regulation that was allegedly violated by their employer in order to sustain a claim under Labor Law § 740. Riley next argues that there is a split of authority concerning the waiver provision contained in Labor Law § 740(7). Plaintiff cites **Cabrera v. Fresh Direct, LLC, 2013 WL 4525659 (E.D.N.Y. Aug. 27, 2013)**, in support of her argument that this court should adopt a narrow "carve-out" exception to Labor Law § 740(7) so as to permit plaintiff's NYCHRL claims to survive dismissal. Furthermore, Riley argues that dismissal of the Labor Law § 740 claim, prior to any discovery would be premature. Moreover, Riley opposes defendants' CPLR § 3211(a)(11) motion, arguing that defendants should be ordered to produce information in the form of documentary evidence to determine if the SBCCS Boards and Individual defendants are entitled to immunity under N-PCL § 720-a. Finally, Riley requests leave to replead, amend and/or supplement the complaint, if this court finds the complaint deficient in any way.

Defendants' reply contends that plaintiff's Labor Law § 740 and NYCHRL claims are not independent of each other because all of Riley's claims relate to her alleged retaliatory discharge, thus barring her discrimination claims. Defendants assert that the case relied upon by Riley to support the "carve-out" exception to Labor Law § 740(7) is not binding on this court. Defendants also distinguish **Villarain v. The Rabbi Haskel Lookstein School, 96 A.D.3d 1 (1st Dept. 2012)**, the lone case cited in support of plaintiff's argument that the conduct complained of affected public health and safety. Defendants do not dispute the applicability of the **Webb-Weber** holding to the instant motion, but state that the root of their argument is that the complaint does not set forth any facts that could support a Labor Law § 740 claim.

Labor Law § 740(7) reads: "[n]othing 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."

CPLR § 3211(a)(7) states that a party may move to dismiss one or more causes of action against it on the ground that the pleading fails to state a cause of action. In deciding a motion to dismiss pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only

whether the facts as alleged fit within any cognizable legal theory." **Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994)**. The complaint should be liberally construed in favor of the plaintiff. **Robinson v. Robinson, 303 A.D.2d 234 (1st Dept. 2003)**.

In the case at bar, the election of remedies provision in Labor Law §740(7) bars plaintiff's NYCHRL causes of action. Throughout Riley's complaint there are claims that her employment was terminated due to her gender, disability, and/or her complaints about student health and safety. Plaintiff specifically alleges that her retaliatory discharge was the result of her "opposition to Defendants' unlawful discriminatory employment patterns of conduct and employer practices, and were payback for internally reporting her observations and findings concerning specific dangers to the health and safety" of the students. (Complaint ¶ 141). Moreover, in her Labor Law cause of action plaintiff "repeats and reiterates" all previous paragraphs contained in the complaint "as if restated in their entirety," refers to the "wrongful and unlawful harms inflicted upon her as described in this complaint," and describes the damages she has suffered due to "defendants' outrageous conduct in violation of [her] human rights." (Complaint ¶¶ 170-173).

New York State courts have consistently held that the Labor Law § 740 "waiver applies to causes of action arising out of or relating to the same underlying claim of retaliation." (citations omitted) **Charite v. Duane Reade, Inc., 120 A.D.3d 1378 (2nd Dept. 2014)**. "Plaintiff's institution of an action against his former employer...in accordance with Labor Law § 740 constitutes a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law, including his remaining claim..., which arises from the allegedly unlawful discharge." (internal quotations omitted) **Bones v. Prudential Fin., Inc., 54 A.D.3d 589 (1st Dept. 2008)**. The **Cabrera** decision relied upon by plaintiff is a non-binding federal court decision and its interpretation of New York State Labor Law will not be adopted by this court. Thus, plaintiff's NYCHRL and Labor Law § 215 causes of action are barred by the waiver provision of Labor Law § 740(7).

The Labor Law § 740(2) claim fails as a matter of law and is dismissed. Even applying the relaxed pleading standard of the **Webb-Weber** holding, the allegations in the complaint that defendants violated the law by not allowing students access to more than five ounces of water during lunchtime and limiting students' access to restrooms failed to meet the pleading requirements of Labor Law § 740 as they did not create and present a substantial and specific danger to the public health and safety. "Labor Law § 740(2)(c), like section 740(2)(a), is triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety." **Remba v. Fedn. Empl. and Guidance Serv., 76 N.Y.2d 801 (1990); see also Cotrone v. Consolidated Edison Co. of N.Y., Inc., 50 A.D.3d 354 (1st Dept. 2008), Green v. Saratoga A.R.C., 233 A.D.2d 821 (3rd Dept. 1996), Kern v. DePaul Mental Health Servs., 152 A.D.2d 957 (4th Dept. 1989), Gardner v. Continuing Dev. Servs., 292 A.D.2d 838 (4th Dept. 2002)**. Furthermore, plaintiff's allegations regarding fraudulent billing practices and the use of plagiarized tests at the school are insufficient to support her Labor Law § 740 claim. **Pipia v. Nassau County, 34 A.D.3d 664 (2nd Dept. 2006)**.

Finally, plaintiff's request for leave to replead, amend or supplement the complaint, in

lieu of dismissal is denied. A Labor Law § 740 "waiver may not be avoided by a plaintiff by amending the complaint, to withdraw the Labor Law § 740 claim." **Bones citing Reddington v. Staten Is. Univ. Hosp., 11 N.Y.3d 80 (2008).**

That branch of defendants' motion pursuant to CPLR § 3211(a)(11) is rendered moot and will not be addressed by this court.

Accordingly, the motion by defendants for an order dismissing plaintiff's complaint pursuant to CPLR § 3211(a)(7), is granted and the complaint is dismissed in its entirety.

Movant is directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: June 1, 2015

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR.