

**Hawkins v David A. Hidalgo, M.D., P.C.**

2019 NY Slip Op 33232(U)

October 29, 2019

Supreme Court, New York County

Docket Number: 151081/2018

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

WALTER HAWKINS,

Plaintiff,

- v -

DAVID A. HIDALGO, M.D., P.C.,

Defendant.

-----X

INDEX NO. 151081/2018

MOTION DATE 03/20/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS

This action was commenced as a defamation action by the plaintiff, who had been an employee of the defendant plastic surgery practice. By order dated December 12, 2018, this court granted the defendant's motion to dismiss the complaint for failure to state a cause of action sounding in defamation. In that order, however, the court suggested that the plaintiff might state a cause of action to recover under the Whistleblower Law (Labor Law §§ 740-741), and granted him leave to replead. He has now done so. The defendant now moves pursuant to CPLR 3211(a)(7) to dismiss the amended complaint for failure to state a cause of action under either of those two statutory provisions. The motion is granted.

Labor Law § 740(2) is narrowly tailored. It provides that:

"An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

"(a) 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;

"(b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer; or

“(c) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation” (emphasis added).

David A. Hidalgo is a physician and the sole principal of the defendant professional corporation. At the time of the plaintiff’s employment with the defendant, the plaintiff’s title was “Practice Manager,” a purely ministerial and administrative role. The plaintiff asserts that, on or about June 1, 2017, after he complained to Hidalgo about alleged bullying behavior by Abigail Kasselakis, a registered nurse employed by the defendant, he became excluded from decisions and was treated differently at work. He further alleges that, on or about August 1, 2017, he was told by Hidalgo to “look for another job.” The plaintiff claims he was given pretextual reasons for the termination of his employment, including allegations that the patient count was down, that he did not update scheduling and phone systems, that he did not properly manage supplies, that he did not coordinate Hidalgo’s social calendar, that he did not track a nurse’s overtime hours, and that he failed timely to purchase annual Yankees tickets for the office.

As set forth in the plaintiff’s own papers, a bold heading characterizes the crux of the amended complaint with the explanation, “Hawkins Suffers Severe Retaliation for Speaking Up about Bullying.” The plaintiff essentially admits, in paragraph 42 of the amended complaint, that he did not disclose or complain to anyone about the two possible violations of law that might have supported his Whistleblower Law claims—suturing of patients by unqualified nurses and lack of patients’ informed consent—because he says that they were “implicit” and “known to Dr. Hidalgo.”

The plaintiff cites, and research has revealed, no authority for the proposition that mere “bullying,” without more, rises to the level of a violation of law, rule, or regulation. The plaintiff’s reliance on the Rules of the New York State Board of Regents, Part 29.1(b)(5) (8 NYCRR 29.1[1][b][5]), is misplaced. That regulation provides that an investigation will be made into professional conduct that “evidences moral unfitness to practice.” Bullying does not fit within the examples of “moral unfitness,” as explained in the case law developed under this rule, which

suggests a much higher threshold, and has included, for example, physicians having improper sexual contact with patients (see *Matter of Block v Ambach*, 73 NY2d 323 [1989]; *Matter of St. Lucia v Novello*, 284 AD2d 591 [3d Dept 2001]; *Matter of Martinez-Urrutia v Szetela*, 216 AD2d 700 [3d Dept 1995]; *Matter of Kim v Sobol*, 180 AD2d 976 [3d Dept 1992]).

Nonetheless, even if bullying were considered evidence of a moral unfitness to practice, the amended complaint still would not state a cause of action because that conduct does not present “substantial and specific danger” to anyone, let alone affect the “public health or safety,” as the statute requires. To meet the statutory standard, claims of this nature must be tied to a specific danger; they cannot constitute mere speculation (see *Cotrone v Consolidated Edison Co. of New York, Inc.*, 50 AD3d 354, 354-355 [1st Dept 2008]). Labor Law § 740 “envisions a certain quantum of dangerous activity before its remedies are implicated” (*id.* at 355). In the amended complaint, the plaintiff does not assert that the alleged bullying caused or posed a specific danger even to him, let alone the public at large, only that the distraction caused by such bullying “could lead to” error, which is speculative and not sufficient to state a claim that could survive a motion to dismiss.

Although suturing by unqualified nurses could present a danger to a particular patient (see *Kern v DePaul Mental Health Servs.*, 152 AD2d 957 [4th Dept 1989]), and might even support a claim that the defendant endangered the public at large because its services were open to members of the public (see *Villarin v Rabbi Haskel Lockstein Sch.*, 96 AD3d 1, 7 [1st Dept 2012]; *Rodgers v Lenox Hill Hosp.*, 211 AD2d 248 [1st Dept 1995]), the plaintiff’s conceded failure to complain of that alleged behavior to a supervisor or to a public body cannot serve as a basis for his Labor Law § 740 cause of action.

Labor Law § 741 is specific to health-care employees. Unlike Labor Law § 740, it permits, but does not require, proof of a substantial and specific danger to the public health or safety. Rather, it prohibits retaliatory action against a health-care employee for complaining to a

supervisor or providing information to a public authority concerning any "Improper quality of patient care," which is defined as

"any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient" (Labor Law § 741[1][d] [emphasis added]).

Nonetheless, Labor Law § 741(1)(a) defines an "employee" as "any 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" (emphasis added). Inasmuch as the plaintiff was not an employee who "perform[ed] health care services," Labor Law § 741 is inapplicable to his claims as well, as the statute was "meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 93 [2008] [Labor Law § 741 does not protect the coordinator/manager of a hospital's volunteer services]).

The plaintiff attempts to cure deficiencies in the amended complaint by asserting in his opposing affidavit that he reported the unauthorized suturing to a supervisor, referring to Kasselakis. Specifically, the plaintiff avers that a patient complained to him about Kasselakis, and that he repeated the complaint to her. The plaintiff, however, does not expressly assert that she was his supervisor, and it is also questionable as to whether the mere repetition of a patient's complaint *about to a nurse directly to that nurse* is sufficient to constitute "disclosure" to a supervisor within the meaning of Labor Law § 740(a). Notably, this is not the theory of the plaintiff's case, as he unambiguously asserts that it was his conversation with Hidalgo about workplace bullying that allegedly led to the termination of employment.

The court notes that a significant portion of the amended complaint sets forth allegations implying that an improper sexual relationship existed between Hidalgo and Kasselakis, but this does not further the plaintiff's Whistleblower Law causes of action; in fact, it suggest another

potential reason for the termination of the plaintiff's employment, i.e., that he offended both Hidalgo and Kasselakis when he accused her of bullying.

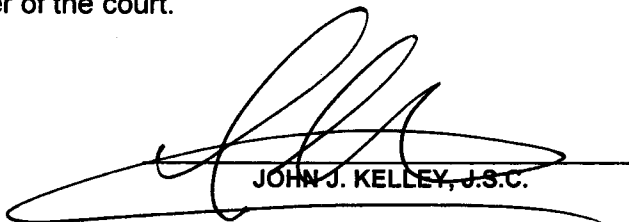
Accordingly, it is

ORDERED that the defendant's motion to dismiss the amended complaint is granted, and the amended complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

10/29/2019  
DATE

  
JOHN J. KELLEY, J.S.C.  
HON. JOHN J. KELLEY  
J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: