McCormick v NYU Langone Med. Ctr.
2019 NY Slip Op 33532(U)
November 27, 2019
Supreme Court, New York County
Docket Number: 155468/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46
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VICTORIA MCCORMICK, Index No. 155468/2016

Plaintiff

- against - DECISION AND ORDER

NYU LANGONE MEDICAL CENTER and
NYU HOSPITAL CENTER,

Defendants

---------------------------------------x

APPEARANCES:

For Plaintiff
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For Defendants
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff McCormick sues defendants NYU Langone Medical Center and NYU Hospital Center for retaliation in violation of New York Labor Law § 741, which protects whistleblowers in health care services against retaliation by their employers. Defendant NYU Hospital Center moves for summary judgment, having claimed in its answer that its co-defendant NYU Langone Medical Center is not a suable entity, but only a name by which NYU Hospital Center

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conducts business. C.P.L.R. § 3212(b). McCormick does not respond to this claim, but cross-moves for summary judgment on NYU Hospital Center's liability. C.P.L.R. § 3212(b) and (e). For the reasons explained below, the court denies both motions.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if the moving party satisfies this standard does the burden shift to the opposing party to rebut that prima facie showing by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the parties' motions, the court construes the evidence in the light most favorable to the opponent. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De

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Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503. If the moving party fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005).

III. UNDISPUTED FACTS

Defendant employed McCormick as a respiratory therapist from March 1999 until it terminated her employment in June 2015. On May 21, 2015, McCormick was assigned to work in defendant's neonatal intensive care unit (NICU). That evening an incident occurred involving McCormick, a NICU patient, the patient's nitric oxide machine, and two of McCormick's supervisors, James Weatherbee and David Wain, as well as other hospital staff. On the morning of May 22, 2015, McCormick reported the incident to the New York State Department of Health (NYSDOH). Also in response to the incident on May 21, 2015, defendant commenced an investigation to ascertain whether the actions by anyone involved warranted disciplinary measures. Following the investigation, defendant terminated McCormick's employment.

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IV. THE PRINCIPAL DISPUTE

The parties dispute whether defendant terminated McCormick in retaliation for whistleblowing and whether defendant even knew McCormick had filed a complaint with NYSDOH when defendant terminated her employment, so as to have been motivated to retaliate. McCormick claims defendant terminated her employment, in violation of Labor Law § 741, because she filed a whistleblower complaint with NYSDOH. Aff. of Scott A. Brody Ex. A ¶ 4. Defendant claims it terminated McCormick for legitimate, non-retaliatory, business reasons, specifically for her violation of hospital policy on May 21, 2015, in conjunction with her prior disciplinary history. Aff. of Steven Gerber Ex. C, at 16; Aff. of Evelyn Taveras Ex. A, at 2.

The parties also dispute the timeline leading up to the termination of McCormick's employment. McCormick claims that defendant terminated her employment June 2, 2015, after NYSDOH visited defendant June 1, 2015. Brody Aff. Ex. A ¶ 4. Defendant claims that it terminated McCormick's employment June 1, 2015, and that it made its decision to do so even before that date. Reply Aff. of Steven Gerber Ex. E, at 17; Brody Aff. Ex. D, at 73-74. Resolution of this dispute is unnecessary to the determination of the parties' motions, however, because, even if defendant shows that it did not learn of McCormick's complaint to NYSDOH from the visit June 1, 2019, as discussed below McCormick

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raises an issue whether defendant knew of her complaint as of May 30, 2015. The parties also dispute many facts specifically regarding the events of May 21, 2015, but these discrepancies also do not materially bear on the current motions.

V. MCCORMICK'S CROSS-MOTION FOR SUMMARY JUDGMENT

A. MCCORMICK ESTABLISHES A LABOR LAW § 741 CLAIM.

To sustain a claim under Labor Law § 741, McCormick must have disclosed or have threatened to disclose an activity of the employer "that the employee, in good faith, reasonably believes constitutes improper quality of patient care." N.Y. Labor Law § 741(2)(a). As defined by the statute, "improper quality of patient care" consists of a violation of law that presents a significant threat to a specific patient's health. N.Y. Labor Law § 741(1)(d).

McCormick satisfies the requirements for a Labor Law § 741 claim. First, McCormick filed a report with NYSDOH May 22, 2015. Blashka v. New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr., 126 A.D.3d 503, 503 (1st Dep't 2015). See Ruiz v. Lenox Hill Hosp., 146 A.D.3d 605, 606 (1st Dep't 2017). Second, McCormick reported her supervisor's use of a contaminated injector module. Blashka v. New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr., 126 A.D.3d at 503. See Ruiz v. Lenox Hill Hosp., 146 A.D.3d at 605-606. Third, McCormick reasonably believed her supervisor's use of this contaminated

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injector module presented a substantial and specific danger to a patient. N.Y. Labor Law § 741(1)(d); Blashka v. New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr., 126 A.D.3d at 503; Finkelstein v. Cornell Univ. Med. Coll., 269 A.D.2d 114, 116 (1st Dep't 2000). McCormick also specifies the regulation defendant violated as determined by NYSDOH. Brody Aff. Ex. A ¶ 12, Ex. G. See King v. New York City Health & Hosps. Corp., 85 A.D.3d 631, 631 (1st Dep't 2011).

Finally, McCormick shows that she is excused from Labor Law § 741(3)'s requirement that, before commencing this action, she "brought the improper quality of patient care to the attention of a supervisor and . . . afforded the employer a reasonable opportunity to correct such activity." N.Y. Labor Law § 741(3); Skelly v. New York City Health & Hosps. Corp., 161 A.D.3d 476, 477 (1st Dep't 2018). This requirement does not apply if "the improper quality of patent care" about which McCormick complained presented "an imminent threat to public health . . . or to the health of a specific patient and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action." N.Y. Labor Law § 741(3).

McCormick testified at her deposition that the incident May 21, 2015, was the third time in the previous 10 days that her supervior James Weatherbee had endangered a patient's health through misuse of life sustaining equipment. Brody Aff. Ex. B,

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at 87, 90, 93, 96; Gerber Aff. Ex. F, at 87, 90. Thus, even if by May 22, 2019, the patient on whom the contaminated injector module had been used was out of danger, a fact that defendant only assumes, from McCormick's perspective Weatherbee presented an imminent threat to his prospective patients, even if he no longer threatened the patient whom he had endangered May 21, 2015.

Regarding the exception's second element, McCormick had witnessed her co-workers complain about both prior incidents to the coordinator and to another supervisor. Brody Aff. Ex. B, at 90- 91; Gerber Aff. Ex. F, at 90-91. McCormick's supervisor Weatherbee was well aware of all three incidents. Her supervisor David Wain was aware of at least the most recent incident. McCormick also had witnessed her co-workers complain at staff meetings about staffing and equipment problems. Brody Aff. Ex. B, at 217, 219; Gerber Aff. Ex. F, at 217, 219. These undisputed facts indicate that no further internal report was required. Skelly v. New York City Health & Hosps. Corp., 161 A.D.3d at 477. See Tipaldo v. Lynn, 26 N.Y.3d 204, 211-12 (2015).

To the extent that Labor Law § 741(3) required McCormick to report the most recent incident to additional supervisors, however, she had not observed any corrective action in response to complaints about the prior incidents, giving her little reason to expect a response on the third occasion. Moreover, she

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reasonably believed in good faith that, to whomever she reported the recent incident, Wain and Charles Catanzaro, Administrative Director of defendant's Respiratory Care Department, would blame her because they resented her experience and superior knowledge of respiratory therapy. Brody Aff. Ex. B, at 97, 102-103, 111-12; Gerber Aff. Ex. F, at 97, 102-103, 111-12. See N.Y. Labor Law § 741(3); Tipaldo v. Lynn, 26 N.Y.3d at 212; Skelly v. New York City Health & Hosps. Corp., 161 A.D.3d at 477. In sum, she did not believe her reporting further would result in corrective action:

> Because I knew more than David. And I knew more than Charlie. . . . So I believe my knowledge made them look bad.
>
> . . . .
>
> I knew more of what was going on of their mess-ups, and I kept finding one mess-up after another after another. And that's not what they wanted to hear. I was making them look bad.

Brody Aff. Ex. B, at 112; Gerber Aff. Ex. F, at 112.

To support her allegation of whistleblower retaliation, McCormick relies on a report filed with defendant's internal reporting mechanism, the Global Compliance Alertline System, May 30, 2015, authenticated by two of defendant's employees. McCormick testified that she did not make this report. Brody Aff. Ex. B, at 97; Gerber Aff. Ex. F, at 97. The person who filed the report May 30, 2015, not only identified McCormick as a whistleblower, but also predicted that she soon would be fired in

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retaliation. McCormick claims a management level employee must have filed this report because only a management level employee would have known of her impending termination as of May 30, 2015. She uses the short time between her report to NYSDOH and the termination of her employment to draw a causal connection between her whistleblowing and a retaliatory termination. Finkelstein v. Cornell Univ. Med. Coll., 269 A.D.2d at 116. Through this admissible evidence, McCormick supports her claim of retaliation. Id.

B. DEFENDANT RAISES A FACTUAL ISSUE REQUIRING DENIAL OF MCCORMICK'S CROSS-MOTION.

In opposition, defendant steadfastly maintains that the termination of McCormick's employment was not in retaliation for her whistleblowing about the incident May 21, 2015, but was due to her involvement in the incident itself, which was the culmination of her history of disciplinary problems. This history included her suspension six months earlier when she received a final warning that her next infraction would lead to termination. Aff. of Evelyn Taveras Ex. A, at 2; Gerber Aff. Ex. C, at 16. Defendant claims McCormick herself violated hospital policy and endangered patient safety May 21, 2015, by causing a contaminated injector module to be used on a patient. Aff. of David Wain ¶ 29.

Much of defendant's evidence consists of unsworn written statements rather than deposition testimony or other admissible

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evidence. Where a witness attempts to lay a business record foundation for these statements, she fails to show personal knowledge that the records were created contemporaneously with the events recorded. C.P.L.R. § 4518(a); People v. Bell, 153 A.D.3d 401, 412 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521 (1st Dep't 2016); Matter of Ramel Anthony S., 124 A.D.3d 445, 445 (1st Dep't 2015). See Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 508 (2015); People v. Rodriguez, 153 A.D.3d 235, 244 (1st Dep't 2017); Barkley v. Plaza Realty Invs. Inc., 149 A.D.3d 74, 79 (1st Dep't 2017); Weicht v. City of New York, 148 A.D.3d 551, 552 (1st Dep't 2017). Even if she lays that foundation, the statement includes other layers of hearsay for which no foundation for another exception to the rule against hearsay is laid. Taylor v. One Bryant Park, LLC, 94 A.D.3d 415, 415 (1st Dep't 2012); People v. Vasquez, 61 A.D.3d 596, 596 (1st Dep't 2009); Matter of Philip, 50 A.D.3d 81, 86 (1st Dep't 2008). See Matter of Breeana R.W., 89 A.D.3d 577, 578 (1st Dep't 2011).

The affidavit by McCormick's former supervisor David Wain, however, does support the claim that McCormick violated hospital policy and endangered patient safety by causing a contaminated injector module to be used. Wain Aff. ¶ 29. See Blashka v. New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr., 126 A.D.3d at 503. Because this evidence raises a factual issue

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regarding the reason defendant terminated McCormick's employment, the court denies her cross-motion for summary judgment. C.P.L.R. § 3212(b).

VI. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant insists that it conclusively establishes the absence of any retaliation against McCormick for whistleblowing. Defendant repeatedly refers to an investigation conducted by Charles Catanzaro, but presents no admissible evidence supporting this investigation's conclusions. In fact, out of the many witnesses to the incident May 21, 2015, defendant produced no witnesses for depositions and only a single affidavit from a witness with personal knowledge of the incident. Wain Aff.

To rebut defendant's claim that McCormick violated hospital policy and endangered patient safety May 21, 2015, by causing a contaminated injector module to be used on a patient, McCormick maintains that she was not responsible for the incident, questions the accuracy of Catanzaro's investigation, and identifies flaws in the post-termination grievance process. First, McCormick attests that she neither handed the contaminated injector module to anyone, nor even was present in the NICU when the incident occurred there, and claims that defendant's inadequate supplies, understaffing, and other staff's error caused incident. Brody Aff. Ex. A ¶¶ 7, 11-12. See Mehulic v. New York Downtown Hosp., 153 A.D.3d 1149, 1150 (2017); Blashka v.

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New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr., 126 A.D.3d at 504. Second, the statements that Catanzaro obtained in his investigation subsequently were recanted. Brody Aff. Ex. E, at 171-73. Following their recantation, Catanzaro obtained no additional statements to support his investigation's factual conclusions, but continued simply to accept the statements previously provided and relied on them to determine that the termination of McCormick's employment was for sound disciplinary reasons.

Third, McCormick identifies flaws in the post-termination grievance hearing and decisionmaking by Derek Forte, a neutral hearing officer: his failure to address or reconcile the discrepancies in contradictory testimony or account for the recanted statements and a resulting lack of evidence for his conclusion. Because the credibility of the post-termination grievance process is so completely undermined, she contends that defendant may not rely on the outcome of the grievance hearing to support defendant's disciplinary action. Id. at 83-85, 137-39, 171-73, 285-94. Even if defendant does not rely on the grievance process to support summary judgment here, McCormick's dispute with Wain, defendant's only witness with personal knowledge, over her responsibility for the contaminated injector module and the absence of undisputed admissible evidence supporting Catanzaro's

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investigatory conclusions rebut this ground for defendant's motion.

Defendant also insists that no evidence indicates defendant knew McCormick had filed a complaint with NYSDOH when defendant terminated her employment, precluding any basis for the termination to have been retaliatory. In fact, no deposition testimony or affidavit from any employee of defendant attests to its unawareness of such a complaint. In any event, the Global Compliance Alertline System report from May 30, 2015, from a person in a position to know that McCormick was about to be fired in retaliation for her whistleblowing, disputes this ground for defendant's motion.

In sum, McCormick presents admissible evidence disputing whether the termination of her employment was predicated upon grounds other exercise of her rights under Labor Law § 741. Therefore the court also denies defendant's motion for summary judgment. Mehulic v. New York Downtown Hosp., 153 A.D.3d at 1150; Blashka v. New York Hotel Trades Council & Hotel Assn. of N.Y. Health Ctr., 126 A.D.3d at 504; Finkelstein v. Cornell Univ. Med. Coll., 269 A.D.2d at 116.

VII. CONCLUSION

For all the foregoing reasons, the court denies both defendant NYU Hospital Center's motion for summary judgment and

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plaintiff's cross-motion for summary judgment on liability. C.P.L.R. 3212(b). This decision constitutes the court's order.

DATED: November 27, 2019

LUCY BILLINGS, J.S.C.

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