

Rexhouse v Concordia Coll.-N.Y. Found., Inc.
2019 NY Slip Op 34623(U)
August 9, 2019
Supreme Court, Westchester County
Docket Number: Index No. 54545/2019
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ERIKA L. REXHOUSE,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 54545/2019
Motion Sequence No. 3

CONCORDIA COLLEGE-NEW YORK FOUNDATION, INC.,
THE LUTHERAN CHURCH-MISSOURI SYNOD, INC.,
JOHN A NUNES, MONIQUE NUNES, ARLENE TORRES,
SHERRY FRASER, and THERESA VIDAL,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with the motion by defendant The Lutheran Church-Missouri Synod, Inc., for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint as against it:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibit A, and Memorandum of Law	1
Affirmation in Opposition, Exhibits A - B, and Memorandum of Law	2
Memorandum of Law in Reply	3

Plaintiff Erika Rexhouse commenced this action by summons and complaint filed on March 25, 2019, alleging that she was wrongfully discharged from her position at Concordia College (“Concordia” or the “College”) in retaliation for engaging in protected whistleblowing activities. The factual allegations were fully set out in the previous decision and order of this Court, filed July 25, 2019, and will not be repeated herein (*see Rexhouse v Concordia College-N.Y. Found., Inc.*, 2019 NY Slip Op 51195[U], 2019 NY Misc LEXIS 4067, 2019 WL 3367780 [Sup Ct Westchester

County 2019]). That decision dismissed two causes of action, leaving only plaintiff's cause of action under Labor Law § 741. Accordingly, although this motion was addressed to the entire complaint, this decision will discuss only the viability of the remaining cause of action as against the moving defendant.

In seeking dismissal of the remaining cause of action as against it, defendant Lutheran Church-Missouri Synod, Inc. ("LCMS") argues that the complaint fails to state a cause of action against it under Labor Law § 741 because the pleading does not allege that LCMS was a "healthcare employer" or that it was plaintiff's employer, or that plaintiff reported to LCMS her claim of improper patient care. In opposing the motion, plaintiff contends that the claim for retaliatory termination under section 741 is sufficiently stated as against LCMS based on LCMS's ownership and operation of Concordia College, and its responsibility, through its appointed Board of Regents, for conditions of employment of Concordia's staff. It also relies on the college's whistleblower policy, promulgated at the direction of LCMS to enable LCMS's Board of Regents to protect against misconduct by college administrators, and the complaint that plaintiff filed pursuant to that policy.

Discussion

"Labor Law § 741, often referred to as the Health Care Whistleblower Law, offers special protection to health care employees who 'perform[] health care services'" (*Minogue v Good Samaritan Hosp.*, 100 AD3d 64, 69 [2d Dept 2012], quoting Labor Law § 741 [1] [a]). "[S]ection 741 . . . offers exceptional and specialized whistleblower protection over and above the generalized protection afforded by section 740" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 93 [2008]). Section 741 (2) of the Labor Law prohibits a health care employer from taking retaliatory action against a health care employee who "(a) discloses or threatens to disclose to a supervisor . . . an

activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care; or (b) objects to . . . any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care” (Labor Law § 741 [2] [a], [b]). The statute defines “improper quality of patient care” 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]).

When considering whether to dismiss a complaint pursuant to CPLR 3211 (a) (7), we must deem the factual allegations to be true, and give the plaintiff the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

The complaint alleges that “The Lutheran Church – Missouri Synod, Inc. is a corporation which, through its association with Concordia College-New York, provides health care services within a ‘private university setting’” (complaint ¶ 127). In addition, it is alleged that LCMS is in charge of operating the Concordia University System, which operates ten individual Concordia colleges in different regions of the country, including defendant Concordia College-New York (complaint ¶ 14), and that the administrative affairs of the College are vested in a Board of Regents, which is its governing body, and that the Board of Regents of Concordia College is composed of members of LCMS, who are elected according to procedures set forth in the LCMS handbook (complaint ¶ 13). It is also alleged that “LCMS reviews and approves institutional budgets, establishes policy guidelines, . . . and grants prior approval of initial appointments to the university faculties” (complaint ¶ 14).

Plaintiff also contends that the complaint incorporates by reference the Handbook of LCMS, which includes the LCMS bylaws, and that these bylaws codify LCMS's authority over the staff at Concordia College. Plaintiff particularly cites LCMS Bylaw 3.10.6.4 (i)(3), which states that the Board of Regents of each individual institution "shall operate and manage the *institution as the agent of the Synod*" (NYSCEF Doc. No. 32 at p. 162 [emphasis added]). Under that Bylaw, the Board of Regents' responsibilities, in the course of such operation and management of the college, include "[d]emonstrating concern for the general welfare of the institutional staff members and other employees, adoption of regulations governing off campus activities, development of policies regarding salary and wage scales, tenure promotion, vacations, health examinations, dismissal, retirement, pension and other employee welfare benefit provisions" (NYSCEF Doc. No. 32 at p. 162).

Notably, for purposes of the present motion, it is not the task of this Court to address the accuracy of the allegations. When the complaint's assertions are deemed to be true and when plaintiff is given the benefit of all favorable inferences that may be drawn from them, the complaint sufficiently states a claim that LCMS qualifies as plaintiff's employer, and, as such, as a "healthcare employer" as defined in Labor Law § 741. The assertion that Concordia's Board of Regents operated and managed Concordia College as the agent of LCMS is sufficient for these purposes. This is particularly true since determination of whether an entity is an employer for purposes of New York's whistleblower laws involves an "economic realities test" in which factors to consider include "whether the alleged employer (1) had the power to hire and fire the employees, [and] (2) supervised and controlled employee work schedules or conditions of employment" (*see Noble v 93 Univ. Place Corp.*, 303 F Supp 2d 365, 376 [SD NY 2003]). The degree of the Board of Regents'

input and oversight, if any, regarding employees, and whether it, in fact, functioned as the agent of LCMS, cannot be determined here.

LCMS's contention that plaintiff failed to allege that she reported improper patient care to LCMS is also rejected. When the allegations are construed in the light most favorable to plaintiff, the pleading sufficiently alleges that plaintiff reported the claimed violations to LCMS. Plaintiff alleged that she reported instances of improper quality of patient care first to the Director of Human Resources, in accordance with the Board of Regents' whistleblower policy, and to Concordia's general counsel, and subsequently, to the college provost (see complaint ¶ 129). The complaint also sufficiently pleads that LCMS, through its Board of Regents, received or should have received these reports through channels set up under its whistleblower policy, since pursuant to that policy such reports and complaints are allegedly supposed to be reported to the Board of Regents (see complaint ¶ 71).

Finally, this Court has already determined, in its prior decision and order, that the complaint's allegations are sufficient to state that plaintiff, in good faith, reasonably believed the the complained-of conduct constituted a practice which violated a rule or regulation where such violation related 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" (see Labor Law § 741).

Accordingly, it is hereby

ORDERED that the motion by defendant Lutheran Church-Missouri Synod, Inc., to dismiss the complaint as against it is denied; and it is further

ORDERED that the parties are directed to appear, *as previously ordered*, on Monday, September 16, 2019 at 9:30 a.m., at the Preliminary Conference Part of the Westchester County

Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, room 811, White Plains, New York

10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 9, 2019


HON. TERRY JANE RUDERMAN, J.S.C.