

Rexhouse v Concordia Coll.
2021 NY Slip Op 33332(U)
March 17, 2021
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 Nos. 4 & 5

CONCORDIA COLLEGE, and THE LUTHERAN
CHURCH-MISSOURI SYNOD, INC.,

Defendants.

-----X
RUDERMAN, J.

The following papers were considered in connection with the motion by plaintiff Erika Rexhouse for partial summary judgment pursuant to CPLR 3212 on the issue of liability on her first cause of action (sequence 4), and the motion by defendant The Lutheran Church-Missouri Synod, Inc. ("LCMS"), for an order pursuant to CPLR 3212 granting it summary judgment dismissing the first cause of action of the complaint as against it:

<u>Papers - Sequence 4</u>	<u>Numbered</u>
Notice of Motion, Affidavit, Affirmation, Exhibits 1 - 42, Memorandum of Law and Appendixes (NYSCEF Docs. 57-110)	1
Concordia's Memorandum of Law in Opposition, Affidavits, Affirmation, Exhibits D-1 – D-8 (NYSCEF Docs. 132-143)	2
LCMS's Memorandum of Law in Opposition, Affirmation and Exhibit A, Affidavits and Exhibit A (NYSCEF Docs. No. 144-149)	3
Reply Memorandum of Law, Affidavit, Affirmation, Exhibits 1-4, Burkee Affidavit, Exhibits 1-7, Rexhouse Affidavit, Exhibit 1 (NYSCEF Docs. 169-185)	4
 <u>- Sequence 5</u>	
Notice of Motion, Affidavit, Exhibit A, Affirmation, Exhibits A - N, and Memorandum of Law (NYSCEF Docs. 111-131)	5
Memorandum of Law in Opposition, Affirmation, Exhibits 1 - 8 (NYSCEF Docs. 150-159)	6
Reply Memorandum of Law, Affirmation, Exhibits A - G (NYSCEF Docs. 160-168)	7

Plaintiff Erika Rexhouse is a licensed clinical social worker who was hired on October 3, 2016 to serve as the Director of defendant Concordia College's Wellness Center, which offered mental health counseling services to students on campus. Her position was terminated on February 22, 2019. She commenced this action by summons and complaint filed on March 25, 2019, alleging that she was wrongfully discharged from her position in retaliation for engaging in protected whistleblowing activities. The factual allegations have been fully set out in a previous decision, and the evidence will not be summarized here (*see Rexhouse v Concordia College-N.Y. Found., Inc.*, 64 Misc 3d 1218(A), 2019 NY Slip Op 51195[U], 2019 NY Misc LEXIS 4067, 2019 WL 3367780 [Sup Ct Westchester County 2019]).

In that previous decision, this Court dismissed plaintiff's causes of action based on Labor Law § 740 and on the theory of intentional infliction of emotional distress; the remaining cause of action is brought under Labor Law § 741 (*see id.*). "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) 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]).

In support of her motion for summary judgment on the issue of liability, plaintiff contends that her submissions establish as a matter of law that she was wrongfully discharged from her position at Concordia in retaliation for engaging in protected whistleblowing activities, namely, reporting that Monique Nunes, then Concordia’s Senior Director of Student Experience and the wife of Concordia’s President, Dr. John A. Nunes, had wrongfully attempted to obtain, and had obtained, confidential information regarding students who sought on-campus mental health counseling, without the students’ consent. Plaintiff submits in support her own affidavit describing some details of the events of September 24, 2018 through September 25, 2018, relating to the handling of the student referred to as “Patient No. 1,” and a few additional details regarding other alleged improprieties in defendants’ handling of plaintiff’s employment and termination. She also submits in support seven deposition transcripts and numerous documents such as chronologies, memoranda, text messages, letters, prepared statements, minutes of meetings, and reports. She contends that the reason and motivation for her firing is undisputed. Further, she contends that as a matter of law, LCMS must be jointly and severally liable as her “employer.”

In opposition, Concordia submits the affidavit of Dr. John Nunes, its President, who denies certain factual assertions on which plaintiff relies, including Dr. Burkee’s testimony regarding the basis for the decision to terminate plaintiff’s position. Also submitted is an affidavit by Concordia’s Provost, Sherry Fraser, who also denies and/or disagrees with some of plaintiff’s claims.

Even assuming that plaintiff's submissions establish that she had a good faith, reasonable belief that a law was violated by an agent of defendants, leading to an improper quality of patient care which might present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient, section 741 (5) of the Labor Law provides that "it shall be a defense that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section." Grounds for that defense are raised by evidence submitted by Concordia, creating a question of fact as to whether plaintiff's discharge was due to a retaliatory animus. Therefore, plaintiff's motion must be denied.

The motion brought by defendant the LCMS for summary judgment dismissing the complaint as against it is based on the same theory on which its dismissal motion was based: it argues that there is no evidence supporting a finding that it is plaintiff's employer as that term is used by Labor Law § 741. It asserts that it did not employ plaintiff, that it exerts no control over Concordia's employment practices, that no whistleblower reports were made to it, and that it had no opportunity to correct any violation of law, rule or regulation. It reasons that it does not fall within the category of a "Healthcare Employer," since it does not provide patient care.

In opposing the LCMS motion, plaintiff contends that LCMS is jointly and severally liable, along with Concordia, as plaintiff's employer. Plaintiff argues that the claim against LCMS is properly based on LCMS's ownership, operation and oversight of Concordia College as part of the Concordia University System, and its responsibility, through Concordia's Board of Regents, for conditions of employment of Concordia's staff. It also asserts that the college's whistleblower policy was promulgated at the direction of LCMS, to enable LCMS's Board of Regents to protect against misconduct by college administrators.

Plaintiff also contends that the LCMS bylaws codify LCMS's authority over the staff at Concordia College, particularly citing 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."

The parties agree that New York courts have adopted the Second Circuit's "economic realities" test to determine whether an entity is an "employer" for purposes of whistleblower laws (see, e.g., *Ruiz v Lenox Hill Hospital*, 2016 NY Slip Op 30552(U), 2016 WL 1301752, *10-11, 2016 NY Misc LEXIS 1113 * 15 [Sup Ct NY County 2016], *affd as modified* 146 AD3d 605, 606 [1st Dept 2017]). However, while plaintiff has not offered evidence establishing that any LCMS representatives *other than individuals from Concordia* played any direct part in the events at issue here, plaintiff's claim against LCMS is fundamentally that it is jointly liable for the actions of Concordia's administrators to the same extent as is Concordia College, based on the overall organizational structure of LCMS and its colleges, in which Concordia is, in effect, an arm or agent of LCMS. This Court observes that this type of liability was the basis for the inclusion of a defendant hospital's corporate owner, upheld in the *Ruiz* case, where litigation was allowed to proceed against both Lenox Hill Hospital and also against North Shore-Long Island Jewish Health System, Inc. (see *Ruiz v Lenox Hill Hosp.*, 146 AD3d at 606).

LCMS's showing does not establish as a matter of law that it cannot be held liable here under Labor Law § 741.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is denied, and it is further

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 in the Settlement Conference Part of the Westchester County Supreme Court, on a date and in a manner of which they will be notified by that part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 17, 2021


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