SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

----------X

MONIFAH LANDELL,

Plaintiff,

- v -

LIFE BRIDGE DENTAL PLLC,ABC CORPORATIONS 1-5

Defendant.

----------X

INDEX NO. 155865/2022

MOTION DATE 11/02/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on January 10, 2023, where Daniel Kovel, Esq. appeared for the Plaintiff Monifah Landell ("Plaintiff") and David Greenhaus, Esq. appeared for Defendant Life Bridge Dental PLLC ("Defendant"), Defendant's motion to dismiss pursuant to CPLR 3211(a)(7) is granted.

I. Factual and Procedural Background

Plaintiff filed her Complaint alleging violations of New York Labor Law ("NYLL) sections 741 and 215 on July 14, 2022 (NYSCEF Doc. 1). Plaintiff alleges that she was employed by Defendant as a dental assistant who worked alongside Defendant's dentists to perform routine care and cleanings on patients (*id.* at ¶ 10). Plaintiff alleges she was assigned to work at Defendant's Park Slope office (*id.* at ¶ 15). Plaintiff alleges the Park Slope office did not have enough sanitation and sterilization inventory to protect patients (*id.* at ¶ 17). Specifically, Plaintiff alleges the staff in the Park Slope office were directed to reuse sanitation pouches and unsterile wrapping paper on dental instruments which were supposed to be sanitized and sterile before use on patients (*id.*).

Plaintiff alleges "many of [Plaintiff's] colleagues in Park Slope did not have requisite experience and [Plaintiff] was left to juggle multiple assignments at once, which at Park Slope made [Plaintiff] a target for disdain from the other assistants, even though the dentists appreciated and relied upon her efforts." (*Id.* at ¶ 16). Plaintiff alleges she "complained several times about the hostility in her workplace" and "requested a transfer to, upon information and belief…Cobble Hill, Upper West Side or Rockefeller Center, where [Plaintiff] knew other experienced assistants were currently on staff." (*Id.* at ¶ 18). This transfer request was allegedly denied (*id.* at ¶ 19).

Allegedly, on December 10, 2021, Plaintiff again complained about "the hostility in her workplace from the other assistants" and "complained about the recirculation of unsanitary and unsterile instruments" (*id.* at ¶ 20). Allegedly, after this email, Defendant approved Plaintiff's transfer request (*id.* at ¶ 22).

Plaintiff alleges she was transferred to the Grand Central location, where the general manager allegedly said to Plaintiff, she "did not want drama" (*id.* at ¶ 24). Allegedly, the general manager also directed her attention at Plaintiff in an open staff meeting and said, "I don't want any issues here" (*id.* at ¶ 25). Plaintiff then says she was not scheduled any additional shifts and had to reach out to request additional shifts (*id.* at ¶ 26). Plaintiff claims that once she was back on the schedule, the staff at Grand Central ignored her and made her feel isolated. Plaintiff alleges Defendant wrote her up for being late even though procedure allegedly states she should have been given a verbal warning (*id.* at ¶ 28). Plaintiff also claims that she was punished by Defendant marking her sick day as an "unexcused absence" even though Plaintiff allegedly called out sick (*id.* at ¶ 29). Finally, Plaintiff alleges she was "pushed out" when her general manager yelled at Plaintiff for taking a phone call, and allegedly said to Plaintiff "you disgust me" (*id.* at ¶ 30). Plaintiff alleges this confrontation allegedly made her scared to continue to work for her general

manager (*id.*). Plaintiff then alleges that she complained to Defendant about her general manager's behavior and said she could no longer work at Grand Central, but Defendant allegedly failed to investigate the matter or conduct an exit interview (*id.* at ¶ 31).

Plaintiff alleges that the alleged facts constituted impermissible retaliation under NYLL § 741. Plaintiff also alleges unlawful retaliation in violation of NYLL § 215; however, Plaintiff has abandoned this claim (*see* NYSCEF Doc. 10).

In response, Defendant makes the instant motion to dismiss (NYSCEF Doc. 5). Defendant asserts numerous grounds to dismiss the Complaint pursuant to CPLR § 3211(a)(7) (*see* NYSCEF Doc. 8). First, Defendant argues that Plaintiff is not an "employee" within the meaning of NYLL § 741. Second, Defendant argues that Plaintiff did not engage in protected activity under NYLL § 741. Third, Defendant argues that Plaintiff has failed to allege retaliatory action under NYLL § 741. Finally, Defendant argues that Plaintiff fails to allege a causal connection between her retaliation and the December 10, 2021 email.

In opposing the motion, Plaintiff argues that she is an employee within the meaning of NYLL § 741 because she worked directly with patients on routine dental care (NYSCEF Doc. 12). Plaintiff also argues that she engaged in protective activity under NYLL § 741 when she complained about Defendant's sanitation practices of the dental equipment. Plaintiff argues she has sufficiently alleged retaliation by being left off the work schedule, being called out by her manager, being punished with a write-up and an unexcused absence in contravention to Defendant's policies, and by having Plaintiff's manager allegedly scream pejorative insults at her. Plaintiff also claims that she has alleged a causal connection between the alleged retaliation and protected activity because Plaintiff's manager's allegedly hostile behavior began immediately

upon her transfer to Grand Central, indicating the behavior was a result of her prior complaints leading up to her transfer.

In reply, Defendant argues that because Plaintiff does not allege she made professional medical judgments, she cannot be an employee within the meaning of NYLL § 741 (NYSCEF Doc. 15). Defendant also argues that the Complaint alleges one report regarding an instance of unsanitary conditions, which does not rise to the level of protected activity under NYLL § 741. Defendant argues Plaintiff has not alleged adverse employment actions, and even if she did, she fails to show how the adverse employment actions are causally connected to the December 10, 2021 email.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

B. New York Labor Law § 741(a)(1)

NYLL § 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." The Court of Appeals has held that employees eligible to bring claims under NYLL § 741 are those qualified to, and required to, make quality-of-patient-care judgments (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 90-92 [2008]). In *Reddington,* the Court of Appeals analyzed the legislative history of § 741 and found that it is meant to protect "professional judgments regarding the quality of patient care." (*id.*). The Court of Appeals noted that a professional license is not required to maintain an NYLL § 741 claim, and that "there may be cases where an employee without a professional license performs health care services in the employment of a health care provider." (*id.*).

Reddington's progeny has further delineated who is and is not a covered employee for purposes of NYLL § 741 (*Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029, 1032-1033 [1st Dept 2014] [registered nurse who only reviewed supporting paperwork for research projects was not protected by NYLL § 741]; [*Galbraith v Westchester County Health Care Corp.*, 113 AD3d 649, 651 [2d Dept 2014] [triable issue of fact whether Plaintiff perfusionist was "qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care"]; *Trivelli v Putnam Hospital Center*, 2020 WL 7246904 at * 10 [SDNY 2020] [radiology supervisor who administered nuclear isotopes into patients qualified as employee under NYLL § 741]; *Scuderi v Family Residences & Essential Enterprises, Inc.*, 2014 N.Y. Slip. Op. 32832[U] at *6-7 [Sup. Ct., Nassau County 2014] [Direct Support Professional who supervised and cared for individuals residing in home for individuals with disabilities, who mediated emergency situations and supervised the administration of medication, was employee

under NYLL § 741]; *Phillips v Ralph Lauren Ct. for Cancer Care & Prevention*, 22 Misc3d 1128[A] at 3-4 [Sup. Ct., New York County 2009] [acts which are preparatory to a medical procedure and performed by a technician are non-discretionary and therefore not medical]

Plaintiff's sole allegation in relation to her job duties is that "in her role as a dental assistant, [Plaintiff] worked alongside [Defendant's] dentists to perform routine care and cleaning on patients (NYSCEF Doc. 1 at ¶ 11). Plaintiff has not provided any other alleged facts pertaining to her job description, responsibilities, training, or certification. Based on Plaintiff's allegations, the only healthcare services she performed were "routine" and alongside dentists. The Court finds the alleged job duties here to be akin to that of the Plaintiff in *Phillips v Ralph Lauren Ct. for Cancer Care & Prevention*, 22 Misc3d 1128(A) (Sup. Ct., New York County 2009). Indeed, Plaintiff's sole allegation pertaining to her job duties are that she provided "routine care and cleaning", and she has not alleged any discretionary tasks she carried out or medical judgments she was required to make. Nor has Plaintiff provided any cases in opposition that indicate an individual in her position is entitled to the protection of NYLL § 741, or an affidavit as to the discretion she exercised and medical judgments she made in her role.

As stated by the Court of Appeals "the universe of covered employees must be smaller than all those employed by a health care provider, who are afforded the more generalized protection of section 740" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 91 [2008]). The universe of covered employees is meant to be those who provide healthcare by exercising their professional judgment (*id.* at 93). The provisions of the NYLL regarding retaliation are to be strictly construed (*Cotrone* v *Consolidated Edison Co. of N.Y., Inc.*, 50 AD3d 354, 354 [1st Dept 2008]). As Plaintiff only alleges she performed "routine care and cleaning", she does not fall in the universe of plaintiffs NYLL § 741 was designed to protect. Because Plaintiff has failed to state a claim under

NYLL § 741(a)(1) and has abandoned her NYLL § 215 claim, the Court need not reach the remainder of Defendant's arguments.

That Plaintiff does not have a claim under NYLL § 741 is not to say she may not have a claim under some other section of the NYLL. However, as the only cause of action Plaintiff has left in her Complaint is a NYLL § 741 retaliation claim, Plaintiff's Complaint is dismissed without prejudice.

Accordingly, it is hereby,

ORDERED that Defendant Life Bridge Dental PLLC's motion to dismiss pursuant to CPLR § 3211(a)(7) is granted, and Plaintiff Monifah Landell's Complaint is dismissed without prejudice; and it is further

ORDERED that within ten days of entry, counsel for Defendant Life Bridge Dental PLLC shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

3/9/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	x	CASE DISPOSED			NON-FINAL DISPOSITION		
	x	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE