

Zheng v Centers Urgent Care Mgt., LLC

2023 NY Slip Op 30888(U)

March 22, 2023

Supreme Court, New York County

Docket Number: Index No. 153567/2022

Judge: Dakota D. Ramseur

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

-----X

JAMIE ZHENG,

Plaintiff,

- v -

CENTERS URGENT CARE MANAGEMENT, LLC, JOSEF
SCHENKER M.D., P.C., JOSEF SCHENKER, SCOTT
ORLANSKI

Defendants.

-----X

INDEX NO. 153567/2022

MOTION DATE 07/08/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS

Plaintiff, Jamie Zheng (plaintiff), commenced this action pursuant to Labor Law § 740 against defendants, Centers Urgent Care Management, LLC, Josef Schenker M.D., P.C., Josef Schenker, Scott Orlanski (collectively, defendants), stemming from his alleged termination from Centers Urgent Care. Defendants now move pursuant to CPLR 3211(a)(3) and (7) to dismiss the complaint. The motion is opposed. For the following reasons, the motion is granted in part.

Plaintiff began working at Centers Urgent Care as a Korean interpreter in March 2021. Scott Orlanski (Orlanski) was the Chief Executive Officer of Centers for Urgent Care. Soon thereafter, plaintiff was asked by the Director of Operations Roxanna Mirica (Mirica) if he would be willing to work full time at the Korean Community Services Center (KCS) in Queens, New York, to which he accepted. Sometime thereafter, plaintiff was offered a promotion to Site Lead at the KCS facility, where he was responsible for mixing the doses of Covid-19 Pfizer vaccination.

According to plaintiff, the vaccine doses required 1.8 ml of saline solution to be added to the vial of the Pfizer vaccine. Plaintiff alleges that adding the 1.8 ml of saline solution would result in six doses of the vaccine, with a little left over, but not enough for an individual vaccine dose. Plaintiff states that adding 1.8 ml saline dilution would rarely result in seven doses from one vial of the Pfizer vaccine. Plaintiff alleges that Centers Urgent Care began to use 1.9 ml of saline solution instead on 1.8 ml, as the larger addition would yield seven doses of the vaccine per vial rather than six with a small amount left over. Plaintiff further alleges that the use of 1.9 ml directly conflicts with the Center for Disease Control (CDC) guidelines which mandates that 1.8 ml of saline solution should be used per vial.

Plaintiff alleges that despite the CDC's orders, defendants trained and repeatedly instructed plaintiff to use between 1.9 ml and 2.0 ml of saline solution when preparing the vaccine dosages. Plaintiff states that he was maximizing the doses to ensure the count remained high, to cover for any other waste, replace missed vials, or to ensure the system reports matched the reported numbers.

On May 20, 2021, plaintiff sent an email to Mirica stating that he was "concerned that I have been instructed by supervisors to engage in activities in the workplace that creates a threat to public health and safety, particularly with the over dilution of Covid vaccine doses at our facility." On the same day, Pfizer-BioNTech Covid-19 Vaccine in collaboration with the CDC issued a Vaccine Preparation and Administration Summary, wherein they state that 1.8 ml of saline solution should be combined with 0.3 ml of the vaccine to create six total doses of the vaccine per vial. Plaintiff claims he removed himself from the preparation of the doses from then onward.

Plaintiff alleges that on June 9, 2021, Orlanski informed plaintiff that six complaints had been lodged against plaintiff within the three weeks from the date plaintiff complained to Mirica concerning the use of 1.9 ml solution to yield seven vaccine doses. According to plaintiff, Orlanski stated that because there had been so many complaints against plaintiff, he could no longer manage the site, and on or about June 9, 2021, plaintiff was informed that he was being transferred to assist a mobile bus vaccine site.

On July 8, 2021, plaintiff was informed that he was being terminated by defendants. According to plaintiff, defendants claimed that they terminated plaintiff as they were winding down their vaccine sites and because of the alleged complaints against plaintiff. Plaintiff argues that defendants' excuse was a pretext to terminate plaintiff, since the defendants' vaccine site remains open. Plaintiff also claims that the alleged complaints were manufactured by defendants as a pretext to terminate plaintiff.

Plaintiff asserts a retaliation claim under New York Labor Law § 740 based on his claim that his employment was terminated because of his complaints; and (2) a claim for intentional infliction of emotional distress (IIED) based on defendants' alleged conduct leading to his termination.

In support of the branch of their motion to dismiss plaintiff's claims under Labor Law § 740, defendants argue that the use of 1.9 ml to dilute the Pfizer vaccine to yield a seventh dose is not contrary to any rule or law and is not improper or unsafe. Defendants further argue that the complaint fails to allege how defendants' miscounted vaccine doses. Defendants further argue that the complaint does not establish that by not reporting waste, defendants would cause a specific danger to public safety. Defendants also argue that the alleged failure to provide certain PPE is not contrary to any rule or law and does not impact public health. Defendants also contend that plaintiff's IIED claim fails because plaintiff fails to allege that defendants' actions were so extreme to meet the standard for a claim pursuant to an IIED.

In opposition, plaintiff argues that adding more than the recommended solution to increase the vaccine yield constituted a specific activity that constitutes an actual violation of the

law, and that defendants posed a specific harm to the public by doing so. Plaintiff also argues that he states a claim for IIED by alleging that the complaints constituting a pretext to fire plaintiff, coupled with the pressure of having to violate CDC regulations amount to a deliberate campaign to harm plaintiff.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Chapman. Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, “factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration” (*Mamoon v Dot Met Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citations omitted]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lob. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Labor Law § 740

A cause of action based upon Labor Law § 740, known as the Whistleblower Law, is available “to an employee who discloses or threatens to disclose an employer activity or practice which (1) is in violation of a law, rule or regulation, and (2) creates a substantial and specific danger to the public health” (*Lamagna v New York State Assn. for Help of Retarded Children*, 158 AD2d 588, 589 [2d Dept 1990]). “Labor Law § 740(4) creates a cause of action in favor of an employee who has been unlawfully discharged as a consequence of engaging in certain protected conduct” (*Pipia v Nassau County*, 34 AD3d at 665 [2d Dept 2006]). A plaintiff asserting a claim under Labor Law § 740 is not required to identify the specific “law, rule or regulation” allegedly violated by the employer (*Webb-Weber v Cmty. Action for Hum. Servs., Inc.*, 23 NY3d 448, 451 [2014]).

Here, plaintiff states a claim pursuant to Labor Law § 740 by alleging that defendants were intentionally overdiluting the COVID-19 Vaccine to obtain additional doses by adding 1.9 ml of saline solution, instead of the recommended 1.8 ml, in order to yield an additional dose, and that defendants fired plaintiff when he said this was improper and voiced his concern to defendants that this should be told to the public.

Defendants’ opposition that the guidance published by the CDC, the New York State Department of Health and Pfizer, reveals that there is nothing improper or unsafe about utilizing 1.9 ml of diluent per vial or obtaining a seventh dose of vaccine from a vial is without merit. Orlanski’s affidavit is insufficient to warrant dismissal of the complaint pursuant to CPLR 3211(a)(7) since the representations set forth therein do not demonstrate the absence of any significant dispute and do not completely refute the allegations against defendants (see *Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563, 564 [1st Dept 2015] citing *Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). For instance, the affidavit states that the CDC guidance states that “[f]or doses administered with diluent volume greater than 1.8 ml, do not repeat dose,” and

that “[i]f the dose given in error is the first dose, a second dose should be administered at the recommended interval (21 days [Pfizer-BioNTech] or 28 days [Moderna]). If this dose is the second dose, the series is complete, and no additional doses are needed” (NYSCEF doc. no. 9). However, the above information does not utterly disprove plaintiff’s claim that a dose with a dilutant volume in excess of 1.8 ml is not harmful in all circumstances. Similarly, the “Additional Doses from Vial” section of the Pfizer Guidance is also inapplicable in that it concerns circumstances where “[t]he vaccine vial is diluted according to recommendations” (NYSCEF doc. no. 10). As discussed above, plaintiff alleges that the vaccine was diluted in excess of the recommendation.

However, plaintiff’s allegations that he was ordered not to report waste of vaccine doses and that there was a lack of personal protective equipment on site are not alleged to be in violation of a law or rule or a threat to public health, and thus, those claims cannot serve as the basis of plaintiff’s Labor Law § 740 claim. Plaintiff does not specifically address this point.

IIED

In order to state a claim for intentional infliction of emotional distress, a plaintiff must demonstrate: “(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and the injury; and (iv) severe emotional distress.... Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*Howell v New York Post Co.*, 81 NY2d 115, 121-22 [1993]).

Here, plaintiff’s claims that defendants allegedly solicited defendants’ other employees to file fraudulent complaints against plaintiff and use thereof as a pretextual excuse to terminate plaintiff is simply insufficient to state a claim for IIED (*see Noble v. Creative Tech. Servs., Inc.*, 126 AD2d 611, 612 [2d Dept 1987] [dismissing IIED claim of employee who alleged that defendants conspired to fabricate a reason to terminate her employment and prevent her from obtaining unemployment benefits because employee did not allege “required extreme, outrageous conduct going beyond all possible bounds of decency”]; *Dillon v City of New York*, 261 AD2d 34, 4 [1999] [“A cause of action for either intentional or negligent infliction of emotional distress must be supported by allegations of conduct by a defendant “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community”]).

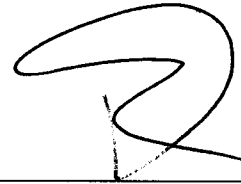
To the extent plaintiff alleges that defendants pressured plaintiff to administer defective doses of the vaccine, there is no allegation that defendants acted with intent to cause plaintiff emotional distress. Thus, plaintiff claim for IIED is dismissed.

Accordingly, it is hereby

ORDERED that defendants’ motion is granted to the extent that plaintiff’s claims pursuant to Labor Law § 740 premised on “waste of vaccine doses” and “lack of personal protective equipment” and IIED are dismissed; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



3/22/2023

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE