SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **37**

Justice

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ROBERT HANNAH,

Plaintiff,

- v -

LIFEBRIDGE DENTAL PLLC D/B/A TEND,

Defendant.

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INDEX NO. 151010/2023

MOTION DATE 04/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to DISMISS.

Upon the foregoing documents, and for the reasons stated hereinbelow, the motion to dismiss is denied.

Background

This action arises from an employment dispute between plaintiff Robert Hannah ("Hannah"), a dentist, and his former employer, defendant Life Bridge Dental PLLC d/b/a TEND ("LBD"), which owns and operates dental offices in the New York City area. NYSCEF Doc. No. 2.

On July 6, 2022, while Hannah was employed at LBD's Cobble Hill office, he alleges that he observed a maskless coworker "with a runny nose, sniffling, and exhibiting other Covid-19 symptoms." NYSCEF Doc. No. 2 ¶ 9. Hannah claims that he knew the co-worker tested positive for Covid-19 five days prior and that Hannah then asked the colleague to wear a mask, because, inter alia, "there were a number of unvaccinated patients in the office." NYSCEF Doc. No. 2 ¶ 11-12. According to Hannah, the coworker "became irate" at the request. NYSCEF Doc. No. 13. Hannah further alleges that he immediately emailed LBD's Senior Human Resource Manager to report the incident as a "a clear violation of health and safety protocols." NYSCEF Doc. No. 2 ¶ 15.

On the morning of July 20, 2022, Hannah sent a second email to defendant's Human Resources manager, in which he says there were issues between "assistants" and "hygieni[s]ts." NYSCEF Doc. No. 7.

Shortly afterwards, LBD management called Hannah into a meeting and terminated his employment. NYSCEF Doc. No. 2. Hannah says that at the meeting, LBD told him was going to "go in a different direction." NYSCEF Doc. No. 1.

On February 1, 2023, Hannah sued LBD, asserting two causes of action: (1) retaliation under Labor Law § 740; and (2) retaliation under Labor Law § 741. Hannah alleges that LBD would not have fired him but-for his complaints about health and safety violations and seeks compensatory damages for lost wages and emotional distress, attorneys' fees, and interest. NYSCEF Doc. No. 2.

On March 23, 2023, pursuant to CPLR 3211(a)(1) and (a)(7), LBD moved to dismiss the complaint. NYSCEF Doc. No. 4.

LBD argues that Hannah's complaint should be dismissed because Hannah's emails to LBD about the January 6, 2023, incident do not fall within protected activity under Labor Law § 740 and § 741. Specifically, LBD cites HC2, Inc. v Delaney, 510 F Supp 3d 86, 97-98, SDNY (2020), which held that Covid-19 guidance issued by local, state or federal agencies do not qualify as a "law, rule, or regulation" for the purposes of Labor Law § 740. NYSCEF Doc. No. 8. In addition, LBD argues that the content of Hannah's June 20, 2022 email does not say what Hannah claims, and, even if it did, such a vague email would still not warrant Labor Law § 740 and § 741 protections. NYSCEF Doc. No. 8.

In opposition, plaintiff argues that LBD violated more than mere administrative guidance, but instead, violated Executive Order 202.8 and related executive orders requiring Covid-19 safety precautions in the workplace. NYSCEF Doc. No. 13.

Plaintiff cites to Lawlor v Wymbs, Inc., 212 AD3d 442 (1st Dept 2023), where a plaintiff pled sufficient facts to survive dismissal of his Labor Law § 740 claim by alleging that his employer allowed a non-employee to enter the workplace without a mask in June 2020. Plaintiff also notes that Labor Law § 740 was amended in January 2022 and now protects employees from employer retaliation if a complaint is founded on a reasonable belief that there is either a violation of law, rule or regulation or that there is a substantial and specific danger to the public health or safety. NYSCEF Doc. No. 14.

In reply, LBD argues there were no laws, rules, executive orders or regulations about indoor masking that applied to private dental practices at the time, and, therefore Hannah is incorrect that his alleged complaints fall under the Labor Law § 740 protections. In addition, movant argues that Hannah's isolated complaint is not sufficient to constitute the "improper quality of patient care or improper quality of workplace safety," as described in Labor Law § 741. NYSCEF Doc. No. 15.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994). And dismissal pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Labor Law § 740(2)(a) prohibits an employer from taking retaliatory action against an employee when he or she "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety." In addition, Labor Law § 740 defines a law, rule, or regulation as "any duly enacted federal, state or local statute or ordinance or executive order… any rule or regulation promulgated pursuant to such statute or ordinance or executive order." Labor Law § 740(1)(c).

Here, by submitting only one of Hannah's emails containing vague complaints about his work environment, LBD has failed to submit documentary evidence that supports a defense to the asserted causes of action. While it is true that the email fails to include the substance of the complaints that Hannah alleges that he made, it does not negate Hannah's assertion that he made complaints prior to that email, nor that his termination was related to them. Dismissal under CPLR 3211(a)(1) may occur "only where the documentary evidence utterly refutes [the] plaintiff's factual allegations." Art and Fashion Group Corp. v Cyclops Prod., Inc. 120 AD3d 436, 438 (1st Dept 2014).

At the start of the global Covid-19 pandemic, New York State implemented a mandatory masking policy for various businesses. Executive Order 202.9. As defendant notes in reply, that masking requirement for businesses was lifted in February 2022 but remained in effect for health care providers regulated by New York State Department of Health ("NYSDOH"). However, private dental offices, like LBD, are not regulated by NYSDOH. Accordingly, LBD has not violated any law, rule, or regulation about masking requirements during the alleged July 2022 incidents.

Pursuant to the amended New York Labor Law § 740, Hannah sufficiently pled his claim by alleging that he told LBD "in great detail" about why the incident with his unmasked coworker was a "a clear violation of health and safety protocols." For pleading purposes, a plaintiff must merely indicate the "particular activities, policies or practices in which the employer allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct." Webb-Weber v Community Action for Human Servs, Inc. 23 NY3d 448, 453 (2014). Hannah's complaint provides sufficient notice to LBD about the alleged lack of masking in its office and alleges a reasonable belief that his employer's conduct, or lack thereof, posed a "substantial and specific danger to the public health."

Defendant relies on Bontempo v N. Shore LIJ-Huntington Hosp., 2019 NYLJ LEXIS 3816 (Sup Ct, Nassau County 1996, Farneti, J.), where the court held that a plaintiff insufficiently pled his Labor Law § 741 claim even though he alleged that his employer's conduct posed a substantial and specific danger to public health on two occasions. Bontempo, however, relies on Pipia v Nassau County, 34 AD3d 664 (2nd Dept 2006), which does not support defendant's argument that single incidents do not qualify as protected activity under Labor Law § 740. In Pipia, the court held that the plaintiff did not satisfy the pleading standard of Labor Law § 741 because he alleged only one instance of financial impropriety, rather than conduct that posed "substantial and specific danger to the public health." Id. at 666.

This Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, defendant Lifebridge Dental PLLC's motion for summary judgment is hereby denied.

7/6/2023
DATE

ARTHUR F. ENGORON, J.S.C.

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