SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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ARTHUR W. WILLIAMS, M.D.,

Plaintiff,

- v -

MOUNT SINAI HEALTH SYSTEM, INC.,

Defendant.

INDEX NO. 160367/2019

MOTION DATE 10/11/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. MELISSA A. CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Plaintiff Arthur W. Williams, M.D., brings this action against defendant Mount Sinai Health System, Inc., alleging that it discriminated against him based on race when it terminated his employment and medical staff privileges in violation of Public Health Law § 2801-b and Administrative Code of the City of New York § 8-107 *et seq.* (NYCHRL). Plaintiff argues that he was treated far worse than similarly situated physicians who are white. Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Factual Background

Plaintiff is a neurosurgeon who is African-American. He was the only African-American neurosurgeon in his department (NY St Cts Elec Filing [NYSCEF] Doc No. 176, defendant's reply to Steven M. Warshawsky [Warshawsky] affirmation, ¶¶ 5, 10 and 15). Defendant is the "passive parent" of the Icahn School of Medicine at Mount Sinai (the School) and the Mount Sinai Hospitals Group, Inc. (Hospitals Group) (NYSCEF Doc No. 54, defendant's Rule 19-a statement of material facts, ¶ 1). Hospitals Group is the "active parent" of several hospitals, including St. Luke's-Roosevelt Hospital Center (SLR) and Beth Israel Medical Center (Beth Israel), that form the Mount Sinai Health System (the System) (*id.*). Prior to 2013, SLR was part of Continuum Health Partners (*id.*). SLR maintains two campuses. The first, formerly St. Luke's Hospital, is known as Mount Sinai Morningside (MSM) (*id.*, ¶ 6). The second, formerly Roosevelt Hospital, is known as Mount Sinai West (MSW) (*id.*, ¶ 7). SLR maintains a combined medical staff, though each campus has its own chief medical officer (CMO) and president (*id.*, ¶¶ 8, 12 and 65). Dr. Tracy Breen (Dr. Breen) has served as MSW's CMO since 2014 (NYSCEF Doc No. 65, exhibit 8, Breen tr at 18). Dr. Alan Multz (Dr. Multz) was MSM's CMO until 2017, when Dr. Brian Radbill (Dr. Radbill) was appointed (*id.*, ¶ 11). Dr. Marc Napp (Dr. Napp) was the System-wide CMO in 2015 (NYSCEF Doc No. 176, ¶ 57).

Plaintiff joined SLR as an attending neurosurgeon in the neurosurgery department (the Department) in 2000 (*id.*, ¶ 11). Before SLR joined Hospitals Group, its full-time attending neurosurgeons were plaintiff, Dr. Saadi Ghatan (Dr. Ghatan), and Dr. Comparator (NYSCEF Doc No. 67, Kevin J. Fee [Fee] affirmation, exhibit 10, Dr. Ghatan tr at 22). In March 2015, Dr. Ghatan was appointed Department chair and reported to the System's chair of neurosurgery, Dr. Joshua Bederson (Dr. Bederson) (NYSCEF Doc No. 54, ¶¶ 13-15; NYSCEF Doc No. 67 at 53). Dr.

Danilo S. (Dr. S.) began working as a neurosurgeon in the Department in October 2017 (NYSCEF Doc No. 176, ¶ 26).

Plaintiff claims he was subjected to "professional antagonism, disrespect, mistreatment and racism" after SLR became part of the System (NYSCEF Doc No. 152, Warshawsky affirmation, exhibit A, plaintiff aff, ¶ 13). During a meeting with Dr. Breen in her first year at SLR, Dr. Ghatan expressed concerns about the deteriorating quality of plaintiff's performance and care, medical judgment, and decision-making (NYSCEF Doc No. 176, ¶ 28; NYSCEF Doc No. 67 at 35-39). Dr. Ghatan had a long-standing professional relationship with plaintiff and had helped him pass his board exams in 2008 (NYSCEF Doc No. 67 at 26).

A. The Site Director Position

In January 2015, Dr. Comparator was appointed the site director of neurosurgery at MSM and was responsible for building the clinical service there (NYSCEF Doc No. 64, Fee affirmation, exhibit 7, Dr. Bederson tr at 46; NYSCEF Doc No. 66, Fee affirmation, exhibit 9, Comparator tr at 15 and 17). Dr. Comparator and plaintiff covered trauma cases at MSM, but there was no neurosurgeon assigned to that location (NYSCEF Doc No. 67 at 75). Dr. Comparator left SLR on December 31, 2016 (NYSCEF Doc No. 54, ¶ 248). Dr. S. assumed the same position from January 1, 2018 (NYSCEF Doc No. 176, ¶ 113). Plaintiff avers that Dr. Ghatan never spoke to him about the position (NYSCEF Doc No. 152, ¶ 15).

B. The February 2015 Complaints

On February 5, 2015, Dr. Ghatan emailed plaintiff that staff had complained about the rate of plaintiff's case cancellations at MSW and about how he had booked cases as placeholders (NYSCEF Doc No. 54, ¶ 64). Dr. Ghatan directed plaintiff to refrain from this practice (*id.*).

Plaintiff could not recall the email, though he remembered they had discussed the issue (NYSCEF Doc No. 70, Fee affirmation, exhibit 13, plaintiff tr at 262).

On February 10, 2015, Dr. Ghatan informed Dr. Bederson of a quality assurance[1] (QA) review involving plaintiff and a "take-back" case[2] (NYSCEF Doc No. 95, Fee affirmation, exhibit 38). Dr. Ghatan wrote that plaintiff "told the resident on call that the patient wasn't salvageable, without seeing him (akin to burial without confirming that the corpse was pulseless), and the trauma attending found the patient following commands … the next day" (*id.* at 1). Dr. Ghatan told plaintiff that he had to assess a patient personally and that it was not "good care" to tell a resident that a patient was "not salvageable," only for the patient to wake the next day (NYSCEF Doc No. 67 at 100).

C. The May 2015 Complaints

On May 18, 2015, Dr. Comparator performed a "wrong-sided" surgery (NYSCEF Doc No. 54, ¶ 75; NYSCEF Doc No. 176, ¶ 42). The surgery resulted from Dr. Comparator's failure to mark the patient's skin and to complete certain preoperative procedures (NYSCEF Doc No. 54, ¶ 76). The incident prompted SLR to announce it would hold a meeting to review its Universal Protocol, that had been developed to prevent such incidents (*id.*, ¶¶ 65-66). The protocol required

[1] Dr. Nirit Weiss (Dr. Weiss) heads the System's QA program for neurosurgery (NYSCEF Doc No. 54, ¶ 145). QA meetings are held every month with all residents and attending physicians invited to attend (*id.*, ¶ 138). Three types of cases are presented at QA meetings: (1) "mortality," meaning a patient has passed; (2) "morbidity," meaning there was "a sickness … [or] an outcome that is worse than what we would expect"; or (3) "near miss," which is "an event that … could have happened and even it if fortunately didn't happen in that case, we don't want to have an opportunity for a morbidity in the future" (NYSCEF Doc No. 69, Fee affirmation, exhibit 12, Dr. Weiss tr at 17-21).

The QA process is not a disciplinary process. Nor is it meant to be punitive (NYSCEF Doc No. 176, ¶ 117). The purpose of the QA process is to present and discuss quality of care issues and "highlight areas that could be improved and educate each other" to improve the quality of care for each department and each individual provider (NYSEF Doc. No. 64 at 24-25).

[2] A "take-back" involves a situation where a patient who has already been operated on returns to the operating room for another procedure (NYSCEF Doc No. 70 at 30-31).

the attending surgeon to mark the procedure site (*id.*, ¶¶ 67 and 69). The announcement for the meeting included a copy of the Universal Protocol that had been in effect at SLR since 2009 (NYSCEF Doc No. 138, Fee affirmation, exhibit 81 at 5).

On May 22, Dr. Ghatan emailed plaintiff about an incident where plaintiff had failed to "mark the skin properly yesterday, prior to the patient entering the room," and reminded him to comply with protocol (NYSCEF Doc No. 127, Fee affirmation, exhibit 70).

Three days later, Dr. Ghatan emailed Dr. Breen on two issues related to plaintiff (NYSCEF Doc No. 54, ¶ 71). The first issue concerned staff reports that plaintiff had twice refused to participate in preoperative initialing and site marking. The initial incident occurred on May 21, when plaintiff drew a "squiggle line instead of placing his initials at the operative site." This led to a reprimand from the circulating nurse (*id.*, ¶ 72). The second incident occurred earlier that week when plaintiff "refused to but ultimately signed the lumbar region of a patient presenting for a lumbar drain" (*id.*). In response, Dr. Bederson wrote, "near misses and lack of full participation in the health systems team steps process is a serious problem" (*id.*, ¶ 73). Dr. Ghatan recommended that plaintiff retrain in TeamSTEPPS[3] (NYSCEF Doc No. 67 at 109-110).

The second issue concerned a call Dr. Ghatan had received from a neurologist requesting a second opinion on a patient with a nodule in the front lobe of the brain (NYSCEF Doc No. 72, Fee affirmation, exhibit 15 at 2). Dr. Ghatan wrote that "the standard of care in neurosurgical management is resection of these tumors, and Dr. Williams told the team at St. Luke's that the patient was not a surgical candidate" (*id.*). Dr. Ghatan consulted the patient and scheduled him for surgery (*id.*). Dr. Ghatan did not feel plaintiff's management fell under the standard of care established on "multiple RCTs … confirmed with a recent meta-analysis"[4] (*id.*). Dr. Ghatan later

[3] TeamSTEPPS is a program to improve operating room communication (NYSCEF Doc No. 65 at 70).
[4] An "RCT" is a "randomized control trial" (NYSCEF Doc No. 65 at 87).

spoke to plaintiff and reviewed the RCT with him (NYSCEF Doc No. 67 at 114). Dr. Ghatan testified that plaintiff had placed the patient at greater risk of harm because "[w]ithout scrutiny and somebody looking over what he's doing, this patient could have been given advice that was contrary to established standards of care" (*id.* at 112). Dr. Ghatan stated these complaints were part of a pattern of behavior that called plaintiff's medical judgment and capability into question (*id.* at 113). Dr. Breen testified the incident reinforced a general concern about plaintiff's "practice that he wasn't always following evidence-based standards" (NYSCEF Doc No. 65 at 88).

D. The April 2016 Suspension

By letter dated April 4, 2016, SLR suspended plaintiff with pay pending an investigation into his treatment of Patient A (NYSCEF Doc No. 176, ¶ 87). The suspension stemmed from an email Dr. Breen had received from Dr. Rodolfo Galindo (Dr. Galindo), an endocrinologist, who sought her advice on a pituitary case (NYSCEF Doc No. 54, ¶¶ 93-95). Dr. Breen testified that Dr. Galindo believed the patient required surgery, but plaintiff "was hesitant" (NYSCEF Doc No. 65 at 103-104). Dr. Breen stated plaintiff "was presenting an endocrine reason why" surgery should not be performed. This was unusual because "endocrinologists are trying to stop surgeons from taking patients to the OR unnecessarily" (*id.* at 104). Dr. Breen reached out to Dr. Ghatan (*id.*), who contacted Dr. Mark Kupersmith (Dr. Kupersmith), a neuro-ophthalmologist (NYSCEF Doc No. 54, ¶ 100). Dr. Ghatan also telephoned plaintiff, who disagreed with the need for surgery (NYSCEF Doc No. 77, Fee affirmation, exhibit 20). Dr. Kupersmith examined the patient and recommended emergency surgery (*id.*; NYSCEF Doc No. 78, Fee affirmation, exhibit 21). Dr. Ghatan then reached plaintiff, who had ceased responding to voicemail and text messages, through staff at Beth Israel and directed him to return to MSW (NYSCEF Doc No. 77). Plaintiff performed surgery later that day (*id.*).

Dr. Breen met with Dr. Ghatan, Dr. Napp, David Engel (Engel), in-house counsel, and Caryn Tiger-Paillex (Tiger-Paillex), a School dean, to discuss three areas of concern involving plaintiff's treatment of Patient A – a delay in care, the inability to reach plaintiff, and plaintiff's berating of Beth Israel staff for "snitching on him" (NYSCEF Doc No. 54, ¶¶ 107-108; NYSCEF Doc No. 65 at 112). Dr. Breen testified there was a concern that "if [plaintiff] hadn't had pressure applied to him, the surgery wouldn't have happened and the patient would have lost their vision permanently" (NYSCEF Doc No. 65 at 115). She stated "there was a concern that Dr. Williams was either misinterpreting or choosing to misinterpret certain laboratory data to suggest that this was not a case that needed a surgical intervention" and that he had no plan to perform surgery (*id.* at 116). The group chose to impose a summary suspension with pay pending an investigation to determine whether it was safe to allow plaintiff to continue practicing (*id.* at 119; NYSCEF Doc No. 54, ¶¶ 110-111). The April 4, 2016 letter advising plaintiff of the suspension stated that his treatment of Patient A "raise[d] serious questions about your clinical judgment and professional conduct" and concerns about "your assessment of the patient, the timeliness of your clinical intervention, your lack of responsiveness to clinical leadership, and your interactions with other professional staff" (NYSCEF Doc No. 165, Warshawsky affirmation, exhibit N).

As part of the investigation, Dr. Breen spoke to several witnesses, and Dr. Ghatan provided a written timeline of events (NYSCEF Doc No. 54, ¶¶ 115-116). Plaintiff spoke to Dr. Kalmon Post (Dr. Post), a professor of neurosurgery, and Tiger-Paillex, and told them his office had erroneously scheduled the surgery for April 8 without his knowledge (NYSCEF Doc No. 152, ¶ 21). By letter dated April 15, 2016 (the April 15 Letter), SLR informed plaintiff that his suspension had concluded (NYSCEF Doc No. 62, Fee affirmation, exhibit 5 at 1). The letter reads, in part:

> "The Hospital's investigation of your treatment of patient [A] determined that the patient required emergency surgery but that you

> did not intend or act to perform the surgery promptly, and ultimately did so only after the intervention and insistence of other clinicians. Your account that you were engaged in prompt assessment and intervention is contradicted by the Hospital's findings.
>
> ...
>
> "While your performance of the surgery ultimately met the standard of care, that conclusion does not obviate the Hospital's finding that your lack of responsiveness put the patient at unacceptable risk. We are also concerned by your lack of candor during our review of the patient's care. This is not the first time that you have been uncooperative with Department processes meant to ensure quality care. For example, after an incident that raised heightened concerns in the Department about surgical side and site issues, you continued to ignore Hospital procedures we were taking pains to reinforce.
>
> "With respect to your employment, this letter will remain in your file as a written warning. Any future incidents of a similar kind may lead to further discipline, up to and including termination. With respect to your privileges, this letter will stand as a written warning and reprimand under Article III, Sect. 1, subsec. 1, a, 1 and 2 of the Medical Staff Bylaws.
>
> "I expect that you will cooperate all Department procedures and activities designed to improve patient care, including but not limited to the presentation of your cases in our weekly radiology case management conferences"

(*id.* at 1-2).

E. Additional Complaints

On June 7, 2016, Dr. Raymond Wedderburn, a trauma surgeon, emailed Dr. Ghatan that plaintiff's only note on a patient who had been operated on five days earlier was a "POMAF," that Dr. Wedderburn deemed was "really unacceptable"[5] (NYSCEF Doc No. 54, ¶ 123). Dr. Bederson forwarded the email to Drs. Breen and Napp and wrote, "[t]here was another quality issue with Dr. Williams .... If confirmed I believe this is below the standard of care and contrary to the medical staff bylaws" (NYSCEF Doc No. 128, Fee affirmation, exhibit 71 at 1). Dr. Bederson testified the

[5] A "POMAF" is a preoperative medical assessment form (NYSCEF Doc No. 64 at 87).

incident raised concerns about a delay in treatment and the lack of documentation in the medical record (NYSCEF Doc No. 64 at 88). Dr. Ghatan testified that Dr. Wedderburn had previously expressed "grave concern" about plaintiff's competence and ability starting as early as 2013 or 2014 (NYSCEF Doc No. 67 at 97).

On July 11, 2016, Dr. Ghatan questioned why plaintiff failed to obtain a "post op MRI after the first decompression back in June" (NYSCEF Doc No. 54, ¶ 124). Plaintiff could not recall discussing this patient with Dr. Ghatan or whether Dr. Ghatan had sent similar emails, though he and Dr. Ghatan would have discussions on patient care (NYSCEF Doc No. 70 at 283).

On September 1, 2016, Dr. Multz notified Dr. Ghatan and others that certain staff members had delinquent records or charts (NYSCEF Doc No. 140, Fee affirmation, exhibit 83). Dr. Ghatan forwarded the email to plaintiff and wrote, "[p]lease let me know what the problem is in compliance with medical record requirements. This seems to be an ongoing issue with you" (*id.*).

On November 15, 2016, Dr. Carl Braun (Dr. Braun), who handles patient grievances and complaints, notified Dr. Breen that a patient had been admitted to plaintiff's service on November 12, but the first attending note in the records was from Dr. Ghatan on November 15 (NYSCEF Doc No. 54, ¶ 128; NYSCEF Doc No. 65 at 226). Dr. Breen stated that this was an example of plaintiff's lack of compliance with proper documentation and recalled that Dr. Wedderburn had periodically raised this same concern about plaintiff (NYSCEF Doc No. 65 at 226-228).

On March 27, 2017, Dr. Ghatan emailed Drs. Bederson and Breen about plaintiff's "unethical and illegal behavior" during a discussion between plaintiff and a chief resident, Dr. Meg Pain (Dr. Pain), about a patient who had an advanced directive dictating no intervention (NYSCEF Doc No. 54, ¶ 132). Dr. Ghatan wrote, "Dr. Williams … instructed her in front of other doctors … to administer D5 Water and lower the head of the bed to hasten the patient's demise" (*id.*). Dr.

Breen testified that such conduct sounded "incredibly unprofessional" and claimed he was "joking or using … gallows humor" (NYSCEF Doc No. 65 at 243). Dr. Breen added that "Dr. Pain just felt it was really offensive and inappropriate to be speaking like that in front of any other patients or any other doctor" (*id.*). Plaintiff recalled the conversation with Dr. Pain differently (NYSCEF Doc No. 70 at 308). He denied "advocating [to] go do it" (*id.* at 311), only that it had been an acceptable practice "back in the day" (*id.* at 312). Plaintiff also told Dr. Breen that he was "was not trying to direct care or to euthanasia" (*id.* at 315).

On July 3, 2017, Dr. Joel Delfiner (Dr. Delfiner), a neurologist, emailed Dr. Ghatan about a patient who had been referred to the neurosurgical clinic (NYSCEF Doc No. 139, Fee affirmation, exhibit 82). Dr. Delfiner examined the patient on June 9 and recorded the results in a note he signed electronically (*id.* at 1-2). Plaintiff examined the same patient and recorded his results in a separate note signed June 28 (*id.* at 3-4). Dr. Delfiner asked Dr. Ghatan to compare the two notes and wrote that "intervention would be appropriate" (*id.* at 1). Plaintiff admitted he copied Dr. Delfiner's note "to bypass the incompatibility between … EMR systems" when patients are transferred between MSW and MSM (NYSCEF Doc No. 58, Fee affirmation, exhibit 1, ¶ 56), though he denied misrepresenting Dr. Delfiner's note as his own (NYSCEF Doc No. 152, ¶ 40).

On July 7, Dr. Ghatan reported to Drs. Breen, Radbill and Bederson that he told plaintiff plaintiff "must not plagiarize the neurologist's note" and "must clearly articulate a plan to the patient and document it in some way" (NYSCEF Doc No. 143, Fee affirmation, exhibit 86). Dr. Ghatan noted that plaintiff's conduct "raised another quality concern both with regard to documentation and clinical management that I addressed directly with this practitioner" (*id.*). In response, Dr. Radbill questioned whether the incident was part of a pattern of behavior that could trigger an "FPPE" (*id.*). Dr. Ghatan replied there were ongoing problems that had been

documented in prior "OPPEs" and that plaintiff had one FPPE within the last two years[6] (*id.*). Dr. Breen testified this was the only time she could recall that an attending physician had complained that another attending physician had fraudulently presented the results of a physical examination another had performed as his own, and then used those findings to make a surgical recommendation (NYSCEF Doc No. 65 at 312-313). Dr. Ghatan testified similarly (NYSCEF Doc No. 67 at 280-281).

E. Plaintiff's Termination

Three of plaintiff's cases – Patients B, C and D – were presented at an October 4, 2017 QA meeting (NYSCEF Doc No. 176, ¶ 116; NYSCEF Doc No. 152, ¶ 26). Dr. Ian McNeill (Dr. McNeill), the Department's chief neurological resident, had brought the cases to Dr. Ghatan due to concerns over plaintiff's mismanagement and delays in treatment (NYSCEF Doc No. 101, Fee affirmation, exhibit 44 at 1-2). Dr. McNeil prepared the presentation (NYSCEF Doc No. 54, ¶¶ 139-140). Plaintiff described the meeting as "hostile" with Dr. Ghatan repeatedly interrupting, yelling and slapping his hands on a table (NYSCEF Doc No. 152, ¶ 27). Plaintiff averred this "was typical of how Dr. Ghatan interacted and spoke with me, treating me with blatant rudeness and disrespect" (*id.*).

Dr. Ghatan emailed Drs. Breen and Bederson after the meeting[7] (NYSCEF Doc No. 176, ¶ 120). Dr. Ghatan wrote that Dr. McNeill had contacted him about Patient C, plaintiff had to be pushed to perform a routine surgery, and described the issue as a delay in diagnosis and treatment

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[6] An "FPPE" is a "focused professional practice evaluation," and an "OPPE" is an "ongoing professional practice evaluation" (NYSCEF Doc No. 67 at 173-174). Dr. Ghatan explained that than FPPE is an evaluation that is completed during a "probationary period" when a practitioner first joins SLR and before the type of evaluation becomes an OPPE (*id.*). If a practitioner's action "causes concern to a sufficient extent, then they are put into FPPE … which is an increased level of scrutiny on their behavior … just like it was in the probationary period" (*id.* at 174).

[7] Dr. Breen had previously informed Dr. Radbill and Eva Johannson, MSM's vice president of quality (NYSCEF Doc No. 65 at 63) about Patient B (NYSCEF Doc No. 83, Fee affirmation, exhibit 26 at 2).

(NYSCEF Doc No. 107, Fee affirmation, exhibit 50 at 1). Another resident contacted Dr. Ghatan about Patient B and raised concerns about "[plaintiff's] specious reasoning about what he deemed to be a malfunctioning intracranial pressure monitor that he was not troubleshooting or replacing … [which caused] [t]he patient's raised intracranial pressures [to] remain[ ] untreated for several days" (*id.*). Dr. Ghatan described plaintiff's conduct as "an inability to care for a patient … according to the standard of care in a patient with a traumatic brain injury" (*id.*). As for Patient D, plaintiff "misdiagnosed and failed to treat a patient with a shunt failure and an abdominal CSF pseudocyst" (*id.*). Dr. Bederson requested a formal QA review of all three cases (NYSCEF Doc No. 54, ¶ 143). The ad hoc QA committee (the QA Committee) consisted of Dr. Post, Dr. Weiss and Dr. Ted Panov (*id.*, ¶ 154).

On October 11, 2017, Dr. Bederson telephoned plaintiff and advised him to resign (NYSCEF Doc No. 176, ¶ 131) because "the higher-ups were upset about the QA findings" (NYSCEF Doc No. 70 at 86). Plaintiff could not recall if he had to resign "this month … or within a certain amount of time," but asked Dr. Bederson "for more time than that" (*id.*). Dr. Bederson "didn't agree … [h]e just said, Okay. A couple more months, or three months" and told him to submit a resignation letter immediately stating that he would stay in service for a couple of months (*id.* at 87). Plaintiff denied telling Dr. Bederson that he was willing to resign (*id.* at 91). That same day, Dr. Bederson emailed Drs. Breen and Ghatan that plaintiff had decided to resign effective immediately, and would be willing to remain on call for a period of time if needed (NYSCEF Doc No. 181, Fee reply affirmation, exhibit 96).

Dr. Bederson spoke to plaintiff the next day and again told him to resign (NYSCEF Doc No. 70 at 91-92). Plaintiff testified, "I thought there was some discussion that I had two months to make up my mind, and he said, No. You need to resign immediately" (*id.*). After that

conversation, Dr. Bederson emailed plaintiff for an update, to which plaintiff responded, "I am requesting until Monday to make my decision" (NYSCEF Doc No. 152, ¶ 36).

On October 16, the QA Committee presented their report to Dr. Bederson. The members were unanimous in their assessment (NYSCEF Doc No. 69 at 62). The committee determined that plaintiff's care of Patient B "did not meet the standard of care" with respect to plaintiff's decision to defer ICP monitoring and his lack of response to ensure that certain equipment was functioning properly (NYSCEF Doc No. 109, Fee affirmation, exhibit 52 at 4). Plaintiff's care for Patient C "was found to be suboptimal but not below the standard of care" and that plaintiff's decision to delay surgical intervention "was found not to meet the standard of care for this patient" (*id.* at 2). As for Patient D, the committee "agreed that the management of the patient was suboptimal and not the path any of the members of the committee would take in work up and treatment. Yet the management did not meet the criteria of 'below standard of care'" (*id.* at 1). Dr. Weiss explained that "suboptimal" care is compared against the standard of care expected of a neurosurgeon within the System and not the medical-legal standard of care (NYSCEF Doc No. at 69 at 68 and 106). Dr. Bederson forwarded the report to Dr. Breen and noted, "[g]iven [plaintiff's] prior warning letter in 2016 I believe that his persistent performance below the standard of care is incompatible with remaining on staff" (NYSCEF Doc No. 84, Fee affirmation, exhibit 27). Dr. Breen agreed and recommended the immediate suspension pending investigation (*id.*).

By letter dated October 17, 2017, SLR suspended plaintiff with pay pending an investigation into the cases involving Patients B, C, and D (NYSCEF Doc No. 63, Fee affirmation, exhibit 6 at 2). Numerous witnesses, including plaintiff and Drs. Ghatan and McNeil, were interviewed, and Dr. Ghatan prepared a memorandum about the cases and Dr. Delfiner's complaint (NYSCEF Doc No. 54, ¶¶ 152-154 and 157-158; NYSCEF Doc No. 152, ¶¶ 38-40).

SLR terminated plaintiff's employment and medical staff appointment by letter on November 3, 2017 (NYSCEF Doc No. 61, Fee affirmation, exhibit 4). The letter stated the action was "necessary because you have engaged in a pattern of conduct that makes it impossible for the Hospital to assure that you will provide safe and effective care to patients" (*id.* at 1). The letter identified three areas of unacceptable behavior. The first concerned a failure to respond promptly and effectively to patients in need of care, citing instances where other clinicians have complained or questioned plaintiff's decisions to delay care without articulating evidence-based reasons for his actions, and where clinicians have had to contact the Department chair to intervene (*id.*). The letter reminded plaintiff that this was same the type of conduct detailed in the April 15 Letter (*id.*). The second area concerned a lack of truthfulness and transparency as a medical staff member, citing plaintiff's supposed falsification of medical records when he copied another physician's note, and his failure to disclose that he had been disciplined in 2016 on his application for reappointment to SLR (*id.*). The third area concerned a failure to follow Department directives, such as the instruction to involve Dr. Ghatan in his cases (*id.* at 2). The letter concluded that these areas, taken together, "compound and exacerbate each other to create a pattern of behavior that no hospital could tolerate in any physician … show a physician practicing below the standard of care who lacks the insight, knowledge, or interest to acknowledge his deficiencies" (*id.*).

Plaintiff, through counsel, appealed his termination (NYSCEF No. 54, ¶ 164). Plaintiff was entitled to a hearing under SLR's bylaws, but the hearing was postponed as the parties explored settlement (*id.* ¶¶ 160 and 185). Although SLR's counsel forwarded a draft settlement agreement to plaintiff's counsel (NYSCEF Doc No. 117, Fee affirmation, exhibit 60), the parties could not resolve the dispute. Plaintiff averred that he rejected the settlement because the terms were not acceptable to him (NYSCEF Doc No. 152, ¶ 42). He also withdrew his appeal because

he did not believe he would receive a fair hearing (*id.*, ¶ 43). SLR's Board of Trustees approved the termination of plaintiff's staff membership and privileges (NYSCEF Doc No. 135, Fee affirmation, exhibit 78 at 5). SLR reported the termination of plaintiff's staff privileges to the National Practitioner Data Bank (NPDB) (NYSCEF Doc No. 58, ¶ 2).

On August 13, 2018, plaintiff filed a complaint regarding his termination with the Public Health and Health Planning Counsel (the PHHPC) (NYSCEF Doc No. 58, ¶ 11). By letter dated June 11, 2019, the PHHPC "credited" plaintiff's complaint and directed SLR to review its actions (NYSCEF Doc No. 137, Fee affirmation, exhibit 80). The PHHPC did not make any factual findings or explain why it was crediting Dr. Williams' complaint.

On August 1, 2019, defendant asked the PHHPC to reconsider (NYSCEF Doc No. 134, Fee affirmation, exhibit 77). To date, the PHHPC has not responded to SLR's request for reconsideration (NYSCEF Doc No. 58, ¶¶ 200-201). Accordingly, defendant did follow PHHPC's directive to review its actions. SLR invited plaintiff to participate in this review process, but he declined (NYSCEF Doc No. 51, ¶ 203). As part of the review process, the QA Committee reviewed its report (NYSCEF Doc No. 110, Fee affirmation, exhibit 53 at 1). The QA Committee affirmed its conclusions and noted that it had been "guided by the standard of care expected of a leading teaching hospital such as [MSH], not by the legal 'standard of care' in the community as such term is used to determine whether a physician has committed medical malpractice" (*id.* at 2).

SLR also convened an ad hoc Professionalism Committee consisting of Dr. Breen, Dr. Napp and Dr. Brijen Shah (NYSCEF Doc No. 86, Fee affirmation, exhibit 29 at 1). The committee examined the medical note plaintiff had copied from Dr. Delfiner; plaintiff's failure to disclose his suspension and formal written warning and reprimand on his reappointment application; and plaintiff's failure to abide by Dr. Ghatan's instruction that he present his cases in weekly case

management conferences (*id.* at 2-3). The committee also looked at other instances of unprofessional behavior, including one instance where he argued with a nurse about the necessity for surgical marking (*id.* at 3). The committee concluded that the lack of professionalism merited termination (*id.* at 4).

F. Dr. Comparator

Dr. Comparator is a white neurosurgeon whom SLR employed from 1999 until December 31, 2016 (NYSCEF Doc No. 54, ¶ 223; NYSCEF Doc No. 176, ¶ 24). As with plaintiff, Dr. Ghatan expressed concerns early in Dr. Breen's tenure about Dr. Comparator's technical ability and medical judgment (NYSCEF Doc No. 67 at 41-42). In May 2015, Dr. Comparator performed a wrong-sided surgery, an incident Dr. Breen described "is considered a sentinel event and … one of the never events that you want to have happen at your hospital" (NYSCEF Doc No. 176, ¶¶ 42-43; NYSCEF Doc No. 65 at 61). Dr. Comparator was summarily suspended, and Dr. Breen learned during the investigation that he had committed a previous wrong-sided surgery in 2013[8] (NYSCEF Doc No. 176, ¶ 45). Dr. Comparator agreed to a voluntary 28-day suspension without pay and to have proctors oversee his surgeries for six months (NYSCEF Doc No. 54, ¶¶ 225-228). SLR and Dr. Comparator also settled the medical malpractice action brought against them, and SLR reported the payment to the NPDB as federal law requires (*id.*, ¶¶ 234-236).

In July 2015, Dr. Ghatan learned from a nurse manager that Dr. Comparator forgot to mark the procedure site on two patients and had to be reminded to mark them (NYSCEF Doc No. 157, Warshawsky affirmation, exhibit F at 2). Dr. Napp advised Dr. Breen that a suspension should be imposed "[i]f there is substance to this" (*id.*). Dr. Comparator was not suspended, with the Department choosing to continue proctoring his cases (NYSCEF Doc No. 176, ¶ 58).

[8] SLR was part of Continuum Health Partners at that time. The Comparator described that event as an "incorrect-sided laminectomy" (NYSCEF Doc No. 66 at 32).

In December 2015, Dr. Comparator allegedly failed to treat a patient properly who had presented with a hemorrhage from an arteriovenous malformation (*id.*, ¶ 61). Dr. Ghatan testified Dr. Comparator should have relieved the swelling in the patient's head, but he did not (NYSCEF Doc No. 67 at 178). Dr. Ghatan explained that Dr. Comparator's approach called into question Dr. Comparator's ability to evaluate and treat the patient properly and his ability to perform the surgery the patient required (*id.* at 179). Though Dr. Ghatan believed Dr. Comparator's care fell below the standard of care, he could not recall if Dr. Comparator was disciplined (*id.* at 179 and 181). The case was discussed at a monthly QA meeting (*id.* at 180).

In response to a job offer Dr. Comparator received from another institution in April 2016, Dr. Bederson offered Dr. Comparator a one-year contract through June 30, 2017 (NYSCEF Doc No. 54, ¶¶ 228-230). However, Dr. Comparator did not receive a new contract (*id.*, ¶ 231), and in August 2016, he hired an attorney to seek compensation (NYSCEF Doc No. 66 at 56).

In July 2016, Dr. Comparator performed surgery on a patient who later died (NYSCEF Doc No. 54, ¶ 237). On August 4, 2016, Dr. Comparator was summarily suspended pending an investigation because of serious concerns about his medical judgment and his failure to discuss the case with Dr. Ghatan as required under his quality assurance plan (NYSCEF Doc No. 54, ¶ 239; NYSCEF Doc No. 176, ¶¶ 63-65). Dr. Comparator's counsel contacted Engel on August 16 to discuss a potential resolution (NYSCEF Doc No. 91, Fee affirmation, exhibit 34). On August 18, a formal QA review found that Dr. Comparator had not deviated from the standard of care (NYSCEF Doc No. 54, ¶ 243; NYSCEF Doc No. 176, ¶ 66). Engel also advised counsel on August 18 that Dr. Comparator would not be given a new contract and would be given a certain amount of time to look for a job elsewhere (NYSCEF Doc Nos. 92, Fee affirmation, exhibit 35). SLR then served Dr. Comparator with a letter "warning that any further conduct that shows a lack of

professionalism or commitment to the Department's quality assurance processes, will result in discipline, up to and including termination" (NYSCEF Doc No. 88, Fee affirmation, exhibit 31).

Meanwhile, Dr. Bederson spoke to Dr. Comparator and told him "[s]omething along the lines of … you seem to want to improve, but you keep having problems, maybe you should move on," which meant finding a position elsewhere (NYSCEF Doc No. 64 at 95-96; (NYSCEF Doc No. 176, ¶ 69)). Dr. Bederson testified Dr. Comparator "seemed open to that" and consented to Dr. Comparator's request for time to find another job (*id.* at 96 and 116). Though Dr. Comparator could not recall if Dr. Bederson told him he should leave, he admitted the discussion could have taken place (NYSCEF Doc No. 66 at 57-58). Dr. Comparator also could not recall if he was told he would be terminated if he did not resign (*id.* at 87). Dr. Comparator agreed to resign because he no longer wished to work at SLR (*id.* at 86). Dr. Comparator's counsel and Engel then negotiated a separation agreement. Of relevance here is a provision in that agreement stating because Dr. Comparator would resign, "federal law and regulation neither permit nor require a report of his resignation to the [NPDB]" (NYSCEF Doc No. 89, Fee affirmation, exhibit 31 at 1). Another provision allowed for the possibility that Dr. Comparator could continue his employment part-time, past December 31, 2016, if he did not accept another offer by November 30 (*id.*). Dr. Comparator understood he could be terminated if he did not sign the agreement (NYSCEF Doc No. 66 at 88).

G. Dr. S.

In April 2017, SLR extended an offer of employment to Dr. S., and in August 2017, SLR announced he was joining the Department (NYSCEF Doc No. 54, ¶¶ 251 and 253). He began working at SLR that October as the site director at MSM (NYSCEF Doc No. 176, ¶¶ 97-98). In September 2018, SLR suspended Dr. S.'s employment and staff privileges after he was accused of

sexual harassment (NYSCEF Doc No. 54, ¶¶ 256-257). By letter dated September 24, 2018, Dr. S. resigned effective October 2, 2018 (NYSCEF Doc No. 176, ¶ 105).

Procedural History

Plaintiff commenced this action by filing a summons and complaint asserting two causes of action for (1) an injunction under Public Health Law § 2801-c for an alleged violation of Public Health Law § 2801-b and (2) race discrimination in violation of the NYCHRL. Plaintiff alleges that he was treated differently compared to white neurosurgeons who had committed "gross acts of malpractice during Dr. Ghatan's tenure but were not terminated" (NYSCEF Doc No, 58, ¶ 62). He seeks a judgment declaring that defendant terminated his staff membership and privileges without justification in violation of Public Health Law § 2801-b; a judgment declaring that defendant discriminated against him on the basis of race in violation of the NYCHRL; an order requiring defendant to reinstate his membership and staff privileges, retroactive to November 3, 2017; an order requiring defendant to void and withdraw the adverse action report filed with the NPDB; and an award of back pay, front pay in lieu of reinstatement, compensatory and punitive damages, pre-and post-judgment interest and reasonable attorneys' fees, expert fees and costs.

Defendant's pre-answer motion to dismiss was granted to the extent of dismissing that part of the first cause of action related to the filing of a report with the NPDB and denied the balance of the motion (NYSCEF Doc No. 32; NYSCEF Doc No. 60, Fee affirmation, exhibit 3, 3/9/2021 oral argument tr at 8). Defendant now moves for summary judgment. Plaintiff opposes.

The Parties' Contentions

Defendant contends the cause of action predicated on Public Health Law § 2801-b should be dismissed because the termination of plaintiff's privileges was reasonably related to the grounds in the statute. The apparent facts provided a basis for defendant reasonably to perceive that

plaintiff failed to respond promptly and effectively to patients needing care, to be truthful about his activities as a staff member, and to follow Department directives. Defendant maintains that it asserted the grounds for plaintiff's termination in good faith and they were not a pretense for some ulterior reason. As to the second cause of action, defendant posits that the Health Care Quality Improvement Act of 1986 (HCQIA) (42 USC § 11101 *et seq.*) bars any claim for relief related to the NPDB report and the NYCHRL. Defendant also argues that the NYCHRL claim fails because it has proffered a legitimate, nondiscriminatory reasons for plaintiff's termination, and plaintiff cannot demonstrate that the proffered reasons were a pretext for discrimination. Defendant further argues that DLR treated plaintiff and Dr. Comparator the same. Defendant investigated the issues with these doctors' patient care and provided time to correct those problems before asking them to resign. Dr. Comparator resigned. Plaintiff did not.

Plaintiff counters that the proffered reasons are pretextual because his treatment of Patients A, B, C, and D did not fall below the standard of care and tenders a redacted affirmation from expert Dr. Howard Tung (Dr. Tung) on this point. Plaintiff also refers to the letter from PHHPC that he claims establish that he met the standard of care. Plaintiff further contends that defendant deliberately pushed him out of SLR by convening a special committee to review his treatment of Patients B, C, and D and by falsely charging him with unprofessionalism. On the NYCHRL claim, plaintiff principally relies on a theory of disparate treatment with respect to inconsistent disciplinary practices and contends that SLR treated two white neurosurgeons – Dr. Comparator and Dr. S. – more favorably even though both had engaged in more egregious misconduct. Drs. Comparator and. S. were selected for the site director position over plaintiff. Defendant allowed Drs. Comparator and S. to resign without having to file any reports with the NPDB. Plaintiff was terminated, and defendant filed an adverse action report about the termination of his privileges.

Discussion

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If the moving party meets its prima facie burden, non-moving party must furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324).

A. The Second Cause of Action Alleging a Violation of the NYCHRL

The NYCHRL makes it an unlawful discriminatory practice for an employer to discriminate against any "person in compensation or in terms, conditions or privileges of employment" because of that person's race (Administrative Code § 8-107 [3]). The provisions of the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent such construction is reasonably possible" (*Albunio v City of New York*, 16 NY3d 472, 477-478 [2011]). Courts analyze NYCHRL claims under the burden-shifting framework articulated in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) (*McDonnell Douglas*) and the mixed motive framework (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]). The *McDonnell Douglas* framework involves a three-step burden-shifting process.

The plaintiff bears the initial burden of establishing a prima face case of discrimination by showing that the plaintiff is a member of a protected class, is qualified for the position, suffered an adverse employment action, and that the adverse employment action gives rise to an inference of discrimination (*id.* at 514). In response, the employer must proffer a legitimate,

nondiscriminatory reason for its action (*id.*). The burden then shifts back to the plaintiff to demonstrate that the employer's reason was a mere pretext for discrimination (*id.*). The mixed motive framework shares the first two steps in the *McDonnell Douglas* framework (*Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 73 [1st Dept 2017]). On the third step, the plaintiff must show that "'unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for [the] adverse employment decision'" (*id.*, quoting *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1st Dept 2012]). Summary judgment dismissing an NYCHRL claim may be granted where, "based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes – *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). The plaintiff may defeat the motion by producing evidence showing the reason proffered by defendant was false, misleading, or incomplete (*id.*), or "the defendant was motivated at least in part by an impermissible motive" (*Ellison v Chartis Claims, Inc.*, 178 AD3d 665, 668 [2d Dept 2019] [citation omitted]).

For purposes of this motion, defendant does not dispute that plaintiff is a member of a protected class, was qualified for the position of attending neurosurgeon, and was terminated. Termination from employment constitutes an adverse employment action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 307 [2004]).

Defendant has proffered legitimate, nondiscriminatory reasons for terminating plaintiff's employment and staff privileges (*see Johnson v IAC/InterActiveCorp*, 179 AD3d 551, 552-553 [1st Dept 2020], *lv denied* 35 NY3d 912 [2020] [dissatisfaction with plaintiff's skills]; *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 554 [1st Dept 2010] [affidavits, depositions and documents

established the reasons for ending plaintiff's employment]). "Unsatisfactory work performance is a nondiscriminatory motivation" for employment termination (*Hudson*, 138 AD3d at 515-516, citing *Bennett*, 92 AD3d at 45-46).

Although none of defendant's concerns about plaintiff involved his skill as a surgeon, the record contains evidence that plaintiff's patient care and medical judgment were questionable. For example, there was the delay to perform surgery on patient C. In addition, there is evidence that staff complained numerous times about plaintiff's paltry documentation or complete lack thereof. There was a reluctance to follow protocol, such as signing his name on patient's skin to mark the proper site for surgery. Defendant has also shown that plaintiff failed to adhere to repeated warnings about his conduct. In particular, plaintiff was warned in April 2016 about his judgment with respect to patient A (see NYSEF doc # 165). The correspondence demonstrates that plaintiff was less than truthful when questioned about the incident and defendant was right to be concerned about plaintiff's "lack of candor." Yet, plaintiff continued this type of behavior when he presented as his own the findings of a physical exam that another physician performed and made a surgical recommendation from that other physician's findings.

Plaintiff contends that the proffered reasons for his termination were pretextual. He asserts that defendant's stated reason of poor patient care is "flimsy and disputed" (NYSCEF Doc No. 174, plaintiff mem of law at 5). "'[A]n employee's general disagreement with a supervisor's evaluation of the employee's job performance, by itself, does not create an inference of discrimination or constitute proof of pretext'" (*Cardwell v Davis Polk & Wardwell LLP*, 2023 WL 2049800, *21, 2023 US Dist LEXIS 26907, *66-67 [SD NY, Feb. 16, 2023, No. 1:19-cv-10256-GHW] [citation omitted]). Here, plaintiff disagrees with the QA committee's conclusions because Patients A, B, C, and D did not suffer adverse outcomes (NYSCEF Doc No. 152, ¶¶ 23, 29, 31,

and 33). Plaintiff's averments, though, amount to nothing more than a disagreement with SLR's actions (*see Melman*, 98 AD3d at 121, quoting *Forrest*, 3 NY3d at 312 ["[t]he mere fact that [plaintiff] may disagree with [his] employer's actions or think that [his] behavior was justified does not raise an inference of pretext"]).

Plaintiff's expert, Dr. Tung, opined that plaintiff's treatment of Patients A, B, C, and D fell within the standard of care (NYSCEF Doc No. 166, Warshawsky affirmation, exhibit O at 7-8). Dr. Tung's affirmation, however, is inadmissible as it was not made under the penalties of perjury (CPLR 2106 [a]). Nor has plaintiff demonstrated that Dr. Tung is qualified to render an expert medical opinion (*see Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 724 [2d Dept 2010] [qualifications established with the submission of a curriculum vitae]). In any event, Dr. Tung's opinion is not probative on the issue of discrimination or whether discrimination was a motivating factor. Dr. Tung opined that "[t]here can be different opinions with regards to medical treatment/surgical treatment between physicians" (NYSCEF Doc No. 166 at 7), but a difference in opinion is not sufficient to establish pretext or a discriminatory animus (*see e.g. Weinstock v Columbia Univ.*, 224 F3d 33, 46 [2d Cir 2000], *cert denied* 540 US 811 [2003] [difference of opinion in evaluating qualifications not evidence of discrimination aimed at plaintiff]). Moreover, Dr. Tung's comments addressed only the medical aspect of plaintiff's employment and not the other issues of which he was unaware (NYSCEF Doc No. 170, Warshawsky affirmation, exhibit S, Dr. Tung tr at 85).

Plaintiff also contends that defendant's claim of poor performance is false or misleading because he had received positive performance evaluations and had been reappointed to the medical staff (NYSCEF Doc No. 163-164, Warshawsky affirmation, exhibits L-M). Positive assessments of an employee's performance that contradict an employer's stated reason for the employee's

termination can constitute evidence of pretext (*see Rollins v Fencers Club, Inc.*, 128 AD3d 401, 403 [1st Dept 2015]). Plaintiff's evaluations, though, are mixed. Dr. Bederson rated plaintiff as "2-marginally meets expectations" in the scholarship, teaching and clinical categories, and as "3-meets expectations" in the service/citizenship category in an annual faculty performance evaluation from March 2017 (NYSCEF Doc No. 120, Fee affirmation, exhibit 63). Dr. Ghatan rated plaintiff as "fair" in all categories, including the technical/skills and clinical judgment categories, in a peer reference inquiry from September 2015, and recommended plaintiff "with some reservation" (NYSCEF Doc No. 119, Fee affirmation, exhibit 62 at 1-2). Dr. Ghatan rated plaintiff "satisfactory" in all categories in a medical staff evaluation from December 2015 (NYSCEF Doc No. 119, Fee affirmation, exhibit 62; NYSCEF Doc No. 162, Warshawsky affirmation, exhibit K at 1). These evaluations were written well before plaintiff was terminated (*compare Rollins*, 128 AD3d at 403 [salary bonus and praise about performance six weeks before plaintiff's termination for poor performance raised triable issue on pretext]). Thus, plaintiff has not established that his evaluations disprove defendant's reasons for his termination.

In addition, the record shows that numerous complaints were made about plaintiff's poor documentation. Plaintiff also admitted to having copied Dr. Delfiner's note. While plaintiff averred that he "did not misrepresent these notes as my own" (NYSCEF Doc No. 152, ¶ 40), he signed the note without referring to Dr. Delfiner's examination. There is no evidence to support plaintiff's averment that Dr. Ghatan was aware the EMR systems at MSM and MSW were incompatible but took no action. This was also the only instance that Drs. Breen and Ghatan could recall where a neurosurgeon was accused of copying and pasting another physician's history and physical examination of a patient. However, it is understandable that plaintiff failed to report his suspension on his reappointment application when it was defendant who had suspended him, and

the reappointment application was to work with defendant (NYSCEF Doc No. 54, ¶ 38). It was reasonable for plaintiff to assume defendant was aware of the suspension and, as no disciplinary action was taken, he need not report it (NYSCEF Doc No. 152, ¶ 40).

As additional evidence of pretext, plaintiff argues that defendant departed from procedural regularity when it convened the QA Committee to prepare a formal report determining whether he had deviated from the standard of care. "'[D]epartures from procedural regularity … can raise a question as to the good faith of the process where the departure may reasonably affect the decision'" (*Stern v Trustees of Columbia Univ. in the City of N.Y.*, 131 F3d 305, 313 [2d Cir 1997] [citation omitted]). The deviation, though, is a minor one (*Carr v New York City Tr. Auth.*, 76 F4th 172, 177 [2d Cir 2023] [minor variation in hiring process not the type of departure "that could allow a jury to infer pretext"]). In prior disciplinary proceedings against plaintiff and Dr. Comparator, SLR made determinations on standard of care when it lifted their suspensions. In 2016, SLR concluded that plaintiff's treatment of Patient A met the standard of care, as indicated in the April 15 Letter. Dr. Comparator was suspended after the August 2016 QA meeting and was later found to have met the standard of care. Thus, plaintiff has failed to show that a departure from procedural regularity reasonably affected the decision to terminate him.

At first, the court was under the impression that plaintiff had raised an issue of fact as to disparate treatment. "A showing that similarly situated employees belonging to a different racial group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, non-discriminatory reason for the adverse job action was a pretext for racial discrimination" (*Graham v Long Island R.R.*, 230 F3d 34, 43 [2d Cir 2000]). In addition, "[t]o prevail on liability [for disparate treatment under the NYCHRL], the plaintiff need only show differential treatment – that [the plaintiff] is treated 'less well' – because of a discriminatory intent"

(*Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 [2d Cir 2013] [internal quotation marks and citation omitted]).

However, upon closer examination of the record, plaintiff has not put forward sufficient evidence to contradict that "the disparate treatment alleged was attributable to legitimate … nondiscriminatory reasons rather than plaintiff's [race]" (*Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503, 505 [1st Dept 2010]). The reason there is no disparate treatment is because, as explained more fully *infra*, Dr. Comparator took advantage of the opportunities offered if he resigned, while Plaintiff refused to resign.

"An employee is similarly situated to co-employees if they were (1) subject to the same performance evaluation and discipline standards and (2) engaged in comparable conduct" (*Cooper v Franklin Templeton Investments*, 2023 WL 3882977, *3, 2023 US App LEXIS 14244, *8 [2d Cir, June 8, 2023] [internal quotation marks and citation omitted]). Whether a comparator engaged in comparable conduct "requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical" (*Graham*, 230 F3d at 40 [internal quotation marks and citation omitted]; *accord Shah v Wilco Sys., Inc.*, 27 AD3d 169, 177 [1st Dept 2005]). "In the context of employee discipline, … the plaintiff and the similarly situated employee must have 'engaged in comparable conduct,' that is, conduct of 'comparable seriousness'" (*Raspardo v Carlone*, 770 F3d 97, 126 [2d Cir 2014] [citation omitted]).

SLR suspended Dr. S.'s employment and staff privileges after he was accused of sexual harassment. Plaintiff has not established how engaging in sexual harassment is comparably similar to the type of conduct cited in his termination letter (*see Dooley v Jetblue Airways Corp.*, 636 Fed Appx 16, 20 [2d Cir 2015] [plaintiff and comparators not similarly situated because they had not

engaged in comparable conduct]; *Albury v J.P. Morgan Chase*, 2005 WL 746440, *10, 2005 US Dist LEXIS 5363, *31 [SD NY, Mar. 31, 2005, No. 03 Civ. 2007 (HBP)] [comparator's offense of sexual harassment is a "qualitatively different" offense than the offense charged to plaintiff]).

Except for one resigning while the other did not, plaintiff and Dr. Comparator are similarly situated in all material respects. They were both neuro-surgeons who made mistakes. However, Dr. Comparator made serious surgical care errors (operating on the wrong side) that resulted in lawsuits, in addition to there being concerns about his medical judgment. By contrast, Defendants were not concerned about plaintiff's surgical abilities, just his medical judgment, candor and ability to follow protocol.

Plaintiff's main contention as to disparate treatment was that Dr. Comparator was given preferential treatment because he was afforded time to find a new job. However, the record reflects that plaintiff was given a similar opportunity. Three of plaintiff's cases were presented at a QA meeting prior to his termination. Plaintiff was then asked to resign. Dr. Bederson told plaintiff, "you should submit a letter resigning immediately, and that you would stay to help with the service for X amount of time. And I think it was a couple months" (NYSCEF Doc No. 70 at 86-87). Thus, just like Dr. Comparator, plaintiff was offered additional time if he resigned. However, unlike Dr. Comparator, Plaintiff refused to resign. He was then suspended pending an investigation because of concerns about his medical judgment. The results of the investigation were not favorable to plaintiff. Having refused to resign, plaintiff was terminated.

By contrast, Dr. Comparator agreed to resign and asked for time to find another job. Dr. Comparator was given additional time because he agreed to resign. Arguably, it can be said that Dr. Comparator was treated less well than plaintiff because Dr. Comparator was asked to resign even though the QA found his treatment in August 2016 met the standard of care. Thus, plaintiff

has not demonstrated how racial bias played a role in the decision to grant Dr. Comparator, who had agreed to resign, additional time (*see Varughese v Mount Sinai Med. Ctr.*, 2015 WL 1499618 at *52, *aff'd*, 693 Fed App'x 41 [2d Cir 2017] [no discrimination where male resident accepted counseling, apologized profusely and met with supervisors for months to talk about professionalism whereas plaintiff refused to acknowledge that she had ever exhibited unprofessional behavior]; *see also Hamburg*, 155 AD3d at 76 n 9 [no direct or circumstantial evidence "from which it could rationally be inferred that bias played a role"]).

Even under the more lenient mixed motive framework, plaintiff fails to demonstrate that defendant was motivated, even in part, by discrimination. To begin, derogatory remarks or comments by a decisionmaker evincing a discriminatory bias may, under some circumstances, constitute evidence that gives rise to an inference of discrimination (*see Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 596 [1st Dept 2012], *affd* 22 NY3d 914 [2013] [repeated, derogatory remarks directed at plaintiff sufficient to raise a triable issue]). Plaintiff offers no direct evidence of racial bias (*see Hamburg*, 155 AD3d at 76 [no remarks revealing age-related bias]; *compare Vaughn v Empire City Casino at Yonkers Raceway*, 2017 WL 3017503 at *16 [disparaging comments involving race and racial slurs]). Plaintiff admitted that Drs. Ghatan, Breen and Bederson never made any racist remarks to him (NYSCEF Doc No. 70 at 241). Plaintiff points to a single comment Dr. Bederson made at an event to discuss how to get Black and Latino high school students interested in neurosurgery (*id.* at 242). Plaintiff testified that Dr. Bederson made a comment "along the lines of, This is – Remember, I'm doing this, this is – this will be good for the dean and us because of these people" (*id.* at 242-243). Plaintiff, though, fails to show that the statement was made in relevant temporal proximity to the time SLR decided to terminate him so as to give rise to a reasonable inference of discrimination (*Kwong v City of New York*, 204 AD3d

442, 444 [1st Dept 2022], *lv dismissed* 38 NY3d 1174 [2022] [no connection between the allegedly derogatory remarks and the decision to terminate plaintiff's employment]; *Godbolt v Verizon N.Y. Inc.*, 115 AD3d 493, 494 [1st Dept 2014], *lv denied* 24 NY3d 901 [2014], [no nexus between remark and decision to terminate plaintiff]). Thus, this isolated, stray remark does not, "without more, constitute evidence of discrimination'" (*Godbolt* at 115 AD3d at 494, quoting *Melman*, 98 AD3d at 125).

Plaintiff complains that Dr. Ghatan treated him with "blatant rudeness and disrespect" by yelling and slapping his hands on the table during the October QA meeting (NYSCEF Doc No. 152, ¶ 27), but Dr. Comparator also testified that Dr. Ghatan often lost his temper, raised his voice, and slapped his hands on the table during QA meetings (NYSCEF Doc No. 66 at 80). The NYCHRL is not a "general civility code" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 79 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009] [internal quotation marks and citation omitted]). As such, plaintiff has not linked Dr. Ghatan's rude and disrespectful conduct to race (*see Russo v New York Presbyterian Hosp.*, 972 F Supp 2d 429, 452 [ED NY 2013] [comment directed at all staff, including men, defeated claim that plaintiff was treated less well because of her gender]).

Nor can a discriminatory motive for plaintiff's termination be inferred from SLR's decision to hire Dr. S. (*Marseille v Mount Sinai Health Sys.*, 2021 WL 3475620, *8, 2021 US Dist LEXIS 147442, *21 [SD NY, Aug. 5, 2021, No. 18-CV-12136 (VEC)], *affd* 2022 WL 14700981, 2022 US App LEXIS 29798 [2d Cir, Oct. 26 , 2022], citing *Hamburg*, 155 AD3d at 77 [attacking an employer's business judgment in terminating plaintiff does not give rise to an inference of discrimination]). SLR extended an offer of employment to Dr. S. in April 2017 (NYSCEF Doc No. 54, ¶ 251), seven months before SLR decided to terminate plaintiff. Hence, plaintiff's belief that Dr. S. was hired as his replacement is not supported (*see Karupaiyan v CVS Health Corp.*,

2023 WL 5713714, *26, [SD NY, Sept. 5, 2023] [rejecting plaintiff's belief that another employee was hired as his replacement when the hiring was weeks before plaintiff was terminated]).

Plaintiff claims he was passed over for the site director position. Plaintiff averred that Dr. Ghatan never spoke to him about the position (NYSCEF Doc No. 152, ¶ 15) before the position was given to Dr. Comparator. Meanwhile, Dr. Ghatan testified that he spoke to plaintiff and Dr. Comparator, plaintiff declined the position, and Dr. Comparator reluctantly accepted it (NYSCEF Doc No. 67 at 54-55 and 63-64). Even crediting plaintiff's version of events that no one spoke to him about the position, which could mean that no one even considered him for it, there is nothing in the record to support that plaintiff was passed over due to bias, implicit or otherwise.

Because plaintiff has not put forward any evidence demonstrating that defendant was motivated, solely or in part, by discrimination or that he was treated less well because of a protected characteristic, the second cause of action is dismissed (*see Matias v New York & Presbyt. Hosp.*, 137 AD3d 649 [1st Dept 2016] [absence of evidence of discriminatory animus fatal to an NYCHRL claim]). In view of the foregoing, the court need not address whether the immunity afforded under HCQIA extends to the NYCHRL claim.

In today's world, discrimination can be less visible and more likely to involve insidious subtleties and microaggressions. Here though, there is no evidence amounting to actionable discrimination. The evidence shows that plaintiff would have had more time to find a new job, just like Dr Comparator, had he resigned. While demanding resignation in exchange for more time, or else face immediate termination, may appear to be a heavy handed employment tactic, and not particularly gracious to someone who had worked at the same facility for many years, it does not mean discrimination occurred.

C. The First Cause of Action under the Public Health Law

Public Health Law § 2801-b (1) provides, in relevant part, that:

> "It shall be an improper practice for the governing body of a hospital ... to exclude or expel a physician ... from staff membership in a hospital or curtail, terminate or diminish in any way a physician's ... professional privileges in a hospital, without stating the reasons therefor, or if the reasons stated are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant"

A person aggrieved by an improper practice described in the statute may file a complaint with the PHHPC (*see* Public Health Law § 2801-b [2]). The PHHPC must investigate and if it determines that "cause exists for crediting" the complaint, the PHHPC "shall direct that such governing body make a review of the actions of such body" (Public Health Law § 2801-b [3]). Any findings made by the PHHPC "shall be prima facie evidence of the facts or facts found therein" (Public Health Law § 2801-c). A plaintiff's sole remedy for a violation or threatened violation of article 28 is injunctive relief under Public Health Law § 2801-c (*Bhard-Waj v United Health Serves., Hosps.*, 303 AD2d 824, 825 [3d Dept 2003]).

To prevail on a cause of action under Public Health Law § 2801-b, the plaintiff must demonstrate that "the hospital acted in bad faith or gave one of the statutory reasons as a pretense for the true reason that the privileges were terminated" (*Gelbard v Genesee Hosp.*, 211 AD2d 159, 164 [4th Dept 1995], *affd* 87 NY2d 691 [1996]). The court "is not concerned with the ultimate truth or falsity of the fact of physician misconduct alleged" (*Fried v Straussman*, 41 NY2d 376, 381 [1977], *rearg denied* 41 NY2d 1009 [1977]; *Matter of Tabrizi v Faxton-St. Luke's Health Care*, 66 AD3d 1421, 1421 [4th Dept 2009] [judicial review not concerned with whether the allegations against the plaintiff were accurate]). "Rather it is charged with responsibility to determine whether there existed objectively reasonable grounds for the physician's complaint and

whether it was made in good faith and not for some impermissible ulterior reason" (*Fried*, 41 NY2d at 381). "There must be reasons, but they must be authentic ones, not pretenses" (*id.* at 382). Thus, "[j]udicial review of an alleged violation of Public Health Law § 2801-b (1) is limited to whether the purported grounds were reasonably related to the institutional concerns set forth in the statute, whether they were based on the apparent facts as reasonably perceived by the administrators, and whether they were assigned in good faith" (*Matter of Fischer v Nyack Hosp.*, 140 AD3d 1264, 1266 [3d Dept 2016] [internal quotation marks and citation omitted]).

Applying these principles, defendant has established that the decision to terminate plaintiff's professional privileges was made in good faith and on objectively reasonably grounds that were reasonably related to patient care, patient welfare, SLR's objectives, and plaintiff's character and competency (*Karim v Raju*, 165 AD3d 504 [1st Dept 2018], *lv denied* 33 NY3d 914 [2019]; *Roth v Beth Israel Med. Ctr.*, 180 AD2d 434, 435 [1st Dept 1992] [concerns about plaintiff's performance a good faith basis for termination]). The evidence demonstrates that defendant was concerned with the quality of patient care plaintiff provided, his lack of truthfulness as a medical staff member, and his failure to follow Department directives, as explained above.

Further, defendant has demonstrated that its actions were taken in good faith (*see Matter of Shapiro v Central Gen. Hosp.*, 220 AD2d 516, 517 [2d Dept 1995] [good faith basis for decision not to reappoint petitioner where petitioner deliberately omitted relevant information on his application]; *Matter of Moss v Albany Med. Ctr. Hosp.*, 61 AD2d 545, 548 [3d Dept 1978] [reasonable basis for denying staff privileges to plaintiff where the hospital concluded there were "violations of accepted standards" even though the "cases involved, for the most part, matters of judgment in procedure and technique"]). Several of the complaints that prompted defendant to act were made by other medical staff (*see Bhard-Waj*, 303 AD2d at 824 [nurse filed report of patient

neglect]; *Matter of Tabrizi*, 66 AD3d at 1422 [hospital acted in response to concerns raised by physician associated with insurance carrier over care of patient carrier insured]). That the PHHPC credited the complaint does not demonstrate that the stated reasons for defendant's action were frivolous or made in bad faith (*Heimlich v St. Luke's Roosevelt Hosp. Ctr.*, 202 AD2d 361, 361 [1st Dept 1994]), especially where the PHHPC made no specific factual findings in its determination (*Karim*, 165 AD3d at 504]; *accord Hauptman v Grand Manor Health Related Facility, Inc.*, 121 AD2d 151, 155 [1st Dept 1986]).

Moreover, there is evidence in the record that plaintiff did not get along with his colleagues. For example, he berated staff for ratting him out when he was not reachable. He apparently could not be in the same room as Dr. Comparator. He obstinately refused to follow instructions about record keeping and using his initials to mark patient's surgery sites. These factors further demonstrate that the hospital's decision was an objectively reasonable one (*see Karim v. Raju*, 165 A.D.3d 504, [1st Dep't 2018] [decision was based on admissible evidence of plaintiff's poor interpersonal skills and difficulties in working with subordinates, which are reasonably related to the statutory standards of "patient care, patient welfare, the objectives of the institution or the character or competency of the applicant"]). Several of the complaints that prompted defendant to act were made by other medical staff (*see Bhard-Waj*, 303 AD2d at 824 [nurse filed report of patient neglect]; *Matter of Tabrizi*, 66 AD3d at 1422 [hospital acted in response to concerns raised by physician associated with insurance carrier over care of patient carrier insured]).

Plaintiff fails to raise a triable issue of fact. He alleges that the real reason for terminating of his privileges was discrimination based on race, but as discussed above, plaintiff's NYCHRL claim has been dismissed. Plaintiff sets forth no other basis demonstrating how the termination

of his professional privileges failed to comport with the requirements in Public Health Law § 2801-b. Accordingly, the first cause of action is dismissed.

C. The Adverse Action Report

Pursuant to 42 USC §§ 11133 (a) (1) (A) and 11134 (a) and (b) and its implementing regulations, 45 CFR 60.2, 60.5 and 60.12 (a) (i), a hospital is required to file a report with the NPDB for any adverse action that affects a physician's clinical privileges for more than 30 days. HCQIA shields those persons or entities from liability in civil actions arising out of the submission of reports to the NPDB, provided the report was made "'without knowledge of the falsity of the information contained in [it]'" (*Brown v Presbyterian Healthcare Services*, 101 F3d 1324, 1334 [10th Cir 1996], *cert denied sub nom. Miller v Brown*, 520 US 1181 [1997], quoting 42 USC § 11137 [c]). Plaintiff concedes that under 42 USC § 11137 (c), defendant is immune from liability for its filing of the adverse action report[9] (NYSCEF Doc No. 174 at 13). Defendants' motion to dismiss all claims for relief related to the filing of the adverse action report is granted.

Accordingly, it is hereby

ORDERED that the motion of defendant Mount Sinai Health System, Inc. for summary judgment dismissing plaintiff Arthur W. Williams, M.D.'s complaint (motion sequence no. 002) is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

10/4/2023
DATE

MELISSA A. CRANE, J.S.C.

[9] There is no indication plaintiff has disputed the accuracy of the report with the NPDB (*see* 42 USC § 11136; 45 CFR 60.21).