

Lawrence v Helene Fuld Coll. of Nursing

2024 NY Slip Op 30149(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 157465/2020

Judge: Margaret A. Chan

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

PRESENT: HON. MARGARET A. CHAN PART 49M

Justice

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STEPHEN LAWRENCE
Plaintiff,

- v -
HELENE FULD COLLEGE OF NURSING,
Defendant.

INDEX NO. 157465/2020
MOTION DATE 06/21/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48
were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this employment discrimination action, plaintiff Stephen Lawrence sues his employer, defendant Helene Fuld College of Nursing (the College), for retaliation under Labor Law §§ 740 and 741 and the Family Medical Leave Act of 1993, 29 U.S.C. §2601 (FMLA). Specifically, plaintiff alleges that defendant retaliated against him (i) for his whistleblower activity in violation of Labor Law §§ 740 and 741 (first cause of action), and (ii) for exercising his FMLA protected right to take medical leave, in violation of FMLA (second cause of action). In Motion Sequence (MS) 001, defendant moves for summary judgment dismissing plaintiff's complaint. Plaintiff opposes. For the reasons below, defendant's motion is granted.

Background¹

Plaintiff Stephen Lawrence was a registered nurse who taught as Assistant Professor at the College, a licensed nursing school in New York (NYSCEF # 17 – pltf tr at 29-30; NYSCEF # 2 – deft answer, ¶ 3). The College offered a skills practicum nursing course called NUR 211 (NYSCEF # 2, ¶ 8; NYSCEF # 20 – Griffin-Sobel tr at 9-10). In years prior to 2019, students failing NUR 211 were mandated to re-take NUR 211 and pay additional tuition for the course, which had six to nine credits (pltf tr at 122; NYSCEF # 43, ¶¶ 29, 30). In the Spring 2019 term, the College changed its policy and instead required students failing NUR 211 to enroll in a one-credit remedial course, NUR 399 (NYSCEF # 20 at 9-10; NYSCEF # 43, ¶¶ 21, 28).

¹ The following facts are drawn from materials submitted in connection with this motion (see NYSCEF #s 1-2, 16-48). Most facts are undisputed, unless otherwise noted (NYSCEF # 43 – pltf's response to uncontested facts).

Students completing this remedial course could earn ten additional points in NUR 211, which allowed more students to pass NUR 211 without re-taking it (*id.*).

Plaintiff's Whistleblowing Activity

In July 2019, the College's President Joyce Griffin-Sobel appointed plaintiff to teach NUR 211 and NUR 399 for the period of August 2019 to July 2020 (NYSCEF #19 – Assignment Agreement). Plaintiff disagreed with the College's policy of allowing students to earn additional points in NUR 211 by taking NUR 399, alleging that it was “artificial inflation of the passing rate for NUR 211 students [that] served to increase [the College's] revenue via tuition” and “ha[d] the potential for allowing unsafe and unqualified graduates to enter the nursing profession” (NYSCEF # 1 – Compl, ¶¶ 10, 11). On August 11, 2019, plaintiff verbally complained of this policy to the College's Human Resources (HR) department, averring that he planned to make a whistleblower complaint about the policy to government authorities (pltf tr at 128-129). On August 22, 2019, plaintiff wrote a whistleblower letter to eight Federal and State agencies and accrediting bodies, accusing the College of “chang[ing] final exam grades for multiple failing students to increase pass rates” (NYSCEF # 22 – Whistleblower Letter).

On September 17, 2019, the College's HR director learned from plaintiff that plaintiff had reported the College to government agencies for “financial aid fraud” (NYSCEF # 46 at 2). The HR director immediately informed the College's President Griffin-Sobel and Vice President Sandra Carollo of plaintiff's reporting activity (*id.* at 3). Plaintiff alleges that the College subsequently retaliated against him for whistleblowing by increasing his workload and falsely accusing him of inappropriate conduct at work (Compl, ¶¶ 15-17). That said, plaintiff continued working at the College until November 2019 (NYSCEF # 43, ¶¶ 35-36, 68-69).

Plaintiff's Intent to Resign and Attempt to Request FMLA Leave

On November 14, 2019, plaintiff openly spoke about his dissatisfaction at work in front of a class of students during a math class he taught (NYSCEF # 34 – audio recording tr; NYSCEF # 35). A student in the class recorded plaintiff's comments and emailed the audio recording to President Griffin-Sobel on November 19, 2019 (NYSCEF #s 34, 35; Griffin-Sobel tr at 53-54). In the audio recording, plaintiff complained of his increased workload and talked about at-will employment, which in his opinion allowed employers to do “anything they want and [employees] don't have any way[s] to get around it” unless employees can prove any employment discrimination, which is “[t]he only way [employees] are protected” (NYSCEF # 34 at 1). Plaintiff also voiced his disapproval of the College's policy that allowed some students to pass NUR 211 by taking NUR 399, calling the policy an illegal tactic to increase school revenue from the additional tuition that the College would earn from NUR 399 (*id.* at 4-5). Plaintiff further mentioned that he “just gave someone [his] color printer” and still “ha[d] a lot of things” to move (*id.* at 5).

President Griffin-Sobel testified that the student recording plaintiff verbally told her that plaintiff was resigning (Griffin-Sobel tr at 53:18-21, 59:5-7). Also, around November 14, 2019, President Griffin-Sobel learned the same from a group of at least four students in plaintiff's class (Griffin-Sobel tr at 60-61). But President Griffin-Sobel did not directly confirm with plaintiff whether he was resigning (*id.* at 61-62). Then, on November 15, 2019, Vice President Carollo sent President Griffin-Sobel an email, stating:

I just heard from [an administrative assistant] that I will be getting an email (hasn't arrived yet) from a student who is complaining about [plaintiff] that he said he is planning to resign and that "this place is a sham." I have a planned meeting with him on [November] 20th to finish our discussion from last week. I think all 3 of us need to be in the room and confront him regarding his behavior and let him go as of Jan 1 – I am tired of this crap!

(NYSCEF # 32 at 1).²

On November 18, 2019, plaintiff emailed a program director at the College that "he was sick and would be going to [his] doctor" the next day (pltf tr at 244).³ Later on November 18, 2019, Vice President Carollo emailed plaintiff the below:

I heard from [the program director] that he thought you are out ill today, but later saw you on campus packing some things up in your office. I do hope that everything is ok. Please feel free to send me an email or phone message if I can be of any support.

(NYSCEF # 33).

Forwarding this email to President Griffin-Sobel, Vice President Carollo noted that "[plaintiff's] office looks pretty bare. It appears he may make his exit sooner vs later" (*id.*). President Griffin-Sobel then reviewed plaintiff's office and found that it was not fully emptied, but plaintiff's personal belongings such as a coat, papers, and notes were gone (Griffin-Sobel tr at 66).

On November 19, 2019, President Griffin-Sobel learned from students that plaintiff was absent from class without giving notice to his students (NYSCEF # 35). The next day, November 20, 2019, President Griffin-Sobel sent a letter to plaintiff, warning him that his absence without notice and his in-class remarks about the College was unacceptable and "[a]ny repetition of such behaviors is grounds for immediate dismissal" (NYSCEF # 35). Later that day, plaintiff did not appear for his scheduled meeting with Vice President Carollo (Griffin-Sobel tr at 61-62).

² When later deposed, President Griffin-Sobel did not recall herself or Vice President Carollo receiving the above-referenced email from any students (Griffin-Sobel tr at 59-60).

³ Plaintiff did not produce a copy of this email.

Thereafter, President Griffin-Sobel sent a second letter to plaintiff on November 20, 2019, stating:

It has come to my attention that you have removed your things from your office. Students and staff have reported to me that you have stated you “resigned”. You have also not appeared for your 2 pm meeting with [Vice President Carollo]. I am taking your removal of your personal effects from your office, along with your statements and failure to meet the provost, as your resignation, which I accept effective immediately.

(NYSCEF # 36).

Plaintiff did not respond to either of President Griffin-Sobel’s letters dated November 20, 2019 (NYSCEF # 43, ¶ 70). Nevertheless, when deposed, plaintiff denied having resigned and asserted that he was on FMLA medical leave at the time of his absence (*id.* ¶ 69; pltf tr at 268-269, 271). Plaintiff stated that he requested an eight-week FMLA medical leave effective November 18, 2019, by hand-delivering his FMLA leave request to the College’s Bursar’s office on November 19, 2019 (pltf tr at 271; NYSCEF # 24 – FMLA Leave Request at 1). Attached to plaintiff’s FMLA Leave Request was a one-page doctor’s note issued by plaintiff’s doctor, Walt Sargeant on November 19, 2019, which read: “please excuse [plaintiff’s] absence from 11/18/19 to 12/13/19”—a five-week period (NYSCEF # 24 at 2). The doctor’s note contained no other substantive content and did not discuss plaintiff’s health condition or any treatment of plaintiff at all (*id.*). In fact, Sargeant’s medical record of plaintiff’s November 19, 2019 visit to his office provided that:

[Patient was] requesting [a] note for “10 weeks” off to better control his sugar. [Patient was] made aware that [I] will honor his request with the understanding if the job denies there is no more I can do, also it was his request and not ours and therefore no additional forms will be completed.

(NYSCEF # 25 – Medical Record).

On November 20, 2019, or shortly thereafter,⁴ President Griffin-Sobel was given plaintiff’s FMLA Leave Request, along with the one-page note (Griffin-Sobel tr at 75-77). She laughed when reading plaintiff’s FMLA Leave Request, as “it didn’t say anything” and did not “describe what is the issue” (*id.* at 76).

Plaintiff commenced this action on September 15, 2020, alleging two causes of action: (i) termination of his employment in retaliation for his whistleblowing

⁴ President Griffin-Sobel could not recall whether she was in receipt of plaintiff’s FMLA Leave Request when she wrote letters to plaintiff on November 20, 2019 (Griffin-Sobel tr at 77).

activity in violation of Labor Law §§ 740, 741, and (ii) termination of his employment in retaliation for taking FMLA medical leave in violation of the FMLA (Compl at 8). Now defendant moves for summary judgment dismissing both causes of action in plaintiff's complaint (NYSCEF # 41 – MOL). Plaintiff opposes, alleging that triable issues of fact exist on his retaliation claims as to his whistleblower complaint and his medical leave request (NYSCEF # 44 – MOL in Opp).

Discussion

On a motion for summary judgment, evidence presented must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017]). “It is well settled that ‘the proponent of a summary judgment motion 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’ ” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

If the moving party makes this initial showing, the burden shifts to the opposing party to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law §§ 740, 741: Retaliation for Whistleblowing (First Cause of Action)

In seeking to dismiss plaintiff's first cause of action, defendant argues that plaintiff's whistleblower letter did not show that in offering a remedial course to students failing NUR 211, the College had violated any law, rule, or regulation, thereby creating a “substantial and specific danger to public health or safety”—which is a required element of Labor Law § 740 (NYSCEF # 41 at 18-21). Defendant contends that allowing nursing school students to pass NUR 211 by completing the remedial course does not create a danger to public health and safety, because students may not practice as licensed nurses until they have developed necessary nursing skills to graduate from the College and pass National Council Licensure Examination for Registered Nurses (*id.*). In opposition, plaintiff avers that creating a remedial course to increase passing rate would allow unfit graduates to enter the nursing profession in violation of law, rule, or regulation (NYSCEF # 44 at 10-12).

Labor Law § 740 prohibits retaliation by employers against employees who whistle-blow about “an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and

specific danger to the public health or safety” (Labor Law § 740 [2]). Critically, protection under Labor Law § 740 only extends to whistleblowing activities concerning violations of law that “create a substantial and specific danger to the public health or safety” (*Cotrone v Consol. Edison Co. of New York, Inc.*, 50 AD3d 354 [1st Dept 2008] [finding Labor Law § 740 inapplicable to a violation of regulation that did not create a substantial and specific danger to public health or safety]; *Villarin v Rabbi Haskel Lookstein School*, 96 AD3d 1, 5 [1st Dept 2012] [“illegal economic or financial activities . . . are not within the statutory protection absent a showing that the illegal activity concomitantly creates ‘substantial and specific danger to the public health and safety’ ”]).

Here, plaintiff’s Labor Law § 740 claim fails because defendant has showed by sufficient evidence that the College would not endanger public health and safety by allowing some students to pass NUR 211 by completing a remedial course. As defendant points out, and plaintiff acknowledges, students who passed NUR 211 by taking NUR 399 still needed to graduate from the College and pass the National Council Licensure Examination for Registered Nurses to practice as licensed nurses (pltf tr at 139; NYSCEF # 43, ¶ 32). Given these safeguards, even if the College’s policy permitted unfit students to pass NUR 211, such a policy would not endanger public health and safety. And, to the extent that students in the College performed limited nursing practice during their clinical courses, they were supervised by hospital personnel to ensure that their practice would pose any substantial and specific danger to public health and safety (pltf tr at 47). Thus, absent any specific and substantial dangers to public health and safety, plaintiff’s Labor Law § 740 retaliation claim cannot stand. The branch of defendant’s motion for summary judgment dismissing plaintiff’s claim under Labor Law § 740 is granted.

As to plaintiff’s claim under Labor Law § 741, defendant contends that Labor Law § 741 only applies to employers and employees that perform and provide health care services and since the College is not a healthcare provider, but a nursing school, Labor Law § 741 does apply (NYSCEF # 41 at 21-22). The court agrees. While Labor Law § 741 prohibits retaliation by employers against whistle-blowing employees, it only applies to employees “*who perform health care services for . . . [an] employer which provides health care services*” and does not extend to employees performing services of other nature (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 90 [2008] [emphasis in original]; *see also* Labor Law § 741 [1] [a], [b]). Here, it is undisputed that neither plaintiff nor the College provides health care services to be within the scope of Labor Law § 741 (NYSCEF # 43, ¶¶ 2, 4, 5). Therefore, plaintiff’s Labor Law § 741 claim is dismissed as outside the scope of Labor Law § 741.

In any event, plaintiff is deemed to have abandoned his Labor Law § 741 claim because he fails to address defendant’s Labor Law § 741 argument in his opposition brief (NYSCEF # 44; *see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [a claim is deemed abandoned if plaintiff did not oppose defendant’s

motion for summary judgment dismissing the same claim]). Accordingly, the branch of defendant's motion for summary judgment dismissing plaintiff's claim under Labor Law § 741 is granted.

FMLA: Retaliation for Taking Medical Leave (Second Cause of Action)

Defendant, in moving to dismiss plaintiff's FMLA retaliation claim, argues that plaintiff failed to provide any medical documentation indicating a serious health condition, thus, plaintiff's attempt to take FMLA leave is not an FMLA protected activity (NYSCEF # 44 at 22-24). Defendant adds that the College terminated plaintiff's employment under the belief that plaintiff had resigned, given that he had expressed such intent to students and become absent at work; therefore, the termination was not in retaliation for plaintiff's attempt to take FMLA leave (NYSCEF # 44 at 22-24).

Plaintiff counterargues that he had properly exercised his protected rights to take FMLA leave by giving his FMLA Leave Request to the College (NYSCEF # 44 at 6-7). Plaintiff further asserts that President Griffin-Sobel's retaliatory intent was obvious because she reacted to plaintiff's FMLA Leave Request by laughing at it and immediately terminating his employment (*id.* at 7-10).

In reply, defendant emphasizes that plaintiff failed to show he had a serious health condition: the doctor's note attached to plaintiff's FMLA Leave Request does not reveal any of plaintiff's health conditions, let alone their seriousness, to clarify why plaintiff's health condition prevented him from performing his work and cause him to request for an eight-week medical leave (NYSCEF # 48 – Reply MOL at 7-8). Defendant denies that there is any causal link between plaintiff's attempt to take FMLA leave and President Griffin-Sobel's decision to terminate plaintiff's employment on November 20, 2019, claiming that President Griffin-Sobel did not receive plaintiff's medical leave request before terminating plaintiff (*id.* at 10-12).

To establish a *prima facie* retaliation claim under the FMLA, a plaintiff “must establish that: 1) he exercised rights protected under the FMLA; 2) he was qualified for his position; 3) he suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent” (*Potenza v City of New York*, 365 F3d 165, 168 [2d Cir 2004]). If one element is missing, plaintiff's retaliation claim under the FMLA cannot stand (*see id.* [granting summary judgment dismissing plaintiff's FMLA retaliation claim as plaintiff failed to establish one of the required elements]). For the first element, a plaintiff must make a showing of “a serious health condition [that] entitl[es] [plaintiff] to FMLA leave,” before he can show that he is retaliated against “for exercising rights that were . . . protected by the Act” (*Kim v Goldberg, Weprin, Finkel Goldstein, LLP*, 862 F Supp 2d 311, 317 [SDNY 2012]).

Here, defendant’s motion for summary judgment dismissing plaintiff’s FMLA retaliation claim should be granted because the record contains no evidence that in November 2019, plaintiff was suffering from a serious health condition that would entitle him to medical leave for eight weeks. In fact, the one-page doctor’s note attached to plaintiff’s FMLA Leave Request does not indicate any medical treatment that plaintiff was receiving at the time, let alone any health issues or their severity (NYSCEF # 24 at 2). Neither does plaintiff’s FMLA Leave Request explain what health condition prevented him from performing specific functions of his position. And while plaintiff’s medical record shows that he had diabetes, nothing in the record demonstrate its severity or duration (NYSCEF # 25). Plaintiff’s own doctor wrote in the medical record from November 19, 2019, that he only issued the one-page doctor’s note on plaintiff’s request, on the condition that “if [plaintiff’s employer] denies [medical leave], there is no more I can do” (*id.*).

Because plaintiff has failed to show any serious health condition that made him unable to perform certain functions of his work, he did not exercise a FMLA protected right. Therefore, plaintiff’s FMLA retaliation claim fails (*Kim*, 862 F Supp 2d at 318). The branch of defendant’s summary judgment dismissing plaintiff’s FMLA retaliation claim is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant Helene Fuld College of Nursing’s summary judgment motion dismissing plaintiff Stephen Lawrence’s complaint in its entirety (MS 001) is granted; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon plaintiff and the Clerk of the Court within ten days of the date of this order; and it is further

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

1/12/2024
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE