| **Mason v New York Univ.** |
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| 2024 NY Slip Op 32740(U) |
| August 6, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 156229/2018 |
| Judge: Paul A. Goetz |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. PAUL A. GOETZ** **PART** **47**

***Justice***

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JOSHUA SCHUYLER MASON M.D.,

Plaintiff,

- v -

NEW YORK UNIVERSITY, NYU LANGONE HOSPITALS, NYU LANGONE HEALTH SYSTEM, NYU LANGONE MEDICAL CENTER, NYU SCHOOL OF MEDICINE, NYU MEDICAL CENTER, NYU HOSPITALS CENTER, NYU LANGONE HOSPITAL BROOKLYN, and NYU PULMONARY & CRITICAL CARE ASSOCIATES, LUTHERAN,

Defendants.

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**INDEX NO.** 156229/2018

**MOTION DATE** 03/14/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 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, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 223, 224

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

Plaintiff Joshua Schuyler Mason, M.D. brings this whistleblower action against defendants New York University, NYU Langone Hospitals, NYU Langone Health System, NYU Langone Medical Center, NYU School of Medicine, NYU Medical Center, NYU Hospitals Center, NYU Langone Hospital Brooklyn, and NYU Pulmonary & Critical Care Associates Lutheran (collectively, defendants) alleging that he was fired in retaliation for complaining about the improper quality of patient care, in violation of Labor Law §§ 215 and 741. Plaintiff also brings claims for defamation per se and libel related to statements made by defendants. Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the amended complaint.

## BACKGROUND

New York University (NYU) is a private university, and the NYU School of Medicine (the School) is an administrative division of NYU (NYSCEF Doc No. 73, Collins affirmation, exhibit B, answer ¶¶ 5-6). NYU Langone Hospitals, formerly known as NYU Hospitals Center, and NYU Langone Health Systems are both not-for-profit corporations (*id.*, ¶¶ 7-8). In 2016, Lutheran Medical Center, located at 1560 55th Street, Brooklyn, merged into NYU Langone Hospitals and is now known as NYU Langone Hospital-Brooklyn (Lutheran) (*id.*, ¶ 9; NYSCEF Doc. 80, Collins affirmation, exhibit I, Dr. Jeanne Carey aff ¶ 4).

In April 2016, the School extended an offer of employment to plaintiff, a physician licensed in New York (NYSCEF Doc No. 72, Collins affirmation, exhibit A, amended complaint ¶ 102), to join its faculty providing clinical services at Lutheran (NYSCEF Doc No. 138, Watkins affirmation, exhibit 1). According to the offer letter, plaintiff's responsibilities included participating in the teaching program for medical residents and working as an attending physician in the Medical Intensive Care Unit (MICU) and the Intermediate Intensive Care Unit (IICU) (together, the ICU) (*id.* at 7 and 10). A provision in Schedule A of the offer letter provides that plaintiff can be terminated for cause if his continued employment "would pose a serious threat to the health, safety or welfare of NYU Langone Medical Center or NYU Lutheran patients, staff or visitors" (*id.* at 8-9). Plaintiff accepted the offer on April 18 (*id.* at 5).

Plaintiff reported directly to Dr. Ravindra Rajmane, the Section Chief of Pulmonary and Critical Care Medicine (PCCM) at Lutheran who had supervisory authority over the physicians in the section and the ICU (NYSCEF Doc No. 73, ¶ 18; NYSCEF Doc No. 173, Watkins affirmation, exhibit 36, Dr. Frank Volpicelli tr at 24). Dr. Rajmane reported to Dr. Daniel Sterman, the Director of the Division of Pulmonary, Critical Care and Sleep Medicine at NYU Langone Hospitals

(NYSCEF Doc No. 72, ¶ 22; NYSCEF Doc No. 74, Collins affirmation, exhibit C, plaintiff tr at 58). Dr. Volpicelli is Lutheran's Chief of Medicine (NYSCEF Doc No. 75, Collins affirmation, exhibit D, Dr. Volpicelli tr at 15). Dr. Joseph Weisstuch is Lutheran's Chief Medical Officer (NYSCEF Doc No. 76, Collins affirmation, exhibit E, Dr. Weisstuch tr at 13). Dr. Carey served as Lutheran's director for the Internal Medicine residency program and was responsible for recruiting and supervising residents (NYSCEF Doc No. 80, ¶¶ 2-4; NYSCEF Doc No. 178, Watkins affirmation, exhibit 41, Dr. Carey tr at 13 and 18-19). Residents, also referred to as "house staff," were "doctors in training" working under licensed, board-certified attending physicians who were responsible for teaching, training and supervising them (NYSCEF Doc No. 80, ¶ 3; NYSCEF Doc No. 73, ¶ 23).

Plaintiff worked at Lutheran as a pulmonary and critical care specialist and a clinical instructor from July 1, 2016 until October 10, 2017, when he was terminated for cause (NYSCEF Doc No. 72, ¶¶ 4 and 17). During his tenure, plaintiff served on the Occurrence Review Committee (ORC), an interdisciplinary committee headed by Dr. Weisstuch that reviewed select cases to identify and improve systemic issues, and on "Morbidity and Mortality," a group that met with residents to review cases that presented clinical concerns (*id.*, ¶ 19; NYSCEF Doc No. 73, ¶ 20; NYSCEF Doc No. 82, Collins affirmation, exhibit K, Dr. J. Reed Caldwell [Dr. Caldwell] aff ¶ 5; NYSCEF Doc No. 214, Collins reply affirmation, exhibit LLL, Dr. Weisstuch aff ¶ 7).

<u>Plaintiff's Complaints about Residents and Dr. Rajmane</u>

Plaintiff alleges that he complained verbally and in writing to Drs. Volpicelli, Carey and Rajmane and others about five residents who "consistently made decisions that were dangerous to patient safety" (NYSCEF Doc No. 72, ¶¶ 25 and 29-33; NYSCEF Doc No. 73, ¶ 27; NYSCEF Doc No. 74 at 170; NYSCEF Doc No. 134, plaintiff aff, ¶ 7; NYSCEF Doc No. 172, Watkins

affirmation, exhibit 35, plaintiff tr at 106; NYSCEF Doc No. 210, Collins reply affirmation, exhibit HHH, plaintiff tr at 96-98). On April 21, 2017, plaintiff made a written complaint about a lack of communication between residents transitioning between shifts (NYSCEF Doc No. 141, Watkins affirmation, exhibit 4). On May 10, 2017, plaintiff complained about two residents, including Dr. Ma Hla Hla "Sarah" Moe, and their inability to perform management tasks (NYSCEF Doc No. 142, Watkins affirmation, exhibit 5). Three weeks later, he complained to Dr. Carey that a resident had failed to complete tasks or had completed them "sub optimally" (NYSCEF Doc No. 143, Watkins affirmation, exhibit 6). In a June 13, 2017 email to Dr. Carey, attending physician Dr. Jose Mercado, and chief residents Dr. Monica Vidaurrazaga and Dr. Marina Iskandir, plaintiff detailed several issues with residents including a "[l]ack of ownership of an individual patient" and "[n]o self-prompted effort to obtain deeper history or collateral information," which could impact patient management (NYSCEF Doc No. 145, Watkins affirmation, exhibit 8). In that same email, plaintiff expressed specific concerns about Dr. Youssef Abdelmalek, who "disapears [sic] throughout the day," performs minimal follow-up and fails to bring critical results to plaintiff's attention (*id.*). On September 7, 2017, plaintiff filed a patient safety intelligence report (PSI) after an incident involving a resident and emailed Thom Nolan (Nolan)[1] and Drs. Carey and Volpicelli shortly thereafter[2] (NYSCEF Doc No. 148, Watkins affirmation, exhibit 11). Plaintiff's email reads, "[t]erribly sorry this was elevated to your level. I have submitted a PSI given the sub-optimally followed potassium level in the setting of aggressive diuresis. I have also counseled the resident on the dangers of not following these things closely" (*id.*). In response, Nolan wrote that he was "glad … we communicated the same message to the resident staff" (*id.*).

[1] Nolan is the Director of Nursing at Lutheran (NYSCEF Doc No. 79, Collins affirmation, exhibit H, Helen A. Buckel [Buckel] aff ¶ 15).
[2] Plaintiff has not tendered a copy of this report.

On May 31, 2017, plaintiff met with Dr. Rajmane, who allegedly "warned [him] that certain residents were 'untouchable' and … if [he] continued to raise concerns about them there would be a 'bullseye on your back'" (NYSCEF Doc No. 134, ¶ 6). Dr. Sterman testified that he met with plaintiff several times and discussed "what [plaintiff] saw as the relative deficiencies of the residents" and "how frustrated he was that residents weren't up to his level of expectation" (NYSCEF Doc No. 174, Watkins affirmation, exhibit 37, Dr. Sterman tr at 64). Plaintiff alleges he suggested disciplining or retraining the residents to remedy their deficiencies, but they were not (NYSCEF Doc No. 72, ¶ 26; NYSCEF Doc No. 134, ¶ 7). Dr. Carey admitted that residents were counseled or received additional teaching, but they were not disciplined or retrained (NYSCEF Doc No. 178 at 35-36). On June 14, 2017, Dr. Rajmane emailed plaintiff and attending physician Dr. Audrey Daggan that he was aware of their frustrations, asked them to "tread lightly with the house staff," and wrote "we have to fix our relationship with house staff" (NYSCEF Doc No. 147, Watkins affirmation, exhibit 10).

Plaintiff also alleges that he complained about Dr. Rajmane's "erratic and unstable behavior" and leadership (NYSCEF Doc No. 72, ¶¶ 22 and 39), particularly Dr. Rajmane's approach to residents' performances, which plaintiff claims led to a loss of "confidence in [Dr. Rajmane's] ability to impact change with regards to patient safety" (NYSCEF Doc No. 172 at 122 and 181). Plaintiff cites Dr. Rajmane's conduct at a faculty meeting in November 2016, where Dr. Rajmane screamed at Dr. Daggan, as one example[3] (*id.* at 421; NYSCEF Doc No. 72, ¶ 21). Plaintiff spoke to Dr. Sterman about the incident and raised other concerns about Dr. Rajmane's leadership (NYSCEF Doc No. 72, ¶ 22). Dr. Sterman testified that he and plaintiff had several discussions where plaintiff complained that Dr. Rajmane was not an effective chief (NYSCEF Doc

[3] This incident may have occurred in March 2017 (NYSCEF Doc No. 174 at 66-67; NYSCEF Doc No. 84, Collins affirmation, exhibit M, Dr. Mark Nunnally aff ¶ 8 and at 30).

No. 174 at 65). Dr. Sterman explained that Dr. Rajmane and faculty had different opinions "about roles and responsibilities on the clinical side and on the nonclinical academic side, and it had created a lot of friction, and … Dr. Rajmani [sic] was not effectively dealing with this friction," which Dr. Sterman believed "was a danger to the … effective function of this academic section at NYU Lutheran" (*id.*). On June 5, 2017, plaintiff met with Evelyn Taveras (Taveras), the Manager of Employee & Labor Relations at NYU, to report his concerns about Dr. Rajmane (NYSCEF Doc No. 134, ¶ 6). Plaintiff avers that he told Taveras he was concerned about retaliation, but Taveras assured him that he would not be retaliated against (*id.*). NYU appointed an executive coach to work with Dr. Rajmane to become a more effective leader (NYSCEF Doc No. 73, ¶ 71; NYSCEF Doc No. 154, Watkins affirmation, exhibit 17).

Complaints about Plaintiff

Several residents, attending physicians in different sections and others complained about difficult interactions with plaintiff. The residents' complaints centered on plaintiff's treatment of them. Some of their comments in their annual evaluations of plaintiff include: "I believe he should not be working with residents as he does not treat residents with respects [sic]"; "I don't think that he has respect for hospital staff or an interest in teaching clinical medicine in a teaching hospital"; "his attitude towards house staff can be quite negative which fosters a detrimental learning environment and overall poor experience for those who rotate through the ICU"; "the delivery of his message can be condescending"; "[n]ot respectful towards residents … he makes the learning environment harder than what it should be"; "[r]ude, condescending, hostile. Inconsistent Rounds. Very difficult to work with. Creates atmosphere of fear"; and "[h]e used to show disrespect to the ICU team in every possible way…. It was a very stressful environment. Teaching was minimal. There was no support at all" (NYSCEF Doc No. 80 at 11 and 13-14).

At least four residents lodged written complaints. On January 2, 2017, Dr. Abdelmalek emailed chief resident Dr. Sarina Sachdev that plaintiff had acted unprofessionally and humiliated him (NYSCEF Doc No. 139, Watkins affirmation, exhibit 2 at 2). Dr. Abdelmalek wrote the incidents "put[ ] me under alot [sic] of stress and the feeling of intimidation" (*id.*). Dr. Sachdev forwarded the email to Dr. Carey, who sent it on to Dr. Rajmane (*id.*).

On February 1, 2017, Dr. John Dwyer emailed Dr. Carey the following:

> Dr. Mason was exceedingly condescending, unprofessional, belittling and disrespectful while speaking to me on two occasions last Saturday. I cannot stress that enough. The way he spoke to me creates an environment of distrust, disruptiveness, and hesitancy when working with Dr Mason, and I am certain that I am not the only resident at Lutheran who feels this way. Last Saturday, I was simply trying to do the right thing for a patient and reached out to an attending for help. I was met with unprofessionalism, disrespect, and condescension (NYSCEF Doc No. 81, Collins affirmation, exhibit J, Dr. Dwyer aff, ¶ 10).

Dr. Carey sent the message to Dr. Volpicelli, who forwarded the email to Dr. Rajmane with the message, "[w]e should meet with him together" (*id.* at 7).

On July 14, 2017, Dr. Michael Kwong emailed Dr. Carey that "Dr. Mason has a very unusual and difficult demeanor to deal with and his expectations contradict each other" and that "[h]e seemed to have a short fuse and was reticent and perturbed for any phone calls. At times it seemed like he wanted us to figure things out on our own and at times it seemed like he wanted updates on anything occurring in the MICU" (NYSCEF Doc No. 80 at 7-8). Dr. Kwong concluded:

> Last night, I received minimal help from the ICU attending nor did I learn anything from the ICU attending last night. I received nothing but attitude, reticence, and accusations from Dr. Mason. I loathe to work with Dr. Mason and this feeling is felt by nearly EVERY single resident at NYU Lutheran. Dr. Mason has made countless residents cry, upset, and feel inadequate. He is a black cloud looming over this residency and has made the ICU experience miserable for us (*id.* at 9) (bold emphasis removed).

Dr. Carey forwarded the email to Dr. Volpicelli with the message, "I think we need to take some kind of action – I am not hearing any signs of improvement" (*id.*).

On September 7, 2017, Dr. Siddhartha Bajracharya complained about plaintiff's "persistently hostile and condescending attitude" and his "assumption of bad faith/incompetence" (NYSCEF Doc No. 89, Collins affirmation, exhibit R). Dr. Bajracharya wrote that residents did not "feel safe asking Dr. Mason questions about patient care" because they could not reach him and they "can't predict whether he'll insult us for either asking him something that we should have been able to address on our own without escalating to him" (*id.*).

Buckel, a nurse manager at Lutheran in 2016 and 2017, avers that in June 2017, she was told plaintiff had sent a message to a resident in the IICU that Buckel had approved administering a specific drug, but this was false[4] (NYSCEF Doc No. 79, ¶¶ 1, 3 and 16-17). Buckel informed Dr. Rajmane of plaintiff's action (*id.*, ¶ 18).

At least four attending physicians made complaints. On September 11, 2017, Dr. Jose Chuquin emailed Dr. Volpicelli and Dr. Charles Okamura[5] about a note plaintiff had recorded in a patient's chart (NYSCEF Doc No. 91, Collins affirmation, exhibit T). Dr. Chuquin wrote that "Dr. Mason was rude and disrespectful to me … [and] then falsely documented that I refused to evaluate the patient even though this is 100% incorrect" (*id.*). Dr. Chuquin added, "[t]his behavior is deeply upsetting to me and bad for patient care. I sincerely hope that this issue is taken very seriously and addressed appropriately" (*id.*). Dr. Okamura replied, "[w]e take concerns with Dr. Mason's communication very seriously and will address immediately" (NYSCEF Doc No. 213, ¶ 4 and at 5). Dr. Volpicelli sent plaintiff a text message directing him to delete the note because it

[4] Plaintiff testified that "this was also categorically false … [t]hat is inconsistent with how I would have approached. I would never have said per Helen Buckheld [sic]" (NYSCEF Doc No. 172 at 193).
[5] Dr. Okamura is the Assistant Chief of Medicine at Lutheran (NYSCEF Doc No. 213, Collins reply affirmation, exhibit KKK, Dr. Volpicelli aff ¶ 4).

"doesn't belong in a progress note and Carina never requested bedside eval" (NYSCEF Doc No. 150, Watkins affirmation, exhibit 13). Plaintiff testified that he believed the request was inappropriate because "you make addendums to [a] note, you don't delete portions of your note" (NYSCEF Doc No. 172 at 276).

On September 18, 2017, Dr. Tshering Amdo[6] wrote that "[t]he only time I can communicate with [plaintiff] is in person when he is on service. The other times he is incommunicado when he is off service. That applies to phone calls, texting and emails" (NYSCEF Doc No. 100, Collins affirmation, exhibit CC). Dr. Caldwell, the former Associate Chief of the Emergency Department at Lutheran, served on the ORC with plaintiff (NYSCEF Doc No. 82, ¶¶ 3 and 5). Dr. Caldwell avers that he complained to Drs. Weisstuch and Volpicelli about plaintiff's "abrasive" and "frequently rude [attitude], bordering on being abusive to his doctor colleagues," citing one example where plaintiff's "tone of voice and speech cadence [at an ORC meeting] made it clear he was seeking to denigrate and embarrass me and my other colleagues" (*id.*, ¶ 7). Dr. David Gordon complained to Dr. Weisstuch about plaintiff's "lack of good sense" when plaintiff contacted a neurooncologist about Dr. Gordon's patient without speaking to Dr. Gordon (NYSCEF Doc No. 214, ¶ 11).

<u>The Focused Professional Practice Evaluation (FPPE)</u>

Defendants were aware of plaintiff's behavior (NYSCEF Doc No. 206, Collins reply affirmation, exhibit DDD at 1), and counseled him several times. After Dr. Abdelmalek's complaint, Dr. Rajmane informed Dr. Carey that "Josh will apologize to Youssef if he felt publicly shamed as that was not his intent" (NYSCEF Doc No. 139 at 3). On February 25, 2017, Dr. Rajmane informed Dr. Volpicelli that he had spoken to plaintiff once again (NYSCEF Doc No. 84

[6] Dr. Amdo is Dr. Rajmane's deputy (NYSCEF Doc No. 79, ¶ 13).

at 30). On June 2, 2017, Dr. Volpicelli asked to meet with plaintiff "for some constructive criticism…[n]ot punitive at all" (NYSCEF Doc No. 93, Collins affirmation, exhibit V). Dr. Volpicelli recommended that plaintiff enroll in a course on resolving workplace conflicts (NYSCEF Doc No. 73, ¶ 49; NYSCEF Doc No. 74 at 183; NYSCEF Doc No. 172 at 177-178). Dr. Volpicelli testified that "[m]e telling him he was a great doc doing great things was me trying to encourage positive behaviors and bring that out in him. I really hoped that the courses, the conversations with multiple members of leadership … would be enough signal to Josh that there was a real problem here" (NYSCEF Doc No. 75 at 279). Dr. Rajmane spoke to plaintiff about his "disruptive behavior" again after incidents in August 2017 (NYSCEF Doc No. 95, Collins affirmation, exhibit X). Dr. Sterman testified that he and plaintiff discussed how plaintiff could deal with his frustration with residents who did not meet his expectations and how best to support them (NYSCEF Doc No. 174 at 64).

Plaintiff testified that he did not know why Dr. Volpicelli had recommended he take the course because Dr. Volpicelli had praised him earlier (NYSCEF Doc No. 210 at 464-465). When asked whether being a great doctor meant he could not have been involved in workplace conflicts, plaintiff replied that those concepts were not "mutually exclusive" (*id.* at 465). Plaintiff testified that he held residents to "higher standards" and "thought intimidation potentially makes you strive for excellence" (*id.* at 85). Plaintiff admitted he was told that he was "demanding" (*id.*) and that his "delivery of criticism … [was] perceived as harsh" (*id.* at 100). He was aware of one incident where he had made a resident cry (*id.* at 94).

By September 1, 2017, Drs. Volpicelli, Rajmane, Weisstuch, Sterman and Nunnally had collectively decided to place plaintiff on the FPPE[7] (NYSCEF Doc No. 75 at 126-127; NYSCEF

[7] Dr. Nunnally is the Director of Critical Care Services for NYU Langone Health (NYSCEF Doc No. 84, ¶ 1; NYSCEF Doc No. 172 at 315 [Dr. Nunnally was the "head of all the ICUs under the NYU umbrella"]).

Doc No. 84, ¶¶ 13-14; NYSCEF Doc No. 95; NYSCEF Doc No. 96, Collins affirmation, exhibit 96). The purpose of the FPPE was not to impose punitive or disciplinary action but to address issues with plaintiff's behavior (NYSCEF Doc No. 77, Collins affirmation, exhibit F, Melissa Greiner tr at 22; NYSCEF Doc No. 84, ¶ 13). The FPPE identifies three areas of concern – "Reported Non-Productive Trainee Environment," "Reported Non-Collaborative Work Environment," and "Failure to be available and responsive during paid non-clinical time" (NYSCEF Doc No. 90, Collins affirmation, exhibit S). The FPPE recites specific incidents in each category, including those involving Drs. Abdelmalek, Kwong and Gordon (*id.* at 2). The FPPE reads, in part:

> In sum total these incidents have led to multiple physicians at all levels of training reporting reluctance to communicate with you or raise clinical concerns to you, or express disagreement about your clinical opinion in a constructive manner.
>
> We have also considered information available regarding your current competence, practice behavior and ability to perform the relevant privileges. After taking this information into consideration, we have based our decision on *the significance of the incidents, on the specific risks to patient outcomes, and whether the generally accepted standard of care in the community appears to have been met* (*id.*) (emphasis in original).

The evaluation process included monitoring for future incidents with residents and physicians (*id.* at 3). The FPPE would remain in place for three months from September 26, 2017, after which it would end with a recommendation on privileges or be extended (*id.* at 3). Drs. Volpicelli and Rajmane presented the FPPE to plaintiff (*id.* at 5; NYSCEF Doc No. 74 at 313).

<u>The October 2017 Incident</u>

On October 1, 2017, Dr. Moe filed a patient safety intelligence report (PSI) involving the treatment of a patient experiencing alcohol withdrawal (Patient X). Dr. Moe wrote that plaintiff had been hired to "help residents, decrease issues with patient safety and provide education and guidance" but had "failed in EVERY one of these aspects" and "was not fit to work at a teaching

hospital" (NYSCEF Doc No. 102, Collins affirmation, exhibit EE at 3). The description of the incident reads:

> Overnight there was a patient whose withdrawl [sic] symptoms were not controlled on maximum dose of precede (while we were giving additional versed/phenobarb). Patient was crawling on the floor, disruptive and dangerous to staff. When I called Dr. Mason to inform him that the patient requires intubation and an [sic] propofol drip, he was unhelpful. Since he did not show up bedside, the charge nurse called him to inform him that the staff needed him immediately. Instead of showing up, he asked the nursing staff to report the housestaff (who was at bedside the entire time) for inefficient management of patient. The [sic] was not only a delay in appropriate patient care, but also created an atmosphere of uncertainty (*id.*).

Dr. Volpicelli was automatically notified of the report (*id.* at 5) and asked Drs. Carey and Rajmane to review the incident (NYSCEF Doc No. 75 at 211). Dr. Carey reported that Dr. Moe had contacted plaintiff for assistance and was told "something along the lines of 'manage it yourself' and he did not come until after the nurse manager had also called" (NYSCEF Doc No. 103, Collins affirmation, exhibit FF). Dr. Volpicelli told Dr. Sterman that he believed the incident represented a failure by plaintiff of the FPPE (NYSCEF Doc No. 105, Collins affirmation, exhibit HH at 2). Dr. Rajmane emailed Dr. Sterman:

> Admittedly, the resident in question is not the strongest trainee, but her story is corroborated by the MICU nurses….This was a very volatile situation that could have resulted in harm to staff. I reminded the resident and charge nurse that they could have called for security to help with an altered mental status patient as well as call for anesthesia to secure the airway. However, this in no way excuses Josh's absence from the unit and lack of support for HS and ICU nurses despite multiple points of contact (NYSCEF Doc No. 104, Collins affirmation, exhibit GG).

Dr. Sterman agreed "[t]here is no possible justification for his response or behavior, which extends beyond the issue of professionalism to an impact upon patient care and staff safety" (*id.*). Dr. Brian P. Bosworth, Chief of Medicine at NYU Langone Tisch Hospital, wrote, "[t]hat is a damning description" (NYSCEF Doc No. 107, Collins affirmation, exhibit JJ). Dr. Volpicelli and Greiner from Human Resources interviewed plaintiff, Dr. Moe, and nurse manager Marius

Skarbauskus (Skarbauskus) (NYSCEF Doc No. 77 at 26 and 33). Greiner testified that according to her notes, Dr. Moe described plaintiff as sounding "sleepy," plaintiff did not show in the MICU for 30 minutes, and four nurses had to restrain Patient X (*id.* at 71-73; NYSCEF Doc No. 108, Collins affirmation, exhibit KK at 4).

Plaintiff testified that there were no errors or mistakes on his part with respect to treating Patient X (NYSCEF Doc No. 172 at 370). He testified, "I believe I advised [Dr. Moe] on all of the management decisions with our conversations on the phone and also at bedside … I was actively involved in guiding her with how to approach this patient" (*id.* at 370-371). Plaintiff avers that "Dr. Moe … never informed me that my presence was ever necessary at the bedside of this patient. Additionally, she never provided me with any information that the patient was potentially a danger to himself or to others" (NYSCEF Doc No. 134, ¶ 17).

At her deposition, Dr. Moe recalled contacting plaintiff twice that night (NYSCEF Doc No. 177, Watkins affirmation, exhibit 40, Dr. Moe tr at 142). In the first call, Dr. Moe requested permission to transfer Patient X to the ICU (*id.* at 143). Dr. Moe contacted plaintiff a second time when Patient X became combative and told him that she believed they needed to administer Propofol and to intubate Patient X (*id.*). She testified that plaintiff, in response,

> didn't help me, he didn't guide me, he didn't say yes or no … This is what you should have done, you can give him this medication or that. He didn't give me any kind of guidance. Instead, he said, excuse me, what do you think is happening here with the condescending tone. And then he said, I will come shortly (*id.* at 43).

Dr. Moe told plaintiff that Patient X was experiencing resistant alcohol withdrawal before he hung up (*id.* at 71). She testified, "the way he treated me, I was scared to call him [again]. I feel intimidated by him" (*id.*). Dr. Moe explained that she did not wish to contact plaintiff again "because he made it sound like he don't [sic] want me to call. The way he treated me after that second phone call, I was – I didn't know what to do anymore. I didn't [sic] he want to hear from

me … then he told me that he was going to come. So I was waiting for him and then I try [sic] my best to … sedate this patient" (*id.*). The charge nurse contacted plaintiff, as well, but plaintiff did not arrive in the unit for another 10 minutes (*id.* at 173). Dr. Moe could not recall if plaintiff told her to follow NYU's Alcohol Withdrawal Protocol, and she denied that plaintiff had discussed the protocol with her (NYSCEF Doc No. 207, Collins reply affirmation, exhibit EEE, Dr. Moe tr at 55). When asked if she had asked plaintiff to come to Patient X's bedside, Dr. Moe responded, "I don't remember I [sic] said that or not" (NYSCEF Doc No. 177 at 144).

Nurses Santoshi Thakuri and Jessica Lok aver that plaintiff did not arrive in the MICU for at least 30 minutes after he was first contacted (NYSCEF Doc No. 85, Collins affirmation, exhibit N, Thakuri aff ¶¶ 8, 12 and 14; NYSCEF Doc No. 86, Collins affirmation, exhibit O, Lok aff ¶¶ 8 and 11-12). Thakuri avers that attending physicians typically arrive two to three minutes after being called (NYSCEF Doc No. 85, ¶ 14). Both attest that plaintiff made several comments in a sarcastic tone when he arrived, saw that Patient X was sleeping, and left his bedside moments later (*id.*, ¶¶ 15-16; NYSCEF Doc No. 86, ¶¶ 14-15).

Dr. Volpicelli testified that the investigation revealed Patient X was in "refractory recalcitrant alcohol withdrawal" (NYSCEF Doc No. 75 at 234). He stated that "[a]t that time, that is way beyond the level of a trainee to be managing, and that patient is in a life-threatening state with concerns for safety to the medical staff around them. The attending physician needs to be standing next to the patient as soon as the resident makes that phone call" (*id.* at 234-235).

Plaintiff's Termination and Grievance

A termination letter dated October 10, 2017 states that plaintiff was terminated for cause (NYSCEF Doc No. 159, Watkins affirmation, exhibit 22). Plaintiff filed a grievance and requested a formal review of what he believed was retaliation and discrimination based on sexual orientation

(NYSCEF Doc No. 111, Collins affirmation, exhibit NN at 5). As part of the review, Dr. Steven B. Abramson, Chair of the Department of Medicine and Senior Vice President & Vice Dean for Education, Faculty & Academic Affairs, reviewed the FPPE, emails and Patient X's hospital record and interviewed Drs. Volpicelli, Weisstuch, Sterman, Carey, Mercado, and Daggan and Dr. Nancy Bael (NYSCEF Doc No. 112, Collins affirmation, exhibit OO at 1). Senior Counsel Lynn Lowy's notes of the interviews show that several physicians confirmed plaintiff had difficult interactions with his peers and with residents, to whom he was particularly harsh (NYSCEF Doc. 88, Collins affirmation, exhibit Q, Lowy aff, ¶¶ 1 and 4; NYSCEF Doc No. 113-117, Collins affirmation, exhibits PP-TT). On January 24, 2018, Dr. Abramson wrote plaintiff:

> within days of receiving the FPPE notice, you exhibited behavior consistent with the concerns about your tendency to be dismissive of the needs of house staff.…[T]he decision to terminate your employment was triggered by your failure to respond in a timely manner to a request for help with a patient in the MICU…. You asserted that your management of this case was appropriate and emphasized that there was no resulting harm to the patient.…[R]ather than acknowledging the warning and taking ownership of improving your approach toward the trainees, you remained unwilling to provide support to residents who were most in need of your supervision and guidance.…[Y]our decision to refuse to come to the bedside of a patient in distress, until after the situation had become less urgent, highlights a more serious issue. This breach of professional responsibility, in the context of your FPPE in part addressing your overly harsh attitude toward trainees, belies a rigidity that posed a risk to at least one of our patient [sic] (NYSCEF Doc No. 112 at 2).

Dr. Abramson concluded that the decision to terminate plaintiff's employment for cause was unrelated to discrimination or retaliation and was justified on the merits (*id.*).

<u>The Allegedly Defamatory Statements</u>

Maxine Simon, the School's Chief Regulatory Officer, reported plaintiff's termination to the New York State Department of Health's Office of Professional Medical Conduct (OPMC) by letter dated October 25, 2017, which reads, in part:

> On October 19, 2017, NYU School of Medicine (the School) terminated the employment of Dr. Joshua Schuyler Mason, due to his failure to appropriately

> supervise resident staff while on call on an inpatient unit, demonstrated by his failure to respond in a timely manner to requests for assistance with a patient in distress. After an investigation into concerns about Dr. Mason's behavior with regard to this incident, the School determined that continuation of Dr. Mason's employment would pose a threat to the health, safety or welfare of NYU Langone Hospitals' patients, staff or visitors (NYSCEF Doc No. 110, Collins affirmation, exhibit MM).

In connection with his application for a medical license in Arizona, plaintiff asked Jenny Kakleas, Senior Director, Professional Affairs, to disclose information about his termination to the Arizona Medical Board (the Board) (NYSCEF Doc No. 120, Collins affirmation, exhibit WW at 2-3). Kakleas's December 11, 2018 letter to the Board partially reads:

> On October 10, 2017, NYU School of Medicine terminated the employment and faculty appointment of Dr. Joshua Schuyler Mason, due to his failure to appropriately supervise resident staff while on call on an inpatient unit, demonstrated by his failure to respond in a timely manner to requests for assistance with a patient in distress. Dr. Mason's Medical Staff privileges at NYU Langone Hospitals automatically terminated in conjunction with the termination of his faculty appointment. This information was reported to the New York State Department of Health Office of Professional Medical Conduct (OPMC) on October 25, 2017. NYU Langone Hospitals received notification from OPMC, dated November 26, 2018, indicating that its investigation of Dr. Mason has been closed (NYSCEF Doc No. 121, Collins affirmation, exhibit XX at 3).

Plaintiff brings this action to recover damages for the following five causes of action: (1) retaliation in violation of Labor Law § 741; (2) defamation per se and libel based on defendants' communication to OPMC about his termination; (3) self-publication defamation; (4) defamation per se and libel based on Kakleas' December 11, 2018 letter to the Board; and (5) retaliation in violation of Labor Law § 215. Defendants now move for summary judgment. They rely on the verified pleadings, deposition transcript excerpts, numerous affidavits, and other exhibits. Plaintiff opposes and submits his affidavit, affidavits from Dr. Jeremy Feldman, a physician licensed in Arizona, California and Oregon (NYSCEF Doc No. 135, Dr. Feldman aff ¶ 1), and Erik Lyons, a registered nurse licensed in New York (NYSCEF Doc No. 136, Lyons aff, ¶ 2), both of whom

reviewed numerous documents including deposition testimony, the FPPE, and Patient X's hospital record.

**DISCUSSION**

"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] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility." (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

A. Whether NYU is the Only Proper Defendant

At the outset, defendants argue that summary judgment dismissing the amended complaint should be granted as against all defendants except NYU (*see Thompson v Jamaica Hosp. Med. Ctr.*, 2016 WL 4556905, *5, 2016 US Dist LEXIS 116985, *14 [SD NY, Aug. 30, 2016, No. 13 Civ. 1896] [dismissing complaint against NYU-affiliated hospitals or entities who were not plaintiff's employer or were not legal entities amenable to suit]). Pietrina Scaraglino (Scaraglino), Deputy General Counsel for NYU Langone Health, which includes NYU Langone Health System and NYU Langone Hospitals, avers that she is fully familiar with and has direct knowledge of the entities affiliated with NYU (NYSCEF Doc No. 87, Collins affirmation, exhibit P, Scaraglino aff ¶¶ 1-2). Scaraglino attests that the School, NYU Langone Hospitals, NYU Langone Health System, NYU Langone Medical Center, NYU Medical Center, NYU Hospitals Center, NYU Langone Hospital Brooklyn, and NYU Pulmonary & Critical Care Associates, Lutheran are subdivisions of NYU, not-for profit corporations separate from NYU, or non-legal entities incapable of being sued and further attests that none of them were plaintiff's employer (*id.*, ¶¶ 4-11). A "Notice of Acknowledgement of Pay Rate and Payday" signed by plaintiff on June 29, 2016 identifies "NYU School of Medicine, a division of New York University Doing Business As (DBA) Name(s): NYU Langone Medical Center" as his employer (*id.* at 5).

Plaintiff counters that NYU Langone Medical Center is a proper defendant because the offer letter states that "this Agreement may be terminated by NYU Langone Medical Center" (NYSCEF Doc No. 138 at 8). The offer letter, though, expressly provides that plaintiff would "become a member of the Faculty of the NYU School of Medicine," and identifies the School as an administrative division of NYU (*id.* at 1 and 4). Thus, plaintiff fails to raise a triable issue of fact in opposition.

Accordingly, the amended complaint will be dismissed as against all defendants except NYU.

B. The First Cause of Action under Labor Law § 741

Plaintiff's first cause of action is for retaliation under Labor Law § 741 (NYSCEF Doc No. 72, ¶¶ 101-133). NYU argues that it has articulated a nonretaliatory reason for plaintiff's termination and that plaintiff cannot demonstrate that its stated reason was a pretext for retaliation. Plaintiff contends that a causal connection exists between the protected activity and his termination based on (1) their close temporal proximity, (2) issues of fact as to the propriety of plaintiff's handling of Patient X, (3) evidence of retaliatory intent, (4) discrepancies in NYU's stated reasons for terminating plaintiff and reporting him to OPMC, and (5) evidence that NYU did not follow its own procedural and substantive norms before taking those actions.

Labor Law § 741, known as the "Health Care Whistleblower Law" (*Minogue v Good Samaritan Hosp.*, 100 AD3d 64, 69 [2d Dept 2012]), prohibits an employer from taking retaliatory action against an employee who "discloses or threatens to disclose … an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety" (Labor Law § 741 [2] [a]). Labor Law § 741 (1) (d) defines "improper quality of patient care" as:

> any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.[8]

[8] Although a plaintiff need not identify a specific law, rule, regulation or declaratory ruling that has been violated to state a cause of action under Labor Law § 741 (*Von Maack v Wyckoff Hgts. Med. Ctr.*, 140 AD3d 1055, 1057 [2d Dept 2016]), the plaintiff must do so on summary judgment (*see Blashka v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 126 AD3d 503, 503 [1st Dept 2015]; *King v New York City Health & Hosps. Corp.*, 85 AD3d 631, 631 [1st Dept 2011], *lv denied* 17 NY3d 712 [2011] [plaintiff's failure to cite the law, rule, regulation or declaratory ruling was deemed "fatal to her cause of

"Retaliatory action" means "discharge, suspension, demotion, penalization or discrimination against an employee, or other adverse employment action taken against an employee in the terms and conditions of employment" (Labor Law § 741 [1] [g]). Therefore, to prevail under Labor Law § 741, the plaintiff must have been engaged in a protected activity of which the defendant was aware and suffered adverse action as a result (*Giurca v Montefiore Health Sys. Inc*., 2020 US Dist LEXIS 38889, *2-3 [SD NY, Mar. 5, 2020, No. 18-CV-11505 (PGG) (BCM)]). A causal link between the adverse action and the protected activity must also exist (*Varughese v Mount Sinai Med. Ctr*., 2015 WL 1499618, *68, 2015 US Dist LEXIS 43758, *178 [SD NY, Mar. 27, 2015, No. Civ. 8812 (CM) (JCF)], *affd* 693 Fed Appx 41 [2d Cir 2017] [discussing Labor Law § 740]).

Labor Law § 741 violations are enforced under Labor Law § 740 (4) and (5) (Labor Law § 741 [4]; *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 88 [2008]). An employee who has been subject to retaliation may bring a civil action for, among other things, compensation for lost wages and benefits and punitive damages for a willful, malicious or wanton violation (Labor Law §§ 740 [4] and [5]). Labor Law § 741 (5) provides that "it shall be a defense that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section." The defendant bears the burden of proof on this defense (*Pal v New York Univ.*, 583 Fed Appx 7, 8 [2d Cir 2014]) and must demonstrate a nonretaliatory reason for its action (*see Matter of Khan v New York City Health & Hosps. Corp.*, 144 AD3d 600, 601 [1st Dept 2016], *lv denied* 29 NY3d 905 [2017]). The plaintiff can defeat summary judgment by showing that the stated reason for the adverse employment action was merely a pretext for retaliation (*Novak v St. Luke's-Roosevelt Hosp. Ctr., Inc*., 136 AD3d 435, 436 [1st Dept 2016]).

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action alleging retaliation"]). On this motion, defendants have not argued that plaintiff did not identify a law, rule, regulation or declaratory ruling that has been violated.

Here, NYU has furnished evidence of a nonretaliatory reason for terminating plaintiff's employment (*see Luiso v Northern Westchester Hosp. Ctr.*, 65 AD3d 1296, 1298 [2d Dept 2009] [transfer based on performance]; *Novak*, 136 AD3d at 436 [abandonment of emergency room post the reason behind termination]; *Thompson*, 2016 WL 4556905, *4, 2016 US Dist LEXIS 116985, *11 [termination due to low volume and insufficient revenue]; *Geldzahler v New York Med. Coll.*, 746 F Supp 2d 618, 633 [SD NY 2010] [termination based on disagreements and tension with colleagues rather than complaints about the supervision, education and training of medical residents]). Plaintiff's duties included teaching residents, and NYU has presented instances where residents complained of plaintiff's dismissive, disrespectful behavior and how they feared asking him for assistance, all of which made for a poor learning environment in a teaching hospital (NYSCEF Doc No. 80 at 7; NYSCEF Doc No. 84 at 12 and 18). Dr. Carey avers that the number of written complaints she received from residents about plaintiff exceeded the number of complaints against all other attending physicians at Lutheran (NYSCEF Doc No. 80, ¶ 7). Dr. Carey further avers that she and Dr. Volpicelli discussed whether plaintiff's "continued inability to foster an effective working relationship with residents posed a potential threat to patient safety" (*id.*, ¶ 17). Dr. Volpicelli testified that "ridiculing" residents "sets up a dangerous precedent" in dealing with sick patients (NYSCEF Doc No. 75 at 166). Dr. Iskandir attests that residents complained to her about how plaintiff spoke to them, that "[h]e came across as arrogant, insensitive and dismissive of residents' concerns," and residents were reluctant to raise issues on patient care to him because they feared his reaction (NYSCEF No. 83, Collins affirmation, exhibit L, Dr. Iskandir aff ¶¶ 4-5 and 11). Dr. Mercado testified that plaintiff "did not seem content with how the residents presented patients or discussing [sic] the data" and would raise his voice (NYSCEF Doc No. 209, Collins reply affirmation, exhibit III, Dr. Mercado tr at 107). Dr. Mercado also

testified that Dr. Rajmane had asked him to help plaintiff deal with his frustrations (*id.* at 133-134). Buckel avers she told Dr. Amdo that plaintiff was not teaching residents and that plaintiff "blew [her] off" when she tried to speak to him about it (NYSCEF Doc No. 79, ¶ 14). Physicians on other services complained about plaintiff, as well (NYSCEF Doc No. 91; NYSCEF Doc No. 100; NYSCEF Doc No. 214, ¶ 11). Dr. Caldwell avers that plaintiff's behavior "undermined the kind of collaboration and teamwork that is essential to providing well-coordinated, safe, patient-centered care" and "made it increasingly challenging to interact with him on a professional level" (NYSCEF Doc No. 82, ¶¶ 8 and 12). Plaintiff's approach remained unchanged despite counseling, all of which culminated in his enrollment on the FPPE on September 26, 2017. Five days later, plaintiff exhibited the exact behavior the FPPE was meant to correct, when he failed to respond in a timely manner to a resident's request for assistance with Patient X (NYSCEF Doc No. 77 at 73; NYSCEF Doc No. 85, ¶ 14; NYSCEF Doc No. 86, ¶ 12; NYSCEF Doc No. 122, Collins affirmation, exhibit YY). Because plaintiff's actions concerned the supervision of residents and implicated patient care, NYU terminated his employment (NYSCEF Doc No. 109, Collins affirmation, exhibit LL at 1 ["[w]e feel we have no option but to terminate his employment to insure the safety of our patients"]; NYSCEF Doc No. 75 at 177). Dr. Abramson confirmed that plaintiff's "overly harsh attitude towards trainees" posed a risk to patient safety and denied his grievance (NYSCEF Doc No. 112 at 2). Thus, NYU has articulated a nonretaliatory reason for plaintiff's termination.

As set forth above, plaintiff must establish a causal link between his complaints and his termination[9] sufficient to infer a retaliatory intent (*see McCormick v NYU Langone Med. Ctr.*, 187

[9] To the extent plaintiff alleges that implementation of the FPPE was retaliatory because it is based on unjustified criticism (NYSCEF Doc No. 72, ¶ 73; NYSCEF Doc No. 135, ¶¶ 8 and 11), plaintiff's placement on the FPPE does not constitute a retaliatory action because the terms and conditions of his employment were not changed as a result

AD3d 442, 442 [1st Dept 2020]; *Novak*, 136 AD3d at 436). In viewing the evidence in the light most favorable to plaintiff, questions of fact remain as to whether the stated reason for his termination was a pretext for retaliation stemming from his complaints about the improper quality of patient care.

Adverse action that follows closely in time to participation in a protected activity can be sufficient to raise an inference of causation (*see Blashka*, 126 AD3d at 503). In this case, plaintiff complained repeatedly about certain residents from April to June of 2017 and filed a PSI on September 7, 2017. NYU implemented the FPPE on September 26 and terminated plaintiff's employment days later. The temporal proximity of these events supports plaintiff's assertion of causation (*see Blashka*, 126 AD3d at 503).

Plaintiff also challenges the thoroughness of NYU's investigation into the incident with Dr. Moe and Patient X and denies any wrongdoing on his part with respect to same. He argues that Drs. Volpicelli, Sterman, Weisstuch and Abramson and Simon never reviewed Patient X's hospital record.[10] Dr. Feldman (plaintiff's expert doctor) and Lyons (plaintiff's expert nurse), who reviewed the hospital record, opine that plaintiff timely arrived at Patient X's bedside (NYSCEF Doc No. 135, ¶ 34 ["Both the Hospital Record and the relevant depositions clearly show that Dr. Mason provided timely guidance to Dr. Moe and arrived at the patient's bedside in a timely fashion"]; NYSCEF Doc No. 136, ¶ 145 ["Dr. Mason came to the bedside of the patient within several minutes of being called by RN Marius"]). Dr. Feldman and Lyons appear to fault Dr. Moe and other hospital staff for failing to follow NYU policies on treating patients experiencing alcohol

(Labor Law § 741 [1] [g]; *see also Brown v American Golf Corp*., 99 Fed Appx 341, 343 [2d Cir 2004]; *Gorman v Covidien, LLC*, 146 F Supp 3d 509, 524 [SD NY 2015] [performance improvement plan not an adverse action even though the plan stated plaintiff could be terminated]).

[10] Dr. Abramson testified that he reviewed Patient X's hospital record after plaintiff filed a grievance "and came to the same judgment" (NYSCEF Doc No. 176 at 40-41).

withdrawal, patients who fall involuntarily, and patients who are disruptive or aggressive (NYSCEF Doc No. 135, ¶¶ 20-23 and 28-29; NYSCEF Doc No. 136, ¶¶ 32-34). "[A] faulty investigation is not in and of itself evidence of pretext" (*Sharpe v Utica Mut. Ins. Co.* (756 F Supp 2d 230, 250 [ND NY 2010]), and "the mere fact that an employee disagrees with an employer's evaluation of that employee's misconduct or deficient performance, or even has evidence that the decision was objectively incorrect, does not necessarily demonstrate, by itself, that the employer's proffered reasons are a pretext for termination" (*Kalra v HSBC Bank USA, N.A.*, 567 F Supp 2d 385, 397 [ED NY 2008], *affd* 360 Fed Appx 214 [2d Cir 2010]). Nevertheless, Dr. Feldman and Lyons's opinions raise an issue of fact as to whether the investigation was so lacking in diligence, and/or the evaluation of plaintiff's performance was so unforgiving, that a discriminatory animus may be inferred (*McCormick*, 187 AD3d at 443 [plaintiff raised a question of fact whether she would have been fired absent a retaliatory motive]).

Additionally, plaintiff claims that negative reactions by Drs. Rajmane, Volpicelli and Sterman in response to his complaints about the improper quality of patient care sufficiently demonstrates retaliatory intent. He alleges that a few months before his termination, Dr. Rajmane warned him against complaining about certain residents because they were related to officials at NYU, and that continuing to do so would put a target on his back (NYSCEF Doc No. 72, ¶ 34). Plaintiff thereafter made at least one more complaint and filed a PSI regarding residents' patient care. From this, a jury could infer that plaintiff was terminated due to his continued complaints about "untouchable" residents.

NYU has offered substantial evidence of a non-retaliatory reason for terminating plaintiff. However, plaintiff has also offered evidence indicating that questions of fact remain as to whether

the decision was motivated, at least in part, by retaliatory animus. Accordingly, NYU's motion for summary judgment will be denied with respect to the first cause of action.

C. The Second and Fourth Causes of Action for Defamation and Libel Per Se

Defamation is the making of a "false statement 'that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace'" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [citation omitted]). A cause of action for defamation requires the plaintiff to demonstrate "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). A statement that tends to injure a person in that person's trade, business or profession is considered defamatory per se, for which damages are presumed (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]).

A statement, though defamatory, may not be actionable if it is protected under an absolute privilege or a qualified privilege, the application of which "'depend[s] on the occasion and the position or status of the speaker'" (*Gottwald v Sebert*, 40 NY3d 240, 253 [2023], quoting *Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 208 [1983]). In contrast to an absolute privilege, which absolutely immunizes the speaker from liability (*Stega v New York Downtown Hosp.*, 31 NY3d 661, 669 [2018]), statements subject to a qualified privilege are protected if they were not made with malice (*id.* at 670, quoting *Liberman*, 80 NY2d at 437-438). Malice for purposes of defeating a qualified privilege can mean either common-law malice, defined as "spite or ill will," or constitutional malice, "where the statements [were] made with [a] high degree of awareness of their probable falsity" (*Foster v Churchill*, 87 NY2d 744, 752 [1996] [internal quotation marks and citation omitted]). The plaintiff bears the burden of demonstrating malice to defeat a qualified privilege (*Stega*, 31 NY3d at 670, citing *Toker v Pollak*, 44 NY2d 211, 219 [1978]).

1. The Second Cause of Action for Defamation Per Se and Libel

The second cause of action alleges that NYU's statement to OPMC that plaintiff failed to timely respond to a patient is defamatory per se and libelous because it tends to injure him in his profession (NYSCEF Doc No. 72, ¶¶ 135-140). NYU contends that it is obligated under Public Health Law § 2803-e (1) (a) to report plaintiff's termination to OPMC and that its report is protected by a qualified privilege. Plaintiff counters that a triable issue of fact exists whether NYU acted out of ill will and with reckless disregard for the truth.

Public Health Law § 2803-e (1) (a) mandates that a hospital must report the "suspension, restriction, termination or curtailment of the training, employment, association or professional privileges … of an individual licensed pursuant to the provisions of title eight of the education law … for reasons related in any way to alleged mental or physical impairment, incompetence, malpractice or misconduct or impairment of patient safety or welfare" within 30 days of the occurrence. The report must be made in writing to the New York State Department of Health (Public Health Law § 2803-e [2]). Public Health Law § 2803-e (3) (b) also provides that:

> "[a]ny person, facility or corporation which makes a report pursuant to this section in good faith and without malice shall have immunity from any liability, civil or criminal, for having made such a report. For the purpose of any proceeding, civil or criminal, the good faith of any person required to make a report shall be presumed."

Based on the foregoing, the statements in NYU's October 25, 2017 report to OMPC are protected by a qualified privilege (*see Roth v Beth Israel Med. Ctr.*, 180 AD2d 434, 435 [1st Dept 1992]). Plaintiff may overcome the qualified privilege by raising a triable issue on malice.

"In order to establish a triable issue regarding common-law malice, a defamed plaintiff must show that a jury could reasonably conclude that the speaker spoke out of spite or ill will, and that such malicious motivation 'was the one and only cause for the publication" (*Hoesten v Best*, 34 AD3d 143, 158 [1st Dept 2006] [internal quotation marks and citation omitted]). Malice "may be inferred from a defendant's use of expressions beyond those necessary for the purpose of the privileged communication or from a statement that is 'so extravagant in its denunciations or so vituperative in its character'" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 259-260 [1st Dept 1995] [internal quotation marks and citations omitted]). As applied here, plaintiff fails to raise a triable issue of fact on common-law malice. Plaintiff has not presented any evidence to suggest that Simon harbored a malicious motive since the circumstances of plaintiff's termination concerned patient safety, and under Public Health Law § 2803-e, his termination must be reported to OPMC (*see Roth*, 180 AD2d at 435). Thus, NYU cannot have been solely motivated by malice (*id.*; *see also Brook v Peconic Bay Med. Ctr*., 152 AD3d 436, 438 [1st Dept 2017]). Furthermore, the language in the report to OPMC is not "so extravagant … or so vituperative in its character as to justify an inference of malice" (*Kasachkoff v City of New York*, 107 AD2d 130, 136 [1st Dept 1985], *affd* 68 NY2d 654 [1986] [internal quotation marks and citation omitted]).

As to constitutional malice, the plaintiff bears the burden of producing evidence sufficient to show that the speaker "entertained serious doubts as to the truth of the statement" (*Present v Avon Prods.*, 253 AD2d 183, 188 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]). On this point, plaintiff argues that Simon did not review any medical charts related to the allegations against plaintiff before she reported his termination to OPMC (NYSCEF Doc 184, Watkins affirmation, exhibit 47, Simon tr at 182). However, the failure to investigate the truth of a statement, standing alone, is insufficient to prove malice (*see Sweeney v Prisoners' Legal Servs.*

*of N.Y.*, 84 NY2d 786, 793 [1995]; *Harte-Hanks Communications v Connaughton*, 491 US 657, 688 [1989] ["failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard"]). Plaintiff has failed to present any other evidence to suggest that Simon harbored serious doubts as to the truth of the statements, that she knew they were false, or that they were made in bad faith (*see Virk v Kaleida Health*, 227 AD3d 1422, 1427 [4th Dept 2024] [no evidence speaker knew the report was false or was made in bad faith or that the speaker intentionally avoided learning the truth]; *Tomasino v Mount Sinai Med. Ctr. & Hosp.*, 2003 WL 1193726, *16, 2003 US Dist LEXIS 3766, *45 [SD NY, Mar. 13, 2003, No. 97 Civ. 5252(TPG)] [no evidence the hospital lacked a good faith belief that plaintiff had falsified documents]). Simon testified that Lowy prepared the letter to OPMC (NYSCEF Doc No. 184 at 166), and Simon knew "what was in the FPPE" (*id.* at 161). Furthermore, plaintiff ignores the fact that NYU investigated the incident shortly after it occurred. The investigation corroborated the events described in the PSI and concluded that plaintiff had failed to timely respond to requests for assistance (*see Smith v Montefiore Med. Ctr*., 116 AD3d 573, 573-574 [1st Dept 2014] [no issue of fact whether the speaker was motivated by malice because an investigation corroborated the speaker's complaint that plaintiff had mistreated a patient]).

Plaintiff cites *Purgess v Sharrock* (33 F3d 134 [2d Cir 1994]) in support, but that case is distinguishable. In *Purgess*, plaintiff anesthesiologist sued the Hospital for Special Surgery (HSS) and its Director of Anesthesiology for, inter alia, defamation stemming from a report HSS had filed with OPMC stating that HSS had terminated plaintiff's appointment and revoked her privileges (*id.* at 136-137). HSS, though, "went further" than simply reporting the revocation of plaintiff's privileges by sending five medical charts, one of which involved a patient treated by a

different anesthesiologist, to OPMC to "justify [plaintiff's] loss of privileges" (*id.* at 137). The Court noted that "the error was not inadvertent" because the associate director who prepared the certification for those records knew that plaintiff had not treated one of the patients (*id.*). The Court reasoned that the jury could have reasonably concluded that HSS had abused the qualified privilege that otherwise attached to the report "by providing information that was 'untrue and communicated with malicious intent'" (*id.* at 141 [citation omitted]). By contrast here, there is no evidence to reasonably infer that anyone at NYU knowingly and intentionally communicated false information to OPMC. Accordingly, summary judgment on plaintiff's second cause of action will be granted in favor of movants, and plaintiff's second cause of action will be dismissed.

2. The Fourth Cause of Action for Defamation Per Se and Libel

The fourth cause of action for defamation per se and libel is predicated on NYU's letter December 11, 2018 to the Arizona Medical Board (NYSCEF Doc No. 72, ¶¶ 164-166). NYU maintains that this cause of action must be dismissed because plaintiff had authorized it to disclose information regarding his termination to the Board, and that NYU could not have defamed him by transmitting that information. NYU additionally asserts that this communication is protected under the common-interest privilege. Plaintiff counters that, as with NYU's report to OPMC, NYU knew this letter contained false statements.

The statements in the December 2018 letter are protected by the common-interest privilege (*see e.g. Schwartz v Society of the N.Y. Hosp.*, 232 AD2d 212, 212 [1st Dept 1996] [common-interest privilege applied to statements made to "potential employers or fellow staff members, regarding the circumstances of the suspension of plaintiff's privileges at the defendant hospital"]; *see also Buckley v Litman*, 57 NY2d 516, 520 [1982] [qualified privilege applied to statements concerning patient care]). Therefore, plaintiff must demonstrate malice.

Here, plaintiff has failed to produce any evidence to show that Kakleas acted solely out of malice (*see Brook*, 152 AD3d at 438). Likewise, plaintiff has not produced any evidence to suggest that Kakleas "entertained serious doubts as to the truth of the statement" (*Present*, 253 AD2d at 188). Kakleas testified that she consulted with both Lowy and Simon on the letter (NYSCEF Doc No. 169, Watkins affirmation, exhibit 32, Kakleas tr at 72). At the time Kakleas wrote the letter, NYU had concluded its investigation into the incident which prompted plaintiff's termination and its investigation after plaintiff appealed his termination (*see Smith*, 116 AD3d at 573-574).

Plaintiff additionally asserts that NYU failed to disclose that OPMC had closed its investigation, but contrary to plaintiff's contention, Kakleas informed the Board that "NYU Langone Hospitals received notification from OPMC, dated November 26, 2018, indicating that its investigation of Dr. Mason has been closed" (NYSCEF Doc No. 121 at 3). Plaintiff has produced no other evidence to suggest malice, and his conclusory allegations of malice are insufficient to defeat the privilege (*see Brooks v US Xpress, Inc.*, 226 AD3d 500, 501 [1st Dept 2024]; *Roth*, 180 AD2d at 435). Accordingly, summary judgment on plaintiff's fourth cause of action will be granted in favor of movants, and plaintiff's fourth cause of action will be dismissed.

D. The Third Cause of Action for Self-Publication Defamation

The third cause of action pleads a claim for self-publication defamation (NYSCEF Doc No. 72, ¶ 155). New York does not recognize a cause of action for self-publication defamation (*Wieder v Chemical Bank*, 202 AD2d 168, 170 [1st Dept 1994), and thus, NYU has demonstrated its entitlement to summary judgment dismissing this cause of action. Plaintiff does not oppose this part of the motion and seeks to withdraw this cause of action (NYSCEF Doc No. 133, plaintiff's mem of law at 11). Accordingly, plaintiff's third cause of action will be dismissed.

E. The Fifth Cause of Action under Labor Law § 215

The fifth cause of action for retaliation in violation of Labor Law § 215 is premised on the allegation that, because of its animosity towards plaintiff, NYU made false and defamatory statements about his termination in its December 2018 letter to the Arizona Medical Board (NYSCEF Doc No. 72, ¶ 182). NYU contends this cause of action fails on two grounds. First, plaintiff was no longer its employee when NYU sent the letter. Second, plaintiff cannot demonstrate a causal nexus between plaintiff's filing of the instant action in July 2018 and the alleged retaliatory act in December 2018. For his part, plaintiff asserts that an employee may pursue a Labor Law § 215 claim against a former employer.

Labor Law § 215 (1) (a) prohibits an employer from discharging, threatening, penalizing "or in any other manner discriminat[ing] or retaliat[ing] against any employee" who has engaged in certain protected activities enumerated in the statute. Under Labor Law § 215 (2), "an employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section." To prevail on a Labor Law § 215 claim, the plaintiff must show that "he or she made a complaint about the employer's violation of New York Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result" (*Higueros v New York State Catholic Health Plan, Inc*., 526 F Supp 2d 342, 347 [ED NY 2007]). The plaintiff must also demonstrate a causal nexus between the complaint and the retaliatory act (*id.*).

Under these precepts, NYU argues that the statute is inapplicable because "***the purported retaliatory act*** [i.e., sending the letter to the Arizona Medical Board in December 2018] occurred when plaintiff was no longer an employee of defendants" (*Vergara v Mission Capital Advisors, LLC*, 200 AD3d 484, 485 [1st Dept 2021] [dismissing Labor Law § 215 claim where the plaintiff was not employed at the time of the adverse action] [emphasis added]; *see also Week Publs., Inc.*

*v Hernandez*, 54 Misc 3d 1221[A], 2016 NY Slip Op 51871[U], *4 [Sup Ct, NY County 2016] ["the retaliatory act must occur while the individual is an employee of the employer"]). Plaintiff argues that the statute applies because he was still employed by NYU ***at the time that he engaged in the protected activity*** (*Rahman v Red Chili Indian Café, Inc.*, 2021 U.S. Dist. LEXIS 95140 *9 [SD NY 2021] ["a plaintiff must demonstrate that *while employed by the defendant*, he made a complaint about the employer's violation of the law"] [emphasis in original], citing *Oram v SoulCycle LLC*, 979 F Supp 2d 498, 511 [SD NY 2013]; *Higueros*, 526 F Supp 2d 342 at 269 [same]). NYU considers plaintiff's action of bringing this lawsuit as the "protected activity." Under this theory, plaintiff's Labor Law § 215 claim would have to be dismissed, even accepting the *Rahman* court's interpretation of the statute, since both the protected activity and retaliatory act occurred after he was terminated. However, plaintiff alleges that NYU took its retaliatory action "because of animosity toward Dr. Mason . . . for having brought this lawsuit" ***and*** "for his underlying complaints regarding inadequate patient care, as set forth herein" (NYSCEF Doc No 17 ¶ 182 [emphasis added]). Accepting plaintiff's action of making the underlying complaints to his then-coworkers as the protected activity, plaintiff's Labor Law § 215 claim may proceed under *Rahman*, since he was still employed by NYU at the time he made those complaints.

While a conflict exists among the courts as to whether a plaintiff asserting a Labor Law § 215 claim must have been employed at the time of the retaliatory act or at the time he engaged in the protected activity, it need not be resolved here because NYU has demonstrated that plaintiff cannot establish a causal nexus between the protected activity and the alleged retaliatory action. "[F]iling a lawsuit seeking to vindicate employee rights constitutes a protected activity" for purposes of Labor Law § 215 (*Rodriguez v Parkash*, 2018 WL 11511602, *4, 2018 US Dist LEXIS 250000, * 12 [ED NY, May 7, 2018, No. 17-CV-3877-KAM-SJB]), however, more than six

months passed between July 3, 2018, the date plaintiff commenced this action, and December 11, 2018, the date NYU sent the letter to the Arizona Medical Board. This six-month gap precludes a causal connection determination (*see Petrisko v Animal Med. Ctr*., 187 AD3d 553, 554 [1st Dept 2020]; *Fischman v Mitsubishi Chem. Holdings Am., Inc*., 2019 WL 3034866, *6, 2019 US Dist LEXIS 115616, *20 [SD NY, July 11, 2019, No. 18-CV-8188 (JMF)] [collecting cases]). Plaintiff's underlying complaints regarding inadequate patient care are even further removed; the complaints were made several months before his termination in October 2017, more than a year before NYU sent the letter to the Arizona Medical Board. Moreover, NYU has shown that plaintiff had asked NYU to release information regarding his termination to the Arizona Medical Board. Consequently, NYU has shown that plaintiff cannot establish the requisite causal link between the protected activity and the alleged retaliatory action (*see Quintas v Pace Univ*., 23 AD3d 246, 247 [1st Dept 2005]).

Accordingly, summary judgment on plaintiff's fifth cause of action will be granted in favor of movants, and plaintiff's fifth cause of action will be dismissed.

**CONCLUSION**

Based on the foregoing, it is

ORDERED that defendants' motion for summary judgment dismissing the amended complaint is granted to the extent that the amended complaint is dismissed as against all defendants except defendant NYU and with respect to plaintiff's causes of action as against NYU for defamation (second), self-publication defamation (third), libel per se (fourth), and retaliation pursuant to Labor Law § 215 (fifth), summary judgment is also granted in favor of movants and the foregoing claims are dismissed as against NYU and the motion is otherwise denied; and it is further

ORDERED that the caption in this matter is hereby amended as follows:

JOSHUA SCHUYLER MASON M.D.,

Plaintiff,

- v –

NEW YORK UNIVERSITY,

Defendant.

And it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended in accordance with this change, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that movants shall, within 30 days of entry of this order, serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

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| DATE | | | | PAUL A. GOETZ, J.S.C. | | |
| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | REFERENCE |