

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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LYNETTE ALLEN,

Plaintiff,

DECISION/ORDER

-against-

Index No. 14-3090
R.J.I. No. 55-14-2232
Richard Mott, J.S.C.

RIVER RADIOLOGY, PLLC and COMPREHENSIVE SUPPORT
SERVICES, LLC,

Defendants.

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Motion returnable: March 3, 2015, final submissions received March 10, 2015.

APPEARANCES:

Plaintiff:

✓ Charny & Associates, P.C.
9 West Market Street
Rhinebeck, NY 12572

Defendants:

Jackson Lewis, P.C.
18 Corporate Woods Boulevard, 3rd Floor
Albany, NY 12211

Mott, J.

Defendants River Radiology, PLLC and Comprehensive Support Services, LLC,
(hereinafter, "Defendants"), move to dismiss the complaint for retaliatory firing asserting
the failure to state a cause of action, pursuant to CPLR §3211(a)(7). Plaintiff opposes.

Background

Plaintiff is a Computed Tomography Technologist (hereinafter, CT Technologist),
licensed by the N.Y.S. Department of Health, responsible for operating diagnostic imaging
equipment used to diagnose and treat patients. Her duties include administering contrast
media and imaging-related medications using intravenous methods, span the entire

procedure from triage to completion, and include advice to the patient, assessment and monitoring. She was fired shortly after complaining to Defendants that a patient was endangered by its policy of, among other things, overbooking appointments and urging employees not to take breaks in order to maximize profits.

Plaintiff brings this action under Labor Law § 741(4), also known as the Health Care Whistleblower Act, (hereinafter, the "Act"), which provides a private right of action for retaliatory firing against a health care worker where the employee has or threatens to disclose, a "policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care." Labor Law § 741(2)(a). This protection is afforded only to a certain class of health care employees who perform "health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration." Labor Law § 741(1)(a).

Defendant's Submission

Defendants contend that Plaintiff is not a health care worker as defined in the Act, as she did not perform non-discretionary services, but merely coordinated them, and that she failed to allege a policy or practice that constitutes improper quality of patient care.

Plaintiff's Submission

Plaintiff counters that she was responsible for direct patient care. Further, her complaint asserts practices that violate regulations thereby threatening the health and safety of a particular patient. Upon apprising Defendants of same, she was fired.

Discussion

Motion to Dismiss

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211 (a) (7), the Court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). “We...determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). A motion to dismiss must be denied if the factual allegations contained within “the pleadings’ four corners...manifest any cause of action cognizable at law.” *511 W 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 (2002) (citations omitted). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).” *Dee v. Rakower*, 112 A.D.3d 204, 208, (2d Dept. 2013).

Health Care Services Employee

The special protection afforded health care services employees applies to an “employee [who] must actually supply health care services,” involving “knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments.” *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 81 [2008]. Thus, while a registered nurse providing direct services would ordinarily be covered by the Act, a non-health care professional coordinating volunteer services or a nurse coordinating research

project activities are not “mak[ing] knowledgeable judgments as to the quality of patient care,” as required for coverage under this statute. *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d at 92-93; see also, *Moynihan v New York City Health and Hospitals Corp.*, 120 AD3d 1029, 1033 [1st Dept. 2014]; *Von Maack v Wyckoff Hgts. Med. Ctr.*, 43 Misc 3d 1206(A) [Sup Ct 2014] (pharmacist compounding medications at direction of physicians directly responsible for providing care, not exercising judgment). Because the Act “is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments,” *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d at 93, the inquiry must be directed to Plaintiff’s employment activities and responsibilities.

In light of the foregoing, this Court concludes that Plaintiff’s activities and responsibilities, as pleaded, provide a sufficient basis to demonstrate coverage under the Act as a health care services employee. Indeed, the activities described are akin to those of a nurse providing direct patient care, albeit with a specialty in radiographic imaging. While a nurse may have a broader scope of responsibilities, such does not preclude a finding here that Plaintiff, as a CT Technologist, exercises professional judgment when administering prescription medications, guiding a patient through an invasive procedure, assessing and evaluating patient progress and making decisions about additional diagnostics. Indeed, Plaintiff is subject to Department of Health licensing, indicating a standard of professional responsibility for the activities she undertakes, and subjecting her to professional discipline for negligence or incompetence. See, e.g., PHL § 3510.

Reasonable Belief of Improper Quality of Patient Care

Plaintiff also has successfully pled a “policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care” to sustain a cause of action under Labor Law § 741. Allegations concerning the “falsification of patient medication and treatment records, inadequate fire safety, mistreatment of residents, and deficiencies in patient care,” *Webb-Weber v Community Action for Human Services, Inc.*, 23 NY3d 448 [2014]; insufficient nursing staff, *Minogue v Good Samaritan Hosp.*, 100 AD3d 64 [2d Dept. 2012]; see also, *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d at 93, and lack of training for new procedures, *Galbraith v Westchester County Health Care Corp.*, 113 AD3d 649 [2d Dept. 2014], are deemed adequate to give notice of the objectionable policy or practice constituting improper patient care. Thus, staffing concerns are legitimately related to patient quality of care. In addition to allegations of Defendants’ policy and practice of limited patient services due to double booking, discouraging breaks and prohibitions on turning away walk-ins, Plaintiff alleges a specific incident wherein the life of a patient was placed at risk due to such practices. (Affidavit of Kristi Rich Winters, Esq., dated December 1, 2014, Exhibit A ¶¶ 40-54, hereinafter, “Complaint”). Moreover, while not required to do so, Plaintiff has alleged in her complaint the law, rule or regulation violated. *Webb-Weber v Community Action for Human Services, Inc.*, 23 NY3d 448, 452 [2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508, 509 [2d Dept. 2014]; *Blashka v New York Hotel Trades Council and Hotel Ass’n of New York City Health Ctr.*, 126 AD3d 503 [1st Dept. 2015]; Complaint ¶ 61.

Accordingly, the Court concludes that the complaint asserting a Labor Law § 741 claim is sufficient and the motion to dismiss is hereby denied.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Plaintiff, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
May 15, 2015

ENTER



RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion to Dismiss and Affidavit of Kristi Rich Winters, Esq.¹, with Exhibit A and Memorandum of Law, dated December 1, 2014;
2. Memorandum of Law in Opposition of Nathaniel K. Charney, Esq., dated February 17, 2015;
3. Reply Memorandum of Law of Kristi Rich Winters, Esq., dated March 2, 2015.

¹ Attorney Rich Winters' submissions are proffered on behalf of both Defendants.