[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** 19
Justice

Index Number : 103104/2010
PUGLIESE, LISA
VS.
ACTIN BIOMED LLC
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUN 14 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/7/12

_____, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----------X

LISA PUGLIESE,

Plaintiff,

Index No.: 103104/2010
Submission Date: 3/14/12

-against-

ACTIN BIOMED LLC, ARCHER BIOSCIENCES, MICHAEL WEISER, MD, JASON STEIN MD, SANDRA SILBERMAN, MD, AND STUART GREEN, ESQ.,

DECISION AND ORDER

Defendants.

----------X

For Plaintiffs:
Bader Yakatis & Nonnenamacher LLP.
350 Fifth Avenue, Suite 7210
New York, New York 10118
212-465-1110

For Defendant:
Wilson Elser Moskowitz Edelman & Dicker LLP
150 East 42nd Street
New York, New York 10017
212-490-3000

Papers considered in review of this motion to dismiss:

Notice of Motion 1
Mem of Law in Support of Motion 2
Mem of Law in Opposition. 3
Aff's in Opposition 4
Reply in Further Support of Motion. 5
Reply Mem of Law 6

HON. SALIANN SCARPULLA, J.:

In this unlawful discharge action, defendants Archer Biosciences, Inc. ("Archer"), Michael Weiser, MD ("Weiser"), Jason Stein, MD ("Stein"), Sandra Silberman, MD ("Silberman"), Stuart Green Esq. ("Green"), and Actin Biomed LLC ("Actin") (collectively "defendants") move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint against them.

Plaintiff Lisa Pugliese ("Pugliese") is a former employee of Archer. Pugliese was hired at Archer on April 15, 2008 as Vice President of Clinical Operations. Pugliese alleges that in the twelve months after being hired, she became aware of, and reported, flagrant violations of the regulations governing investigational drug trials and their reported findings.

Pugliese alleges that Archer violated the applicable regulations by "approving regulatory negligence, treat[ing] patients with expired drugs, knowingly reporting false data to the FDA, falsifying data, falsifying results of clinical testing, falsifying and misrepresenting clinical results, and allowing a lack of accountability and lack of safety oversight" in the reporting process. Specifically, Pugliese asserts that defendants violated multiple statutory provisions of the Code of Federal Regulations ("CFR") regarding investigations for new drug applications including: 21 CFR 312.59 (procedure for returning drugs at study end); 21 CFR 312.63 (maintenance of study records for at least 2 years after the study); 21 CFR 312.62 (reasonable notification of adverse effects of the drugs); and 21 CFR 312. 33 (requirements for the annual report).

Pugliese alleges that she complained to the individual defendants about the risks of the alleged violations, only to have her objections dismissed with no change in procedure. Pugliese alleges that in response to her objections, defendants devised a plan to create an "intolerable work environment" for her in attempt to force her to quit and avoid paying her severance. The alleged intolerable work environment included verbal and written harassment and forced relocation to an office in New York City in April, 2009.

Pugliese commenced this action in March, 2010, alleging numerous causes of action relating to workplace discrimination, infliction of harm, libel and slander, breach of employment contract, and retaliatory employment action. In a decision and order dated April 7, 2011, I dismissed the causes of action for discrimination, infliction of harm, libel and slander, and breach of contract and I found that the remaining claim for retaliatory employment action was insufficiently plead.

Pugliese subsequently amended her complaint to plead a sole cause of action for retaliatory conduct under New York Labor Law ("Labor Law") § 740, "the whistleblower law." In the amended complaint, Pugliese alleges that defendants' violations of established protocol generally threatened public safety, and that she was constructively terminated as a result of her non-compliance with violations of established drug-trial procedures.

Defendants move to dismiss the amended complaint under CPLR 3211(a)(1) and (7). Defendants argue that Pugliese fails to allege: (1) that her alleged whistle-blowing activities related to conduct that presented substantial and specific danger to public health; (2) that defendants took any retaliatory action against her as a result of her alleged whistleblowing; and (3) that defendant Actin and the individually named defendants were employers within the meaning of the Labor Law.

In opposition, Pugliese argues that Labor Law §740(2)(c) applies broadly to violations of law and that failure to adhere to established protocol when conducting drug studies poses a substantial danger to the public health or safety. Further, Pugliese alleges

that determining whether or not an employee has been constructively discharged is a question of fact to be left to the jury, and in any event, degrading oral and written communications created a hostile work environment sufficiently amounting to constructive discharge. Lastly, Pugliese contends that the defendants have not proffered evidence as to whether Actin or the individual defendants are plaintiff's employer for purposes of this motion and more aptly, that Labor Law §740(1)(b) applies to individuals with controlling positions in companies.

Discussion

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims as a matter of law. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168 (1st Dept. 1998).

On a motion to dismiss a pleading under CPLR 3211(a)(7), the sole inquiry is whether, according the facts alleged in the complaint every favorable inference, any cognizable cause of action can be made out. *See Leder v. Spiegel*, 31 A.D.3d 266 (1st Dept. 2006) *aff'd* 9 N.Y.3d 836 (2007); *Franklin v. Winard*, 199 A.D.2d 220 (1st Dept. 1993). Further, CPLR 3211(a)(7) measures whether or not the plaintiff "has a cause of action" not necessarily "whether [s]he has stated one" and generally a showing of evidentiary support is not required. *Leon*, 84 N.Y.2d at 88, *citing Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, (1977).

In New York, a presumption of at-will employment operates when, as here, there is no contract or specified term of employment. Accordingly, at-will employment "may be freely terminated by either party at any time for any reason or even for no reason." *Shah v. Wilco Sys. Inc.*, 27 A.D.3d 169, 174 (1st Dept. 2005), *quoting Lobosco v. New York Tel. Co./NYNEX*, 96 N.Y.2d 312, 316 (2001). New York Labor Law § 740(2)(c) creates an exception to this rule, creating a cause of action for employees who were terminated for refusing or abstaining from violating a law, rule or regulation, which safeguards against a "substantial and specific danger to the public health and safety." Labor Law § 740.

To state a cause of action under Labor Law § 740 a plaintiff must (1) allege a law, rule or regulation violated by the employer; and (2) demonstrate that the violation presents a substantial and specific danger to the public health or safety. *Remba v. Federation Employment & Guidance Serv.*, 76 N.Y.2d 801, 802 (1990). Here, Pugliese alleges that defendants falsified data, disregarded established reporting procedures, and failed to take proper safety precautions during the drug study in violation of 21 CFR 312.59, 312.63, 312.62, and 312.33. Pugliese has therefore sufficiently alleged that Archer violated the Code of Federal Regulations governing the investigations for new drug applications.

The whistleblower statute is silent as to what specifically qualifies as a "substantial and specific" public danger but has been construed to require more than "mere speculation" of a public detriment. *Cotrone v. Consol. Edison Co. of New York, Inc.*, 50

A.D.3d 354, 355 (2008), *citing Nadkarni v. North Shore–Long Is. Jewish Health Sys.,* 21 A.D.3d 354 (2005). Accordingly, the statute envisions a certain "quantum of dangerous activity" before protection under it can be afforded. *Cotrone,* 50 A.D.3d at 355, *quoting Peace v. KRNH, Inc.,* 12 A.D.3d 914, 915 (2004).

However, alleging only a single or a few violations will not prevent the application of Labor Law § 740 protection, as the courts have acknowledged a qualified impact on public health and safety when the possibility exists that an inherently dangerous activity will recur. *See Villarin v. Rabbi Haskel Lookstein Sch.,* 2012 NY Slip Op 2786 (1st Dept. April 12, 2012) (failure to report child abuse may result in further abuse and neglect). Thus, the aggregation of such an activity can be an appropriate measure of its overall public impact if the "behavior pattern" is itself dangerous. *Villarin,* 2012 NY Slip Op 2786 at 6, *citing Finkelstein v. Cornell Univ. Med. College*, 269 A.D.2d 114, 116-117 (2000).

Here, Pugliese alleges multiple activities that undermine the integrity of the drug trials conducted at Archer including falsifying data and not adhering to established safety measures. These could potentially create adverse conditions for a larger population of test subjects if repeated. Further, Pugliese alleges that the misreported records associated with the trials could lead to approval of unsafe drugs for distribution to the general population. Therefore, Pugliese has sufficiently plead a substantial or specific danger to public health or safety to survive scrutiny under CPLR 3211(a)(7).

Moreover, Pugliese has adequately pled that she was subject to retaliatory personnel action. To make out a retaliation claim, plaintiff must plead (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that activity; (3) she suffered adverse employment action based on her activity; and (4) there is a causal connection between the protected activity and the adverse action. *Koester v. New York Blood Ctr.*, 55 A.D.3d 447, 448-49 (1st Dept. 2008), *citing Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 312–313 (2004).

"[C]onstructive discharge occurs when an employer intentionally creates a work environment that is so difficult or intolerable that a reasonable person would feel forced to resign." *Ferraro v. Seamen's Church Inst. of New York & New Jersey*, 18 Misc. 3d 1108(A) (Sup. Ct. NY County 2007), *citing Fisher v. KPMG Peat Marwick,* 195 A.D.2d 222, 225 (1st Dept.1994). Moreover, "what a just, reasonable person would or would not do under certain circumstances is a question of fact," and thus delegated to the fact-finder. *Fisher,* 195 A.D.2d at 226.

Pugliese alleges that after she reported violations of drug testing procedure to defendants Weiser, Stein, Silberman, and Green, she was told that they were attempting to make her work environment intolerable so she would quit, specifically commenting that she would be "washing toilets and taking out garbage" and referring to her as "agenda girl" in reference to her objections to drug trial protocol. Further, Pugliese alleges that she was subjected to comments concerning her sexuality and her body, and

eventually was forced to relocate her office to New York City. Pugliese alleges that as a result, she took medical leave and abandoned her position.

Defendants argue that documentary evidence establishes that Pugliese voluntarily chose to be absent from work, thereby precluding her retaliatory discharge claim, and that the she was relocated along with the entire business and all of its employees from New Jersey to New York. Further, the defendants argue that Pugliese's allegation that the defendants wanted her to leave, but hoped not to pay her severance, precludes her claim under Labor Law § 740 because her termination would, by her own admission, stem from defendants wanting to avoid severance and not from the original whistleblower action.

Defendants fail to submit documentary evidence that conclusively establishes a defense to Pugliese's claims as a matter of law. Defendants' documents chronicle Pugliese's absence from work for an undisclosed illness but do not mention any intention of not returning. Further, Pugliese's argument that defendants' desire to not pay her severance was not their overarching motivation for subjecting her to supposedly intolerable conditions, but merely a justification for allegedly attempting to constructively discharge her, has not been proved or conclusively disproved on these motion papers.

Finally, defendants argue that Pugliese's cause of action against Actin and individual defendants Weiser, Stein, Silberman, and Green is improper and that Pugliese is seeking remedies not available under Labor Law § 740.

Labor Law §740 provides that an "'employer' means any person, firm, partnership, institution, corporation, or association that employs one or more employees." Defendants

argue that Actin, Weiser, Stein, Silberman, and Green were not Pugliese's direct employers and that Pugliese has not established an employment relationship with any of them.

In determining who is an "employer," courts have employed an "economic realities" analysis. The economic realities analysis considers whether a specific defendant employee had an "ownership interest or power to do more than carry out personnel decisions made by others." *Patrowich v. Chem. Bank*, 63 N.Y.2d 541 (1984). State courts have adopted a broad interpretation of the "economic reality" analysis, evaluating "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." *Carver v. State*, 87 A.D.3d 25 (2nd Dept. 2011), *quoting Herman v. RSR Sec. Services Ltd.,* 172 F.3d 132, 139 (2d Cir. 1999).

Here, Pugliese has identified the individual defendants and Actin and Archer as her "employers" and claims that they were responsible for the alleged violations and adverse employment actions. Pugliese asserts that the individually named defendants, Stein, Weiser, Silberman, and Green are part owners of Archer and may be liable if they profited from the complained of acts.

Further, Pugliese alleges that both Archer and Actin are owned and controlled by Stein and Weiser, who make management and employee decisions for the corporate entities. Therefore, based on "the circumstances of the whole activity, viewed in light of

economic reality," Pugliese has sufficiently stated a cause of action against defendants Actin, Weiser, Stein, Silberman, and Green as her employers. *Ovadia v. Office of Indus. Bd. of Appeals (IBA),* 81 A.D.3d 457 (1st Dept. 2011) *leave to appeal granted*, 17 N.Y.3d 702, (2011) and *rev'd* sub nom. *Ovadia v. Office of Indus. Bd. of Appeals*, 2012 NY Slip Op 03358 (N.Y. May 1, 2012).

However, defendants properly maintain that Pugliese is not entitled to punitive damages. Available remedies for a Labor Law §740(5) claim include: (a) injunctive relief, (b) reinstatement of position, (c) reinstatement of full fringe benefits and seniority rights, (d) compensation for lost wages and other remuneration, and (e) payment of reasonable litigation costs. Labor Law § 740. Pugliese concedes that she is not entitled to punitive damages, but seeks compensation in the form of the severance due to her at the time of termination, as is allowed under the scope of the statute.

In accordance with the foregoing, it is

ORDERED that the motion by defendants Actin Biomed LLC, Archer Biosciences, Michael Weiser, MD, Jason Stein, MD, Sandra Silberman, MD, and Stuart Green, MD to dismiss the complaint against them is granted only to the extent that plaintiff Lisa Pugliese's claim for punitive damages is dismissed and the motion is otherwise denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 7, 2012

ENTER:

Saliann Scarpulla, J.S.C.

FILED

JUN 14 2012

NEW YORK
COUNTY CLERK'S OFFICE