SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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DAVID OSMAN,

Plaintiff,

- against-

THE LORGE SCHOOL, and MARTHA B. BERNARD,

Defendant.

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Index No. 158241/2016
Motion Seq: 001

DECISION & ORDER

ARLENE P. BLUTH, JSC

The motion by defendants to dismiss plaintiff's first and second causes of action is denied. Plaintiff agreed to withdraw his third and fourth causes of action pursuant to a stipulation dated February 21, 2017 (*see* NYSCEF Doc. No. 16).

Background

This matter arises out of plaintiff's termination as a clinical social worker for defendant, the Lorge School, a publicly-funded private school that serves students with disabilities. Defendant Bernard is the Chairperson of Lorge's Board of Directors. Plaintiff claims that he worked for 10 years at the Lorge School and has served as the school's clinical director.

Plaintiff contends that in 2015, the school and defendant Bernard fired the school's executive director Dr. Sandra Kahn. Plaintiff maintains that after this termination, Bernard concluded that she would occupy the Executive Director role despite the fact that she did not possess the legally required qualifications to fulfill this role. Plaintiff alleges that he spoke up

about this issue and his objections were ignored. Plaintiff insists that after months of raising these objections, he wrote to the school's board of trustees on April 17, 2016 seeking a meeting to discuss the fact that Bernard continued to run the school without the proper qualifications. After receiving no response, plaintiff sent another request and included a regulator form the New York State Department of Education. Plaintiff contends that he was suspended the next day and fired a week later.

Plaintiff alleges whistleblower and retaliation causes of action pursuant to Labor Law §§ 740 and 741.

Defendants move to dismiss on the ground that plaintiff failed to demonstrate any alleged violation by the Lorge School that constitutes a substantial and specific danger to public health or safety as required by Labor Law § 740. Defendants also claim that plaintiff fails to state a claim for retaliation under Labor Law §§ 740 and 741 because he has not pled facts sufficient to demonstrate a causal connection between his alleged protected activity and adverse employment action.

In opposition, plaintiff insists that paragraphs 28-40, which detail the requirements for an executive director, identify the specific and substantial dangers to the health and safety of the school's staff and students. Plaintiff maintains that it is not necessary to plead any specific incidents between September 2015 (when Bernard took over the Executive Director role) and April 2016 (when plaintiff was fired).

Plaintiff also argues that the complaint sets out a causal connection between protected activity and his termination.

Discussion

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

Whistleblower Claim

"In order to establish wrongful termination pursuant to 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 and safety" *(Villarin v Rabbi Haskel Lookstein Sch.*, 96 AD3d 1, 5, 942 NYS2d 67 [1s Dept 2012]). "The statutory language of 'substantial and specific danger to the public health and safety' is not defined in the whistleblower statute. Courts have consistently held that the statute addresses only traditional 'public health and safety' concerns" (*id.*).

Here, plaintiff's complaint alleges, and defendants do not dispute, that Bernard did not meet the legally required qualifications to be executive director at the Lorge School. These qualifications mandate that "supervisory personnel are required to be appropriately certified" pursuant to the regulations of the state Commissioner of Education (plaintiff's complaint ¶ 29). Supervisory personnel must obtain a provisionary or permanent certification, both of which require the applicant to have met certain educational standards and have experience as a teacher or administrator (*id.* ¶¶30-35). Applicants for certification must also take coursework regarding suspected child abuse or maltreatment, violence prevention and intervention, and receive training

in harassment and bullying prevention (*id.* ¶ 36).

Plaintiff stresses that these requirements serve to ensure that a child's school is a safe and healthy environment. Plaintiff argues that these requirements are especially important at a school that caters to students with disabilities. Plaintiff contends that the executive director is responsible for crisis intervention and management as well as investigating (and remediating) incidents of child abuse, violence, harassment and bullying (*id.* ¶ 39).

These allegations properly state a cause of action under the whistleblower statute. As an initial matter, it is undisputed that Bernard (and her assistant) do not possess the required qualifications. The issue, then, is whether her lack of qualifications pose a danger to public health and safety. "[T]here is no requirement that there be a . . . *large-scale* threat, or multiple potential or actual victims [;] . . . rather a threat to any member of the public might well be deemed sufficient" (*Villarin*, 96 AD3d at 7).

Here, there is a large-scale threat and many potential victims, including the students and staff at the Lorge School because Bernard does not possess the qualifications necessary to run a school. The executive director, according to plaintiff's complaint, oversees conflict resolution and is responsible for identifying child abuse and harassment. The qualifications set forth by the state Commissioner of Education are not aspirational goals. They are legally-mandated rules promulgated to ensure that students have a safe environment in which to learn. At a school that caters to students with disabilities, these requirements are especially critical. The executive director must make a variety of serious decisions about serious issues, including (according to plaintiff) allegations of sexual assault (*see* plaintiff's complaint ¶ 40). Leaving these decisions to be made by an unqualified executive director poses a threat sufficient to state a cause of action.

Further, plaintiff was not required to identify specific events that have already occurred in order to state a cause of action. The case law clearly states that a *threat* is sufficient (*see Villarin*, 96 AD3d at 7), which implies that there need not be cognizable victims in order to state a whistleblower cause of action. Should the Court wait until a student suffers before allowing plaintiff to pursue this cause of action?

Retaliation

"In order to make out a claim of unlawful retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) her employer was aware that she participated in such 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" (*Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553, 909 NYS2d 439 [1st Dept 2010] [citation omitted]).

Defendants focus on the fourth element: that plaintiff cannot show a causal connection. Defendants claim that plaintiff made multiple complaints about Bernard throughout the school year and point to a meeting (and letter dated March 22, 2016) between Bernard, her assistant and plaintiff about alleged misconduct by plaintiff in support of their claim that there was no causal connection.

Despite defendants' insistence that there is no causal connection, the Court finds that at the motion to dismiss stage, plaintiff has stated a cause of action for retaliation. Defendants' reliance on the March 22 letter and meeting concerning plaintiff's alleged misconduct might provide a defense or a justifiable reason for firing plaintiff after discovery. But it is not sufficient to meet defendants' burden in the instant motion because the timeline of events, as detailed in plaintiff's complaint, set forth a cause of action for retaliation.

On April 19, 2016 plaintiff sent an email making a second request for an emergency board meeting (Donnelly affirmation, exh C). Plaintiff contends that he wanted a meeting to discuss, in part, Bernard's control of the school and the fact that the school had still not hired an executive director (plaintiff's complaint ¶¶82-84). The email states that "I could only hope that my request and my observations will not lead the Board to instead of dealing with the issue at hand to again just to sweep it under the rug and to fire me" (Donnelly affirmation, exh C). The email also 'cced' a New York State Department of Education regulator (*id.*). The next day, plaintiff was suspended (*id.* exh D) and a week later, on April 27, 2016, he was fired (*id.* exh E).

The timing of the plaintiff's email, suspension and firing prevents dismissal of a retaliation cause of action at the motion to dismiss stage. Plaintiff has set forth detailed allegations that, if true, state a cause of action for retaliation.

Summary

Defendants' motion to dismiss is denied because plaintiff's complaint states retaliation and whistleblower causes of action. The Court also observes that this motion would have been denied, in any event, because defendants failed to attach plaintiff's complaint to its moving papers (*see Anderson v City of New York*, 2014 NY Slip Op 30080(U)(Trial Order), 2014 WL 176808 [Sup Ct, NY County 2014]). Although the Court was able to review the complaint via the NYSCEF system, that does not absolve defendants' responsibility to comply with the Rules of the Justices for New York County Supreme Court, Civil Branch.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the first and second causes of action is denied.

The parties are directed to appear for a preliminary conference on July 11, 2017 at 2:30 p.m.

This is the Decision and Order of the Court.

Dated: April 13, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC