| **Kilcullen v New York & Presbyt. Hosp.** |
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| 2017 NY Slip Op 31793(U) |
| August 24, 2017 |
| Supreme Court, New York County |
| Docket Number: 650470/15 |
| Judge: Debra A. James |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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MARIE KILCULLEN,

Plaintiff,

- against- Index No.: 650470/15

THE NEW YORK AND PRESBYTERIAN HOSPITAL d/b/a NEW YORK-PRESBYTERIAN HOSPITAL,

Defendant.

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**Debra A. James, J.:**

In this whistleblower action brought under Labor Law §§, defendant The New York and Presbyterian Hospital (the Hospital) moves, pursuant to CPLR 2221 (e), to renew defendant's motion to dismiss the complaint.

Plaintiff, Marie Kilcullen, opposes and cross-moves, pursuant to 22 NYCRR 130-1.1, for an order sanctioning defendant.

**CONCLUSION**

For the following reasons, the motion to renew is denied and the cross motion is denied.

**Background**

In February 2014, plaintiff's thirty-two (32) years of employment, mostly as a perfusionist,[1] at the Hospital ended.

Plaintiff alleges that she tendered her resignation under severe duress after raising serious concerns with the Hospital

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[1] A perfusionist is a specialized healthcare professional who uses the heart-lung machine during cardiac surgery and other surgeries that require cardiopulmonary bypass to manage the patient's physiological status.

regarding its newly implemented disposal procedures for blood-contaminated and potentially infectious items, which she claims circumvented regulations by requiring perfusionists to place waste products into the regular municipal trash. Plaintiff tried to retract her resignation, as other employees had purportedly done with success, but her attempts were rebuffed and plaintiff's employment was ultimately terminated.

On February 17, 2014, plaintiff filed the complaint alleging that the Hospital retaliated against her and terminated her employment in violation of New York Labor Law §§ 740 and 741 because she complained to her supervisors about the Hospital's method for disposing waste produced by the heart-lung machines. Plaintiff relies on Occupational Safety and Health Administration (OSHA) citations that were issued after the cessation of plaintiff's employment.

After filing an answer, the Hospital moved to dismiss the complaint pursuant to CPLR 3211 (a) (7) on the grounds that the complaint failed to allege that any activity, policy or practice of the Hospital resulted in a substantial and specific danger to the public or improper quality of care (motion seq. No. 001).

On October 26, 2015, the court entered a decision and order finding that plaintiff "alleges that defendant violated several [OSHA] regulations with regards to its handling of biohazardous waste disposed from heart and lunch machines" and held that

> "plaintiff has alleged a substantial and specific public health threat posed by her employer's disregard of OSHA regulations, which she reported to her supervisor. Her allegations that such report resulted in adverse treatment in retaliation, including but not limited to revocation of hours and constructive termination, has merit under the Whistleblower Law"

(*see* decision and order dated October 26, 2015).

Thereafter, on February 29, 2016, the Occupational Safety and Health Review Commission issued an order vacating the OSHA citations that the Hospital contends plaintiff relied on for her claims against the Hospital in this case (see Secretary of Labor v New York & Presbyt. Hosp., OSHA Docket No. 1509945 [Feb. 29, 2016] (OSHA Order).

Defendant now moves to renew its original motion, arguing that new evidence in the form of the vacatur by OSHA of the citations concerning disposal of waste from the heart and lung machines that did not exist at the time of such motion defeats plaintiff's claim. The Hospital asserts that given such new evidence, plaintiff cannot prove that the Hospital retaliated against her for reporting any actual violation of law, rule or regulation and the Labor Law § 740 claim must fail. Likewise, the Hospital argues that because plaintiff never made any report concerning patient care, the Labor Law § 741 must also fail.

**ANALYSIS**

CPLR 2221 provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that

would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]).

Here, the Hospital argues that given the OSHA Order was rendered subsequent to the court's October 2015 decision, there are new facts which establish that plaintiff cannot prevail on the claims raised in the complaint. The Hospital claims that it was reasonably justified from not presenting such facts on the prior motion as it could not have presented such, i.e., the OSHA Order, until the Order became final. The court agrees that the Hospital has provided a reasonable justification for its renewal motion.

Labor Law § 740 Claim

Labor Law § 740 prohibits an employer from taking retaliatory action against an employee because the employee

> "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud"

(Labor Law § 740 [2] [a]). Defendant argues that the OSHA Order determination that the Hospital's tubing waste disposal procedures, of which plaintiff complains, did not violate OSHA regulations or any law renders the complaint insufficient as a matter of law.

When asserting Labor Law § 740 claims, "[t]he law requires that there be not only an actual, as opposed to a possible, violation, but also an actual and substantial present danger to the public health. Reasonable belief as a basis for protection under Labor Law § 740 will not suffice" (Remba v Federation Empl. & Guidance Serv., 149 AD2d 131, 135 [1st Dept 1989], affd 76 NY2d 801 [1990]; see also Webb-Weber v Community Action for Human Servs., Inc., 23 NY3d 448, 452 [2014] ["in order to *recover* under a Labor Law § 740 theory, the plaintiff has the burden of proving that an actual violation occurred, as opposed to merely establishing that the plaintiff possessed a reasonable belief that a violation occurred"]). The protection afforded by Labor Law § 740 (2) "is triggered only by a violation of a law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety" (Remba, 76 NY2d at 802).

However, "[t]he plain language of Labor Law § 740 (2) (a) does not impose any requirement that a plaintiff identify the specific 'law, rule or regulation' violated as part of a section 740 claim" (Webb-Weber, 23 NY3d at 452; Carillo v Stony Brook Univ., 119 AD3d 508, 509 [2d Dept 2014]).

Plaintiff counters that the OSHA Order was actually entered after the Hospital entered into a settlement with the Secretary of Labor, United States Department of Labor (Settlement Agreement), and that while the Settlement Agreement vacated

citations concerning disposal of rinsed tubing, the Hospital agreed to pay a fine for violations concerning the manner in which the tubing was rinsed by perfusionists pursuant to the "Procedures" in two categories of regulatory violations, the first consisting of "employees, including . . . perfusionists . . working in the Cardiac OR during surgery and perioperative environment cleaning were exposed to bloodborne pathogen hazards from splashes to the eye and face" in dereliction of required protocols, and the second concerning defendant's failure "to determine or implement an appropriate written schedule for cleaning and method of decontamination for the Cardiac OR that selected and communicated disinfectants". These citations, unlike the others, which related to the process, were not vacated and as a result the Hospital was assessed fines.

Taking the allegations in the light most favorable to plaintiff and after further review of the complaint, plaintiff broadly alleges her complaining to the Hospital not only of the disposal of the bioharzardous waste, but also about the manner in which the waste was disposed. As not all violations were vacated by OSHA, the court shall deny such branch of the motion (see Carillo, 119 AD3d at 509).

Labor Law § 741 Claim

Defendant argues that because plaintiff does not allege making any report concerning patient care, her Labor Law § 741

claim must fail as a matter of law. Here, the Hospital raises no new facts that justify its renewal motion at bar. Rather, the Hospital asserts that the court did not address the section 741 claim in its October 2015 decision. The court agrees that it did not explicitly consider the merits of this claim, and for the sake of clarity, will fully address the issue below.

Labor Law § 741, known as the "Healthcare Employees' Whistlblower Law, provides a prohibition against a "health care employer who penalizes employees because of complaints of employer violations" of a law, rule or regulation that adversely affects patient health care (see generally Labor Law § 741 [2]). "'A cause of action alleging a violation of Labor Law § 741 (2) differs from a cause of action alleging a violation of Labor Law § 740 (2) in that such a complaint is required to allege only a good faith, reasonable belief that there has been a violation of the applicable standards, rather than an actual violation" (Minogue v Good Samaritan Hosp., 100 AD3d 64, 70 [2d Dept 2012] [citation omitted]).

> "A complaint asserting a violation of Labor Law § 741 (2) (a) must nonetheless allege conduct that 'constitutes improper quality of patient care,' which is defined 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'"

(*id.*, quoting Labor Law § 741 [1] [d]).

> "'Improper quality of patient care' means, with respect to patient care, 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"

(Labor Law § 741 [1] [d]).

Most recently, the Second Department issued a decision in Von Maack v Wyckoff Hgts. Med. Ctr. (140 AD3d 1055, 1056 [2d Dept 2016]), wherein the plaintiff, a pharmacist, filed a Labor Law § 741 claim against the defendant claiming, "the defendant retaliated against her for objecting to hazardous and unsanitary conditions in the pharmacy," including improper storage of chemicals, use of an old ventilator, and leaks in the ceiling (Von Maack v Wyckoff Hgts. Med. Ctr., 43 Misc 3d 1206[A], NY Slip Op 50514[U] [Sup Ct, Kings County 2014]). The Second Department found that the plaintiff "sufficiently identified activities, policies, and practices in which the defendant allegedly engaged and which may have presented 'a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient'" (Von Maack, 140 AD3d at 1057, quoting Labor Law § 741 [1]).

Here, plaintiff alleges that during the course of her employment, she learned of the Hazardous Waste Project, which she

reasonably believed violated various US Department of Labor regulations, including 29 CFR 1910.1030, which governs the safe disposal of blood-contaminated and potentially infectious medical waste, creating a substantial and specific danger to the Hospital's patients and to public health and safety.

The Hospital's argument that plaintiff never made any report relating to patient care because her concerns related to Hospital procedures that followed the alleged completion of care in the form of medical procedures in which the heart-lung machines were used, is completely unpersuasive. Plaintiff alleges in her complaint that immediately after its initiation, she reported her concerns about the Hazardous Waste Project as seriously and dangerously deficient, clearly implicating patient care, to various members of Hospital management, including her supervisor, which is sufficient as a matter of law (see Blashka v DDS v New York Hotel Trades Council and Hotel Ass'n of New York City Health Center, 188 AD3d 503 [1st Dept. 2015]).

The court holds that plaintiff states a cause of action under Labor Law § 741 (2) by identifying specific regulations, in the context of this action, which, plaintiff reasonably believed, in good faith, to have been violated, regardless of whether the OSHA Order and Settlement Agreement found otherwise (Galbraith v Westchester County Health Care Corp., 113 AD3d 649, 650-651 [2d Dept 2014], citing Minogue, 100 AD3d at 70; Luiso v Northern

Westchester Hosp. Ctr., 65 AD3d 1296, 1298 [2d Dept 2009]).

The branch of the Hospital's motion pursuant to CPLR 3211 (a) (7) to dismiss the Labor Law § 741 (1) claim must be denied (Von Maack, 140 AD3d at 1057).

Cross Motion for Sanctions

Plaintiff cross-moves for sanctions pursuant to pursuant to 22 NYCRR 130-1.1 (c).

22 NYCRR 130-1.1 provides:

> "(a) The court, in its discretion, may award to any party or attorney . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct . . .
> (c) . . . conduct is frivolous if:
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false."

"In making that determination, the court must consider the circumstances under which the conduct took place and whether or not the conduct was continued when its lack of legal or factual basis was apparent [or] should have been apparent" (Finkelman v SBRE, LLC, 71 AD3d 1081, 1082 [2d Dept 2010] [internal quotation marks and citation omitted]).

The court finds that the filing of the motion to renew by

the Hospital does not rise to the level of frivolous conduct to warrant sanctions. The Hospital had a good faith belief that the motion had merit in law and fact based on the Settlement Agreement and OSHA's decision, which were rendered after the October 2015 decision of this court. Such circumstance is distinguishable from the facts in Russek v Dag Media Inc (47 AD3d 457 [1st Dept 2008]) which involved a pleading and amended pleading that were both without basis in law or fact, as well as being untimely interposed.

**ORDER**

Accordingly, it is

ORDERED that the motion by defendant The New York and Presbyterian Hospital, d/b/a New York-Presbyterian Hospital is denied in its entirety; and it is further

ORDERED that the cross motion by Marie Kilcullen for sanctions is denied.

DATED: August 24, 2017

ENTER:

J.S.C.
DEBRA A. JAMES