Heller v New York City Health & Hosps. Corp.
2018 NY Slip Op 33828(U)
September 14, 2018
Supreme Court, New York County
Docket Number: 108086/09
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 52

JEFFREY A. HELLER, R.P.N.,

Plaintiff,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("HHC"), MICHAEL A. STOCKER, M.D., individually and in his official capacity as Chairman of HHC, ALVIN D. ALVILES, individually and in his official capacity as President of HHC, CLAUDE RITMAN, individually and in his official capacity as Executive Director of an HHC Hospital, LEAH MATIAS, R.P.N., STANLEE RICHARDS, R.P.N., CECILIA LAVIDES, R.P.N., a/k/a CECILIA LIM-LAVIDES, R.P.N., and "John Does" one through ten,

Defendants.

Index No.: 108086/09

DECISION & ORDER

ALEXANDER M. TISCH, J.:

In this whistleblower action, plaintiff Jeffrey A. Heller, R.P.N. (Heller) sues his former employer, defendant New York City Health and Hospitals Corporation (HHC), and various individual employees of HHC, alleging that he was fired in retaliation for protesting inadequate staffing, in violation of Civil Service Law § 75-b and Labor Law § 741, and in violation of his free speech and due process rights under 42 USC § 1983 and the First and Fourteenth Amendments. Defendants move, pursuant to CPLR 3212 and Labor Law § 740 (7), for summary judgment dismissing the amended complaint. For the reasons stated herein, defendants' motion is granted.

Background

HHC is a public benefit corporation established to operate New York City's municipal hospitals and health centers, including Coler-Goldwater Special Hospital and Nursing Facility (the Hospital), where plaintiff worked for about three months from December 2008 to March 2009. Defendants Michael A. Stocker (Stocker), Alvin D. Aviles (Aviles), and Claude Ritman (Ritman), are, respectively, Chairman, President, and an Executive Director of HHC. Defendants Leah Matias, R.P.N. (Matias), Stanlee Richards, R.P.N. (Richards), and Cecilia Lavides, R.P.N. (Lavides), are, respectively, Chief Nursing Director, Deputy Director of Nursing, and Associate Director of Nursing at the Hospital.

Plaintiff, a registered nurse as well as a practicing attorney, was employed by HHC at the Hospital as a staff nurse from December 8, 2008 to March 4, 2009. Plaintiff was represented by the New York State Nurses Association (NYSNA or union), a labor union which had a collective bargaining agreement with HHC at all relevant times. *See* Contract, Ex. 24 to Affirmation of Bellantoni in Opposition to Defendants' Motion (Bellantoni Aff.); Staff Nurses Terms of Employment, Ex. 6 to Bellantoni Aff. Pursuant to the terms of his employment, plaintiff was subject to a one-year probationary period. *Id.*

Plaintiff testified that, when he was hired, he requested the "hardest work" and a daytime schedule (Deposition of Heller [Pl. Dep.], Ex. H to Piercey Affirmation in Support of Defendants' Motion [Piercey Aff.][1], at 25-26), and was assigned to a 7:30 a.m. to 4:00 p.m. shift on the C12, or Ventilator, Unit (C12 Unit or unit). Marie Georges (Georges), the head nurse on the C12 Unit during plaintiff's shift, was plaintiff's direct supervisor. Georges reported to

[1]All subsequent references to Plaintiff's Deposition are to Ex. H to Piercey Aff.

Abelardo Lucinario, the Assistant Director of Nursing (AND), and he reported to Lavides, the Associate Director of Nursing. Deposition of Cecilia Lavides (Lavides Dep.), Ex. R to Piercey Aff., at 54-55. The duties and responsibilities of nurses on the C12 Unit included caring for patients who were on ventilators by, among other things, administering medication, treating pressure ulcer wounds, and monitoring, caring for and suctioning patients' trach tubes and feeding tubes. Deposition of Marie Georges (Georges Dep.), Ex. I to Piercey Aff., at 33; Pl. Dep. at 27-28. The C12 Unit had 34 beds, 25 of which were designated for ventilator patients. Georges Dep., Ex. 5 to Bellantoni Aff., at 62; Lavides Dep., Ex. R to Piercey Aff., at 51-52.

For the first two or three weeks of his employment, plaintiff worked with and shadowed other "preceptor" nurses, and then was then given his own patients to care for; his workload started with five patients and was gradually increased over the following weeks. Georges Dep., Ex. J to Piercey Aff., at 135-138. Georges testified that within the first week that plaintiff was working on his own, she recognized that he needed help with time management. *Id.* at 140. He was, she testified, administering medication properly, "by the book," and doing "everything the way he was supposed to," but was having problems finishing his work on time. *Id.* at 146, 151-152.

According to plaintiff, he realized soon after he began working on the C12 Unit that staffing shortages made it impossible for nurses to timely perform their work according to Hospital protocols. Amended Verified Complaint, Ex. E to Piercey Aff., ¶¶ 45-46; Pl. Dep. at 30. In January 2009, plaintiff filed several Protest of Assignment forms (POAs), which the union provided to nurses "to alert HHC about matters pertinent to a nurses' work, duties, hours, conditions of employment." Complaint, ¶ 40; *see* Pl. Dep. at 60-61. Plaintiff filed three POAs,

on January 13, January 15, and January 29, 2009, which were signed by other nurses working with him on the C12 Unit, complaining that inadequate staffing and "redundant documentation requirements" made it impossible to both follow protocols and provide timely care during their shift. *See* POAs, Ex. K to Piercey Aff.; Pl. Dep. at 40, 51-52.

Georges acknowledged that she signed the three POAs, and that she had signed other POAs in the past. Georges Dep., Ex. J to Piercey Aff., at 171-172, 175-176, 180, 182. She explained that POAs were often filed at the beginning of a shift, when the unit was short-staffed, and more than twenty had been filed in the six months before plaintiff started working on the C12 unit. *Id.* at 171-172. She signed the POAs, she testified, because she wanted to support the nurses and she agreed with what was stated in them, although she did not agree that the C12 Unit needed nine nurses, as the January 13, 2009 POA stated. *Id.* at 176-177. According to Georges, five or six nurses were sufficient to handle the unit's workload. *Id.* at 179.

On January 30, 2009, after the POAs were filed, plaintiff attended a meeting with Richards and Lavides to discuss his work performance and, in particular, the time it took him to complete his tasks. *See* Memo, Ex. M to Piercey Aff. According to plaintiff, they asked him why he filed the POAs and told him that a ratio of six patients to one nurse was adequate. Pl. Dep. at 52. On February 2, 2009, Richards and Lavides also met with a union representative to discuss plaintiff's inability to complete his work in a timely manner. *See* Memo, Ex. N to Piercey Aff.; Deposition of Stanlee Richards (Richards Dep.), Ex. V to Piercey Aff., at 97-98.

On February 3, 2009, AND Lucinario wrote a memorandum to Lavides, in which he stated that plaintiff was not meeting expectations to complete his assigned tasks, particularly giving medication to patients, in the allotted time, despite efforts by Georges to lighten his

workload. *See* Lucinario Memo, Ex. O to Piercey Aff. He also noted that plaintiff had filed POAs asking for eight or nine nurses to be assigned to the unit, although he and Lavides told him that was excessive for the unit. *Id.*

Subsequently, on February 13, 2009, Georges, at Lucinario's request, completed a written evaluation of plaintiff. *See* Mid-Point Evaluation, Ex. P to Piercey Aff. She described him as "a caring nurse" and "a respectful staff" who "needs to prioritize his work in order to complete his daily assignment & to have time to attend to unexpected events." *Id.* The evaluation, covering the time period from when plaintiff started in the unit to date (Georges Dep., Ex. J to Piercey Aff., at 204), rated him as unsatisfactory in five of nine categories and gave him an overall performance rating of "unsatisfactory." Mid-Point Evaluation, Ex. P to Piercey Aff. At her deposition, Georges testified that plaintiff performed his work correctly, and followed policies and procedures "to the letter," which not all nurses did, but he was not able to complete his work within the necessary time frame. Georges Dep., Ex. 5 to Bellantoni Aff., at 164, 167-168. On February 24, 2009, Lavides wrote a "follow-up evaluation" of plaintiff, based on the "actual evaluation" done by Georges and Lucinario, stating that his performance had not improved and that his inability to finish providing 9:00 a.m. medication doses to six patients until 11:00 a.m.-12:00 p.m. was "considered medication error," and his inability to complete assigned documentation, and the unlikelihood of completing other tasks without assistance from other nurses, were unsatisfactory. She recommended termination. *See* Lavides Memo, Ex. Q to Piercey Aff. Shortly after, by letter dated March 3, 2009, plaintiff was notified that his employment was terminated effective March 4, 2009. *See* Termination Letter, Ex. F to Piercey Aff.

Plaintiff served a Notice of Claim on HHC in April 2009, and commenced this action in June 2009 in Supreme Court, New York County. Defendants removed the action to the United States District Court for the Southern District of New York, which, by order dated February 1, 2010, remanded the case to this court. Plaintiff then filed an Amended Verified Complaint (Complaint) in June 2010. Plaintiff does not dispute that he was unable to finish his work, including the administration of medicine, in the time allotted for the tasks. He claims, however, that the problem was inadequate staffing, which made it impossible for the nurses to provide proper patient care and endangered patient safety, and that his employment was terminated in retaliation for protesting this inadequate staffing on the C12 Unit. The complaint alleges four causes of action: that he was fired, in violation of 42 USC § 1983, for exercising his First Amendment free speech rights (first) and in violation of his property interest in continuing employment under the Fourteenth Amendment (second); and that he was retaliated against in violation of Civil Service Law § 75-b (third) and Labor Law § 741 (fourth).

Discussion

To prevail on a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, by submitting admissible evidence sufficient to demonstrate the absence of any material issues of fact. *See* CPLR 3212 (b); *Stonehill Capital Mgt. LLC v Bank of the West*, 28 NY3d 439, 448 (2016); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such showing has been made, to defeat summary judgment, the party opposing the motion must "establish the existence of material issues of fact which require a trial of the action," also by producing evidentiary proof in admissible form. *Alvarez*, 68 NY2d at 324 (1986); *see*

Zuckerman, 49 NY2d at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (*see Stonehill Capital Mgt. LLC*, 28 NY3d at 448; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 (1st Dept 2013). However, "the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist." *Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 (1st Dept 1983), *affd* 62 NY2d 686 (1984). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562.

At the outset, in opposition to defendants' motion, plaintiff acknowledges that as a probationary employee, he had no property interest in continued employment, and voluntarily withdraws the second cause of action for violation of 42 USC § 1983 based on the Fourteenth Amendment. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion (Pl. Memo in Opp.), at 22. Plaintiff also withdraws the third cause of action for violation of Civil Service Law § 75-b as against the individual defendants (*id.*), recognizing that Civil Service Law § 75-b "does not apply separately to individual public employees where the pertinent governmental entity is also sued." *Frank v State of New York, Off. of Mental Retardation & Dev. Disabilities*, 86 AD3d 183, 188 (3d Dept 2011).

As to the remaining causes of action, defendants move to dismiss the Civil Service Law § 75-b claim against HHC on the grounds that, by asserting a claim under Labor Law § 741, plaintiff has waived all other New York state law claims arising out of the alleged retaliatory

actions. Defendants further argue that plaintiff has not established the requisite elements of a whistleblower claim under either Civil Service Law § 75-b or Labor Law § 741, because plaintiff does not identify a policy, law, rule or regulation violated by the Hospital or HHC that resulted in improper patient care. In addition, defendants contend, plaintiff was terminated for separate and independent reasons, that is, that his performance was unsatisfactory. Defendants also argue that plaintiff's claim under 42 USC § 1983, that he was retaliated against for exercising his First Amendment rights, cannot survive because the POAs did not constitute speech made as a private person or speech on a matter of public concern.

Civil Service Law § 75-b, Labor Law § 741, and Election of Remedies

Civil Service Law § 75-b and Labor Law § 741, as well as Labor Law § 740, are known as whistleblower protection statutes, and, generally, "prohibit employers from taking retaliatory actions against their employees for disclosing wrongful activities by their employers." *Hanley v New York State Exec. Dep't. for Youth*, 182 AD2d 317, 320 (3d Dept 1992); *see Harisch v Goldberg*, 2016 WL 1181711, 2016 US Dist LEXIS 39494, *37 (SD NY 2016). Labor Law § 740 and Civil Service Law § 75-b, both originally enacted in 1984, differ chiefly in applying, respectively, to private sector employers and public sector employers. Thus, Labor Law § 740 provides protections to private sector whistleblowers, and "is not applicable to wrongful discharge claims against public employers" (*Matter of Yan Ping Xu v New York City Dept. of Health*, 77 AD3d 40, 48 n* [1st Dept 2010]); and Civil Service Law § 75-b provides comparable protections to public sector employees. *See Rodgers v Lenox Hill Hosp.*, 211 AD2d 248, 252 n 4 (1st Dept 1995). Labor Law § 741, often referred to as the Health Care Whistleblower Law, "applies more narrowly to employees of health care organizations[, whether public or private,]

who actually 'perform[ ] health care services.'" *Matter of Moynihan v New York City Health & Hosp. Corp.*, 120 AD3d 1029, 1030 (1st Dept 2014), citing Labor Law § 741 (1) (a); *see Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 89 (2008); *Minogue v Good Samaritan Hosp.*, 100 AD3d 64, 69 (2d Dept 2012).

Under Labor Law § 741 (4), "[a] health care employee may seek enforcement of this section pursuant to [Labor Law § 740 (4) (d)]." As the Court of Appeals has held, "rather than creating its own private right of action, Labor Law § 741 contemplates enforcement through a Labor Law § 740 (4) civil suit." *Reddington*, 11 NY3d at 89; *see Minogue*, 100 AD3d at 71. Civil Service Law § 75-b (3) (c) similarly provides that, unless a public employee is subject to a mandatory arbitration provision in a collective bargaining or other negotiated agreement, "the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law," codified as Labor Law § 740. *See Tipaldo v Lynn*, 26 NY3d 204, 213 (2015); *Frank*, 86 AD3d at 186; *Verdi v City of New York*, 306 F Supp 3d 532, 549 (SD NY 2018). The remedies available in Labor Law § 741 and Civil Service Law § 75-b actions are set out in Labor Law § 740 (5). *See Tipaldo*, 26 NY3d at 213.

As pertinent here, Labor Law § 740 (7) provides that "the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law." "Because a claim alleging a violation of Labor Law § 741 (2) is enforced pursuant to Labor Law § 740 (4) (d) (see Labor Law § 741 [4]), the same waiver is effected by the institution of a cause of action alleging a violation of Labor Law § 741 (2) (*see* Labor Law § 740 [7])."

Pipia v Nassau County, 34 AD3d 664, 667 (2d Dept 2006); *accord Minogue*, 100 AD3d at 72, 73; *see also Menghini v Neurological Surgery, P.C.*, 2016 WL 3034482, 2016 US Dist LEXIS 69196, *8 (ED NY 2016) (narrowly construing waiver of § 741 claim as it did § 740 waiver). Courts also have found that "Labor Law § 740 (7) . . . is incorporated into actions against public employers under Civil Service Law § 75-b (3) (c)." *Frank*, 86 AD3d 183, 187 (3d Dept 2011); *see also Catapano-Fox v City of New York*, 2015 WL 3630725, 2015 US Dist LEXIS 75875, *23-24 (SD NY 2015) (without deciding whether § 75-b action invokes § 740 election of remedies provision, court concludes that, under § 740 (7), § 75-b claim does not waive discrimination claims).

While courts continue to sculpt, and generally narrow, the scope of § 740(7)'s election-of-remedies provision (*see generally D'Antonio v Little Flower Children & Family Servs. of N.Y.*, 2018 WL1385897, 2018 US Dist LEXIS 44595, *14-16 [ED NY 2018]), "the First Department has found that the waiver provision in the statute does not apply to causes of action which are separate and independent from a retaliation cause of action." *Ruiz v Lenox Hill Hosp.*, 2016 WL 1301752, 2016 NY Misc LEXIS 1113, *11, 2016 NY Slip Op 30552(U) (citing cases), *affd in part and mod. in part* 146 AD3d 605 (1st Dept 2017); *see e.g. Demir v Sandoz Inc.*, 155 AD3d 464, 466 (1st Dept 2017) (discrimination claims under state human rights law not waived by § 740 claim); *Seung Won Lee v Woori Bank, N.Y. Agency*, 131 AD3d 273, 277-278 (1st Dept 2015) (sexual harassment and negligent supervision are independent claims not waived by whistleblower claim). Courts have noted that "[t]he narrow scope of the statutory right and remedy supports an equally narrow view of the waiver of rights that is attached to the Act" (*Collette v St. Luke's Roosevelt Hosp.*, 132 F Supp 2d 256, 267-268 [SD NY 2001]), and have

"observed that the purpose of the waiver is to prevent duplicative recovery, a policy that is not offended when redress is sought for injury under a claim that is distinct from a statutory cause of action predicated on wrongful termination." *Seung Won Lee*, 131 AD3d at 277, citing *Reddington*, 11 NY3d at 89, and *Collette*, 132 F Supp 2d at 267-268; *see also Haight v NYU Langone Med. Ctr.*, 2014 WL 2933190, 2014 US Dist LEXIS 88117 (SDNY 2014).

Further, the Court of Appeals, in *Reddington*, made clear that a Labor Law § 741 claim is not waived by the commencement of an action under § 740, reasoning that because "every section 741 claim relies on and incorporates section 740 for purposes of enforcement" (11 NY3d at 88), "no election of remedies is implicated when sections 741 and 740 are pleaded together, or section 741 is pleaded after a plaintiff has instituted a section 740 claim, because section 741 provides no independent remedy." *Id.* at 89. As the Court in *Reddington* also explained, "the plain language of section 741 (4) indicates that a claim under that provision necessarily involves section 740 (4) (d) and therefore section 740, to that extent, remains in the case, eliminating any notion of waiver." *Id.*

The dispute here involves a less clear issue, whether plaintiff's assertion of a claim under Labor Law § 741, incorporating § 740's election of remedies provision, precludes his claim under Civil Service Law § 75-b. This court, in a decision affirmed by the First Department on other grounds, held, without discussion, that the Labor Law § 740 (7) "'election of remedies' provision means that a plaintiff may not bring a claim under §741 via § 740 *and* under § 75-b." *King v New York City Health & Hosps. Corp.*, 2010 WL 10981898, 2010 NY Misc LEXIS 7001, *4, 2010 NY Slip Op 33967(U) (Sup Ct, NY County 2010), *affd* 85 AD3d 631 (1st Dept 2011); *see also Harisch*, 2016 US Dist LEXIS 39494, at *33 (§ 75-b claim waived by commencing § 740

action which was subsequently withdrawn in favor of § 75-b); *but see Fouche v St. Charles Hosp.*, 43 F Supp 3d 206 (ED NY 2014) (concurrently instituted claims under § 740 and § 75-b dismissed not on election of remedies grounds but because § 740 was time-barred and § 75-b not applicable to plaintiff who was not a public employee); *DiBiase v Barber*, 2008 WL 4455601, 2008 US Dist LEXIS 75664, *15 (ED NY 2008) (in action alleging § 740 and § 75-b claims, court dismissed § 740 as not applying to public employee, and considered § 75-b claim).

In a more recent decision, however, the First Department held, also without discussion, that "[t]he motion court erred in finding that, by commencing this action pursuant to Labor Law § 740, plaintiff waived his right to assert a retaliatory termination claim under Civil Service Law § 75-b." *Castro v City of New York*, 141 AD3d 456, 457 (1st Dept 2016), citing *Hanley*, 182 AD2d 317. Although defendants attempt to distinguish *Castro* by arguing that it involved a case in which a § 740 claim was withdrawn, courts consistently have found that it is the institution of an action under § 740 or § 741, not whether it continued or was withdrawn, that triggers the waiver provision. *See Reddington*, 11 NY3d at 87-88; *Bones v Prudential Fin., Inc.*, 54 AD3d 589, 589 (1st Dept 2008); *Pipia*, 34 AD3d at 666-667.

Civil Service Law § 75-b is the well-recognized "public employee counterpart" to Labor Law § 740. *Fouche*, 43 F Supp 3d at 212. It serves the same purpose and provides protections similar to Labor Law §§ 740 and 741, and, like § 741, depends on § 740 for its enforcement. In view of this and the reasoning in *Reddington* in analogous circumstances, and considering the inconsistent conclusions of courts in this Department and the absence of other New York decisions addressing the issue, the Court concludes that, as Civil Service Law § 75-b, like Labor Law § 741, "necessarily involves" Labor Law § 740 for its enforcement, plaintiff did not waive

his right to assert a claim under Civil Service Law § 75-b by making a claim under Labor Law § 741. *See Reddington*, 11 NY3d at 88, 89. As a practical matter, however, the court in *Reddington* emphasized, "as the entire point of section 740 (7)'s waiver provision is to prevent duplicative recovery, a plaintiff health care worker can only recover damages for a section 741/740 (4) violation (specific) *or* a section 740 [or section 75-b] violation (general) but *not* for both." 11 NY3d at 89 (emphasis in original).

Labor Law § 741 / Civil Service Law § 75-b

Turning to the substance of plaintiff's claims under Labor Law § 741 and Civil Service Law § 75-b, Labor Law § 741 (2) prohibits a health-care employer from retaliating against an employee who

> "(a) discloses, or threatens to disclose to a supervisor or to a public body 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 (b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care."

"Improper quality of patient care" is defined in the statute 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."

Labor Law § 741 (1) (d); *see Hutchinson v Kings County Hosp. Ctr.*, 139 AD3d 673, 676 (2d Dept 2016).

"[S]ection 741, which offers exceptional and specialized whistleblower protection over

and above the generalized protection afforded by section 740, 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.*, 11 NY 3d at 92-93; *see Matter of Moynihan*, 120 AD3d at 1042; *Geldzahler v New York Med. College*, 663 F Supp 2d 379, 391 (SD NY 2009). "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 (see Labor Law § 741 [2] [a], [b])." *Pipia*, 34 AD3d at 666; *see Ruiz*, 146 AD3d at 606; *Minogue*, 100 AD3d at 70; *Deshpande v TJH Med. Servs., P.C.*, 52 AD3d 648, 650 (2d Dept 2008).

"A complaint asserting a violation of Labor Law § 741 (2) (a) must nonetheless allege conduct that 'constitutes improper quality of patient care.'" *Pipia*, 34 AD3d at 666; *see Minogue*, 100 AD3d at 69-70; *Deshpande*, 52 AD3d at 650. That means that plaintiff must show conduct that violated, or that he reasonably believed violated, a law, rule or regulation and presented a substantial and specific danger to the public or a threat to a specific patient's health. The statute also provides the employer with an affirmative "defense that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section." Labor Law § 741 (5).

Civil Service Law § 75-b (2) (a) provides that

> "a public employer shall not dismiss or take disciplinary or other adverse personnel action against a public employee . . . because the employee discloses to a governmental body

> information: "(i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. 'Improper governmental action' shall mean any action taken by a public employer or employee . . . which is in violation of any federal, state or local law, rule or regulation."

To establish a claim under § 75-b, a plaintiff must show "[i] an adverse personnel action; [ii] disclosure of information to a governmental body (a) regarding a violation of a law, rule, or regulation that endangers public health or safety, or (b) which she reasonably believes constitutes an improper governmental action; and [iii] a causal connection between the disclosure and the adverse personnel action." *Catapano-Fox*, 2015 US Dist LEXIS 75875, at *27 (citations omitted); *see Ehrlich v Department of Educ. of the City of N.Y.*, 2013 WL 5958382, 2013 NY Misc LEXIS 5202, 2013 NY Slip Op 32875(U) (Sup Ct, NY County 2013). A plaintiff, further, must show that he was "terminated solely in retaliation for his purported whistleblowing disclosures." *Matter of Chamberlin v Jacobson*, 260 AD2d 317, 317 (1st Dept 1999); *see also Yan Ping Xu*, 77 AD3d at 47; *Matter of McDonnell v Lancaster*, 17 Misc 3d 1101(A), 851 NYS2d 58, 2007 NY Slip Op 51783(U) (Sup Ct, NY County 2007).

Plaintiff's claims under Labor Law § 741 and Civil Service Law § 75-b rest on his allegations that, during the time that he worked on the C12 Unit, the unit was understaffed and the inadequate staffing resulted in poor patient care and forced nurses to "cut corners" and make entries in patients' charts indicating that tasks had been performed when they were not actually completed. *See* Pl. Memo in Opp., at 4. This resulted, he alleges, in violations of the Public Health Law, the State Hospital Code, and HHC's own professional guidelines. *Id.*; Complaint, ¶

50. While neither Labor Law § 741 nor Civil Service Law § 75-b requires proof of an actual violation of law, rule or regulation, they do require a showing that defendants' conduct provided a reasonable basis to believe that there was such a violation.

Plaintiff identifies no provision of the Public Health Law or the State Hospital Code or Hospital guidelines that he reasonably believed was violated, and otherwise provides no support for his claim that the number of nurses assigned to the C12 Unit during his shift violated any rule, regulation, policy, or law. His conclusory assertions that staffing the C12 Unit with five or six nurses (see Pl. Dep. at 53-54), as opposed to eight or nine, as the POAs requested, constituted improper quality of patient care, are insufficient on this summary judgment motion to raise an issue of fact as to whether there was a reasonable basis for his belief that the staffing on the unit constituted improper quality of patient care. *Compare Blashka v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 126 AD3d 503 (1st Dept 2015) (summary judgment denied to defendant on § 741 claim, where plaintiff alleged he was fired for complaining that defendant failed to terminate a dentist with an untreated alcohol addiction, and showed that permitting a dentist to practice while intoxicated violated Education Law §§ 6509 [3]-[4] and Board of Regents Rule 29.1); *Doyle v Seton Health Sys., Inc.*, 28 Misc 3d 1221(A), 95 NYS2d 635, 2010 NY Slip Op 51424(U) (Sup Ct, Rensselaer County 2010) (on 3211 motion to dismiss, allegations that inadequate staffing in hospital nursery resulted in infants being left without supervision and that an unsupervised infant needing oxygen did not receive timely attention, sufficient to survive); *see also Von Maack v Wyckoff Hgts. Med. Ctr.*, 140 AD3d 1055, 1057 (2d Dept 2016) (pharmacist's specific allegations of unsafe conditions in pharmacy, such as cross contamination from keeping certain drugs together in same room, lack of ventilation and high

temperatures affecting medications, lack of screens or shields in pharmacy to protect pharmacists from exposure to hazardous vapors, pharmacists working without gloves, sufficient to survive 3211 motion to dismiss).

Plaintiff argues that he reasonably believed that the activities he complained about - inadequate staffing, consequent inability of all nurses to properly complete work, and filing of false records - amounted to improper quality of patient care, and his belief is supported by the POAs, and the fact that they were signed by other nurses, including Georges, who agreed with what was stated in them. The POAs protested insufficient staffing, based largely on plaintiff's inability to timely finish his work while following Hospital protocols "to the letter." They do not, contrary to plaintiff's argument, show that he raised concerns that the other nurses did not follow protocols "to the letter," and were unable to complete their work but falsely represented in patient records that they did. Rather, the POAs complain that there was "inadequate time for documentation" and that "redundant documentation requirements unrelated to patient safety" contributed to "mak[ing] it impossible to both observe all protocols and to provide timely care during our shift." POAs, Ex. K to Piercey Aff.

Plaintiff also contends that Georges' testimony supports his belief that there was too much work to be able to timely complete it when protocols were properly followed, and that other nurses were not doing tasks according to protocol. Georges testified that, soon after plaintiff started working on his own, she realized that he needed help with time management. Georges Dep., Ex. J to Piercey Aff., at 140. He did, she testified, administer medicine "by the book, the way it was supposed to be done" (*id.* at 146), and did his work correctly, in accordance with policies and procedures. Georges Dep., Ex. 5 to Bellantoni Aff., at 213-214. She testified

that he was a good worker, but he was slow (*id.* at 213), and there were things he could have done to speed up the process. Georges Dep., Ex. J to Piercey Aff., at 146-147. In performing his tasks, Georges said, he performed "to the letter" of the procedure manual. Georges Dep., Ex. 5 to Bellantoni Aff., at 167-168. Other nurses also complied with procedures and guidelines, she stated, and "might not go to the letter, but [took the] most important steps." *Id.* at 167. Georges' testimony thus does not support plaintiff's claim that other nurses were not following procedures or were not completing their work, and plaintiff submits no other evidence to show that any nurse or nurses did not complete their work or did not follow procedures. He also provides no evidence that other nurses' conduct created any specific or substantial danger to the public or patients.

To the extent that plaintiff also contends that adequate staffing requires a patient-to-nurse ratio of four-to-one, this claim arises from his understanding that "the California standard" is three to four patients per nurse, and his testimony that Georges told him that four patients per nurse was what the unit can handle. Pl. Dep. at 52. He, again, however, offers nothing more to show that there was a reasonable basis for believing that a ratio greater than four patients per nurse violated any law, rule or regulation in New York. Georges, further, testified that, generally, five or six nurses were adequate for the workload, the proper patient-to-nurse ratio depends on the type of patients each nurse has to see, and a four-to-one ratio did not necessarily result in a higher level of care. Georges Dep., Ex. J to Piercey Aff., at 179, 189-190. She did not agree that nine nurses were needed for 34 patients. Georges Dep., Ex. 5 to Bellantoni Aff., at 178.

Defendants, moreover, present evidence that the number of nurses assigned to the unit

met Hospital guidelines, was reviewed periodically by management, was approved by the Department of Health, and was adequate. Lavides testified that staffing protocol for the Hospital is created by the Department of Nursing and, in particular, the Director of Nursing, and staffing guidelines for the C12 Unit provide for one head nurse and five or six nurses during the daytime shift, depending on the number of patients. Lavides Dep., Ex. R to Piercey Aff., at 50-51, 132-133. The staffing protocol, which is specific to each HHC Hospital and each unit of the Hospital, is reviewed on a quarterly basis and is based on the type of patient that comes to the Hospital. *Id.* at 133-135. At times relevant to the complaint, Lavides testified, full staffing for the C12 Unit, when all beds were occupied, was six nurses. *Id.* at 137. She also testified that, during Department of Health re-accreditation processes, the Hospital presents the current staffing level and the current staffing requirement, including the nursing care hours required for the unit. *Id.* at 138-140. If the staffing levels are found inadequate, the Hospital would be cited and required to take corrective action, and the Hospital has never been cited for inadequate staffing. *Id.* at 140-141. Plaintiff acknowledges that, at a meeting with Lavides and Richards in January 2009, he was advised that six patients per nurse was adequate (Pl. Dep. at 52), and he presents nothing to refute the testimony of Lavides that the staffing met hospital guidelines.

As to plaintiff's allegations that the Hospital maintained a policy, as a result of the understaffing, of pressuring and requiring nurses to falsely certify that work was done, he claims that this policy violated the Board of Regents rules for professional conduct (8 NYCRR) §§ 29.1 (b) (6) and 29.2 (a) (3), as specifically made applicable to the nursing profession by §29.14; and Penal Law § 175.35. *See* Complaint, ¶¶ 47-49. Rules 29.1 (b) (6) and 29.2 (a) (3) provide, in relevant part, respectively, that it is unprofessional nursing conduct to willfully make or file a

false report or induce another person to do so, or to fail to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. Complaint, ¶ ¶ 47-48. Penal Law § 175.35 (1) makes it a crime for a person to file a written instrument with a public office, public servant, public authority or public benefit corporation, knowing that it "contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state."

Although plaintiff claims that other nurses on the unit wrote up false patient records, which he refused to do, he offers no evidence, documentary or testamentary, to show which nurses falsified records and when, what records were falsified, or what information in such records was false. Nor does plaintiff show how any information in the patient records created a substantial and specific danger to the public health or a significant threat to the health of a specific patient. *See Mokrue v Comprehensive Care Mgt. Corp.*, 2013 WL 2282854, 2013 NY Misc LEXIS 2137, *9, 2013 NY Slip Op 31086(U) (Sup Ct, NY County 2013) ("any misinformation which may make its way into a patient's file is not actionable as a substantial danger to the public health and safety"); *see also Peace v KRNH, Inc.*, 12 AD3d 914 (3d Dept 2004) (conduct of respiratory therapist, who allegedly falsely documented results of tests that were never performed on patient, did not show danger to public health and safety or threat to patient who suffered no adverse consequences).

For the above reasons, plaintiff's causes of action alleging violations of Labor Law § 741 and Civil Service Law § 75-b are dismissed. The Court, therefore, does not reach defendants' alternate grounds for dismissing these causes of action.

42 USC § 1983 First Amendment Claim

"A plaintiff asserting a First Amendment retaliation claim must establish that: (1) his [or her] speech or conduct was protected by the First Amendment; (2) the defendant took adverse action against him [or her]; and (3) there was a causal connection between this adverse action and the protected speech." *Eyshinskiy v Kendall*, 692 Fed Appx 677, 677-678 (2d Cir 2017), quoting *Matthews v City of New York*, 779 F3d 167, 172 (2d Cir 2015); *see Massaro v New York City Dept. of Educ.*, 481 Fed Appx 653, 655 (2d Cir 2012). "To establish a causal connection, a plaintiff must demonstrate that the speech was a substantial or motivating factor for the adverse employment action." *Shuh v Westchester Cmty. Coll.*, 556 F Supp 2d 227, (SD NY 2008), citing *Burkybile v Board of Educ. of Hastings-On-Hudson Union Free Sch. Dist.*, 411 F3d 306, 313 (2d Cir 2005), citing *Morris v Lindau*, 196 F3d 102, 110 (2d Cir 1999).

"The issue of whether certain speech is protected by the First Amendment is one of law for the court." *Ezekwo v New York City Health & Hosps. Corp.*, 940 F2d 775, 781 (2d Cir 1991), citing *Connick v Myers*, 461 US 138, 148 n 7 (1983); *see Airday v City of New York*, 2018 WL 2170295, 2018 US Dist LEXIS 79672, *6 (SD NY 2018). In determining whether a public employee's speech is constitutionally protected, the court must first consider whether the employee spoke as a citizen rather than as an employee on a matter of public concern. *See Garcetti v Ceballos*, 547 US 410, 418 (2006); *Eyshinskiy*, 692 Fed Appx at 678; *Massaro*, 481 Fed Appx at 655. "Although the boundaries of what constitutes speech on matters of public concern are not well defined, . . . [the U.S. Supreme] Court has said that speech is of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of general interest and of value and concern

to the public.'" *Snyder v Phelps*, 562 US 443, 444 (2011), quoting *Connick*, 461 US at 146 and *City of San Diego v Roe*, 543 US 77, 83-84 (2004); *see Kiernan v Town of Southampton*, 2018 WL 2251633, 2018 US App LEXIS 12777 (2d Cir 2018); *Singer v Ferro*, 711 F3d 334, 339 (2d Cir 2013).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 US at 147-148; *see* ; *Singer*, 711 F3d at 339; *Ruotolo v City of New York*, 514 F3d 184, 189 (2d Cir 2008). Courts also consider "'whether the speech was calculated to redress personal grievances or whether it had a broader public purpose.'" *Kiernan*, 2018 US App LEXIS 12777, at *5-6, quoting *Singer*, 711 F3d at 339; *see Ruotolo*, 514 F3d at 189. Generally, speech related to "'an employee's dissatisfaction with the conditions of his employment[ ] does not pertain to a matter of public concern.'" *Portelos v Hill*, 719 Fed Appx 37, 40 (2d Cir 2017), quoting *Sousa v Roque*, 578 F3d 164, 174 (2d Cir 2009); and "'mere employee grievances do not qualify as matters of public concern.'" *Norton v Breslin*, 565 Fed Appx 31, 33 (2d Cir 2014) (citation omitted); *see also Carpiniello v Hall*,, 2010 WL 987022, 2010 US Dist LEXIS 143558, *19 (SD NY 2010). While the motive of the employee in making the statement "may be one factor" in determining whether speech addresses a matter of public concern, motive "is not, standing alone, dispositive or conclusive." *Sousa*, 578 F3d at 175; *see Gusler v City of Long Beach*, 823 F Supp 2d 98, 124 (ED NY 2011).

As to whether a public employee speaks as a citizen or as an employee, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," and their speech is not constitutionally protected.

Garcetti, 547 US at 421; *see Weintraub v Board of Educ. of City Sch. Dist. of City of N.Y.*, 593 F3d 196, 201 (2d Cir 2010), *cert den* 562 US 995 (2010); *Airday*, 2018 US Dist LEXIS 79672, at *62; *Castro v County of Nassau*, 739 F Supp 2d 153, 179 (ED NY 2011). "This is the case even when the subject of an employee's speech is a matter of public concern." *Ross v Breslin*, 693 F3d 300, 305 (2d Cir 2012); *see Norton v New York State Dept. of Correctional Servs.*, 2012 WL 5873644, 2012 US Dist LEXIS 166586, *15 (SD NY 2012), *affd sub nom Norton v Breslin*, 565 Fed Appx 31 (2d Cir 2014); *Anemone v Metropolitan Transp. Auth.*, 629 F3d 97, 115-116 (2d Cir 2011).

"[S]peech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description.'" *Weintraub*, 593 F3d at 203; *see Ross*, 693 F3d at 305; *Norton* , 2012 US Dist LEXIS 166586, at *15-16. "Rather, where the speech at issue 'owes its existence to a public employee's professional responsibilities,' it can properly be said to have been made pursuant to that party's official duties." *Looney v Black*, 702 F3d 701, 710-711 (2d Cir 2012) , quoting *Garcetti*, 547 US at 421-422 and citing *Ross*, 693 F3d at 308; *see Williams v Board of Educ.*, 519 Fed Appx 18, 19 (2d Cir 2013); *Weintraub*, 593 F3d at 201. As courts have reasoned, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 US at 421-22; *see Ross*, 693 F3d at 305.

"The inquiry into whether a public employee is speaking pursuant to her official duties is not susceptible to a bright-line rule. Courts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two. Other contextual factors, such as whether the complaint was also conveyed to the public, may properly influence a

court's decision." *Ross*, 693 F3d at 306, citing *Weintraub*, 593 F3d at 201-202, 205; *see also Castro*, 739 F Supp 2d at 179. Thus, to determine whether a plaintiff spoke as a citizen or as an employee, courts consider both whether the speech was made "in furtherance of the execution of . . . [plaintiff's] core duties" and whether the form of the speech had a "relevant citizen analogue," that is, a similar "form or channel of discourse available to non-employee citizens." *Weintraub*, 593 F3d at 203, 204; *see Matthews*, 779 F3d at 173; *Flynn v New York State Dept. of Corr. & Cmty. Supervision*, 2018 WL 2041713, 2018 US Dist LEXIS 72277 (SD NY April 30, 2018). "Although the lack of a citizen analogue is 'not dispositive'. . . , it does bear on the perspective of the speaker---whether the public employee is speaking as a citizen." *Weintraub*, 593 F3d at 204 (citations omitted); *see Montero v City of Yonkers*, 890 F3d 386, 397-398 (2d Cir 2018); *Harisch*, 2016 US Dist LEXIS 39394, at *18. Ultimately, courts have emphasized, "the inquiry into whether speech was made pursuant to an employee's official duties is a practical one, focused on whether the speech was part-and-parcel of his concerns about his ability to properly execute his duties." *Ross*, 693 F3d at 305-306 (internal quotation marks and citations omitted); *see Garcetti*, 547 US at 424; *Montero*, 890 F3d at 398; *Matthews*, 779 F3d at 173; *Weintraub*, 593 F3d at 202, 203.

In this case, plaintiff alleges that he was retaliated against, in violation of his First Amendment rights, for speaking in three "Protests of Assignment" about inadequate staffing on the C12 Unit, which he claims created a potential danger for the patients on the unit. In the three POAs that plaintiff, together with five or six other nurses, submitted to Hospital management, he complained that the "case load [was] too high and impedes safe care," and there was an "inadequate number of qualified staff" and "inadequate time for documentation." *See* POAs, Ex.

K to Piercey Aff. In additional comments in the POAs, he stated that nearly every patient on the unit "requires tens of meds. treatments and procedures" during the day shift, and "[r]edundant documentation requirements unrelated to patient safety, combined with patient census and acuity, make it impossible to both observe all protocols and to provide timely care." *Id.* The POAs indicated that, in one instance, there were seven nurses on duty for 34 patients, and nine were needed; and in two instances, there were six nurses on duty for 31 or 32 patients, and eight were needed. *Id.*

Plaintiff alleges that he filed the POAs "as mandated by HHC's Principles of Professional Conduct, and in compliance with HHC's collective bargaining agreement with NYSNA" (Complaint, ¶ 51), and that the POA forms were provided by NYSNA to its members to "alert HHC about matters pertinent to a nurse's work, duties, hours, conditions of employment, and the like." *Id.*, ¶ 40. Pl. Dep. at 60-61. Under HHC policy, he testified, he was "duty-bound to speak up." Pl. Dep. at 42. He also alleges that, "[a]s a Registered Professional Nurse, plaintiff had a professional duty to notify the Hospital that its policies and practices compromised patient safety." Complaint, ¶ 53. By signing the POAs, he also confirmed that, "as a registered professional nurse . . . responsible and accountable to my clients . . . I notified you that, in my professional judgment, today's assignment is unsafe and places my clients at risk." POAs, Ex. K to Piercey Aff.

Although plaintiff asserts that filing POAs was not part of his job description or one of his duties, by his own representations he filed complaints because he was "duty-bound" to do so, as a professional registered nurse whose responsibilities included caring for the patients on the C12 Unit. See POAs, Complaint, ¶ 53; Pl. Dep. at 42, 60-61. Plaintiff's complaints in the

POAs, prompted by his inability to complete his work during his shift, and requesting additional nursing staff for his unit, clearly were "part-and-parcel of his concerns about his ability to properly execute his duties." *Weintraub*, 593 F3d at 203. Further, plaintiff's speech, which "owed its existence to [his] job duties and was made in furtherance of those duties" (*Ross*, 693 F3d at 308; *see also Looney*, 702 F3d at 713), essentially "took the form of an employee grievance, for which there is no relevant civilian analogue." *Weintraub*, 593 F3d at 203; *see also Jackler v Byrne*, 658 F3d 225, 237-238 (2d Cir 2011). The POAs, internal communications filed pursuant to union-provided forms and procedures, were "not a form or channel of discourse available to non-employee citizens." *Weintraub*, 593 F3d at 204.

His assertions that inadequate staffing was affecting the quality of patient care, absent any details, specifics, or evidence, also "fall short of stating a matter of public concern." *Airday*, 2018 US Dist LEXIS 79672, at *66. Even if, however, the issue of nurse staffing could be considered a matter of public concern, considering the context and the content of plaintiff's speech as a whole, he was speaking as an employee, not as a citizen, and the First Amendment does not protect his speech. Plaintiff's first cause of action for violation of his First Amendment rights, therefore, is dismissed.

Accordingly, it is

ORDERED that defendants' motion is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 14, 2018

Alexander M. Tisch, A.J.S.C.