SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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INDEX NO. 159355/2015

RAJENDRA SHAH

MOTION DATE 02/28/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

NEW YORK PRESBYTERIAN HOSPITAL,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Rajendra N. Shah, the former director of facilities operations at the Weill Cornell Medical Center (WCMC) of defendant New York Presbyterian Hospital (defendant or the hospital), brings this action against defendant for retaliatory termination in violation of Labor Law § 740 (known as the Whistleblower Law), premised on claims that his employment was terminated because of his threats to report several alleged code violations to his supervisor's superiors. Defendant now moves pursuant to CPLR 3212, for summary judgment dismissing the complaint on the grounds that the Whistleblower Law does not apply to plaintiff, and that plaintiff was terminated for legitimate reasons.

BACKGROUND

On August 25, 2014, plaintiff, a professional engineer, was hired by defendant on a probationary basis to be the Director of Facilities Operations at WCMC, in Manhattan. His

duties included overseeing 120 maintenance employees who were responsible for the overall maintenance of WCMC's campus.

When he was hired, plaintiff's direct supervisor was Joseph D'Angelo, the vice president of facilities management. In December 2014, as part of a reorganization effort at WCMC, D'Angelo was replaced by Joseph Lorino, who took over as the new vice president of facilities management.

On March 2, 2015, Lorino prepared a "Performance Evaluation" (the evaluation) for plaintiff, identifying several areas where plaintiff was "[s]till developing or did not achieve expectations, improvement needed" (Cesaratto Affirmation, exhibit D). On March 13, 2015, Lorino placed plaintiff on a "Work Improvement Plan," (the plan), listing ways in which plaintiff could improve the issues identified in the evaluation (*id.*, exhibit E). On July 8, 2015, plaintiff was terminated from his position, due to continued poor performance.

Plaintiff alleges that plaintiff's grade on the evaluation, Lorino's issuance of the plan and, ultimately, his termination were due, not to poor performance, but to his repeated complaints about three alleged violations of codes, rules or regulations at WCMC, and his specific warning to Lorino on July 7, 2015 that, because the violations persisted despite his complaints to Lorino, he would report the violations to Lorino's supervisors and to the Hospital's CEO.

Specifically, plaintiff raised with Lorino three ongoing issues that he believed posed a danger to patient safety: (a) a nurse call system, sometimes referred to as pillow speakers (the speakers), that needed regular maintenance; (b) nitrogen powered operating room booms that leaked and needed regular maintenance (the booms); and (c) the installation of partition walls, known as verticalizations, in WCMC's emergency department (the partitions) (collectively, the issues).

Plaintiff points to a series of email correspondences where he identified the issues. Specifically, as borne out by plaintiff's testimony and documents presented during his deposition, as early as December 31, 2014, plaintiff had emailed Lorino regarding assistance with the "nurse call system parts and repairs" and the "OR med. gas column nitrogen leak repairs" (Kaiser Affirmation, exhibit H). Plaintiff also emailed Lorino about the booms on several other occasions (*id.*, exhibit I [April 3, 2015 agenda/email regarding, *inter alia*, the Booms]; exhibit K [June 29, 2015 email regarding ongoing issues with the booms]; exhibit L [April 15, 2015 through April 22, 2015 email chain regarding repairs on several booms]).

On one occasion, plaintiff asked Lorino whether he should "make the OR aware of [leaking Booms] and consequences that brake on booms may not work . . ." (*id.*, exhibit Q [April 3, 2015 email chain]). Lorino, in response, emailed Leo Bodden, the vice president of the Bio-Engineering department, stating "[t]his has become not only wasteful but a dangerous situation for our patients and staff" (*id.*). In addition, on January 6, 2015 plaintiff advised his superiors that the newly installed partitions may not have been compliant with the "Healthcare Facilities Guideline 2010" (*id.*, exhibit P).

According to plaintiff, the issues persisted, despite his warnings and complaints. In addition, plaintiff testified that shortly after he first brought up the issues, Lorino and other senior staff members began to treat plaintiff in a hostile manner. Plaintiff stated that his poor evaluation, and his placement on the plan, were solely a result of his warnings and complaints about the Issues and not due to any poor performance on his own part. Plaintiff testified that, ultimately, at a July 7, 2015 meeting with Lorino and several other senior staff members, he threatened to report the Issues to "Dr. Kelly," the CEO of WCMC (plaintiff's tr at 178). The next day, plaintiff was fired.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dep't 2011], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O'Brien v. Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Procedural Issues

Plaintiff's initial complaint pleaded a whistleblower claim pursuant to Labor Law § 741. Section 741, which incorporates and relies upon several sections of section 740, applies only to employees who provide health care services. In a prior motion, defendant moved to dismiss the complaint on the ground that plaintiff did not provide health care services. Plaintiff then cross-moved to amend the complaint to remove the section 741 claim and replace it with the current section 740 claim. By decision and order, dated May 24, 2016 (the prior order), defendant's motion was denied, and plaintiff's cross-motion was granted. Plaintiff then filed his amended complaint on June 9, 2016 alleging one count of wrongful termination, pursuant to Labor Law § 740.

Defendant now argues that Labor Law § 740's one-year statute of limitations prevents plaintiff from raising or relying on any events that occurred prior to May 24, 2015 – one year before the prior order's date.

Section 740 (4) (a) provides, in pertinent part, the following:

> "An employee who has been the subject of a retaliatory personnel action in violation of this section may institute a civil action . . . within one year after the alleged retaliatory personnel action was taken."

Here, plaintiff's whistleblower claim is based on his July 8, 2015 termination. Therefore, pursuant to section 740 (4) (a), plaintiff had until July 8, 2016 to bring his section 740 whistleblower claim. The amended complaint was filed on June 9, 2016. Accordingly, plaintiff's section 740 claim is timely (*see e.g.*, *Demir v Sandoz Inc.*, 155 AD3d 464 [1st Dept 2017]).

To the extent that defendant argues that plaintiff is time barred from referring to events that occurred, or documents that were created prior to May 24, 2015, defendant provides no case law evidencing that section 740's statute of limitations in any way bars the use of such evidence.

The Retaliation Claim

The Whistleblower Law provides the following, in pertinent part:

> "An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:
>
> > (a) 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]).

Section 740 prohibits retaliatory personnel actions "against an employee who undertakes to disclose conduct in violation of any law or regulation, who furnishes information to an investigative body in regard to such activities or who refuses to participate in such activity"

(*Seung Won Lee v Woori Bank, N.Y. Agency,* 131 AD3d 273, 277 [1st Dept 2015]). The statute's goal is to encourage employees "to report hazards to supervisors and, if necessary, to public authorities, with the intended effect of offsetting the frequent tendency of layers within organizations to screen out information which might cause embarrassment if it reached the top of the organization or the outside" (*Rodgers v Lenox Hill Hosp.*, 211 AD2d 248, 251 [1st Dept 1995] [internal quotation marks and citations omitted]). That said, "[t]he provisions of Labor Law § 740 regarding retaliatory discharge are to be strictly construed" (*Cotrone v Consolidated Edison Co. of N.Y., Inc.,* 50 AD3d 354, 354 [1st Dept 2008]). To that extent, courts have held that the protections of § 740 are "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" (*Villarin v Rabbi Haskel Lookstein School*, 96 AD3d 1, 5 [1st Dept 2012]; *Remba v Federation Empl. & Guidance Serv.*, 76 NY2d 801, 802 [1990]). Therefore, "[i]n order to recover under a Labor Law § 704 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" (*Webb-Weber v Community Action for Human Servs., Inc.,* 23 NY3d 448, 452 [2014]; *see also Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 288 AD2d 350, 350 [2d Dept 2001] citing *Bordell v General Elec. Co.,* 88 NY2d 869, 871 [1996] ["[t]o sustain a cause of action to recover damages under Labor Law § 740 . . . an employee must, *inter alia*, plead and prove that the employer engaged in an activity, policy or practice that constituted an actual violation of law, rule or regulation]). "[M]ere speculation" of a violation is insufficient (*Cotrone,* 50 AD3d at 355, citing *Nadkarni v North Short-Long Is. Jewish Health Sys.*, 21 AD3d, 354, 355 [2d Dept, 2005]). Accordingly, the threshold issue that must be determined is whether the issues that plaintiff brought to Lorino's attention constitute actual violations of a law, rule or regulation and,

if so, whether any of those violations constitute a "substantial and specific danger to the public health and safety" (Labor Law § 740 [2] [a]). Absent such a determination, section 740 would not apply to plaintiff, in the first instance.

Additional Facts Relevant to This Issue

In his affidavit, submitted in opposition to defendant's motion, plaintiff stated that he "made repeated complaints to Mr. Lorino and other management staff, concerning health and safety issues [at WCMC] that needed immediate attention, as patient safety . . . [was] in jeopardy" (Shah Aff, paragraph 3).

Plaintiff also stated that the partitions, the booms and the speaker maintenance issues are "violations of Department of Health, Joint Commission, and HIPPA, rules and regulations" (*id.*, at 4).

The Partitions

Defendants have come forward with sufficient evidence to establish that, though there were initial worries regarding the partitions, after they investigated, the Partitions were adjusted to be code compliant (Lorino tr at 76-77 ["the panels were put up to the ceiling, which blocked the pattern of the sprinkler system. So, we immediately asked that they be cut down to a point where it didn't impede on the sprinklers"]).

Plaintiff argues that the partitions continue to violate several provisions of the National Fire Prevention Agency's (NFPA) "Life Safety Code 101" (NFPA 101) (select portions of which are annexed to plaintiff's affidavit, exhibit D). Plaintiff presents highlighted excerpts from NFPA 101, which, without additional support, he opines were violated. Those sections include the following:

> "19.1.6.4 Interior nonbearing walls in buildings of Type 1 or Type II construction shall be constructed of noncombustible or limited-combustible materials . . .
>
> "19.2 Means of Egress Requirements
>
> > "19.2.1 General. Every aisle, passageway, corridor, exit discharge, exit location and access shall be in accordance with Chapter 7 . . .[1]
>
> "4.6.11 Change of Use or Occupancy Classification. In any building or structure, whether or not a physical alteration is needed, a change from one use or occupancy classification to another shall comply with 4.6.7"[2]

(Plaintiff's affidavit, exhibit D).

Notably, plaintiff does not explain or provide any evidence establishing that the Partitions actually violated the cited provisions (*Bordell v General Elec. Co.*, 88 NY2d at 871 (where there is "no proof of an actual violation . . . plaintiff's Labor Law § 740 claims are untenable and were properly dismissed"). There is no evidence in the record (1) that the partitions' materials were combustible in violation of section 19.1.6.4, (2) that the partitions interfered with a means of egress at the WCMC campus in violation of section 19.2.1, or (3) that any portion of the WCMC underwent a change of use or occupancy. In addition, there is no evidence in the record establishing that plaintiff ever "disclose[d] or threatened to disclose" issues regarding these cited provisions to Lorino or any other supervisor (Labor Law § 740 [2] [a]).

Plaintiff also argues that the partitions violated the Health Insurance Portability and Accountability Act (HIPAA), which provides privacy standards to protect patient medical records and health information. However, a complaint "related to the privacy of confidential information . . . cannot satisfy the element of a threat to public health and safety" (*Tomo v*

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[1] Plaintiff does not annex "Chapter 7" of the NFPA 101.
[2] Plaintiff does not annex section 4.6.7 of the NFPA 101.

Episcopal Health Services, Inc., 85 AD3d 766, 768 [2d Dept 2011]; *Easterson v Long Is. Jewish Med. Ctr.*, 156 AD2d 636, 637 [2d Dept 1989] [alleged improper disclosure of medical records "did not threaten the health or safety of the public-at-large").

Accordingly, section 740 does not apply to plaintiff's claim regarding the partitions.

The Booms

Essentially, the hospital argues that the leaks in the booms are nothing more than run-of-the-mill ongoing maintenance issues, of the type handled on a day to day basis at a large hospital facility, and that the booms were maintained and repaired, as needed, in the ordinary course of operations at the facility. In support of this position, the hospital puts forward the affidavit of Brian Reilly, the plumbing supervisor at WCMC. Reilly avers that he "personally handled the orders for the refilling of the nitrogen gas, as well as arranged the repairs to the connections when needed" and that "[r]epairs were promptly made as needed, including through the use of outside contractors" (Reilly affidavit, ¶ 4). Reilly's statement is supported by the record (see Kaiser affirmation, exhibits G [email regarding scheduling repairs on a boom] K [email regarding inspection and repair of a leaking boom]; L [email regarding scheduling a technician for boom repairs]; M [purchase order regarding leaking boom and repairs]; N [email regarding inspection and scheduled repairs on a boom]; Q [email regarding identifying a leak in a boom and prior repairs]; Cesaratto reply aff, exhibit CC [email regarding inspection and maintenance of nitrogen levels in a boom, and scheduling of repairs]).

In opposition, plaintiff raises, for the first time, that the hospital failed to have "written policies and procedures" regarding maintenance of "safety controls" in violation of section 405.12 of the New York State Department of Health regulations (10 NYCRR 405.12). However, the record is devoid of any testimony or evidentiary proof that plaintiff raised complaints about

the hospital's purported lack of written policies and procedures, or that plaintiff ever disclosed or threatened to disclose this issue. Further, plaintiff has not put forth any evidence to establish that the hospital's purported failure to keep written inspection records presents a substantial or specific danger to the public health and safety. A statement that a violation of a law, rule or regulation "constitute[s] a substantial and specific danger to public health and safety, without any supporting facts, is legally deficient and will not support a cause of action" (*Remba v Federation Empl. and Guidance Serv.*, 149 AD2d 131, 138 [1st Dept 1989], *affd* 76 NY2d 801 [1990]).

Next, plaintiff argues that the hospital's failure to maintain the booms violated multiple sections of the NFPA's "Health Care Facilities Code" (NFPA 99). This argument is unavailing. Plaintiff's claims that the hospital violated sections 5.1.12.2.3 ("Initial Pressure Test")[3] and 5.1.12.2.6 ("Standing Pressure Test for Positive Pressure Medical Gas Piping")[4] of NFPA 99 are unsupported by any evidence that plaintiff ever complained, disclosed, or threatened to disclose that the hospital had failed to perform an "Initial Pressure Test" or a "Standing Pressure Test" as defined by these provisions, or that those specific tests discovered leaks that the hospital did not repair. In addition, the record contains no evidence supporting plaintiff's uncorroborated assertion that these tests had not been performed, or that the lack of such performance was a substantial and specific danger to the public (*Remba*, 149 AD2d at 138).

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[3] The specific section plaintiff identifies as being violated sets forth the following: "Each section of the piping in medical gas and vacuum systems shall be pressure tested" (NFPA 99, § 5.1.12.2.3.1).

[4] The specific section plaintiff identifies as being violated sets forth the following: "Leaks, if any, shall be located, repaired (if permitted) or replaced (if required), and retested" (NFPA 99, § 5.1.12.2.6.6).

For the same reason, plaintiff's argument that the hospital violated sections 5.1.14.2.2 ("Maintenance Programs")[5] and section 5.1.15 ("Category 1 Maintenance)[6] of NFPA 99 are also unpersuasive. The record contains no evidence that plaintiff raised concerns about a lack of scheduled or routine maintenance. In fact, as noted above, the record contains ample evidence that ongoing maintenance, testing and repairs of the booms were performed at the WCMC campus (Kaiser affirmation, exhibits G, K, L, M, Q; Cesaratto affirmation, exhibit CC).

Finally, plaintiff's reliance on multiple sections of the 2014 "Guidelines for Design and Construction of Hospitals and Outpatient Facilities" and the "Comprehensive Accreditation Manual – Hospital" (CAMH) (plaintiff's affidavit, exhibit B) are also unavailing for the same reasons discussed above.

The Speakers

Defendant argues that the issues with the speakers, much like the issues with the booms, was a general maintenance issue that was repaired on an ongoing basis – when a patient informed them that a speaker was not working properly, it would be replaced, and the malfunctioning unit would be repaired.

Plaintiff argues that the malfunctioning speakers violated several NFPA and CAMH directives. Initially, it is unclear whether the CAMH – a manual that sets forth guidelines on hospital accreditation – is a law, rule or regulation, which, if violated, would trigger the

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[5] The specific section plaintiff identifies sets forth the following, in pertinent part: "Maintenance Schedules. Scheduled maintenance for equipment . . . shall be established through the risk assessment of the facility . . ." (NFPA 99, § 5.1.14.2.4).

[6] "Facilities shall have a routine maintenance program for their piped medical gas and vacuum systems" (NFPA 99, § 5.1.15).

protections of Labor Law § 740. Assuming, *arguendo*, that it is, plaintiff's arguments are, nevertheless, unavailing.

As with the booms, plaintiff cites to several provisions dealing with the hospital's purported failure to have written maintenance procedures and maintenance records. There is no evidence of such a lack of written procedures or records. In addition, plaintiff provides no evidence establishing that a failure to maintain written maintenance records impacts the public safety (*Remba*, 149 AD2d at 138).

Plaintiff also cites to CAMH accreditation requirements that require a hospital to provide emergency power "within 10 seconds" to all emergency communication systems and to any equipment that could cause harm if they fail (plaintiff's affidavit, exhibit C, CAMH, p EC-30). Again, there is no evidence in the record that the hospital violated these requirements, or that plaintiff ever complained about a lack of adequate emergency power. Further, there is no evidence, aside from plaintiff's own assertion, that the speakers are governed by this requirement.

Finally, to the extent that plaintiff argues that he held a good faith belief that the Issues constituted violations and, therefore, he is protected under section 740, "[a]n employee's good faith, reasonable belief that a violation occurred is insufficient" to sustain such a claim (*Nadkarni v North Shore-Long Is. Jewish Health Sys,* 21 AD3d 354, 355 [2d Dept 2005]).

Given the foregoing, defendant has established that the issues did not violate any law, rule or regulation which created and presented a substantial and specific danger to the public health or safety and, therefore, plaintiff's action does not fall within the scope of Labor Law § 740. In opposition, plaintiff did not raise a triable issue of fact as to the existence of an actual violation of a law, rule or regulation, necessary to sustain a claim under Labor Law § 740 (*see*

Lukose v Long Is. Med. Diagnostic Imaging, P.C., 120 AD3d 1312, 1313 [2d Dept 2014] [granting summary judgment where there was "no predicate violation of a law, rule or regulation which created a substantial and specific danger to the public health and safety"]; *see also Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d at 452; *Bordell v General Elec. Co.*, 88 NY2d at 871). Accordingly, defendant is entitled to summary judgment dismissing the complaint.

Because section 740 does not apply in the first instance, the court need not reach the issue of whether plaintiff was terminated due to his complaints or for performance related issues.

The court has considered the parties' remaining arguments and finds them to be unpersuasive.

CONCLUSION & ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant New York Presbyterian Hospital's motion is granted and the complaint is dismissed, and the Clerk shall enter judgment accordingly, with costs and disbursements to defendant as taxed by the Clerk.

10/4/19
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE