SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

FILED & ENTERED

1/6/2014

WESTCHESTER COUNTY
CLERK

GEORGE GALBRAITH,

Plaintiff,

- against -

WESTCHESTER COUNTY HEALTH CARE CORPORATION,

Defendant.

DECISION
Index No. 28420/10

At the end of a four day bench trial, the Court reserved decision. An amended complaint was filed on August 21, 2012, alleging as follows: That plaintiff brings this action, pursuant to New York State Labor Law § 741, alleging that he was unlawfully terminated from his employment in retaliation for his disclosure to his supervisors as well as a public body, of activities, practices and policies of his employer that he reasonably believed constituted improper patient care in violation of 8NYCRR § 29.1(b)(10).

The defendant claims that it had legitimate reasons to fail plaintiff during his probationary appointment as Chief Perfusionist; that plaintiff's cause of action under Labor Law §741 must fail as plaintiff never reported or claimed that any specific law or rule was being violated which may present a substantial and specific danger to the public health or a significant threat to the health of a specific patient; and that plaintiff is not eligible to bring an action under Labor Law §741 as he was not an "employee" as defined by statute. However, this Court finds that the plaintiff was an employee as defined in Labor Law §741 (1)(a). He clearly performed "health care services."

The evidence at the trial indicated that the plaintiff was employed as a Perfusionist since May of 1983. The plaintiff was hired by the Hospital as a temporary probationary Perfusionist on April 14, 2005, and according to Mr. Liebowitz's testimony (Tr. at p.380), Mr. Galbraith achieved "permanent " status as a "temporary" Perfusionist in "April of 2006." Exhibit G in evidence indicates that on May 14, 2006, a month later, there was salary adjustment. On August 20, 2006 he received a "provisional" "full time" promotion as a Chief Perfusionist.

Exhibit G-4, a letter from Paula Red Zeman, the then Commissioner of Westchester County Human Resources, states as follows:

> "Our department has established eligible list #76-047, Chief Perfusionist. This list contains less than three names. George Galbraith is one of these and was appointed as a ***provisional*** in this title by your agency on August 20, 2006. (emphasis supplied)
>
> Pursuant to New York Civil Service Law, Mr. Galbraith is receiving a Permanent appointment in this title effective October 31, 2008, the date the list was established. ***This appointment will become permanent upon completion of a probationary period of not less than twelve weeks or more than 52 weeks.***
>
> There is no need for you to take any additional steps to implement this appointment."

As Chief Perfusionist he was responsible for the supervision and training of the staff of approximately nine Perfusionists employed by the Hospital. As Chief Perfusionist he developed certain protocols regarding the training, monitoring and supervision of his staff on new equipment. It was the plaintiff's responsibility as Chief Perfusionist to determine when and if a Perfusionist was competent to operate a particular machine.

The plaintiff, Mr. George Galbraith, testified that he received an email on June 17, 2009 from Mr. Jarrett Stern, the Vice President of Preoperative Services, which stated in relevant part "Perfusionist will operate the Rapid Infusion machine for all liver transplant cases except if bypass is required at which point the Anesthesia Provider will assume operational responsibility for the machine." Plaintiff responded the next day, in relevant part, "There seems to be a great deal of ambiguity with regard to the standard of care regarding rapid infusion. If such a standard does indeed exist, it should be presented to all concerned parties as soon as possible. In addition, there are several serious potential violations of New York State Department of Health regulations in your mandate. These issues must be researched and addressed before any changes can be made to the current clinical practice."

On June 22, 2009, plaintiff sent an email to Mr. Stern which stated "I have communicated your email regarding rapid infusion to the perfusion staff as you directed. The perfusionists respectfully decline to assume responsibility for rapid infusion during liver transplant surgery on July 1, 2009. The following reasons were given:...2. The issues concerning NYSDOH have not been addressed...5. There are patient safety concerns that need to be discussed with Dr. Sheiner." Later that day plaintiff addressed an email to Barbara Kukowski, Senior Associate General Counsel, wherein he stated "Barbara: I was presented with the following from the New York State Department of Education website: The administration of medication is a function that is statutorily authorized to a limited number of professions. A physician or registered nurse may not legally delegate the administration of medications to unlicensed personnel, no matter what the experience or education of the unlicensed person. Section 1(b)(10) of Part 29 of the Rules of the New York State Board of Regents specifically prohibits delegation of this professional responsibility by licensed persons to an individual who the licensee knows or has reason to know, lacks the education, experience or licensure to perform these tasks. Can you please interpret the legalese for me and tell me what this mean? Thanks!"

As of June 2009, the Perfusionists at the Hospital were not familiar with the rapid infusion procedure. Other than a single member of the team, none of the Perfusionists had ever operated a rapid infusion device during their career. Serious patient injury or death can occur if the rapid infusion procedure is mishandled. The plaintiff determined that such an assignment, i.e. the operation of the rapid infusion machine during liver transplant surgery, was a violation of various regulatory provisions regarding the management of blood and medication.

The email from Mr. Stern dated June 17, 2009, advised the Perfusionists that they would be performing the rapid infusion procedures on patients during liver transplants effective July 1, 2009. According to Mr. Stern this was "operational streamlining" and done to save money. The plaintiff indicated his patient safety concerns and in particular a concern with 8 NYCRR 29.1(b)(10), which states that: "Unprofessional conduct in the practice of any profession licensed, certified or registered pursuant to title VIII of the Education Law... shall include:(10) delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person in not qualified, by training, by experience or by licensure, to perform them."

On June 22, 2009, the plaintiff contacted the New York State Department of Health for guidance regarding the June 17, 2009 mandate and on June 29, 2009 the plaintiff met with Alan Liebowitz, Director of Labor Relations, to discuss his objections to and his concerns with the June 17, 2009 rapid infusion mandate. In response to his email to Barbara Kukowski, Senior Associate General Counsel, Westchester County Health Care Corporation, Office of Legal Affairs, on June 22, 2009, he was told, inter alia, "Please

return to your Chief Perfusionist duties and know that a refusal to perform duties as directed is subject to discipline."

Plaintiff began taking the necessary steps to implement the June 17, 2009 mandate, including contacting the manufacturer of the device, Belmont, to have a representative of the company come and hold on-site training. The on-site training had to be rescheduled with the earliest date of July 23, 2009. Even though the plaintiff notified Mr. Stern of the cancellation and of the new date, Mr. Stern required that the new date of July 9, 2009 be implemented and Perfusionist were called upon to operate the Rapid Infuser in the second week of July. By the second week of August 2009, most of the training had been completed and the Perfusionist began taking on the Rapid Infusion assignments. Three weeks later, the plaintiff was advised that he was being terminated from Chief Perfusionist position, having purportedly failed his probation period, and being returned to the position of permanent hourly Perfusionist on "an as-needed basis." Although plaintiff made efforts to secure work from the defendant, plaintiff did not receive any assignments because Mr. Stern had instructed the new acting Chief not to give plaintiff any such assignments.

At the trial, Mr. Alan Liebowitz, Director of Labor Relations for Westchester Health Care Corporation, testified that plaintiff's probationary appointment as Chief Perfusionist began on October 31, 2008. He indicated that the Hospital makes sure that only those employees that have their supervisor's full support transition to permanent status; that, "we have a system where ... our department head or manager or the administrator is notified that their employee, who is appointed to a probationary appointment, is coming to an end of that probation." The Hospital does not require documentation by supervisors when failing an employee during probation. Mr. Liebowitz further stated that on September 25, 2009, he wrote to plaintiff informing him of the decision that he would revert back to his prior permanent appointment as a per diem Perfusionist. The letter stated that "your probationary appointment, in the position of Chief Percussionist, will be terminated effective October 2, 2009."

Dr. David Spielvogel, a Cardiothoracic Surgeon, presently affiliated with Westchester Medical Center, the hospital operated by defendant, testified that he worked with plaintiff in his role as Chief Perfusionist and, although he did not believe him to be a "good" Chief Perfusionist, given his unwillingness to accept responsibility for a variety of programs, he did indicate that the Chief Perfusionist is responsible for ensuring that the Perfusionists have the proper training and experience in the operating room and that, as the attending surgeon, he would not accept an untrained operator on the rapid infusion device.

Dr. Steven Lansman, Chief of Cardiothoracic Surgery at Westchester Medical Center, testified that he felt that plaintiff was a competent Perfusionist, but that he was a poor leader who did not foster team morale. However, he did write the plaintiff a letter of

recommendation stating that:

> "George has been a perfusionist for approximately 30 years, has been active in perfusion societies, and is very knowledgeable about the field. At Westchester, in his capacity as chief, he spent the majority of his time administering rather than perfusing cases, but was competent and comfortable as a perfusionist. On a number of occasions, George came in and 'rescued' members of his team who ran into unusual problems during a pump run. So, although George's position at Westchester did not involve perfusing cases on a routine basis, I believe he is responsible and can step into that role without difficulty. In that capacity, George may prove himself an asset to your team." (emphasis supplied)(exhibit 6 in evid.)

Mr. Jarrett Stern, Vice President of Preoperative Services at Westchester Medical Center, testified that after speaking to both Dr. Lansman and Dr. Spielvogel, he informed Human Resources that they would not be passing plaintiff's probation. Mr. Stern stated that upon plaintiff's return to the per diem Perfusionist staff he instructed the new acting Chief to only utilize plaintiff as a last resort, given that he was upset about his demotion, had a great deal of influence over the other perfusionists and was "often their champion with regard to union issues." He testified that it didn't matter that the Perfusionists were not trained on the rapid infuser because he felt that the risk was minimal due to the frequency of the use of the machine and that it was his responsibility, as the administrator of the department, to make that determination even though he had no clinical experience. Mr. Stern further stated that he "was frustrated with this last interaction and did not see a good reason to retain his services at this point."

Clearly, the evidence at this trial, which includes statements made by the various witnesses, demonstrates that the demotion and discharge of the plaintiff, Mr. Galbraith, was as a result of his disclosure to more than one of his supervisors, of an activity, policy or practice of the employer or agent that he, in good faith, reasonably believed constituted improper quality of patient care; and objected to and refused to participate in an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believed constituted improper quality of patient care. Such action taken by his employer was retaliatory in nature and in violation of statute. [See Labor Law §741(2)].

In accordance with subdivision 3 of Labor Law § 741, the plaintiff brought the improper quality of patient care to the attention of a supervisor, even though he was not required to do so, and afforded the employer a reasonable opportunity to correct such activity, policy or practice, which the employer did not do.

Labor Law §741(1)(d) states; "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.

The violation of 8NYCRR§29.1(b)(10) relates to the delegation of professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience or by licensure, to perform them. Knowing that a person is not qualified in training and experience to perform a rapid infusion but is still required to do so, clearly presents a substantial and specific danger to public health and safety and a significant threat to the health of a specific person.

Although the defendant attempted to make it look like the plaintiff was demoted and discharged because he failed the one year probation period in that his performance was less than acceptable, the evidence proved otherwise.

The failure of probation was a pretext by the Hospital to cover up its retaliatory conduct. When the plaintiff was bumped back to a per diem Perfusionist, he was not given any work. This was contrary to Civil Service Law. The Hospital tried to make it appear as though they were following Civil Service Law, but in fact, it wanted to get rid of him because he spoke out and objected when he felt that lives were in danger. Mr.Galbraith is your classic whistleblower, which the law was designed to protect. It is to be noted that he was a Chief Perfusionist for over 3 years and with only three weeks left on his probation period, after serving almost the entire year probation, he was terminated as the Chief Perfusionist because he objected to the immediate implementation of a life threatening policy.

Damages

Section 741(4) of the Labor Law states that "A health care employee may seek enforcement of this section pursuant to paragraph (d) of subdivision four of section seven hundred forty of this article."

Paragraph (d) of subdivision four of section seven hundred forty states, inter alia, "that a health care employee who has been the subject of a retaliatory action by a health care employer in violation of section seven hundred forty-one of this article may institute a civil action...for relief as set forth in subdivision five of this section..."

Labor Law §740 (5) states that: "(I)n any action brought pursuant to subdivision four of this section, the court may order relief as follows:
(a) an injunction to restrain continued violation of this section;
(b) the reinstatement of the employee to the same position held before the retaliatory

personnel action, or to an equivalent position;
(c) the reinstatement of full fringe benefits and seniority rights;
(d) the compensation for lost wages, benefits and other remuneration; and
(e) the payment by the employer of reasonable costs, disbursements, and attorney's fees." (emphasis supplied).

With respect to subdivision (a), said subdivision is moot, as the Perfusionists have been trained in the use of the rapid infuser and the plaintiff is no longer employed at the Hospital. Therefore, no injunctive relief is necessary at this time.

With respect to subdivision (b) and (c), the plaintiff cannot be reinstated to the same position or an equivalent position and be given his full fringe benefits and seniority rights because at this time he is not qualified to assume said position. He has not worked as a Perfusionist for approximately four years and he would need at least a minimum of one year to be brought up to speed. Further, the plaintiff indicated in his testimony that he likes his current job with CAS Medical Systems and it sounded like he might want to stay with CASMED. The plaintiff testified at page 124 of the transcript as follows starting on line 5: "Q. So did you, in fact, go to work for CASMED? A. CASMED approached me, that they recruited me given my clinical experience and asked if I would consider being a clinical specialist for them, and given that I had no other full time work available, I accepted their offer. Q. So very briefly describe for the Court what your duties and responsibilities at that time were for CASMED when you started? A. I'm a clinical specialist. I teach physicians how to use the monitoring technology that they manufacture. Q. What happened with your per diem work at Mount Sinai once you took the job with CASMED? A. Well, it was sparse to begin with and then it dwindled after that, and because I was doing so well at CASMED, my scope of my responsibilities expanded to both domestic and international work so I was traveling a great deal, and by a great deal, I mean at the present time, I travel 300 days a year." Does this sound like someone who wants to go back to the Westchester Medical Center?

With respect to subdivision (d), the plaintiff is entitled to his lost wages and other remuneration up to December 31, 2013 of $366,932.00 plus prejudgment interest as calculated below. (see *John Tipaldo v Christopher Lynn, 76 AD3d 477 [2010]; Matter of Aurecchione v New York State Div.of Human Rights*, 98 NY2d 21 [2002]). The plaintiff established that the difference in his income from what he should have earned had he not been discharged improperly and what he was actually able to earn during this time period was $19,691.00 in 2009, $88,468.00 in 2010, $95,216.00 in 2011, $82,583.00 in 2012, and $80,974.00 in 2013, which equals $366,932.00. The prejudgment simple interest at 9% annually is calculated as follows: on the $19,691.00 for 2009 for five years, for 2009 -$1,772.19.00 ; for 2010-$1,772.19.00; for 2011-$1,772.19.00 for 2012-$1,772.19.00 and for 2013-$1,772.19.00 for total on the $19,691.00 of $8,860.95. On the $88,468.00 for 2010 for four

years , for 2009-$7,962.12; for 2010-$7,962.12; for 2011-$7,962.12; for 2012-$7,962.12; and for 2013-$7,962.12 for a total on the $88,468.00 of $31,848.48. On the $95,216.00 for 2011 for three years, for 2011-$8,569.44; for 2012-$8,569.44; for 2013-$8,569 .44 for a total on the $95,216 of $25,708.32. On the $82,583.00 for 2012 for two years , for 2012-$7,432.47; and for 2013 $7,432.47 for a total on the $82,583.00 of $14,864.94. On the $80,974.00 for 2013 for one year, for 2013-$7,287.66 for a total on the $80,974 of $7,287.66 for a grand total on prejudgment interest of $88,570.35 added to the judgment of $366,932.00 for a total amount of $455,502.35.

Further with respect to subdivision (e), the plaintiff is entitled to payment by the employer of reasonable costs, disbursements, and attorney's fees and the attorney for the plaintiff is to submit an affirmation for attorney's fees on notice within 45 days from receipt of the Order to be entered hereon.

Based upon the foregoing, the plaintiff has sustained his complaint by a fair preponderance of the credible evidence. Accordingly, the Court renders a verdict in favor of the plaintiff Settle judgment within 30 days on at least 7 days notice.

Dated: January 3, 2014

Orazio R. Bellantoni
Supreme Court Justice

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