

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

D'ANDREA JOSEPH,

Plaintiff,

- v -

NYU GROSSMAN SCHOOL OF MEDICINE, JOHN
ALLENDORF, COLIN BRATHWAITE, CAMILLE
GLOTZBECKER

Defendant.

-----X

INDEX NO. 650521/2024

MOTION DATE 04/12/2024,
07/30/2024

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISCOVERY.

Background

D’Andrea Joseph M.D. (“plaintiff”) brings this action against NYU Grossman School of Medicine (“NYU” or “defendant”), John Allendorf, Colin Brathwaite, and Camille Glotzbecker (“individual defendants”) for alleged violations of New York State Human Rights Law and Defamation per se. Plaintiff alleges that while employed as a physician by NYU, she was subjected to a course of discrimination due to her race and gender, ultimately culminating in her demotion and subsequent pretextual termination.

Plaintiff was hired by NYU in 2017 to serve as the Associate Trauma Medical Director of NYU Langone Hospital – Long Island (“NYULH-LI”), formerly NYU-Winthrop. In 2018, plaintiff became the Chief of Trauma and Acute Care Surgery, which included the responsibilities

of Trauma Medical Director, Emergency General Surgery Director for her division and Medical Director of the Surgical Intensive Care Unit. Plaintiff alleges that in September 2023, without notice or cause, NYU demoted her while simultaneously promoting less qualified white male doctors. Plaintiff further alleges that NYU then suspended and restricted her key surgical privileges without just cause, relying on surgical complications that similarly situated male colleagues had not lost privileges for. Plaintiff alleges that when she then refused NYU's requests to resign, she was terminated in retaliation.

On or about August 30, 2023, Plaintiff disputed the restrictions on her clinical privileges and requested an administrative hospital hearing. The first hearing session occurred on November 27, 2023, and remains ongoing to date.

Plaintiff alleges that throughout her tenure at NYU, she witnessed rampant misogyny and racism from senior leadership, doctors, physician assistants, nurses, and administrators. Plaintiff alleges that she was treated disparately from her male colleagues and that ultimately her demotion, termination and restriction of privileges were the result of NYU's desire to retain white male leadership. Plaintiff alleges that in addition to her retaliatory termination, defendants went on to submit false information to the National Practitioner Data Bank ("NPDB") regarding their concerns about her character and honesty.

Plaintiff asserts two causes of action under New York Human Rights Law. Plaintiff's first cause of action alleges that NYU violated Executive Law § 296, by engaging in unlawful discriminatory practices and the individual defendants aided, abetted, incited, compelled, and coerced such discriminatory practices. Plaintiff's second cause of action alleges that defendants further violated Executive Law § 296 by retaliating against plaintiff for her objections to

defendants' discriminatory practices. Lastly, plaintiff asserts a cause of action for defamation per se, alleging that defendants' statements to the NPDB were false and harmed her reputation.

Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. (*See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]). Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. (*Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]). "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Id.*

Pursuant to CPLR § 3211(a)(1) documentary evidence provides a basis for dismissing a cause of action "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Moreover, under CPLR § 3211(a)(2) a party may move for a judgment dismissing one or more causes of action asserted against him on the ground that the court does not have jurisdiction of the subject matter of the cause of action. (CPLR § 3211(a)(2)).

Discussion

I. New York Human Rights Law

Under New York Law, the statutory procedure under which a physician may challenge a termination of hospital privileges requires the physician to file a complaint with the PHC for review. (*Mahmud v. Bon Secours Charity Health Sys.*, 289 F. Supp. 2d 466 [S.D.N.Y. 2003]). Once the PHC inquiry is exhausted, he or she may proceed to the second step of seeking redress in the courts, regardless of the result of the PHC inquiry. *Id.* Where a physician asserts claims based on the hospital's allegedly wrongful termination of plaintiff's employment and withdrawal of their staff privileges, whether such claims seek damages or reinstatement, the Court lacks subject matter jurisdiction to entertain them since they had not yet been reviewed by the Public Health Council under the grievance procedure provided by Public Health Law § 2801-b. (*Eden v. St. Luke's-Roosevelt Hosp. Ctr.*, 39 AD3d 215 [1st Dep't 2007]).

Here, plaintiff does not seek injunctive relief or monetary damages for her termination but rather asserts claims under New York State Human Rights Law which prohibits employment discrimination based on age, race, color, sex, and other protected classes. Executive Law § 296. Thus, the issue here is whether the court must dismiss plaintiff's claims for lack of subject matter jurisdiction.

Defendants argue that here, plaintiff's alleged grievances concerning the restrictions and suspension of her privileges as discrimination and retaliation claims and are therefore subject to dismissal. Alternatively, plaintiff contends that rather than challenging the termination of her privileges and to seek reinstatement her complaint seeks instead to redress the discrimination she was subjected over six years as a woman and a person of color in violation of New York law. Plaintiff argues the cases cited to by defendants only apply where physicians seek to challenge the termination of privileges, not where a physician's claims sound in discrimination and disparate treatment.

The Court finds that although plaintiff does not seek reinstatement or reversal of her termination of privileges, plaintiff's claims still arise from her demotion, termination, and restriction of privileges, and therefore the Court does not have subject matter jurisdiction over plaintiff's claims at this juncture. Although plaintiff alleges a discriminatory work environment at NYU as whole, the core of plaintiff's allegations is that she was unjustly and pretextually demoted, and later terminated, due to her race and gender. To extrapolate her demotion and restriction of privileges from the complaint would leave the complaint devoid of actionable injury. As plaintiff's alleged wrongful demotion and termination are so inextricably linked with her termination and restriction of privileges that they cannot be separated for the purpose of the complaint, the Court is restricted from addressing plaintiff's claims until plaintiff has exhausted her administrative remedies. (*Eden v. St. Luke's-Roosevelt Hosp. Ctr.*).

The Court notes that while defendants argue that plaintiff is limited to injunctive relief and cannot maintain an action for damages, the Court declines to rule on this issue. Whether section 2801-b prevents a physician from seeking damages under New York State Human Rights Law is a question left to be determined.

II. Defamation Per Se

Next, defendants seek to dismiss plaintiff's claim for defamation per se on the basis that the hospital's statements are protected by absolute privilege and that the statements are non-actionable opinion.

Even accepting plaintiff's allegations as true, plaintiff alleges that NYU's statement to the NPDB that they had "character and honesty concerns" about plaintiff, is a false statement as defendant never had such concerns and rather just stated this to the NPDB in retaliation to plaintiff.

Defamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion, or disgrace. (*Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435 [2002]). A party alleging defamation must allege that the statement is false. *Id.* Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. (*Rapaport v. Barstool Sports Inc.*, 2024 U.S. App. LEXIS 556 [2d Cir. 2024] (internal citations and quotations omitted)).

The Court agrees with defendant that the alleged defamatory statements are non-actionable. Whether NYU had concerns as to plaintiff’s “character” and “honesty” is a statement expressing what they believed. Because the statement reflects their belief and opinion, the statement is a non-actionable opinion.

III. Motion to Lift Stay

Pursuant to the aforementioned, plaintiff’s motion to lift the stay of discovery is denied as moot.

Accordingly, it is hereby

ORDERED that plaintiff’s complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly.

9/5/2024
DATE


20240905144559LFRANKE024A058480E4C03AE224DD34C56EAC6

LYLE E. FRANK, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
	SETTLE ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE