2014 WL 8096271 (D.C.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of the District of Columbia.
Civil Division

Katayoon BERESTON, Plaintiff,
v.
UNIVERSAL HEALTH SERVICES, INC. et al., Defendants.

No. 2014CA000416.
March 20, 2014.

Next Date: May 9, 2014 (Initial Conference)

Defendant' Reply in Support of Motion to Dismiss Plaintiffs Complaint

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Hon. John M. Mott.

Universal Health Services, Inc. (“UHS”) and District Hospital Partners, LP (“DHP”) (collectively, “GWUH” or “Defendants”), by and through counsel, Bonner Kiermn Trebach & Crociata, LLP, hereby file this reply in response to Plaintiff's Reply [sic] to Defendants' Motion to Dismiss pursuant to Rule 12(b)(6), and state as follows:

As set forth in Defendants' Motion to Dismiss, Plaintiff's Complaint fails to state a claim upon which relief can be granted for each of the claims Plaintiff seeks to pursue. While Plaintiff's Reply (“Opposition”) challenges the arguments and authority relied upon by Defendants, her challenges should be rejected because they cannot cure the deficiencies of her Complaint and do not provide a viable basis for her purported claims to proceed.

Defendants' Motion to Dismiss should be granted because: (1) Plaintiff's claims do not fall under the limited public policy exception to the at-will employment doctrine; (2) she fails to state a claim under the District of Columbia Human Rights Act (“DCHRA”); (3) the facts alleged in her Complaint do not rise to the requisite level of extreme or outrageous conduct necessary to state a claim for intentional infliction of emotional distress; and (4) she fails to allege facts sufficient to make out a claim for negligent hiring, supervision, and training.

ARGUMENT [1]

I. Plaintiff's Allegations do not Support a Public Policy Exception to the At-Will Employment Doctrine.

A. Plaintiffs claims fail under the exception articulated in Adams.

In Adams v. George W. Cochran & Co., 597 A.2d 28, 32 (D.C. 1991), the District of Columbia Court of Appeals recognized a “very narrow [public policy] exception” to the employment-at-will doctrine. To establish a claim for wrongful termination falling within this exception, a plaintiff must establish that the “sole reason for the discharge [was] the employee's refusal to violate the law, as expressed in statute or municipal regulation.” Id. at 34. Under applicable law, the facts alleged in Plaintiff's Complaint do not state a claim for wrongful termination or unlawful harassment in violation of public policy, and Counts I and II of her Complaint should be dismissed accordingly.

As a preliminary matter, Plaintiff's Complaint clearly provides that when she identified alleged problems at GWUH (that she believed related to violations of EMTALA, HIPAA, the "Stark Law" and/or CMS regulations), she was never required by GWUH to violate those laws or regulations. (See Complaint, ¶¶, 24, 28, 32, 38.) Rather, in each instance (according to Plaintiff), GWUH addressed her recommendations:

• On October 3, 2011, GWUH hired Plaintiff. (See Complaint, ¶4);

• In October 2011, Plaintiff allegedly complained of EMTALA violations, and GWUH implemented her proposed changes. (See Complaint ¶¶ 12, 14 ("Ms. Bereston changed the ER admissions process immediately"));

● In mid-2012, Dr. Brem asks for more admissions staff (see Complaint, ¶ 27), and it was determined that Plaintiff should look for HIPAA-compliant solution. (Complaint,¶28.) Plaintiff ensured that her staff was appropriately trained on HIPAA. (See Complaint, ¶¶ 24.);

● In early 2013, Plaintiff raised an issue of "bed-switching" (CMS Regulation), and GWUH implemented changes. (See Complaint, ¶¶ 30, 32); and

● July 2013, Plaintiff raises "Stark Law" issue, and GWUH implemented her proposed changes. (See Complaint, ¶¶ 35, 38).

Based on the narrow exception to the at-will employment doctrine as set forth in Adams - but unlike the circumstances in Adams - Plaintiff here was not "forced to choose" between violating the law and losing her job. Adam, 596 A.2d at 34; see also Thigpen v. Greenpeace, Inc., 657 A.2d 770, 771 (D.C. 1995) (stating that the Adams "exception requires an outright refusal to violate a specific law, with the employer putting the employee to the choice of breaking the law or losing his job"). Indeed, Plaintiff's Complaint does not describe any instance in which GWUH's purported violations would be deemed Plaintiff's violation of the law. In reviewing Plaintiff's Complaint and the statutes and regulations upon which she seeks to rely: (a) under Plaintiff's HIPAA-based claim - there is no allegation that GWUH directed Plaintiff to knowingly "use[] or cause[] to be used a unique health identifier;" "obtain [] individually identifiable health information relating to an individual;" or "disclose[] individually identifiable health information to another person." (HIPAA of 1996, 42 U.S.C. § 1320d-6(a) - enumerating the conduct constituting a violation under HIPAA); (b) under Plaintiffs EMTALA-based claim - Plaintiff does not allege that GWUH ordered her to deny uninsured patients the same treatment as paying patients; (c) under the "Stark Law" claim - Plaintiff does not allege that she was ordered to refer designated health services for Medicare and Medicaid patients to a provider with whom the physician has a financial relationship; or (d) under her CMS-based claim - Plaintiff does not allege that GWUH ordered or directed her to engage in conduct that would cause fraud or waste in Medicare and Medicaid programs, or any other federal health programs. (See Complaint, generally.)

Defendants further submit that EMTALA, HIPAA, the "Stark Law" and CMS regulations [2] do not provide any requirement or duty for Plaintiff to raise concerns or recommendations as she claims to have done while employed by GWUH. Plaintiff argues in her Opposition that she had a legal, professional, and ethical duty to ensure GWUH complied with health care laws. (See Opposition at 7). Curiously, however, none of the statutes cited by Plaintiff impose any such duties on her. There is no basis for this Court to find that if Plaintiff did not act as she had, then she would be personally liable or culpable for GWUH's purported failure to comply with any law or regulation she identifies. [3]

Plaintiffs arguments concerning the case of Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1998) are also misplaced. The court in Wallace did not dismiss plaintiff's claims because the Rules of Professional Conduct were insufficient in import, scope or consequence, as Plaintiff contends. (See Opposition at 17). Rather, the court determined that the Rules on which plaintiff relied did not "expressly impose[] a duty upon the subordinate attorney to report anything to her superiors." Wallace, 715 A.2d at 884. Similarly, nothing in HIPAA, EMTALA, the Stark Law, or CMS Regulations expressly

imposed a duty on Plaintiff to act as she did or for her to ensure GWUH's compliance. As such, Plaintiff cannot maintain her claim as alleged. [4]

Plaintiffs Complaint also fails to allege a causal connection between any declared public policy and Plaintiff's termination - and there is no temporal proximity between Plaintiff's alleged implementation of compliance policies and her termination. *See Owens v. Nat'l Med. Care, Inc.*, 337 F. Supp. 2d 131, 137 (D.D.C. 2004) (requiring causal connection to state claim under public policy exception). Plaintiff was terminated on October 24, 2013 - two years after she allegedly raised concerns of EMTALA violations (October 2011), more than a year after she allegedly raised HIPAA concerns (mid-2012), several months after she allegedly raised concerns regarding CMS regulations (early-2013), and three to four months after she allegedly raised concerns regarding compliance with the Stark Law (July 2013). The D.C. Circuit has "generally found [in employment cases] that a two- or three-month gap between the protected activity and the adverse employment action does not establish the temporal proximity needed to prove causation." *Jones v. D.C. Water & Sewer Auth.*, 922 F. Supp. 2d 37, 42-43 (concluding that retaliation claim failed because no causal link where alleged protected activities took place "many months" before termination).

B. Plaintiff fails to state a claim under the exception established in Carl.

Recognizing the limitations of the public policy exception set forth in *Adams*, the court in *Carl v. Children's Hosp.*, 702 A.2d 159, 160 (D.C. 1997) explained that the narrow exception created in Adams does not bar the court from "recognizing some other public policy exceptions *when circumstances warrant such recognition.*" (emphasis added). Acknowledging the danger that the exception could "reduce the at-will doctrine to a virtual nullity," the Court of Appeals created a case-by-case standard, cautioning the courts to "consider seriously" only those claims (1) that "make a clear showing, based on some identifiable policy that has been 'officially declared' in a statute or municipal regulation, or in the Constitution, that a new exception is needed," and (2) where there is "a close fit between the policy thus declared and the conduct at issue in the allegedly wrongful termination." *Carl*, 702 A.2d at 163-164 (Terry, J., concurring). In other words, Plaintiff must "sufficiently plead a *violation* of public policy 'firmly anchored either in the Constitution or in a statute or regulation which clearly reflects the particular policy being relied upon."' *Coleman v. District of Columbia*, 828 F. Supp. 2d 87, 96 (D.D.C. 2011) (quoting *Carl*, 702 A.2d at 164) (emphasis added).

While the court in *Carl* opined that the public policy exception to the at-will doctrine is not limited to only those circumstances set forth in *Adams*, Plaintiff's allegations here should not survive dismissal even under the "expanded" standard that now applies in this jurisdiction. In that regard, Plaintiff fails to show a "close fit" between a public policy and her termination because her Complaint lacks any allegation that GWUH engaged in conduct that violated a public policy. According to Plaintiff's Complaint, GWUH implemented the proposed changes about which Plaintiff allegedly complained - *consistent* with the public policies Plaintiff purports to identify in her Complaint.

Plaintiff does not allege that GWUH failed to follow her recommendations concerning HIPAA, EMTALA, the Stark Law, or CMS Regulations - nor does she allege that she was directed by GWUH to violate any policies stemming from those laws. Indeed, no "public policy" was violated in the context of Plaintiff's allegations. The purpose of the public policy exception is to ensure that employers do not contravene fundamental policies. Carl, 702 A.2d at 164 (quoting *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083, 1095, 824 P.2d 680, 687-688, 4 Cal. Rptr. 2d 874, 881-882 (1992)). Here, Plaintiff alleges in her Complaint that all of the purported public policies were followed pursuant to her guidance and advice. (See Complaint ¶¶ 17, 24, 28, 32, 38). Without an alleged violation of public policy, Plaintiff has not met the standard established in *Carl*. *See Stevens v. Sodexo, Inc.*, 846 F. Supp. 2d 119, 127 (D.D.C. 2012) (dismissing claims where plaintiff's alleged conduct did not constitute a violation of public policy); *Hopkins v. Blue Cross & Blue Shield Ass'n*, 2010 U.S. Dist. LEXIS 134730, * 12-13 (D.D.C. 2010) (same); *Hicks v. Ass 'n of Am. Med. Colleges*, 503 F. Supp. 2d 48 (D.D.C. 2007) (same); *cf. Riggs v. Home Builders Inst.*, 203 F. Supp. 2d 1, 22 (concluding that complaint was not deficient where plaintiff allegedly refused to engage in conduct which would constitute a violation of public policy). [5]

As the court explained in *Stevens v. Sodexo:*

> [A]ccording to the law that has developed in this area since the DCCA's decision in *Adams*, wrongful termination claims have been limited to situations where an employer puts an employee between a rock and hard place—namely, between the rock of termination and the hard place of either breaking a law or refraining from some activity promoted by public policy. This case does not fit, either neatly or messily, into this rubric. F. Supp. at 127. Similarly the instant case does not fit into the rubric of the public policy.

846 F. Supp. at 127. Similarly,the instant case does not fit into the rubric of the public policy exception. Plaintiff's Complaint lacks any allegation that she was directed to violate a public policy, and thus there is not a "close fit" between any alleged conduct and her termination. Based on the record in this matter, Counts I and II of Plaintiff's Complaint should be dismissed.

II. Plaintiff Fails to State a Claim Under the DCHRA.

To establish a violation of the DCHRA, Plaintiff must allege that she (1) is a member of a protected class, (2) that she suffered an adverse employment action, and (3) that the unfavorable action gives rise to an inference of discrimination. *Hamilton v. Howard Univ., 960 A.2d 308, 314 n.6 (D.C. 2008) (quoting Furline v. Morrison,* 953 A.2d 344 (D.C. 2008)).

In her Complaint, Plaintiff merely alleges that staff "made remarks about her race" without providing any specific facts to support her assertion. (See Complaint,¶15.) Moreover, she contends that allegations that she was admonished for typos and grammar mistakes, that Mark Lerner was promoted, and that a younger employee may have replaced her are sufficient to allege a claim of discrimination under the DCHRA. (See Complaint, ¶¶15, 66; Opposition at 20.) Plaintiff is incorrect in her arguments. *See Mesumbe v. Howard Univ.,* 706 F. Supp. 2d 86, 92 (D.D.C. 2010) (determining that conclusory allegations that an individual of a different ethnicity was treated favorably were insufficient to support a DCHRA claim). Simply identifying herself in her Complaint as a 51-year-old female of Iranian descent is insufficient to establish the inference that her termination and alleged retaliation and/or harassment were based on discrimination. See Bary v. RHT, Inc., 748 F. Supp. 3, 5 (D.D.C. 1990) (stating that plaintiff cannot merely invoke race in the complaint and automatically be entitled to relief); *see also Ndondji v. Interpark Inc.,* 768 F. Supp. 2d 264, 274 (D.D.C. 2011) (noting that plaintiff must allege facts that demonstrate that race was a reason for defendant's actions). Here, Plaintiff's Complaint does not set forth facts that establish any nexus between the alleged wrongful conduct and Plaintiff's race, age, or gender. Accordingly, Plaintiff's claim under the DCHRA must fail and Count III should be dismissed with prejudice.

III. Plaintiff Fails to State a Claim for Intentional Infliction of Emotional Distress.

In order to make out a claim for intentional infliction of emotional distress, Plaintiff was required to allege in her Complaint that she was forced to endure conduct that was: (1) extreme and outrageous conduct on the part of the defendants which (2) either intentionally or recklessly (3) causes the plaintiff severe emotional distress. *See Kassem v. Wash. Hosp. Ctr.,* 513 F.3d 251, 255 (D.C. Cir. 2008) (quoting *Larijani v. Georgetown Univ.,* 791 A.2d 41, 44 (D.C. 2002)).

Plaintiff notes that *District of Columbia v. Thompson,* 570 A.2d 277, 290 (D.C. 1990) does not represent the law of this court because it was reversed on rehearing. Although the dismissal of intentional infliction of emotional distress claims was reversed in *District of Columbia v. Thompson,* 593 A.2d 621 (D.C. 1991), the case was reversed for preemption issues, not because the court's analysis of the intentional infliction of emotional distress claims were flawed. Accordingly, Thompson is still persuasive authority. Indeed, the D.C. Court of Appeals has relied on Thompson's analysis of intentional infliction claims even after the (preemption) decision was reversed. *See, e.g., Minch v. District of Columbia,* 952 A.2d 929, 940 (D.C. 2008); *Duncan v. Children's Nat'l Med. Ctr.,* 702 A.2d 207, 212 (D.C. 1997); *Brown v. Hamilton,* 601 A.2d 1074, 1079 (1992). Moreover, *Thompson* was merely one of several in a string citation of valid cases.

Plaintiff has failed to plead a claim for intentional infliction of emotional distress under the law of this court. Plaintiff's allegations of termination, workplace bullying and unprofessional behavior are insufficient to rise to the level of outrageousness required to state a claim in this jurisdiction. In *Crowley v. North Am. Telecommunications Ass'n*, 691 A.2d 1169, 1172 (D.C. 1997), plaintiff claimed intentional infliction of emotional distress as a result of his employer's unprofessional behavior, attempts to thwart his efforts to do his job, and unjustified hostility. The court explained that "[s]uch circumstances are not the type for which liability may be imposed for this particular tort." *Id.* at 1171. The court further emphasized that "iability will be imposed only for conduct which exceeds all bounds of decency and for acts which are regarded as 'atrocious and utterly intolerable in a civilized community." *Id.* at 1172 (quoting *Waldon v. Covington*, 415 A.2d 1070, 1076 (D.C. 1980)). Thus, the court concluded that the circumstances surrounding plaintiff's discharge as alleged in the complaint were "insufficient as a matter of law" to establish an intentional infliction of emotional distress claim. *Id.* Plaintiff's instant allegations are nearly identical to the "contempt, scorn and other indignities" alleged in Crowley. *Id.* Accordingly, Plaintiff's claims do not rise to the level of extreme or outrageous conduct that would entitle her to relief, and her claim must be dismissed.

IV. Plaintiff Fails to Assert a Claim for Negligent Hiring and Supervision.

Plaintiff's argument that her Complaint establishes a claim for negligent hiring and supervision is also unavailing. Plaintiff's claim for negligent hiring and supervision must arise in tort because she fails to establish a claim for wrongful termination or intentional infliction of emotional distress. *See Griffin v. Acacia Life Ins. Co.*, 925 A.2d 564, 575-578 (D.C. 2007) (stating that claims for negligent hiring, training, and supervision must be predicated on common law theories). Having failed to state a claim in tort, Plaintiffs claim must be dismissed.

Moreover, Plaintiff does not allege which employees were negligently hired or why; nor does she allege the manner in which Defendant(s) failed to supervise or train those unnamed employees. Plaintiff's generalized allegations to support this claim are insufficient, without more, to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007). Based on the record in this matter, Defendant respectfully submits that Count V of Plaintiff's Complaint should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Defendants' Motion to Dismiss, Defendants respectfully submit that Plaintiffs Complaint should be dismissed with prejudice, and for such other and further relief as may be just and proper.

Dated this 20th day of March, 2014.

Respectfully submitted,

UNIVERSAL HEALTH SERVICES, INC.

DISTRICT HOSPITAL PARTNERS, LP

By Counsel

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Footnotes

1 In her Opposition, Plaintiff addressed Defendants' citation to the case of *Grayson v. AT&T Corp.*, 980 A.2d 1137 (D.C. 2009) and submitted that the case was vacated by an en banc decision in 2011. (See Opposition at 6.) In fact, however, Plaintiff is mistaken in her assertion. The Grayson decision of 2009 was vacated only on the issue of standing in 2011 - but was affirmed with respect to dismissal under Rule 12(bX6). *See Grayson v. AT&T Corp.*, 15 A.3d 219, 250-252 (D.C. 2011). Additionally, notwithstanding Plaintiff's own reliance on cases decided at summary judgment, Plaintiff attempts to criticize Defendants for citing cases decided by trial courts at summary judgment, arguing that such cases were "decided under more rigorous standards." (*See* Opposition at 11.) In fact, Defendants relied on such cases to set forth the elements and applicable standards for claims such as those pursued by Plaintiff here. (See Motion to Dismiss at 6-10.) Defendants respectfully submit that to fully understand the law regarding the public policy exception to the at-will employment doctrine, an examination of Adams and Carl and subsequent cases is useful - regardless of the procedural posture of this case or those of the cases relied upon by the parties.

2 Plaintiff does not specify in her Complaint or Opposition which of CMS's hundreds of guidelines and related statutes proscribe the "bed-switching" practice alleged in Plaintiffs Complaint. As such, Plaintiff has failed to identify any statute or regulation for violation of which would impose liability on her on that basis. Plaintiff also has not clearly identified a statute or regulation from which a public policy against the alleged bed-switching practice arises. Accordingly, Plaintiffs claims relating to the CMS Regulations fail under the analyses set forth in both Adams and Carl.

3 Plaintiff had no duty to act as she did and she did not risk any (personal) repercussions of civil penalties or criminal charges if she had not acted. See 42 U.S.C. § 1395dd(d)(1)(A)-(B) (imposing liability on hospital or physician for violation of EMTALA); 42 U.S.C. § 1320d-1(a) and 1320d-6(a) (imposing liability for violation of HIPAA on health plan, health care clearinghouse, health care provider, or any person who discloses protected information without authorization); 42 U.S.C. 1395nn(gX3)-(4) (imposing liability for violation of Stark Law on physician or entity, or any person who "presents or causes to be presented a bill or a claim for service" in violation of the provision).

4 Plaintiff does not allege in her Complaint that the sole reason for her termination was her refusal to violate the law - or that she was directed by Defendants to violate the law. See Adams v. Cochran & Co., 597 A.2d 28, 30 (D.C. 1991). While Plaintiff claims that Dr. Brem's demand to provide additional admissions staff in the radiology clinic amounted to a direction that Plaintiff violate HIPAA, Plaintiff's Complaint omits any allegation that Dr. Brem, on behalf of Defendants, directed Plaintiff (herself) to violate HIPAA. (See Complaint; Opposition at 7). In fact, Dr. Brem was not employed by either Defendant, and the Complaint clearly provides that Defendants directed Plaintiff to "work with other GWUH staff on solutions to satisfy Dr. Brem's concerns without violating HIPAA." (See Complaint, ¶28)(emphasis added).

5 Plaintiffs Opposition is devoid of any authority that supports a public policy claim where a plaintiffs stated public policy was not violated by the employer's conduct. In *Washington v. Guest Servs., Inc.*, 718 A.2d 1071, 1080-81 (D.C. 1998), the employer directed plaintiff to act in a manner which violated food safety policies. The employer in *Myers v. Alutiiq Intern. Solutions, LLC*, 811 F. Supp. 2d 261 (D.D.C. 2011) ordered plaintiff to overlook its noncompliance with federal contracting regulations. The plaintiff in *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999) was terminated for threatening to report the employer's violation of drug storage guidelines. In *Ware v. Nicklin Assocs., Inc.*, 580 F. Supp. 2d 158 (D.D.C. 2008), the employer was engaged in a fraudulent billing and invoicing scheme. In each of the foregoing cases, the plaintiff was terminated in connection with the employer's violation of some

public policy. That element is absent from the facts alleged in the case at bar. Plaintiff does not allege that GWUH refused to comply with pubic policy or directed her noncompliance - or even that she was terminated when she raised compliance issues. See Complaint ¶17, 28, 32, 36-38). As such, Plaintiff has not alleged "a close fit between the policy thus declared and the conduct at issue in the allegedly wrongful termination." *Carl*, 702 A.2d at 163-164 (Terry, J., concurring).

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