UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NEELU PAL, M.D.,

Plaintiff,

-against-

NEW YORK UNIVERSITY,

Defendant.

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MEMORANDUM DECISION AND ORDER

06 Civ. 5892 (PAC)(FM)

FRANK MAAS, United States Magistrate Judge.

I. Introduction

This is a whistleblower action brought by plaintiff Neelu Pal ("Pal"), who contends that the New York University School of Medicine ("SOM"), sued as New York University ("NYU"), wrongfully terminated her in retaliation for her complaints about substandard conditions and patient care.[1] (See Compl. ¶¶ 1, 32-34).

Pal has moved for an order compelling NYU to produce materials relating to an investigation, conducted pursuant to the SOM Evaluation, Corrective Action, and Disciplinary Policy for Residents ("Disciplinary Policy" or "Policy"), which led to Pal's termination from her fellowship position at NYU. She also seeks an order compelling

[1] On August 22, 2007, Judge Crotty, to whom this case is assigned, dismissed Pal's claim that NYU induced her to accept a post-residency fellowship through fraudulent misrepresentations. (Docket No. 45).

NYU to provide further responses to other discovery requests. Pal's motion to compel is granted to the extent set forth below.

II. Background

A. Relevant Facts

The relevant facts were described in my prior Memorandum Decision and Order. See Pal v. N.Y. Univ., No. 06 Civ. 5892, 2007 WL 1522618 (S.D.N.Y. May 22, 2007). Accordingly, the facts are set forth herein only to the extent that they represent a change in Pal's position or are necessary to resolve her motion.

Pal is a foreign-trained doctor who completed two residency programs in the United States between 2000 and 2005. (Compl. ¶ 6). She subsequently was accepted for a fellowship in laparoscopic practice at the SOM which began in October 2005. (Id. ¶ 13). Pal's fellowship supervisors were Drs. Christine Ren ("Ren") and George Fielding ("Fielding").

Shortly after she began working at NYU, Pal allegedly became concerned about the care and treatment of some of the patients awaiting surgery. (Id. ¶ 15). Specifically, she concluded that Ren and Fielding were not taking the time necessary to understand the medical histories of their patients, obtain the patients' informed consent before surgery, and ensure proper post-operative care. (Id. ¶¶ 16-17). Although she voiced these concerns to Ren and Fielding, no changes were made. (Id. ¶ 19).

In January 2006, one of Fielding's patients died following surgery; another suffered severe post-operative complications. (Id. ¶¶ 20-21). Having grown increasingly worried about the welfare of Ren's and Fielding's patients, on or about January 21, 2006, Pal placed anonymous telephone calls to the patients who were scheduled for surgery the following day. (Id. ¶ 22; Affirm. of Jason L. Solotaroff, Esq., in Supp. of Pl.'s Mot. to Compel Disc., dated Sept. 12, 2007 ("Solotaroff Affirm."), Ex. A. ("Ren Dep.") at 159). During these calls, Pal "warn[ed] them of the risks of the surgery," "inform[ed] them that there had been a recent death," and "encouraged the[m] to request additional information" from Ren, Fielding, and NYU. (Compl. ¶ 22).

On January 24, 2006, Pal met with Dr. Carol Bernstein ("Bernstein"), NYU's Director of Graduate Medical Education, to express her concern that Ren and Fielding were providing inadequate services. Pal also disclosed that she had made the calls to the patients. (Solotaroff Affirm. Ex. D ("Pal Dep.") at 212). Later that day, Pal summarized her concerns about Ren and Fielding in an email which Bernstein forwarded to the department chair, Dr. Thomas Riles ("Riles"). Riles, in turn, showed the email to Ren, who showed it to Fielding. (See Ren Dep. at 180-82; Solotaroff Affirm. Ex. C).

The following day, NYU suspended Pal "in accordance with" NYU's Disciplinary Policy, for "actions [that] may have constituted . . . a threat to the welfare and safety of patients." (Solotaroff Affirm. Exs. G (suspension letter), K (Disciplinary Policy)). The specific actions cited in the letter, which was signed by Riles and Ren, were

her anonymous "phone calls to patients" and her "attempt to scare [them] into canceling their treatment." (Solotaroff Affirm. Ex. G).

Following Pal's suspension, Fielding sent an email to Dr. Max Cohen ("Cohen"), who apparently was the Chief Medical Officer of the Tisch Hospital at NYU. (See Ren Dep. at 172; Solotaroff Affirm. Ex. F ("Bernstein Dep.") at 15). In that email, Fielding indicated that he was willing to work with Pal upon the expiration of her suspension, provided that she "g[o]t rid of the lawyers" representing her. (Solotaroff Affirm. Ex. B at 4). Only a few days later, on February 9, 2006, Fielding sent Cohen an email rescinding his offer to help Pal through her fellowship. (Id. Ex. C). In his second email, Fielding expressed a desire to "report Pal to the state for [a] possible HIPAA violation" arising out of her telephone calls to patients. (Id. at 2). This email has been produced to Pal in redacted form.

During Pal's four-week suspension, NYU conducted an internal investigation which allegedly established her "pattern of unprofessional behavior." On February 21, 2006, she was dismissed from her fellowship program. (Solotaroff Affirm. Ex. H (dismissal letter) at 1; Compl. ¶¶ 23-24). The reasons cited by Riles in his letter informing Pal of her termination included her anonymous telephone calls, other instances of unprofessional behavior at a prior residency program, and inappropriate handling of Fielding's patient's death. (Solotaroff Affirm. Ex. H at 1). Riles' letter made no mention

of Pal's complaints regarding the substandard level of patient care allegedly provided by Ren and Fielding. (See id.).

Pursuant to the Disciplinary Policy appeals procedures, Pal sought to have her dismissal reviewed by an SOM Appeals Committee ("Appeals Committee") consisting of two SOM professors and two residents. (Bernstein Dep. at 95). The Appeals Committee reviewed the relevant documents and interviewed Bernstein, Fielding, Pal, Ren, Riles, and other witnesses. (Solotaroff Affirm. Ex. I at 1). On May 30, 2006, the Appeals Committee recommended to Richard Levin, NYU's Dean for Graduate Medical Education, that Pal's suspension and termination be upheld. (Id. at 8). The Appeals Committee's "Report Regarding Neelu Pal, M.D. Appeal of Summary Suspension and Termination" ("Report") was marked "Privileged and Confidential," but a copy was nevertheless provided to Pal. (Id.). In that Report, the Appeals Committee described each of its interviews and identified each document that it reviewed. (Id. at 1-8). The Report concluded that while Pal had made complaints about patient care at NYU and "genuinely felt concern" for the bariatric surgery patients, this did not "justif[y] . . . directly contacting" patients before exhausting other "reasonable alternatives." (Id. at 7). The Appeals Committee therefore unanimously recommended that Pal's summary suspension and termination be upheld. (Id. at 8).

Pal filed this action on August 4, 2006. Her sole remaining claim is that she was the victim of a retaliatory discharge, in violation of New York's employee

whistleblower statute, Section 741 of the New York Labor Law ("Section 741"). Pal contends that NYU's stated reasons for her dismissal are pretextual and that she actually was dismissed for complaining about the substandard conditions and patient care at NYU. (Compl. ¶¶ 32-34).

III. Discussion

A. Pal's Motion to Compel Evidence Related to the Disciplinary Procedures

NYU has declined to produce the tape recordings and transcripts of the interviews conducted by the Appeals Committee pursuant to the Disciplinary Policy. It further has directed Bernstein, Ren, and Riles not to answer deposition questions about what was disclosed in its "deliberative process." (Def.'s Mem. at 5). NYU asserts that this information is privileged under Section 2805-m of the New York Public Health Law ("Section 2805-m" or the "Public Health Law privilege") and Section 6527 of the New York Education Law ("Section 6527" or the "Education Law privilege").

1. New York Privilege Law Governs

Under Federal Rule of Evidence 501, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." The parties agree that New York privilege law therefore applies in this diversity suit, which arises under New York law and concerns events that occurred in New York. See

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Tartaglia v. Paul Revere Life Ins. Co., 948 F. Supp. 325, 326 (S.D.N.Y. 1996).

2. Public Health Law Privilege

Under Section 2805-m, "none of the records, documentation or committee actions or records required pursuant to sections [2805-j and 2805-k or] the reports required pursuant to section [2805-l] shall be subject to disclosure."[2] N.Y. Pub. Health Law § 2805-m(2) (McKinney 2002). Section 2805-j requires hospitals to institute a malpractice prevention program supervised by a quality assurance committee and to collect and maintain information concerning negative treatment health care outcomes and incidents of injury to patients. Id. § 2805-j. Section 2805-k requires hospitals to establish procedures for the periodic review of clinical privileges granted to physicians. Id. § 2805-k. Section 2805-l requires hospitals to report to the New York Department of Health certain types of "incidents," including "patients' deaths." Id. § 2805-l(1), (2)(a).

The Public Health Law privilege was enacted as part of a comprehensive reform of New York's medical malpractice laws. Tartaglia, 948 F. Supp. at 328 (citing White v. N.Y.C. Health & Hosps. Corp., No. 88 Civ. 7536, 1990 WL 33747, at *10 (S.D.N.Y. Mar. 19, 1990)); Logue v. Velez, 92 N.Y.2d 13, 17 (1998). The legislation sought to reduce the incidence of medical malpractice by requiring that "physicians

[2] Section 2805-m applies only to a hospital, which is defined as a "facility or institution engaged principally in providing services . . . for the prevention, diagnosis or treatment of human disease, pain, injury, . . . or physical condition." N.Y. Pub. Health Law § 2801.

responsible for acts of professional misconduct . . . be subject to effective discipline." Tartaglia, 948 F. Supp. at 328 (quoting Med. & Dental Malpractice & Prof'l Conduct, 1986 N.Y. Laws, ch. 266, § 1). The legislature believed that this, in turn, "would ensure the continued adequacy of medical malpractice insurance for health care providers" and thereby help ensure that necessary medical services continued to be available to the public. Id.

3. Education Law Privilege

Section 6527 of the Education Law is similar to Section 2805-m. See Tartaglia, 948 F. Supp. at 328 (addressing both statutes "concurrently"); Logue, 92 N.Y.2d at 17 (noting that the two laws embody the "same policy"and to a "large measure duplicate[]" one another). Section 6527 thus protects from disclosure the proceedings and records "relating to performance of a medical or a quality assurance review function or participation in a medical . . . malpractice prevention program," as well as "any report required by" Section 2805-l of the Public Health Law. N.Y. Educ. Law. § 6527(3). Section 6527 is broader than Section 2805-m, however, because it applies to the entire medical profession, not just hospitals. See Williams v. Brookhaven Mem. Hosp. Med. Ctr., Inc., No. 03-6201, 2006 WL 2559527, at *1 (N.Y. Sup. Ct. July 26, 2006).

The purpose of the broad nondisclosure provisions of Section 6527 is to encourage frank peer review of physicians by guaranteeing confidentiality to participants in the process. Tartaglia, 948 F. Supp. at 328; Logue, 92 N.Y.2d at 17 (quoting

legislative history); see also Katherine F. v. New York, 94 N.Y.2d 200, 205 (1999) (the "thrust of section 6527(3) is to promote the quality of care through self-review without fear of legal reprisal"). Like Section 2805-m, one goal of Section 6527 is to "reduce the incidence of medical malpractice in New York." Tartaglia, 948 F. Supp. at 328.

4. Which Privilege Applies to NYU

Pal contends that the Public Health Law privilege is inapplicable in this case because Pal was employed by the SOM, which is not a "hospital." (Pl.'s Mem. at 15). NYU counters that Pal in fact was employed by the NYU Hospitals Center, a statutory "hospital" under the New York Public Health Law. (Def.'s Mem. at 7). Her employment agreement lends some support to both positions because it is between Pal and the SOM, but indicates that Pal will be on the payroll of either the NYU Hospitals Center or the Bellevue Hospitals Center. (Decl. of Diane Krebs, Esq., in Opp'n to Pl.'s Mot. to Compel Disc., dated Oct. 12, 2007, Ex. F at 1).

The Court need not resolve this factual dispute to rule on Pal's motion. Assuming, arguendo, that Pal was employed solely by the SOM, Section 6527 still would apply because the Education Law privilege is not limited to "hospitals." Insofar as relevant here, that privilege is at least as broad as the Public Health Law privilege because both privileges prevent the disclosure of any evidence related to (a) medical malpractice prevention programs, (b) medical review and quality assurance programs, and (c) incident reports required by Section 2805-l of the Public Health Law. See N.Y. Pub. Health Law

§§ 2805-j - 2805-m; N.Y. Educ. Law § 6527(3). Accordingly, because both statutes cover substantially similar ground and embody the "same policy," the Court will assume for purposes of this motion that both privileges apply to NYU. Logue, 92 N.Y.2d at 17; see Tartaglia, 948 F. Supp. at 328.

5. Neither Privilege Applies to the Disciplinary Policy in this "Whistleblower" Employment Case

A party seeking to avoid disclosure under the Public Health and Education Law privileges has the "burden of establishing" that (a) "the information sought . . . was prepared in accordance" with the privileges, and (b) "the disclosure of such information would frustrate the purposes underlying the privileges." Ryan v. Staten Island Univ. Hosp., No. 04 Civ. 2666, 2006 WL 1025890, at *3 (E.D.N.Y. Apr. 13, 2006) (citing Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 377 (1991) and Marte v. Brooklyn Hosp. Ctr., 9 A.D.3d 41, 46 (2d Dep't 2004)). Furthermore, because both "privileges constitute exceptions to the general principle that all relevant evidence must be produced," they must be "narrowly construed." Strini v. Edwards Lifesciences Corp., No. 05 Civ. 440, 2007 WL 1017280, at *2 (N.D.N.Y. Mar. 30, 2007). NYU arguably has failed to make the first required showing, but even if it has, it unquestionably has failed to make the second necessary showing.

The first element that NYU must establish is that the information sought by Pal was prepared in accordance with Section 2805-m or Section 6527. Thus, NYU must demonstrate that its Disciplinary Policy constitutes either a medical malpractice

prevention program or a medical review or quality assurance program. See N.Y. Pub. Health Law §§ 2805-j - 2805-m; N.Y. Educ. Law § 6527(3). In an effort to meet this requirement, NYU submits the declaration of Lynn Lowy ("Lowy"), Associate General Counsel of the NYU Medical Center, who states that the Disciplinary Policy is a part of NYU's quality assurance program designed to "improve the overall care provided to patients and to reduce the volume of malpractice litigation by evaluating and correcting the performance of residents and fellows." (Decl. of Lynn Lowy, Esq., dated Oct. 12, 2007, ¶ 8).

There is no evidence that Lowy helped write the Disciplinary Policy or was employed by NYU at the time of its creation. Lowy's conclusory assertions further seem to be contradicted by the text of the Disciplinary Policy, which makes no mention of "quality assurance" or "malpractice prevention." Instead, the Disciplinary Policy states simply that its procedures are "designed to be fair to [fellows], patients under care, and the training program." (Disciplinary Policy at 1). Although a fellow can be disciplined for actions that constitute "medical malpractice" or involve a risk to patient care, these are not the only concerns that the Disciplinary Policy addresses. Thus, fellows can also be disciplined for such shortcomings as failing to (a) participate in the "educational and scholarly activities" of NYU, (b) teach other residents, (c) participate in committees whose actions affect their education, (d) publish original research in peer-reviewed journals, or (e) publish or present at professional society meetings. (Id. at 3).

It thus is unclear whether the Disciplinary Policy is part of NYU's quality assurance program. See Strini, 2007 WL 1017280, at *4 (Sections 2805-m and 6527 "protect from disclosure only those records and information generated . . . pursuant to . . . quality assurance obligations"). Here again, however, the Court need not resolve the factual issue because even if the Disciplinary Policy serves the same interests as the Public Health and Education Law privileges, those privileges are "not an absolute bar to disclosure" if NYU has failed to show that the disclosure of the information sought by Pal would frustrate the purposes underlying them. Ryan, 2006 WL 1025890, at *3.

The federal courts have acknowledged that improving the quality of health care and lowering the cost of malpractice insurance are important policy goals of the State of New York which are furthered by "protecting the confidentiality of incident reports regarding physician misconduct." Tartaglia, 948 F. Supp. at 328 (citing White, 1990 WL 33747, at *10). Consequently, to "permit disclosure of these reports in circumstances where their contents could lead to admissible evidence of medical malpractice would be entirely contrary to the spirit and intent of [New York's] comprehensive professional malpractice legislation." Id. (quoting White, 1990 WL 33747, at *10). However, in both Tartaglia and White the court "allowed the disclosure of medical records . . . because the purpose of the statute would not be served by maintaining confidentiality in actions that were not based on medical malpractice." Id. Indeed, in actions "not based on claims of medical malpractice, where the underlying policy of improving medical care" is not

implicated, courts often have "compelled disclosure of peer review committee findings." Ryan, 2006 WL 1025890, at *3. But see Daly v. Genovese, 96 A.D.2d 1027 (2d Dep't 1983) (plaintiff in defamation action denied discovery regarding peer committee review meetings).

To date, the federal courts have had occasion to consider the application of the Public Health and Education Law privileges in five cases not involving medical malpractice. In each case, the court either held that the privileges did not apply or required the disclosure of the allegedly privileged evidence for policy reasons. Two of the cases were federal-question cases governed by federal law and, therefore, are not directly applicable. See White, 1990 WL 33747, at *11 (requiring disclosure of incident reports to permit plaintiff to prosecute civil rights action against hospital); Lizotte v. N.Y.C. Health & Hosps. Corp., No. 85 Civ. 7548, 1989 WL 260217, at *2-6 (S.D.N.Y. Nov. 29, 1989) (directing disclosure of hospital incident reports and minutes of quality assurance committee meetings in civil rights action). The three remaining cases were diversity cases. Strini, 2007 WL 1017280, at *2; Ryan, 2006 WL 1025890, at *2; Tartaglia, 948 F. Supp. at 326. Of these, Ryan and Tartaglia are particularly instructive.

In Ryan, the plaintiff sought the production of allegedly privileged documents regarding a medical review committee meeting in order to prosecute her false advertising, deceptive business practices, and common law fraud claims. Ryan, 2006 WL 1025890, at *4. The plaintiff alleged that her husband went from Florida to New York to

undergo useless cancer treatment on the basis of the defendants' false advertising. Id. at *1. Magistrate Judge Matsumoto concluded that the hospital failed "to meet its burden to demonstrate that disclosure of the information sought by plaintiff would frustrate the policies behind the privileges it asserts." Id. at *4. As the judge explained, the plaintiff did not "seek information regarding 'medical malpractice' or 'physician misconduct' to demonstrate that such malpractice or misconduct actually occurred." Id. Rather, the plaintiff sought the information to demonstrate that the hospital's advertisements were false. The judge reasoned that disclosure therefore would not hamper the hospital in providing candid peer reviews. Id. Balancing the competing interests, the court held further that "to prevent disclosure would prevent plaintiff from obtaining the very evidence needed to prosecute the . . . false advertising . . . and common law fraud causes of action . . . and would undermine the policy [of the laws] to ensure an honest marketplace." Id. at *5 (internal quotation marks and citations omitted).

In Tartaglia, a plaintiff physician filed a lawsuit in another state after he was denied disability and other insurance benefits. The defendant insurer alleged that the doctor had failed to reveal his history of drug and alcohol abuse in his application for insurance benefits. After a New York hospital declined to produce records relating to the doctor's prior employment there, the insurer moved pursuant to Rule 45(c) of the Federal Rules of Civil Procedure to compel the disclosure of peer review and quality assurance information, arguing that these materials were essential to its defense and to prevent

insurance fraud. Tartaglia, 948 F. Supp. at 326. After determining that New York law applied, Judge Stein observed that the goal of both the Public Health and Education Law privileges is to reduce the incidence of medical malpractice in New York. Id. at 328. He held that the privileges consequently did not apply because the disclosure of the documents in an action involving contract and insurance fraud claims, rather than malpractice claims, would not increase the future incidence of malpractice. Id. at 328-29.

As in Ryan and Tartaglia, this suit is not brought to recover damages for medical malpractice, but to vindicate other rights. Significantly, those rights have also been recognized by the New York legislature, which enacted Section 741 of the Labor Law to encourage employees to reports hazards to their supervisors and to protect them from retaliatory personnel actions when they make such reports. Sponsor's Mem. (Oct. 23, 2001), N.Y. Bill Jacket, L. 2002, ch. 24; see Collette v. St. Luke's Roosevelt Hosp., 132 F. Supp. 2d 256, 263 (S.D.N.Y. 2001) (citing Rodgers v. Lenox Hill Hosp., 211 A.D.2d 248, 250-51 (1st Dep't 1995)). Additionally, as in Ryan, Pal is not seeking "information regarding 'medical malpractice' or 'physician misconduct' to demonstrate that such malpractice or misconduct actually occurred." Ryan, 2006 WL 1025890, at *4. Rather, Pal seeks the evidence to determine whether NYU's stated reasons for her discharge were pretextual. Because any disclosure of the information will presumably be subject to a protective order, (see Docket No. 18), the participants in the disciplinary proceedings also will continue to be assured that they may openly engage in a discussion

of a physician's actions without fear of exposing themselves or their hospital to malpractice liability.[3] While this disclosure could potentially lead to NYU's liability on a whistleblower claim, the Public Health and Education Law privileges are not intended to guard against this possibility.[4]

At their core, both Section 741 and the Public Health and Education Law privileges seek to improve patient care. As discussed above, while the disclosure Pal seeks would not discourage frank peer review and therefore would not hurt patient care, a failure to make the disclosure would "prevent [Pal] from obtaining the very evidence needed to prosecute" her Labor Law claim and would undermine Section 741's goal of encouraging whistle blowing by medical personnel. Ryan, 2006 WL 1025890, at *5. Only if plaintiffs can obtain the evidence necessary to support their case can Section 741 function as it was intended to and provide protection from retaliation.

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[3] Additionally, NYU's own regulations require that a summary of the disciplinary interviews be provided to the fellow. (Disciplinary Policy at 11). Since the participants in the disciplinary interviews presumably are aware that a summary of their statements will be disclosed, it is difficult to see why the disclosure of the full interview transcripts would further chill open discussion.

[4] In Seaman v. Wyckoff Heights Med. Ctr., Inc., 25 A.D.3d 596 (2d Dep't 2006), a case relied upon by both NYU and Pal, a medical whistleblower, suing under Section 740 of the New York Labor Law, moved to compel the production of privileged investigation reports and hospital accreditation documents. The Appellate Division, Second Department, affirmed the denial of the plaintiff's motion to compel the production of documents protected by the Public Health and Education Law privileges because the plaintiff failed to demonstrate that the evidence was "material and necessary to the prosecution" of the action. Id. at 597. By implication, if the documents sought had been shown to be material and necessary to the prosecution of the action, the court would have ordered disclosure. Thus, if anything, Seaman supports Pal's request because the documents that she seeks may help her establish that the grounds for her dismissal were pretextual.

Pal's motion to compel therefore is granted to the extent she seeks the disclosure of additional information concerning the process that led to her termination. More specifically, NYU is directed to produce the tape recordings and transcripts of the interviews conducted by the Appeals Committee pursuant to the Disciplinary Policy. NYU shall further allow Bernstein, Ren, and Riles to answer additional deposition questions relating to the subsequent investigation conducted pursuant to the Disciplinary Policy and the Appeals Committee's subsequent review.

B. Pal's Other Discovery Requests

Pal seeks to compel NYU to provide four additional categories of evidence: (1) responses to deposition questions about alleged comparator residents; (2) testimony regarding the disciplinary action, if any, taken by NYU against Ren and Fielding; (3) an unredacted version of an email that Fielding sent to Cohen on February 9, 2006; and (4) responses to deposition questions posed to Ren about her role in an alleged insurance fraud.

1. Discipline of Other Residents

During several depositions, NYU's counsel directed witnesses not to answer questions about the discipline imposed on other residents who allegedly endangered patient care. (See Ren Dep. at 176-77; Bernstein Dep. at 69; Solotaroff Affirm. Ex. J ("Riles Dep.") at 126-27). NYU furnishes two justifications for these instructions: first, that the information sought was privileged; second, that the other

residents' circumstances were not comparable and, therefore, are not relevant. (See Def.'s Mem. at 6, 20). As noted previously, the first of these grounds lacks merit because this is not a malpractice suit. The second ground would require Pal to demonstrate that other similarly-situated residents were treated disparately before she could obtain any information about the manner in which the disciplinary proceedings against those individuals were resolved. This obviously is an impossible burden. Indeed, NYU refused to let its witnesses indicate even in "yes" or "no" form whether there were other residents who had endangered patient care but were not terminated. (See Bernstein Dep. at 69). While it may ultimately be established that Pal's situation was unique, she is, at a minimum, entitled to explore this issue. NYU's witnesses will therefore be required to respond to Pal's questions regarding the existence of other residents who were retained despite having endangered patient safety.

Pal is not entitled, however, to engage in a fishing expedition. Accordingly, to the extent that Pal seeks further details, NYU need only provide information at the depositions of its witnesses concerning the approximate numbers of residents who kept their jobs despite having endangered their patients and the general type of wrongdoing that was alleged. NYU may withhold any information identifying those residents. Additionally, unless Pal is able to make a showing of particularized need, NYU will not be required to produce any documents relating to the discipline of the other residents.

2. Disciplinary Action Against Fielding and Ren

Pal also seeks disclosure of any evidence relating to "any investigation conducted by NYU Hospital[s] Center concerning" Ren or Fielding and the outcome of that investigation. (Pl.'s Mem at 25). In addition to its privilege claims, NYU argues that this information is not relevant because "there is no question that [they] were not Plaintiff's comparators." (Def.'s Mem at 6). As I noted during a telephone conference on July 23, 2007, the mere fact that Ren and Fielding may have far more experience than Pal does not mean that the information sought is not relevant. For example, Fielding's sudden change of heart about his willingness to continue working with Pal may be explained by his fear that Pal would precipitate an investigation of him. Alternatively, if Pal's allegations regarding Fielding had already caused an investigation to be launched, Fielding's change of position might be attributable to his desire for retribution. At a minimum, information about the outcome of any disciplinary proceeding against Fielding might help Pal explain his animus toward her. The information might also support Pal's claim that she became a scapegoat for the wrongdoing of her supervisors. While the admissibility of evidence regarding the outcome of investigations of Ren and Fielding at trial is by no means certain, at this preliminary stage, in the absence of a valid claim of privilege under the Public Health or Education Law privileges, information concerning the discipline imposed (or not imposed) on Ren and Fielding is plainly discoverable.

3. Unredacted Email

NYU has turned over to Pal a version of Fielding's email dated February 9, 2006, containing several redactions. The only justification for these redactions that NYU provides is that they were made "to protect the confidentiality of information privileged under the New York statutory provisions discussed herein and do not relate to Plaintiff's termination." (Def.'s Mem at 21). NYU also contends that Pal's assertion that the redacted information is harmful to NYU is "conclusory and without any basis in fact." (Id.).

NYU has furnished the Court with the unredacted email for in camera review. (See letter from Diane Krebs, Esq., to the Court, dated Nov. 16, 2007). The redacted portions of the email relate to NYU's handling of certain of Pal's complaints regarding Ren. As such, they plainly are relevant. Moreover, the only privileges that NYU has cited as a basis for its redactions are inapplicable. NYU therefore will be required to produce Fielding's February 9 email in unredacted form.

4. Insurance Fraud

Pal also seeks to compel Ren to answer certain questions about her testimony in prior cases and alleged prior participation in fraudulent activity. (Pl.'s Mem. at 25). Although Pal's motion papers cite only an instruction from NYU's counsel directing Ren not to answer questions regarding whether she intentionally had miscoded procedures so that insurers would pay for them, (see Ren Dep. at 77-78, 96), Ren also was

instructed not to testify as to whether she testified in prior malpractice cases. (Id. at 9). Pal argues that both inquiries were proper because they relate to Ren's credibility. (Pl.'s Mem. at 12).

The only justification advanced for the instructions relating to Ren's alleged insurance fraud is that she has a Fifth Amendment right not to incriminate herself. (Def.'s Mem. at 21-22). That cannot be seriously disputed. See OSRecovery, Inc. v. One Groupe Int'l, Inc., 262 F. Supp. 2d 302, 306 (S.D.N.Y. 2003) ("An individual may invoke the Fifth Amendment to decline to answer a deposition question when the individual has reasonable cause to apprehend that answering the question will provide the government with evidence to fuel a criminal prosecution."). Nevertheless, if a truthful answer would tend to incriminate Ren, she must invoke her Fifth Amendment right herself; counsel is not entitled to instruct her not to answer on that ground. See United States v. Schmidt, 816 F.2d 1477, 1481 n.3 (10th Cir. 1987) (only holders of Fifth Amendment privilege, "not their counsel, are the proper parties to interpose a claim of privilege"); see also United States v. Bowe, 698 F.2d 560, 566 (2d Cir. 1983) (Fifth Amendment prohibits "blanket assertion" of privilege); Moll v. U.S. Life Title Ins. Co. of N.Y., 113 F.R.D. 625, 628-29 (S.D.N.Y. 1987) (availability of Fifth Amendment privilege against self-incrimination does not mean that witness need not attend deposition; proper procedure is for deponent to attend deposition and answer non-incriminating questions). NYU should be forewarned, however, that Ren's invocation of her Fifth Amendment

privilege in this civil case may warrant an inference that she engaged in insurance fraud. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them").

Turning to the deposition questions about prior malpractice suits, NYU's counsel did not expressly state a basis during the deposition for instructing Ren not to answer, but the rationale was apparently that the inquiry was barred by the Public Health and Education Law privileges. Inasmuch as those privileges do not apply to this whistleblower suit, Ren's counsel's instruction was improper.[5]

IV. Conclusion

Pal's motion to compel is granted to the extent set forth above. NYU is directed to provide any information required by this Memorandum Decision and Order within ten business days. Thereafter, Pal may depose Bernstein, Ren, and Riles for an additional hour per deponent to explore any issues directly related to, or reasonably arising out of, the additional materials that NYU has been directed to disclose. Those depositions are to be completed on or before January 4, 2008.

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[5] Rule 30(c) of the Federal Rules of Civil Procedure previously provided that all "objections made at the time of the examination . . . shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections." As of December 1, 2007, an amendment to Rule 30(c), intended to codify existing practice, added the clarification that a "person may instruct a deponent not to answer only when necessary to preserve a privilege." Thus, NYU may not instruct a deposition witness not to answer a question on the basis of relevance.

Additionally, the Court will hold a further telephone conference on January 7, 2008, at 2 p.m. Pal's counsel should initiate that call.

Dated: New York, New York
December 5, 2007

FRANK MAAS
United States Magistrate Judge

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