1 No. 6

Anne Indemini,

Appellant,

v.

Beth Israel Medical Center,

Respondent.

Steven I. Locke, for appellant.
Mark Platt, for respondent.
Healthcare Association of New York State, amicus curiae.

READ, J.:

On December 7, 1999, the Department of Emergency Medicine at defendant Beth Israel Medical Center terminated plaintiff Anne Indemini from her position as a second-year

medical resident. The Department took this action "[b]ased on [plaintiff's] disciplinary history, and on [an] incident of inappropriate and disruptive conduct, insubordination, poor judgement and poor performance while on probation." Plaintiff grieved the Department's decision to the Medical Center's House Staff Grievance Committee, which determined on May 19, 2000, that "the evidence produced by the Department fully justifie[d]" the termination, and that there was "no evidence to support the conclusion that the reasons given by the Department for its actions were pretextual," as plaintiff had argued. On July 5, 2000, the Medical Center's Review Committee recommended that the Medical Center's Board of Trustees uphold plaintiff's termination; on July 26, 2000, the Board voted unanimously to accept the Review Committee's recommendation.

On April 20, 2001, plaintiff commenced this breach of contract action, alleging that the Medical Center had wrongfully terminated her residency because of her advocacy for the rights of staff members and her union organizing activities. Plaintiff sought declaratory relief; reinstatement and/or future damages; compensatory damages; and expurgation of the Medical Center's records to delete any references to personnel actions taken against her. Upon the Medical Center's motion, Supreme Court dismissed the complaint for lack of subject matter jurisdiction because plaintiff had not exhausted her administrative remedies under article 28 of the Public Health Law. The Appellate

Division affirmed (309 AD2d 651 [1st Dept 2003]), as do we.

Section 2801-b(1) of the Public Health Law provides in relevant part that

> "[i]t shall be an improper practice for the governing body of a hospital to refuse to act upon an application for staff membership or professional privileges or to deny or withhold from a physician . . . staff membership or professional privileges in a hospital, or to exclude or expel a physician . . . from staff membership in a hospital or curtail, terminate or diminish in any way a physician's . . . professional privileges in a hospital, without stating the reasons therefor, or if the reasons stated are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant."

A party aggrieved by an improper practice may file a complaint with the Public Health Council (PHC) (Public Health Law § 2801-b[2]), which must promptly conduct a confidential investigation (Public Health Law § 2801-b[3]). The PHC is composed of the Commissioner of Health and 14 members appointed by the Governor with the advice and consent of the Senate (Public Health Law § 220). If the PHC determines that cause exists to credit the complaint's allegations, it must promptly so advise the governing body of the hospital against which the complaint was lodged, and direct the hospital to review its actions (id.). The provisions of section 2801-b do not "impair or affect any other right or remedy" that a physician may have (Public Health Law § 2801-b[4]). Supreme Court may enjoin violations or threatened violations of article 28, and any finding made by the PHC or the Commissioner or a hearing officer "shall be prima facie evidence

of the fact or facts found therein" (Public Health Law § 2801-c).

By its terms, section 2801-b applies to plaintiff because she is a "physician" who has been denied "professional privileges" by the Medical Center. A medical resident is undoubtedly a physician (see Merriam-Webster's Collegiate Dictionary, 10th Edition, 1998, at 996 [defining "resident" as, among other things, "a physician serving a residency"]). Further, the Medical Center's adverse decision regarding plaintiff's fitness to continue in its residency program "curtail[s], terminate[s] or diminish[es]" the "professional privileges" extended to her by virtue of the Medical Center's postgraduate medical education program in emergency medicine and/or the Resident Agreement.

Public Health Law § 2801-b was originally enacted to create an avenue of redress for physicians whom hospitals discriminated against or unjustly denied staff membership or professional privileges; however, as Supreme Court below observed, "the statute gives no indication that the Legislature intended Residents, who perform medical duties under the direction of licensed physicians, to have greater access to the courts than physicians." Thus, reading section 2801-b to exclude from its reach those physicians who are residents is unsupported by the statute's language and disserves the "dual purpose" of threshold PHC review -- to "allow[] an expert body to initially review the physician's complaint and [] promot[e] prelitigation

resolution" (Gelbard v Genesee Hosp., 87 NY2d 691, 696 [1996]; see also Mason v Central Suffolk Hosp., 3 NY3d 343 [2004]).

Plaintiff argues that PHC review would be redundant in her case because she has already exhausted the internal grievance procedure that the Accreditation Council for Graduate Medical Education mandates teaching hospitals to follow. The medical staff privileges of the plaintiff-physician in Gelbard, however, also were terminated only after he had exhausted the defendant-hospital's internal hearing and review procedure. Article 28 provides for review by a government panel of medical professionals having no connection whatsoever to the hospital whose actions are being questioned. The availability of this impartial forum "with vast experience and unparalleled expertise in these cases" (Gelbard, 87 NY2d at 697) not only affords a terminated physician an additional level of professional scrutiny, but also serves to protect the hospital by eliminating any hint of institutional bias. As we observed in Matter of Cohoes Mem. Hosp. v Deptmant of Health of State of N.Y. (48 NY2d 583, 589 [1979]):

> "[T]he legislature, by enacting section 2801-b of the Public Health Law, intended to provide the physician and the hospital with a professionally competent forum in which to resolve their disputes in an effort to avoid litigation, if possible. [The PHC] us[es] its professional expertise to identify and discourage groundless claims, to mediate and to conciliate disputes between health-care professionals, and to offer the court some aid in resolving such disputes, should the parties fail to come to an agreement on their own."

Plaintiff also protests that the Appellate Divisions are split over whether an aggrieved resident must exhaust administrative remedies under section 2801-b, pointing to the Second Department's decision in Antonoff v Maimonides Med. Ctr. (251 AD2d 522 [1998] [plaintiff-resident who claimed that he was coerced into resigning after being accused of sexually harassing a patient alleged breach of contract sufficiently to withstand motion to dismiss]), and the Third Department's decision in Jabbour v Albany Med. Ctr. (237 AD2d 787 [1997] [male plaintiff-resident terminated for allegedly conducting an inappropriate medical examination of a female patient raised a material issue of fact sufficient to defeat summary judgment on his cause of action for breach of contract]).

Both of these cases, however, involved a resident's termination based solely on allegations of sexual misconduct; neither the Second nor the Third Department considered, much less decided, whether section 2801-b applies in this context because the issue was not raised. They certainly did not decide that section 2801-b is inapplicable to those physicians who are residents. In our view, a medical resident's "proper recourse for challenging [] termination from [a hospital] residency program is the grievance process set out in Public Health Law § 2801-b, which cannot be avoided 'simply by asserting a breach of contract claim'" (see Solomon v Beth Israel Med. Ctr., 248 AD2d 118 [1st Dept] [1998], lv denied, 92 NY2d 874 [1998],

quoting Gelbard at 697). Whether there is an exemption from PHC review when a physician's staff membership or professional privileges are denied, curtailed or terminated solely because of alleged sexual harassment or misconduct directed at a patient is another question for another day.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Read. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt and Graffeo concur. Judge R.S. Smith took no part.

Decided February 10, 2005