IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAY J. SCHINDLER,

OPINION and ORDER

Plaintiff,

v. 05-C-705-C

MARSHFIELD CLINIC, PAUL L. LISS, ROBERT K. GRIBBLE, DONALD B. KELMAN JOHN H. NEAL, RODNEY W. SORENSON, TOM FACISZEWSKI, KEVIN RUGGLES, JAMES P. CONTERATO, FREDERIC P. WESBROOK, GARY P. MAYEUX, ROBERT A. CARLSON, DAVID J. SIMENSTAD, TIMOTHY R. BOYLE, DANIEL G. CAVANAUGH, GARY R. DEGERMAN, DOUGLAS J. REDING, and IVAN B. SCHALLER,

Defendants.

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In this civil action for injunctive and monetary relief, plaintiff Jay J. Schindler contends that defendants committed various torts against him by terminating his employment with the Marshfield Clinic, making allegedly defamatory statements about him and failing to provide third parties information about his past affiliation with the clinic. Jurisdiction is present under 28 U.S.C. § 1332.

Now before the court are defendants' motions for summary judgment on plaintiff's

remaining claims. Because plaintiff has failed to adduce sufficient evidence in support of his defamation and tortious interference claims, summary judgment will be granted in favor of defendants on plaintiff's claims that defendants Marshfield Clinic, John Neal and Tom Faciszewski slandered him; defendant Marshfield Clinic defamed him by issuing a report to the National Practitioner Data Bank in June 2004 that the clinic knew to be false; defendant Marshfield Clinic tortiously interfered with his employment contract at the Luther Midelfort Clinic; defendant Marshfield Clinic tortiously interfered with his prospective employment and insurance contracts; and defendants Paul Liss, Neal, Robert Gribble, Rodney Sorenson, Donald Kelman and Kevin Ruggles tortiously interfered with his employment contract with defendant Marshfield Clinic. Defendants' motion will be granted also with respect to plaintiff's claim that defendants breached plaintiff's employment contract by failing to follow the clinic's professional review action policy because plaintiff has adduced no evidence that the policy was not followed. Because plaintiff's only remaining claims are those raised in counts I and III of his complaint, alleging breach of the terms of his employment contract, plaintiff's claim of intentional and negligent infliction of emotional distress will be dismissed. Wisconsin law bars terminated employees from recovering damages in tort for breaches of their employment contracts.

Before turning to the motions for summary judgment, I will address defendants' "Motion to Strike and for Sanctions," in which defendants ask the court to strike all documents filed by plaintiff after his summary judgment opposition deadline and to award

them attorney fees for costs they incurred answering plaintiff's submissions, many of which fail to conform to this court's summary judgment procedures.

Time and again in this lawsuit, plaintiff has been warned of his failure to comply with this court's rules and given opportunities to conform his filings to the standards required by this court. See, e.g., Order dated Oct. 12, 2006, dkt. #70, at 3 (chronicling plaintiff's repeated failure to comply with this court's summary judgment procedures). The rulings seem to have fallen on deaf ears. Many of plaintiff's submissions were filed after the filing deadline, and the documents plaintiff filed on time are, to put it charitably, a mess. Repeatedly, plaintiff has proposed facts that are overwrought, vague and irrelevant, and facts "supported" by citations to blatantly inadmissible evidence or by evidence that does not support the proposed facts for which they are cited.[1] Many proposed facts are not supported by citation to any evidence at all.

Although it would serve no purpose to formally strike plaintiff's submissions, I have

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[1]As an example of an overwrought proposal, see plaintiff's proposed finding of fact #136(f):

> Jay had dreamed of running the Iditerod since his youth. During the winter of 2001-2001 [sic], Jay and his team ran 15000 miles. Now he travels nearly 400 miles one way to care for his other practice on the far side of the state. Jay cries easily when he talks about his aging team and the fact that they will not run this great, "last race."

Lawyers tempted to draft facts in such hyperbolic terms as these would do well to consider their client's interests before submitting documents that undermine the seriousness of the claims they are litigating and the credibility of the lawyers propounding them.

disregarded documents that were submitted after the November 6, 2006 deadline for filing a response. Dkt. ##189-194, 197-99. In addition, I have ignored all of plaintiff's proposed facts and responses to defendants' proposed facts that are not properly supported by accurate citations to admissible evidence.

Defendants have asked the court to sanction plaintiff by requiring him to reimburse them for the cost of responding to his proposed findings of fact. However, defendants did not suggest in their opening brief any authority under which the court might impose such a sanction on plaintiff. Although plaintiff's failings are legion, I am not inclined to search independently for a ground upon which to honor defendants' request for attorney fees. A court has authority to impose sanctions on lawyers who do not follow its rules. Ignoring the irrelevant and unsupported proposed findings of fact and untimely filings *are* sanctions, even if they do not satisfy defendants' understandable frustration at plaintiff's inability to understand the basic rules of evidence and court procedures. Consequently, defendants' request for monetary sanctions will be denied.

From the parties' remaining proposed findings of fact and the evidence to which they cite, I find the following to be material and undisputed.

## UNDISPUTED FACTS

### A. Parties

Plaintiff Jay Schindler is a neurosurgeon specializing in complex spine procedures.

He is a citizen of South Dakota. Plaintiff graduated from the Yale University School of Medicine and completed his neurosurgery training at the Mayo Clinic in Rochester, Minnesota.

Defendant Marshfield Clinic is a Wisconsin nonprofit corporation with its principal place of business in Marshfield, Wisconsin. The clinic provides health care services.

Defendant Paul Liss is chief medical officer of the Marshfield Clinic. Defendant John Neal is chair of the neurosurgery department. Defendant Robert is director of quality improvement and medical director for health information management. Defendant Rodney Sorenson is chair of the neurology department. Defendant Donald Kelman is a neurosurgeon and past chair of the neurosurgery department. Each is a citizen of Wisconsin.

At the time plaintiff was employed at the Marshfield Clinic, defendant Kevin Ruggles was the clinic's division medical director. He is a citizen of Illinois.

Defendant Paul Conterato is a doctor employed by the Marshfield Clinic. In addition, he is Chief of Staff at St. Joseph's Hospital and in that capacity served as a member of the clinic's executive committee. At the time the complaint was filed, defendant Conterato was a citizen of Wisconsin. He is now a citizen of Florida.

Defendants Frederic Wesbrook, Gary Mayeux, Robert Carlson, David Simenstad, Timothy Boyle, Daniel Cavanaugh, Gary Degerman, Douglas Reding and Ivan Schaller are doctors employed by the Marshfield Clinic and members of the clinic's executive committee. Each is a citizen of Wisconsin.

B. Plaintiff's Employment at the Marshfield Clinic

Plaintiff entered into a two-year contract with the Marshfield Clinic, beginning in August 2002. Plaintiff's employment contract contained the following provisions relevant to his claims in this lawsuit:

> 4.08 Policies and Procedures. Physician is required to follow all Clinic policies and procedures during the term of this Agreement. Failure to adhere to all Clinic policies and procedures during the term of this agreement constitutes "good cause" for termination under Section 4.10.
>
> 4.09 Amendments. This Agreement may be amended at any time by mutual agreement of the parties, provided that before any amendment shall be operative or valid, it shall be reduced to writing and signed by the parties.
>
> 4.10 Term of Agreement. This Agreement shall remain in force and effect for the term of two (2) years beginning as of the 19th day of August 2002.
>
> Notwithstanding the other provisions of this contract, upon a showing of good cause, either party shall have the right and privilege of canceling and terminating this Agreement upon sixty (60) days written notice to the other, and upon the expiration of said notice, this Agreement shall be and become of no further force and effect whatsoever, and each of the parties hereto shall be relieved and discharged therefrom except as otherwise provided herein. Good cause includes but is not limited to the provisions and requirements outlined in Sections 4.02 [liability insurance], 4.03 [licensure status, National Practitioner Databank inquiry and credentialing], 4.04 [exclusion from federal health care programs], 4.05 [immigration status], 4.06 [drug free workplace], and 4.08 above and/or any misconduct by Physician. The sixty-day notice provision is not required for termination under Sections 4.02, 4.03, 4.04, or 4.05.

During plaintiff's first year of employment, he performed a high number of surgeries. During his second year of employment, he received several significant raises in recognition

of his high surgical "production rate" and in an attempt to dissuade him from leaving the clinic to obtain higher paying employment.

As a term of his employment, plaintiff received evaluations after 4 months, 8 months and 15 months. At his 4-month and 8-month evaluations, plaintiff received the highest possible score in each of 31 categories in which he was scored. At plaintiff's 15-month evaluation in late November 2003, he received a score of 7.5 out of a possible 10 points. Although this score was lower than those plaintiff received on his earlier evaluations, plaintiff's performance was deemed above average and satisfactory.

### C. The Professional Review

On December 2, 2003, plaintiff operated on a 41-year-old patient identified as T. S. During the surgery, plaintiff "advanced a trial spacer" into the patient's spinal column, rendering her quadriplegic for a short period of time and leaving her with permanent impairments. (The severity of her residual disability is disputed.)

The day after T. S.'s surgery, defendant Liss, chief medical director, spoke with defendant Neal, chair of neurosurgery, about the complication that had occurred. Defendant Liss met also with defendant Ruggles, the director of the medical division that included the neurosurgery department. Defendant Liss asked the clinic's legal department to search its risk management database and generate a report of other complications involving plaintiff's patients.

After meeting with defendants Neal and Ruggles and reviewing the report generated by the legal department, defendant Liss decided to initiate a professional review action and summarily suspend plaintiff's surgical privileges while the professional review was pending. On December 4, 2003, defendants Liss and Neal met with plaintiff and informed him of the decision to initiate a professional review and suspend his surgical privileges.

In September 2003, the Marshfield Clinic adopted a professional review action policy. Under the terms of the policy, the chief medical officer, division medical director, department chair and other members of the medical staff designated by the chief medical officer are required to investigate cases that merit professional review. The policy requires the chief medical officer to appoint "at least one or two individuals knowledgeable about the subject doctor's specialty but without any supervisory relationship with the affected professional" to serve on a professional review committee. Under the terms of the policy, a professional review committee is charged with "investigating the matter" that prompted the professional review. The committee has discretion to "invite the affected individual to a meeting to discuss the proposed professional review." After concluding its investigation,

> [i]f the Professional Review Committee decides that all or any portion of the affected individual's practice be restricted, suspended or terminated to a summary suspension or restriction of privileges is extended, the C[hief] M[edical] O[fficer] (or his or her designee) shall so advise the affected individual in writing (Notice) . . . .

When a physician is the subject of an adverse professional review action, he has the right to file an appeal to the clinic's executive committee. At the appellate level (and only

at that level), the physician is guaranteed the right to a hearing at which he has

> the right to representation by an attorney or by another member of the medical staff of the physician's choice; to a record (in the form to be determined by the executive committee) made of the proceedings . . .; to call, examine and cross-examine witnesses; to present evidence determined to be relevant by the hearing Chair . . . ; and to submit a written statement at the close of the hearing.

However, under the terms of the policy, the executive committee is limited to determining whether "the initiated Professional Review is arbitrary or without any factual basis."

Section 6 of the policy governs its interpretation and provides that

> [t]he provisions of this Policy shall be interpreted in a manner consistent with the best interests of the Clinic and its patients. In any particular case, the fact that certain provisions of this Policy are not strictly followed will not invalidate any final action.

The committee assigned to conduct plaintiff's professional review included defendants Liss, Ruggles, Neal, Gribble, Sorenson and Kelman.

The professional review committee met for the first time on December 8, 2003. The committee members were asked to review four of plaintiff's cases in preparation for a December 17, 2003 meeting, at which plaintiff would be present to discuss the cases and answer questions.

On December 17, 2003, a second professional review committee meeting was held. Defendant Ruggles did not attend because he was on vacation. Defendant Gribble left early to attend a hospital function. Although defendant Neal arrived at the meeting late and missed at least a portion of plaintiff's testimony to the committee, he participated in the

committee's vote. All four doctors who deliberated at the December 17 meeting (defendants Neal, Kelman, Sorenson and Liss) voted unanimously to terminate plaintiff's employment. The following day, defendant Liss called defendant Gribble to ask him whether he had formed an opinion regarding plaintiff. Defendant Gribble stated that he believed plaintiff's employment should be terminated.

Of the members of the professional review committee, only defendants Neal and Kelman had any experience in neurosurgery but Kelman was partially retired.

On the afternoon of December 18, 2003, defendant Liss met with plaintiff and informed him that his employment was being terminated immediately. Plaintiff was given a termination letter, which stated in relevant part:

> Thank you for meeting with the Professional Review Committee on December 17, 2003. After your presentation, the Members again discussed and reviewed a number of patient charts, with the focus upon patient W. K, date of surgery 6/18/03; patient R. S., date of surgery 6/23/03; patient M. J., date of surgery 6/19/03; and patient T. S., date of surgery 12/2/03.
>
> This letter will provide Notice that based upon the recommendation of the Professional Review Committee . . . you are hereby notified that your employment with the Marshfield Clinic is hereby terminated.

Dkt. #136, Exh. 100, at 1. Plaintiff was given no further explanation for the committee's decision.

Plaintiff appealed his termination to the clinic's executive committee. On March 2, 2004, the executive committee held a nine-hour hearing that was attended by committee members defendants Wesbrook, Mayeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman

and Schaller. Defendant Reding was unable to attend. During the hearing, plaintiff presented the testimony of numerous experts, who testified that they had experienced complications when performing surgeries similar to the one plaintiff experienced and testified that such complications are not uncommon. The clinic presented the testimony of defendants Faciszewski, Sorenson and Neal. On March 9, 2004, after two hours of discussion, the committee voted 7-0 to uphold the professional review committee's decision.

On March 22, 2006, defendant Wesbrook issued the decision of the executive committee. The decision stated in part:

> It was the unanimous opinion of the P[rofessional] R[eview] A[ction] C[ommittee] members that Dr. Schindler is not a safe surgeon . . . With regard to the indications for surgery, the extent of surgery, and complications, the expert witnesses for Dr. Schindler supported his actions in general, although not in every particular. They opined that among the neurosurgeons and orthopedic surgeons doing this type of work, there is a broad range from very conservative to very aggressive, and that in this young specialty a national consensus has not developed. Each of them has had similar complications, including severe bleeding. All described themselves as more conservative than Dr. Schindler, and both Drs. Ebersold and Krauss stated they would have done a less extensive procedure in the [T. S.] case . . . The overall thrust of testimony from Dr. Schindler's experts was that Dr. Schindler was an aggressive surgeon, but within the bounds of acceptable practice, and that his blood loss in the two cases was excessive, but also within bounds of reasonable variation, and that his complications were those that occur with this type of work.
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> * * * *
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> After receiving nine hours of testimony, reviewing hundreds of pages of submitted documents, and then discussing the matter for two hours in executive session, the executive committee unanimously upheld the [professional review committee] decision and rejected Dr. Schindler's

contention that the decision was arbitrary and/or without basis in fact.

> The executive committee finds that these cases are replete with facts that demand scrutiny. It further concluded that these facts, contested only in part by Dr. Schindler's witnesses, were carefully and prudently considered by the [professional review committee], and that the [committee's] decision was justified and reasonable . . .
>
> The executive committee acknowledges that there is a range of acceptable "aggressiveness" among surgeons, that there may be disagreement among surgeons regarding indications and extent of surgery, and that even severe complications can occur. The executive committee also feels that documentation of clinical findings, documentation of thinking, honest and accurate recording of complications, and willingness to admit and learn from mistakes are all necessary and fundamental to patient safety and should be directly proportional to aggressiveness. This is not the case here, and in fact the opposite is true. Dr. Schindler, by the most charitable estimate, is a very aggressive surgeon. However, he deals with errors and complications by denial, evasion, and blaming others, accepting no responsibility for himself. His documentation leaves much to be desired, in some cases omitting serious events. Explanations and reasons offered, after the fact, on his behalf at the hearing were often inconsistent with the explanations and reasons offered in his documentation or in his testimony to the [professional review committee]. All of these inconsistencies and aforementioned behaviors, in conjunction with the complications and outcomes of these cases, lead us to conclude that the [committee] decision was correct.

Dkt. # 136, Exh. 103, at 2, 4-5.

On March 29, 2004, plaintiff requested the Marshfield Clinic's board of directors to review the executive committee's decision. A review hearing was held on June 22, 2006. Only one board member voted in favor of reversing the executive committee's decision.

D. National Practitioner Data Bank Report

On June 24, 2004, defendant Marshfield Clinic filed a report with the National Practitioner Data Bank, stating that plaintiff's clinical privileges had been permanently revoked. The report contained the following summary:

> On December 4, 2003, a professional review was initiated consistent with the applicable professional review action policy. On that date, Dr. Schindler's employment activities were suspended for a period of 14 days. An investigation was conducted concerning the adequacy of Dr. Schindler's skill level in three distinct areas, namely identification of appropriate surgical candidates; the extent of the surgery performed in those individuals properly identified as surgical candidates; and surgical techniques. A professional review action committee was appointed and those individuals conducted and completed their review of Dr. Schindler's surgical practice. On December 19, 2003, Dr. Schindler was notified that the committee had unanimously determined that his employment was terminated, subject to his rights of appeal. Dr. Schindler appealed the decision and a hearing was conducted on March 2, 2004. Dr. Schindler was represented by counsel who examined and cross-examined witnesses, presented witnesses, and presented evidence in support of his appeal. Dr. Schindler had been advised that the determination by the committee was deemed necessary and required in the best interests of patients. Testimony was received on the topics of indications for surgery, the extent of surgery, and complications encountered. The appellate body reconvened on March 9, 2004, and voted unanimously to uphold the decision of the committee, concurring that the best interests of patients required the termination of Dr. Schindler's employment with the resultant termination of his clinical and surgical privileges. Dr. Schindler presented a further appeal to the entire board. This "second" appeal was conducted on June 22, 2004, and the board was unanimous with the exception of one vote in its support of the determinations by the committee and the appellate body. This action undertaken by the board on June 22, 2004, renders final the actions and determinations of the committee.
>
> Basis for Action: Substandard or inadequate skill level

Dkt. #140, Exh. 151, at 2-3. The clinic did not mail plaintiff a copy of the adverse action report or include his mailing address on the report so the National Practitioner Data Bank

could send him a copy of the report. Although plaintiff became aware of the report at some later time, he has not disputed the report or added a statement to it, as he is permitted to do at any time.

E. Plaintiff's Employment at Luther Midelfort

Immediately after his employment was terminated by the Marshfield Clinic in December 2003, plaintiff began seeking alternative employment. One of the places from which he sought employment was the Luther Midelfort Clinic in Eau Claire, Wisconsin. Before hiring plaintiff, the medical director of the Luther Midelfort Clinic, Dr. Terrance Borman, spoke with chief medical director defendant Liss about the reasons for plaintiff's termination by the Marshfield Clinic. (At no time did Borman speak with anyone at the Marshfield Clinic other than defendant Liss regarding plaintiff.) On December 24, 2003, plaintiff accepted a job offer from the Luther Midelfort Clinic.

Subsequently, plaintiff asked defendant Marshfield Clinic to provide the Luther Midelfort Clinic with verification of his past employment. At first, defendant Marshfield Clinic conditioned the verification on plaintiff's signing a personally tailored waiver form releasing the clinic from all legal liability for its communications with the Luther Midelfort Clinic. Plaintiff refused to sign this form. Eventually, the clinic agreed to accept a standard signed release form, which plaintiff signed on January 19, 2004. Later that day, defendant Liss sent Luther Midelfort Clinic a letter verifying plaintiff's dates of employment with the

Marshfield Clinic.

Plaintiff began work at Luther Midelfort on February 16, 2004. While plaintiff was employed at Luther Midelfort, Randall Sandfort, a lawyer for defendant Marshfield Clinic, had a conversation with Andra Palmer, a lawyer for Luther Midelfort, during which he told Palmer that "from a risk management point of view," he was "relieved that Dr. Schindler was no longer associated with Marshfield Clinic."

On April 30, 2004, plaintiff performed back surgery on a patient and made an incision at the wrong part of the patient's spine. The error was a well-known complication that most spine surgeons experience at one time or another. The patient was not harmed and benefited from the surgery. Later, however, the patient sued plaintiff and others for malpractice.

In the days following the surgery, Borman talked to plaintiff about his employment, making it clear that plaintiff should resign from the Luther Midelfort Clinic. Borman did not consult with plaintiff's supervisors, Drs. White and Ebersold, before forcing plaintiff's resignation. (Both White and Ebersold support plaintiff and believe he was performing adequately as a surgeon.) As a result of his conversations with Borman, plaintiff resigned from the clinic on June 2, 2004.

### F. Plaintiff's Subsequent Employment

Immediately after plaintiff resigned from Luther Midelfort, plaintiff's wife began

searching the internet and reading through neurosurgical journals, looking for jobs for him. She called clinics throughout the country and arranged for plaintiff to interview with health care providers in Illinois, Alaska, South Dakota, Oregon, Mississippi and North Dakota. All of these interviews took place in June 2004, and each lasted two to three days.

Plaintiff applied for and was granted a medical license with the State of South Dakota. On July 1, 2004, plaintiff began working as a neurosurgeon in South Dakota.

G. Plaintiff's Emotional Health

While employed at the Luther Midelfort Clinic, plaintiff met with a "career counselor," Dr. Robin King-Cooper, who discussed "coping strategies" with him. Plaintiff has not sought counseling or other treatment for the anxiety and emotional distress he has alleged in this lawsuit. Recently, however, psychiatrist Dr. Marvin Firestone examined plaintiff and concluded that he is suffering from severe depression and post-traumatic stress disorder.

According to plaintiff's wife and mother, plaintiff's behavior has changed since his termination from the Marshfield Clinic. Once a classical music enthusiastic, plaintiff no longer listens to music. He has abandoned his hobbies, including photography. He places blankets and quilts over the windows of his home to prevent light from entering the house. He no longer engages in outdoor activities or cares for the menagerie of horses, dogs and other animals he and his family own. He neglects his wife and five year old daughter. On

many occasions, he has suggested to his wife that she leave him.

## OPINION

Defendants have filed two separate motions for summary judgment. In their "Motion for Summary Judgment on Claims Not Subject to HCQIA Immunity," defendants contend that they are entitled to judgment as a matter of law on plaintiff's claims of (1) defamation; (2) tortious interference with plaintiff's employment contract at the Luther Midelfort Clinic and with prospective employment contracts; and (3) intentional and negligent infliction of emotional distress. In their "Motion for Summary Judgment on Counts II and V of the Complaint," defendants contend that judgment should be entered in their favor on plaintiff's claims that defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles (4) tortiously interfered with the Marshfield Clinic's employment contract with plaintiff and (5) breached a contract by failing to comply explicitly with the terms of the Marshfield Clinic's professional review policy. It appears that defendants have not moved for summary judgment on counts I and III of plaintiff's complaint, which are variations of his claim that defendants breached the terms of his employment contract by firing him without good cause to do so.

The parties' summary judgment submissions are something of a jumble. Not infrequently, they have discussed in the briefs matters that are tangential to legal and factual allegations raised in the complaint. In the interest of clarity, I will address each of plaintiff's

remaining claims (with the exception of counts I and III, on which defendants have not moved for summary judgment) in the order they were raised in the complaint. All other matters have been disregarded.

A. Breach of Contract—Employment Procedures and Policies

In his complaint and brief in opposition to defendants' motion for summary judgment, plaintiff characterizes defendant Marshfield Clinic's peer review policy as a contract and contends that defendant breached the contract by failing to follow the policy in various ways. Although the parties' arguments focus on whether the peer review policy is a binding contract that was implicitly or explicitly incorporated by reference into plaintiff's employment contract, there is no need to resolve that question. Assuming without deciding that the peer review policy is a contract, I find plaintiff has adduced no evidence from which it might be inferred that defendant Marshfield Clinic breached the policy.

In his complaint, plaintiff alleged that defendant Marshfield Clinic breached its peer review policy procedures by (1) waiting two months to provide plaintiff with an explanation for his termination; (2) not including at least "one or two individuals" on the program review committee who were knowledgeable in plaintiff's specialty; and (3) excluding the division medical director and department chair from the program review committee. However, the evidence plaintiff himself has adduced contradicts each of these assertions.

It is undisputed that on December 18, 2003, defendant Liss (chief medical director)

met with plaintiff and provided him with a written letter, stating that the professional review committee had reviewed the charts of four patients and had decided to terminate his employment. Although the letter was terse, the peer review policy required the committee only to issue a written decision; it did not spell out the content of that decision or the level of explanation required.

Similarly, it is undisputed that the committee assigned to conduct plaintiff's professional review included *two* individuals with neurosurgical experience, defendants Neal and Kelman. Although these doctors may not have performed the exact surgeries that plaintiff performed, that does not disqualify them as specialists in neurosurgery, plaintiff's field of specialty.

Finally, it is undisputed that both defendant Liss (chief medical officer) and defendant Neal (chair of the neurosurgery department) were members of plaintiff's professional review committee. Although defendant Neal missed one committee meeting and arrived late at another, nothing in the clinic policy requires all committee members to be prompt or even that they attend every committee meeting. In fact, the policy explicitly renounces the kind of nitpicking in which plaintiff asks this court to engage, stating explicitly that "[i]n any particular case, the fact that certain provisions of this policy are not strictly followed will not invalidate any final action." Dkt. #2, Exh. 2, at § 3.6.

Plaintiff's complaints with defendants regarding the peer review process focus on the *conclusions* reached by his peer review committee, not on the committee's failure to adhere

to its policy. Flawed though the policy may be, Order dated Oct. 12, 2006, dkt. #170, at 33-34, the undisputed facts show that defendants followed it and provided plaintiff with all the process it guaranteed. Consequently, defendants' motion will be granted with respect to plaintiff's claim that defendants breached their peer review policy in finding cause to terminate plaintiff's employment.

## B. Defamation

In his complaint, plaintiff alleged:

> Defendant Marshfield Clinic, through and by other named defendants, as well as by the named defendants below, publicized to numerous third parties a number of defamatory statements. These statements included, but are not limited to, the following:
>
> a. Dr. Neal stat[ing] that Dr. Schindler had been "forced to give up neurosurgery" and "was just providing some primary care services out west."
> b. Dr. Faciszewski stat[ing] that Dr. Schindler had "paralyzed four patients."
> c. A Marshfield Clinic secretary, Cindy, stat[ing] that Dr. Schindler was a "very dangerous surgeon."
> d. A Marshfield Clinic physician's assistant, Jean, stat[ing] that one of Dr. Schindler's surgeries had resulted in a "dropped instrument" and a "severed cord."
> e. Two Marshfield Clinic physician assistants, Hazel Neufeld and Bob Aldrich, stat[ing] that Dr. Schindler was terminated because of "wound infections" and that he had "operated too quickly."

Cpt., dkt. #2, ¶ 158. In addition, the complaint contained the following allegations:

> After defendants fired Dr. Schindler, they also proceeded to report their adverse action against him to the National Practitioner Data Bank (NPDB).

> In doing so, the defendants were passing on information which was directly harmful to Dr. Schindler's good name, reputation, livelihood and opportunities to continue his career. This information was conveyed either knowingly or in a manner where the foreseeable result would be harmful to Dr. Schindler's good name, reputation, livelihood and opportunities to continue his career.

Id., ¶ 96.

Before turning to the substance of plaintiff's defamation claims, a word about procedure is in order. When deciding diversity cases pursuant to 28 U.S.C. § 1332, federal courts apply state law to resolve substantive questions and federal law to resolve procedural and evidentiary issues. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Harper v. Vigilant Ins. Co., 433 F.3d 521, 525 (7th Cir. 2005). Pleading requirements fall generally into the category of procedural matters.

To prove a claim of defamation under Wisconsin law, a plaintiff must adduce evidence showing that the statement alleged to been defamatory: "(1) was spoken to someone other than the person defamed, (2) is false, (3) is unprivileged and (4) tends to harm the defamed person's reputation so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 534, 563 N.W.2d 472, 477 (1997); Hart v. Bennet, 2003 WI App 231, ¶ 21, 267 Wis. 2d 919, 941, 672 N.W.2d 306, 317. Although a plaintiff need not plead verbatim the defamatory remarks made about him, he is required to be specific, indicating in his complaint "the particular words" of which he is complaining.

Wis. Stat. § 802.03(6). Once a plaintiff has pleaded his claim with specificity, he will be required to prove that the allegedly defamatory words were spoken by the defendant and were false. Mach v. Allison, 2003 WI App 11, ¶ 15, 259 Wis. 2d 686, 656 N.W.2d 766 (on summary judgment court confines its analysis to "specific implication that is alleged to be false"). By mandating pleas of specificity for defamation claims, Wisconsin law imposes pleading requirements that are stricter than those imposed by federal law. Compare Wis. Stat. § 802.03(6) with Fed. R. Civ. P. 8.

When state law conflicts directly with the Federal Rules of Civil Procedure, federal rules govern. Hanna v. Plumer, 380 U.S. 460, 473 (1965). Here, however, no conflict arises. By describing in his complaint the content of the statements allegedly made by defendants, plaintiff has met the requirements of both § 802.03(6) and Rule 8. Having pleaded his claim with specificity, plaintiff may be held to proving that defendants made the exact statements plaintiff has attributed to them. Limiting plaintiff to proof of only those statements alleged in the complaint insures that "the outcome of the litigation in the federal court [will] be substantially the same, so far as legal rules determine the outcome of a litigation, as if it [had] be[en] tried in a State court." Felder v. Casey, 487 U.S. 131, 151 (1988) (citing Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)); see also Talens v. Bernhard, 669 F. Supp. 251, 255 (E.D. Wis. 1987) (assuming without deciding that Wis. Stat. § 802.03(6) applied to federal diversity suit).

I note that the parties' briefs reveal some confusion about the exact nature of

plaintiff's claims. In large part, this confusion is a result of the fact that plaintiff's defamation claims are a kaleidoscope of shifting allegations against ever-changing defendants. Plaintiff alleged in his complaint that six individuals (defendant Neal and Faciszewski and Marshfield Clinic employees "Cindy," "Jean," Hazel Neufeld and Bob Aldrich) made four general sets of allegedly false and defamatory statements about him. In addition, plaintiff alleged that defendant Marshfield Clinic filed a report with the National Practitioner Data Bank that the clinic knew to be false.

However, in his summary judgment briefs, plaintiff takes a different tack. He asserts that even if the defendants and clinic employees named in his complaint did not make the statements he attributed to them, he may pursue his defamation claims so long as *any* clinic employee made *any* similar statements at *any* time following plaintiff's discharge from the clinic. According to plaintiff, under Wisconsin law "the circumstances of publication, which include details of how the [allegedly defamatory] statements were published (orally or by print), or by whom (e.g., by Neal or by another employee of defendant Marshfield Clinic), may be 'stated generally.' Only the particular words constituting the defamation must be identified in the complaint." Dkt. #182, at 25. Not so.

Wisconsin Statutes § 802.03(6) states, "In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally." This "general" statement regarding publication and its application must meet the "general pleading requirements" set

forth in Wis. Stat. § 802.02(1)(a), which, like its federal counterpart, Fed. R. Civ. P. 8(a), requires a pleading to contain "a short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief."

It is true that § 802.02(1)(a) does not state explicitly that a plaintiff must name the proper defendants to his claim (or at least not the wrong ones). However, Wisconsin courts have held repeatedly that "[p]leading with 'particularity' means that the plaintiff's allegations must specify 'the particular individuals who made the representations [and] the details of where and when the misrepresentations were made, and who the misrepresentations were made to.'" Doe v. Archdiocese of Milwaukee, 2005 WI 123, ¶ 52, 284 Wis. 2d 307, 700 N.W.2d 180 (citing Friends of Kenwood v. Green, 2000 WI App 217, ¶ 16, 239 Wis. 2d 78, 619 N.W.2d 271) (addressing pleading requirements for fraud under § 802.03(2)). Although Wis. Stat. § 802.03(6) dispenses with the requirement that a plaintiff plead with particularity "where" and "when" allegedly slanderous statements were made, it does not dispense with the requirement that a plaintiff indicate "who" spoke the "particular words" alleged to be defamatory. To do otherwise would undermine the purpose for heightened pleading requirements, which is to "protect[] persons from casual allegations of serious wrongdoing and put[] defendants on notice so that they may prepare meaningful responses to the claim" against them. Id.; Putnam v. Time Warner Cable, 2002 WI 108, ¶ 26, 255 Wis. 2d 447, 649 N.W.2d 626; Rendler v. Markos, 154 Wis. 2d 420, 428, 453

N.W.2d 202 (Ct. App.1990). To the extent that plaintiff attempts to raise on summary judgment claims that he was defamed by persons or in ways not mentioned in the complaint, his arguments will be ignored. Therefore, I will confine my analysis to the allegations of the complaint.

With respect to plaintiff's claims in his complaint that defendant Neal stated that plaintiff had been "forced to give up neurosurgery" and "was just providing some primary care services out west," that defendant Faciszewski stated that plaintiff had "paralyzed four patients," that "Cindy" stated that plaintiff was a "very dangerous surgeon," that "Jean" stated that one of plaintiff's surgeries had resulted in a "dropped instrument" and a "severed cord" and that Hazel Neufeld and Bob Aldrich stated that plaintiff was terminated because of "wound infections" and that plaintiff "operated too quickly," plaintiff has adduced no evidence in support of his claims.

The proposed "evidence" upon which plaintiff relies does not bear even a passing resemblance to admissible evidence. Take, for example, the following passage from plaintiff's brief:

> There is evidence that [St. Joseph's] Hospital employee Pam Goelke stated to a third party, affiant William Sukow, that Dr. Schindler was "not doing neurosurgery," and that Dr. Schindler was "providing some primary care services out west." Ms. Goelke worked with Marshfield employees, and she heard employee Megan Eick state that Neal was the originator of these statements.

Dkt. #182, at 23. Elsewhere, plaintiff relies on Sukow's averment that an unidentified

"male anesthetist or anesthesiologist" repeated derogatory comments to Sukow about plaintiff "that seemed to be mimicking gossip the speaker had heard from other employees." In support of each of these factual assertions, plaintiff cites *solely* to the affidavit of William Sukow. Of course, Sukow's testimony regarding what Goelke told him that Eick told Goelke that Neal told Eick is not admissible evidence of a defamatory statement by Neal. His testimony is hearsay within hearsay. Sukow's bald assertion that an unidentified speaker made statements that may have originated with "other employees" of defendant Marshfield Clinic is not just hearsay, but rumor or speculation. Because plaintiff has adduced no evidence from which it might be inferred that he was defamed by defendants Neal, Faciszewski and Marshfield Clinic in the manner he alleged in ¶ 158 of his complaint, defendants will be granted summary judgment with respect to each of those claims.

One defamation claim remains: plaintiff's assertion that defendant Marshfield Clinic defamed him by filing a report with the National Practitioner Data Bank that it knew to be false. In their reply brief, defendants contend vigorously that plaintiff did not plead this claim in his complaint. Although it is true that plaintiff did not summarize this claim in the portion of his complaint entitled "Claim IX – Defamation," in paragraph 96 of the complaint plaintiff identifies the report and alleges that, by filing it, defendants "were passing on information which was directly harmful to Dr. Schindler's good name, reputation, livelihood and opportunities to continue his career." Defendants complain that plaintiff did not parse out the specific words in the report of which he was complaining, and that he therefore failed

to plead his libel claim with the requisite particularity. However, it is clear from plaintiff's complaint that he believes the *entire report* conveys the false implication that he is a dangerous surgeon whose patients' best interests were best served by his permanent termination. Although plaintiff could have drafted his complaint more carefully, his failure to do so is not fatal. Plaintiff's allegations regarding the June 2004 report were adequate to put defendants on notice that he was pursuing this claim against them; that defendants ignored his claim is no reason for this court to do the same.

The more difficult question is whether defendant Marshfield Clinic is entitled to immunity under the Health Care Quality Improvement Act for filing the report. It is undisputed that defendant Marshfield Clinic submitted a report to the National Practitioner Data Bank in June 2004. Plaintiff alleges that he lost job and insurance opportunities as a result of false implications drawn from the report. Although defendants do not dispute that plaintiff was denied opportunities as a result of the report, they take the position that the report was accurate and that they are therefore entitled to immunity for filing it. In defendants' view, so long as the words in the report were true, that is, so long as plaintiff was terminated on the ground that he had an inadequate level of skill, it is of no consequence that the grounds themselves may have been baseless, or even maliciously manufactured.

As I explained in the court's October 12, 2006 order, the Health Care Quality Improvement Act was designed to improve patient care by "restricting the ability of physicians who have been found to be incompetent to hide their malpractice by moving from

state to state without discovery." Gordon v. Lewistown Hospital, 423 F.3d 184, 201 (3d Cir. 2005) (citing 42 U.S.C. § 11101). To that end, the Act requires clinics to report adverse actions taken against practitioners who, like plaintiff, have been terminated following a professional review action. 42 U.S.C. § 11133(a)(1)(A). The reporting entity is entitled to immunity from damages so long as the report is made "without knowledge of the falsity of the information contained in the report." 42 U.S.C. § 11137(c).

Although plaintiff challenges the underlying validity of the peer review process and the motives of those who engaged in it, he has not suggested that the report defendant Marshfield Clinic filed in June 2004 was not accurate on its face, that is, it inaccurately summarized the proceedings against plaintiff and the reasons given by the clinic's professional review committee and executive committee for their decision to terminate plaintiff and uphold his termination. In that way this case is distinguishable from Brown v. Presbyterian Healthcare Services, 101 F.3d 1324, 1334 (10th Cir. 1996), in which the Court of Appeals for the Tenth Circuit denied immunity to a defendant who had submitted a report to the National Practitioner Data Bank listing the wrong reason for a medical center's disciplinary action against an obstetrician. In Brown, the data bank report indicated that the disciplined doctor had engaged in "negligence/ incompetence/malpractice," although the record revealed that neither the review panel nor the hospital's board of trustees had ever found the doctor negligent, incompetent or guilty of malpractice. Id.

In this case, the report on plaintiff indicated that he was terminated because he was

found to have a "substandard or inadequate skill level," a fact that accurately summarizes the reasons given by the professional review committee and executive committee for his discharge. Plaintiff has adduced no evidence from which it might be inferred that the information contained in the form was an inaccurate summary of the peer review committee's findings. Nevertheless, he contends that defendant Marshfield Clinic should be denied immunity because certain members of his professional review committee, employed by the clinic, knew that the committee's conclusions were wrong and that plaintiff did not lack surgical skill.

Following the thread of plaintiff's logic would require courts to deny immunity to clinics and hospitals each time there is reason to believe any actor in a peer review process may have had an improper motive or may have reached a knowingly false conclusion regarding disciplinary action against a doctor. Each person responsible for reporting the outcome of peer review hearings would be required not only to report factually accurate information but also to examine the subjective motives of each player in the disciplinary process before reporting the outcome of any peer review action. Such a process would be time consuming, burdensome and likely to dissuade hospitals and clinics from reporting adverse information about doctors for fear of incurring liability—a burden the Health Care Quality Improvement Act was designed to alleviate. See, e.g., 42 U.S.C. § 11101(4) (Congress found that professional review protected patients and "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal

antitrust law, unreasonably discourages physicians from participating in effective professional peer review"); Mathews v. Lancaster General Hospital, 87 F.3d 624, 633 (3d Cir. 1996) ("The Act was intended to deter antitrust suits by disciplined physicians.").

Plaintiff's complaint is not that the June 2004 National Practitioner Data Bank report conveyed false information, but that it rested on faulty premises. In the court's October 12, 2006 opinion, I declined to grant defendant members of plaintiff's professional review committee immunity under 42 U.S.C. § 11111(a), finding that there were disputed questions of material fact with respect to whether they engaged in a good faith review of plaintiff's work. That question is distinct from whether defendant Marshfield Clinic is entitled to immunity under 42 U.S.C. § 11137(c) for filing the June 2004 National Practitioner Data Bank report summarizing the outcome of the peer review process. Because it is undisputed that the report submitted to the National Practitioner Data Bank in 2004 accurately summarized the reasons given by the professional review committee for terminating plaintiff's employment, I conclude that defendant Marshfield Clinic is entitled to summary judgment on plaintiff's claim that the clinic defamed him by filing the June 2004 report.

### C. Tortious Interference

Under Wisconsin law, there are five elements to the tort of interference with a contract: (1) the plaintiff had a contract or a prospective contractual relationship with a

third party; (2) the defendant interfered with that relationship; (3) the interference was intentional; (4) there was a causal connection between the interference and damages; and (5) the defendant was not justified or privileged to interfere. Briesemeister v. Lehner, 2006 WI App ¶ 48, — Wis. 2d. —, 720 N.W.2d 53. To have the requisite intent, the defendant must "act with a purpose to interfere with the contract." Dorr v. Sacred Heart Hospital, 228 Wis. 2d 425, 456-57, 597 N.W.2d 462 (1999). "If an actor lacks the 'purpose to interfere' then his []conduct does not subject him []to liability even if it has the unintended effect of deterring a third party from dealing with the plaintiff." Foseid v. State Bank of Cross Plains, 197 Wis. 2d 772, 788, 541 N.W.2d 203, 209 (Ct. App. 1995). Plaintiff contends that defendants tortiously interfered with his employment contracts with the Marshfield Clinic, his employment contract with the Luther Midelfort Clinic and prospective employment and insurance contracts between himself and unspecified insurers and employers.

1. Interference with Marshfield Clinic contract

First, plaintiff contends that defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles, all members of the Marshfield Clinic's professional review committee, tortiously interfered with his employment contract with defendant Marshfield Clinic by terminating his employment when they lacked good cause to do so. It is undisputed that each of these defendants is an employee of the clinic and was required by the clinic to serve as a member of plaintiff's professional review committee. The question, then, is whether any impropriety

in their recommendation to terminate plaintiff's employment could constitute the tort of interference with a third party contract. In other words, should defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles be viewed merely as agents of the Marshfield Clinic (which cannot be considered a third party to its own contract with plaintiff) or as distinct persons capable of interfering with the contract between plaintiff and the Marshfield Clinic?

Defendants contend that Wausau Medical Center v. Asplund, 182 Wis. 2d 274, 297, 514 N.w.2d 34, 44 (Ct. App. 1994), bars plaintiff's tortious interference claim by holding that one cannot tortiously interfere with one's own contract. In Asplund, a physician employed by Wausau Medical Center formed his own service corporation, of which he was the sole member, while he was employed by the clinic. After forming the corporation, Asplund gave the clinic notice that he was leaving, thereby violating his employment contract. The clinic asserted that the service corporation had tortiously interfered with the contract between itself and Asplund. The court of appeals disagreed, and held that because

> Asplund and his service corporation are in effect the same person, this cause of action cannot stand. Tortious interference with a contract occurs when someone "intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract. To argue that the service corporation interfered with the contract between W[ausau] M[edical] C[enter] and Asplund is to say that Asplund interfered with the contract by inducing himself not to perform the contract. Because Asplund's interference with his own contract with W[ausau] M[edical] C[enter] is not an action encompassed by a tortious interference with contract cause of action, we affirm the trial court's grant of summary judgment on this issue.

Id. at 297.

The facts of this case are clearly distinguishable from those in Asplund. The alleged tortfeasors (defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles) are not alter egos of the alleged third party (Marshfield Clinic), although they may be its agents. Factually, this case is closer to Porcelli v. Joseph Schlitz Brewing Co., 397 F. Supp. 889, 893 (E.D. Wis. 1975), Mendelson v. Blatz Brewing Co., 9 Wis. 2d 487, 101 N.W.2d 805 (1960), and the more recent Mackenzie v. Miller Brewing Company, 2000 WI App 48, ¶ 63, 234 Wis. 2d 1, 608 N.W.2d 331, in which employees were permitted to pursue tortious interference claims against fellow employees who acted in their own self-interest to secure the termination of the plaintiffs. As defendants point out, in each of those cases, the plaintiffs were employees at-will—a fact on which the courts placed emphasis. See also Preston v. Wisconsin Health Fund, 397 F.3d 539, 544 (7th Cir. 2005) (applying Wisconsin law); see also Mark R. Hinkston, "Tortious Interference with At-Will Employment," 74 Wis. Law. 14 (Sept. 2001). The parties have not cited any cases involving tortious interference claims lodged against co-workers by contractual employees and my independent search has not revealed any.

The reason that courts have given special attention to tortious interference in the at-will context is not because at-will employees are given greater protections from interference than are contractual employees, but because the employment "contract" in an at-will employment arrangement is less obviously susceptible to interference. Preston, 397 F.3d at 543 (explaining that "[e]mployment at will is a contractual relationship, albeit one with no

definite duration" that may provide grounds for claim for tortious interference with that contract). Courts have been hesitant to recognize tortious interference claims in the at-will context because of the danger of transforming "employment at will into employment terminable only for cause." Id. Here, however, that concern is not present. Plaintiff's employment was already terminable only for cause. Therefore, there is no apparent reason why his tortious interference claim should be treated less favorably than similar claims brought by at-will employees, such as Preston, Porcelli, Medelson and Mackenzie.

Although it is true that defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles were required to participate in the peer review process that led to plaintiff's termination, if they made their decisions *solely* out of animosity and personal jealousy and not on behalf of their employer's interests, their actions would likely fall outside the scope of their employment and might make them liable for their interference with plaintiff's employment contract. Therefore, the key to proving tortious interference in the employment context is adducing evidence that ill will motivated the decision. That is not to do as easy as it may seem.

Courts have recognized that tortious interference claims brought in the context of employment raise especially thorny issues:

> In the typical tortious-interference case, A has a contract with B—for example, to sing in an opera produced by B—and C comes along and induces A to break her contract and sing for C's opera company instead. B can sue A for breach of contract, but B can also sue C in tort for inducing the breach . . . . The present case is unusual because C is, as it were, another singer, trying to take

> A's place. It is not as if [the co-employees], viewed as a pair who conspired to replace [plaintiff], . . . were competitors of the [employer] seeking to steal [plaintiff] from it. They were employees . . . seeking to get rid of a competing employee. The struggle is internal to the employer, which will find it hard to control its employees if they can sue each other . . . . If [plaintiff's] tortious-interference claim can fly, it means that whenever a supervisor decides to promote one person in place of another, the person who doesn't get the promotion will be able to sue the supervisor. An employer's costs will rise if he must compensate his supervisors for the risk of their being sued by employees whom they fire—that, or the supervisors will be timid about firing nonperforming employees. . .

Preston, 397 F.3d at 542-543. To minimize the potentially disruptive effects of such claims, the court of appeals held in Preston that:

> Unless courts are to be overwhelmed by suits by disgruntled former employees against corporate officers, more is required than that a discharge be tainted by some private motive, such as greed, personal dislike, or . . . perhaps a personal attachment to a competing employee. Few are the employees whose actions are motivated solely by a selfless devotion to the employer's interests. The plaintiff must prove both that the employer did not benefit from the defendant's act and that the act was independently tortious, for example as fraud or defamation.

Id. at 544.

In this case, plaintiff has not adduced evidence that defendants committed any independent tort against him when they decided to terminate his employment. Therefore, although his termination may have breached the terms of his employment contract (the claim on which plaintiff is proceeding to trial), the recommendation of defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles that plaintiff's employment be terminated was not tortious in itself. Under Preston, 397 F.3d 539, plaintiff's claim against these defendants

for tortious interference with his employment contract is barred.

2. Interference with Luther Midelfort contract

Plaintiff contends that defendants interfered with his contract with Luther Midelfort in three ways: by failing to provide the clinic with plaintiff's employment verification in a timely manner, by engaging in "adverse and disruptive communications" with the clinic's in-house counsel and by making "adverse statements" to prospective patients. The first theory is nothing more than a repackaging of plaintiff's claim that defendants failed to provide verification of plaintiff's affiliation with the clinic (see § C.3, below), a contention I found previously did not state a claim for tortious interference. Similarly, the third theory relates to facts and legal theories not pleaded in the complaint and with respect to which I denied plaintiff leave to amend. Dkt. #200, at 5.

That leaves only plaintiff's second theory: that defendant Marshfield Clinic tortiously interfered with his employment contract with the Luther Midelfort Clinic when Randall Sandfort, general counsel for the Marshfield Clinic, engaged in conversations with Andra Palmer, general counsel for Luther Midelfort. It is undisputed that Sandfort and Palmer spoke at least once while plaintiff was employed at Luther Midelfort and that Sandfort told Palmer he was "relieved," from a "risk management" perspective, that plaintiff no longer worked at the Marshfield Clinic. Had Sandfort's comments induced Palmer to take action to terminate plaintiff, his comments might constitute tortious interference. However,

plaintiff has adduced no facts in support of his claim that Sandfort's comments were relayed to Borman or played any part in Borman's decision to force plaintiff to resign. If plaintiff had any evidence to support his claim, this was the time to adduce it. Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir. 1999) ("Summary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.") Because plaintiff has failed to show a "causal connection" between Sandfort's comment and plaintiff's termination, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendant Marshfield Clinic tortiously interfered with plaintiff's employment contract with the Luther Midelfort Clinic.

3. Interference with prospective employment and insurance contracts

With respect to plaintiff's claim that defendants tortiously interfered with his prospective employment and insurance contracts, defendants' motion for summary judgment will be granted. As I explained at length in orders dated May 2, 2006, dkt. #22, and August 18, 2006, dkt. #135, Wisconsin law does not recognize a duty on the part of medical agencies to provide information about credentials to third parties, such as the employers and insurers to whom plaintiff refers in his complaint. Humana Medical Corp. v. Peyer, 155 Wis. 2d 714, 719, 456 N.W.2d 355, 359 (1990). In the absence of a free-standing or contractual duty, defendant Marshfield Clinic was not legally obligated to provide the

information plaintiff wanted it to provide.

Furthermore, plaintiff has proposed no facts from which it may be inferred that any prospective employers requested information from defendant Marshfield Clinic, much less that the clinic refused to provide such information. In support of his claim, plaintiff has submitted the affidavit of lawyer Heather Springer, who states that the insurer Wellmark Blue Cross/Blue Shield denied plaintiff a contract. However, Springer avers that the contract was denied because of the 2004 adverse action report on file with the National Practitioner Data Bank, not because of defendant Marshfield Clinic's alleged failure to provide employment verification. In addition, Springer's affidavit does not lay a foundation for her testimony by demonstrating her personal knowledge of Wellmark's decision or by explaining how she is qualified by training or experience to testify as an expert on the health care entity's decision-making process. Plaintiff himself avers only that he "lost many professional opportunities"as a result of defendant Marshfield Clinic's failure to provide credentialing information. Such general statements are insufficient to defeat summary judgment on plaintiff's tortious interference claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (party's failure to show what evidence he has to convince a trier of fact to accept his version of the facts will result in summary judgment for the opposing party); Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003); see also Helland v. Froedtert Memorial Lutheran Hospital, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999) (To defeat summary judgment, "[i]t is not enough to rely upon unsubstantiated conclusory

remarks, speculation, or testimony which is not based upon personal knowledge.").

D. Infliction of Emotional Distress

In an order dated May 2, 2006, I denied defendants' motion to dismiss plaintiff's claims for intentional and negligent infliction of emotional distress, holding that it "w[as] too soon to tell whether plaintiff w[ould] be able to come forward with sufficient proof of the severe and debilitating nature of the emotional injuries he allegedly sustained" as a result of defendants' conduct. The moment of truth has arrived; however, instead of focusing on the facts plaintiff has adduced in support of his claims for emotional distress, defendants focus their arguments on the law governing plaintiff's claims.

Defendants assert that if each of plaintiff's defamation and tortious interference claims were to be dismissed, as they will be, plaintiff's claims for emotional distress relate exclusively to the breach of his employment contract with defendant Marshfield Clinic. Wisconsin law bars terminated employees from recovering tort damages for the breach of their employment contracts. Tatge v. Chambers & Owen, Inc., 219 Wis. 2d 99, 107, 579 N.W.2d 217, 220 (1998) ("The breach of an employment contract is not actionable in tort.") Plaintiff does not contest this fundamental proposition, which is designed to prevent the "irreverent marriage of tort and contract law" by limiting damages for the breach an employment contract to traditional contract remedies. Id. Because plaintiff's sole remaining claim is that defendant Marshfield Clinic breached the terms of his employment contract by

firing him without good cause, plaintiff may not seek tort damages for the emotional distress caused by the clinic's decision to terminate his employment. Consequently, defendants' motion for summary judgment will be granted with respect to plaintiff's claim that defendants inflicted emotional distress on him both intentionally and negligently.

ORDER

IT IS ORDERED that

1. Defendants' Motion for Summary Judgment on Claims Not Subject to HCQIA Immunity Defense is

a) GRANTED with respect to plaintiff's claim that defendants Marshfield Clinic, Neal and Faciszewski defamed him;

b) GRANTED with respect to plaintiff's claim that defendants Marshfield Clinic defamed him by issuing a report to the National Practitioner Data Bank in June 2004 which the clinic knew to be false;

c) GRANTED with respect to plaintiff's claim that defendants tortiously interfered with his employment contract at the Luther Midelfort Clinic;

d) GRANTED with respect to plaintiff's claim that defendants tortiously interfered with his prospective employment and insurance contracts; and

e) GRANTED with respect to plaintiff's claim that defendants inflicted emotional distress on him intentionally and negligently.

2. Defendants' Motion for Summary Judgment on Counts II and V of the Complaint is

a) GRANTED with respect to plaintiff's claim that defendants breached his employment contract by failing to follow the clinic's professional review action policy; and

b) GRANTED with respect to plaintiff's claim that defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles tortiously interfered with his employment contract with defendant Marshfield Clinic.

3. Defendants' Motion to Strike and for Sanctions is GRANTED in part and DENIED in part.

Entered this 4th day of January, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge