IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAY J. SCHINDLER,

Plaintiff,

OPINION AND ORDER

v.

05-C-705-C

MARSHFIELD CLINIC, ST. JOSEPH'S HOSPITAL OF MARSHFIELD, INC., 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, by failing to follow proper employment policies and terminating him without good cause, (1) defendant Marshfield Clinic breached the terms of its employment contract with him; (2) defendant Marshfield Clinic and defendants Paul Liss, Robert Gribble, Donald Kelman, John Neal and Rodney Sorenson breached the covenant of good faith and fair dealing; (3) defendants Marshfield Clinic, Liss, Gribble, Kelman, Neal and Sorenson

tortiously interfered with his employment contracts with defendant Marshfield Clinic; (4) unspecified defendants tortiously interfered with his employment contracts with defendant Luther Midelfort; (5) defendants Marshfield Clinic, St. Joseph's Hospital, Liss, John Neal and James Conterato and other unspecified defendants tortiously interfered with his prospective contracts with other employers and insurers; (6) defendants Marshfield Clinic, Kevin Ruggles and Liss misrepresented facts to him; (7) defendants Marshfield Clinic, Neal and Tom Faciszewski defamed him; (8) all named defendants inflicted emotional distress upon him both intentionally and negligently; and (9) all defendants were negligent in their conduct toward him. Jurisdiction is present under 28 U.S.C. § 1332.

Now before the court are two motions to dismiss portions of plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants Marshfield Clinic, Liss, Gribble, Kelman, Neal, Sorenson, Faciszewski, Ruggles, Conterato, Wesbrook, Maxeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller have moved to dismiss plaintiff's claims that they breached the duty of good faith and fair dealing by the manner in which they applied hospital policies to terminate his employment contract, that they misrepresented facts to him, that they intentionally and negligently inflicted emotional distress upon him, and that they were generally negligent in their conduct toward him. Defendant St. Joseph's Hospital has moved separately to dismiss plaintiff's claim that it tortiously interfered with his prospective employment and insurance contracts.

In response to defendants' motions to dismiss, plaintiff has agreed to voluntarily

dismiss his claims that defendants breached a duty of good faith and fair dealing, misrepresented facts, and acted negligently toward him. However, he continues to assert that defendants inflicted emotional distress upon him, both intentionally and negligently, and interfered with prospective economic opportunities. I agree that plaintiff has stated a claim for intentional and negligent infliction of emotional distress because he has pleaded facts from which a jury could infer that he suffered extreme and debilitating emotional injury. Therefore, the motion to dismiss of defendants Marshfield Clinic, Liss, Gribble, Kelman, Neal, Sorenson, Faciszewski, Ruggles, Conterato, Wesbrook, Maxeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller will be denied with respect to plaintiff's intentional and negligent infliction of emotional distress claims. Finally, because Wisconsin law has not established that a defendant may "interfere" with another person's prospective contract by failing to perform an act not required by law, I will grant defendant St. Joseph's Hospital's motion to dismiss plaintiff's claim that it tortiously interfered with his prospective employment and insurance contracts by failing to verify the dates during which he was affiliated with the hospital.

I draw the following facts from the allegations of plaintiff's complaint.

FACTUAL ALLEGATIONS

A. Parties

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

He is a citizen of South Dakota.

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

Defendant St. Joseph's Hospital of Marshfield, Inc. is a Wisconsin corporation with its principal place of business in Marshfield, Wisconsin. The hospital is a subsidiary of Ministry Health Care and is in the business of providing health care services.

Defendants Paul Liss, Robert Gribble, Donald Kelman, John Neal and Rodney Sorenson are doctors employed by the Marshfield Clinic and members of the clinic's Professional Review Committee. Each is a citizen of Wisconsin.

Defendant Kevin Ruggles is a doctor employed by the Marshfield Clinic. He is a citizen of Wisconsin.

Defendant Paul Conterato is a doctor employed by the Marshfield Clinic. In additon, he is Chief of Staff at St. Joseph's Hospital. He is a citizen of Wisconsin.

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

B. Plaintiff's Background and Training

Plaintiff received his medical degree from Yale University and completed his

neurosurgery training at the Mayo Clinic in Rochester, Minnesota. He completed additional training in complex spine surgery through the Mayo Clinic's neurosurgery and orthopedic departments, which are ranked first in the nation. In January 2004, one of plaintiff's mentors at the Mayo Clinic wrote, "Dr. Schindler has training, background, experience and judgment in spinal fusion and instrumentation techniques which exceeds his regional neurosurgical peers and fellowship trained orthopedic surgeons."

C. Employment at the Marshfield Clinic

On September 19, 2001, plaintiff signed a written employment contract with defendant Marshfield Clinic. The contract took effect August 19, 2002, and covered a period of two years' employment. On August 19, 2002, plaintiff began working at the Marshfield Clinic. His practice grew rapidly, and from October 1, 2002 to November 30, 2003, plaintiff performed more surgeries than any other member of the neurosurgery department. From January 1, 2003, to June 30, 2003, plaintiff performed more surgeries than any of his neurosurgical colleagues. From October 2002 to August 2003, plaintiff's gross billings were higher than those of any other member of the neurosurgery department.

In April 2003, plaintiff began looking for a new job. By September 2003, he had received several job offers, two of which offered higher salaries than did his job at the Marshfield Clinic. In October 2003, plaintiff was on the brink of resigning from the clinic. Defendant Neal was aware of this fact and used it to negotiate a salary increase for himself

and other members of the neurosurgery clinic who had been employed at the clinic for more than two years.

Defendant Ruggles, the administrative head of the Marshfield Clinic's neurology and neurosurgery departments, met with plaintiff to encourage him not to leave the clinic. Defendant Ruggles offered to increase plaintiff's salary, if plaintiff would agree to "set down some roots" and "make his home" in the Marshfield area.

Plaintiff asked for a salary at the 100% percentile of the median salary range. Defendant Ruggles refused to pay plaintiff a salary beyond the 95% percentile because he thought a higher salary would cause animosity on the part of defendant Neal. Beginning on October 20, 2003, plaintiff's annual salary was increased to $728,840. In a letter to plaintiff announcing the raise, defendant Liss wrote that the salary increase was a response to "the extraordinary effort and production exhibited by Dr. Schindler during his first Associate year." The raise was the second plaintiff had received within a period of two months, both of which were designed to retain him as a surgeon at the Marshfield Clinic.

In November 2003, plaintiff mailed letters declining three different job offers and began constructing a home.

D. Termination of Employment

On December 2, 2003, plaintiff was performing discectomies and fusion of a patient's cervical vertebrae when accidentally he "advanced a trial spacer." This error resulted in a

well-recognized surgical complication that caused the patient to become temporarily quadriplegic. Plaintiff reported the incident to clinic administrators, as required by clinic protocol.

On December 4, 2003, without any prior notice, Marshfield Clinic management told plaintiff that he was being suspended immediately from all medical and hospital practice for a period of two weeks. As the Marshfield Clinic's Chief Medical Officer, Dr. Liss had no authority to suspend plaintiff's hospital privileges.

Plaintiff was ordered to attend a meeting on December 17, 2003. Several days before the meeting, plaintiff received a list of ten patients whom he was told would be discussed at the meeting. At the December 17 meeting, plaintiff was questioned about four of the ten patients. Plaintiff was then asked to leave the meeting while the members of the Professional Review Committee deliberated.

Although the Marshfield Clinic's Policies and Procedures Manual details procedures to be followed during professional review meetings, defendants did not follow these procedures. Defendant Liss did not ask any independent experts to attend the meeting. No literature was presented or referenced.

Of the six physicians on the Professional Review Committee who were scheduled to attend the December 17 meeting, only three were present for the entire meeting. Defendant Gribble said nothing, asked no questions, and left halfway through the meeting. Defendant Ruggles did not attend any portion of the meeting. Defendant Neal was not present during

any portion of the meeting in which plaintiff was questioned; he arrived after plaintiff had been asked to leave but nevertheless participated in the voting process. When plaintiff asked defendant Liss for a copy of the minutes of the meeting, Liss laughed and responded that no minutes had been taken because "none w[ould] be necessary."

On December 18, 2003, plaintiff met with defendant Liss and a lawyer from the Marshfield Clinic. Defendant Liss gave plaintiff a letter stating that the Professional Review Committee had recommended that plaintiff's employment be terminated and that the termination was effective immediately. Although the clinic's policies required defendants to inform plaintiff of the reasons for the Professional Review Committee's recommendation, defendant Liss's letter did not state any specific reasons for the decision. In deciding to terminate plaintiff, defendants did not seek the advice of any individual or entity that could have provided an unbiased and objective review of plaintiff's cases.

Defendant Liss told plaintiff that he had 14 days in which to appeal the Professional Review Committee's decision to the Marshfield Clinic's Executive Committee but advised him not to do so. (In fact, plaintiff had 30 days to appeal the decision.) Defendant Liss told plaintiff to resign from the St. Joseph's Hospital medical staff "before they beg[a]n the process to revoke" plaintiff's privileges. The hospital never revoked, threatened to revoke or otherwise limited plaintiff's privileges.

Plaintiff filed a timely appeal of the Professional Review Committee's recommendation and a hearing was scheduled for March 2, 2004. Although plaintiff had

performed many successful surgeries prior to his summary suspension, he was not allowed to return to work while his appeal was pending. When plaintiff's patients tried to contact him, defendants "stonewalled" them. These patients were forced to find plaintiff by other means, including hiring a private investigator and visiting plaintiff's house.

In January 2004, plaintiff requested a copy of the record of the Professional Review Committee's minutes, his patients' records and a copy of his personnel file, so he could prepare for his appeal hearing. Despite plaintiff's repeated requests, defendants refused at first to provide any of the requested information.

Finally, two months after the December 17 meeting, plaintiff received a copy of a memorandum written by defendant Liss, which purported to be a record of the December 17 meeting. In that memo, reference was made to non-existent anatomical structures and to false and inaccurate information that supported the decision to terminate plaintiff's employment. Less than two weeks before the March 2 appeal hearing, defendants sent plaintiff some medical records and portions of his personnel file. Defendants refused to provide plaintiff with complete documentation and knowingly concealed or withheld documents from him.

At the hearing held on March 2, members of the Executive Committee limited the number of witnesses plaintiff was allowed to present, limited the time plaintiff's representatives had to present his case and refused to allow plaintiff to call his patients as witnesses. In his defense, plaintiff presented oral testimony from three renowned

neurosurgical experts and written testimony from three other independent complex spine neurosurgical experts, two of whom had no connection to plaintiff or the Marshfield Clinic. Defendants presented no experts and relied solely on the testimony of defendants Neal and Faciszewski, the doctors who were most threatened by plaintiff's work productivity. When plaintiff pointed out the inconsistencies in the data defendant Liss has presented data, the Executive Committee refused to acknowledge Liss's errors.

The Marshfield Clinic's policies required a decision to be issued on plaintiff's appeal within ten days; however, plaintiff did not receive a copy of the committee's decision until March 22, 2004. The committee's decision denying the appeal contained false statements and distorted facts.

Plaintiff appealed the Executive Committee's decision to the Marshfield Clinic's Board of Directors, which consisted of all doctors who had practiced with the clinic for two years or more. At his hearing before the board, plaintiff was allowed to present only thirty minutes of testimony. The Board disregarded plaintiff's statement and upheld his dismissal.

E. Employment at Luther Midelfort

After plaintiff was suspended from the Marshfield Clinic on December 4, 2003, he began seeking other work immediately. On December 24, 2003, plaintiff accepted an offer from Luther Midelfort, an Eau Claire, Wisconsin satellite clinic of the Mayo Clinic. Because defendant Liss and the Marshfield Clinic refused to provide Luther Midelfort with plaintiff's

employment information until plaintiff signed additional release forms, plaintiff was not able to begin work until February 16, 2004.

Shortly after plaintiff began working at Luther Midelfort, the chair of his department informed him that the lawyer for the Marshfield Clinic and the lawyer for Luther Midelfort were "having frequent conversations about [plaintiff]." As a result of those conversations, plaintiff was required to undergo an "employment fitness evaluation" not required of other doctors. While plaintiff was working at Luther Midelfort, defendants made derogatory comments about him that were passed on to medical sales representatives, nurses and doctors. Defendant Faciszewski stated publicly that plaintiff "had paralyzed four patients" and defendant Neal reported that plaintiff had been "forced to give up neurosurgery."

Three months after plaintiff began working at Luther Midelfort, he was told that the clinic wanted to replace him "for business reasons." Under duress, plaintiff was forced to resign.

F. Failure to Verify Dates of Affiliation

After plaintiff left Luther Midelfort, he tried to find employment in Alaska. However, because defendant St. Joseph's Hospital refused to complete a questionnaire plaintiff was required to submit, plaintiff was unable to obtain an Alaska medical license.

Defendant Marshfield Clinic refused to verify plaintiff's employment information in response to inquiries it received from plaintiff's prospective employers. The clinic contended

first that it had completed all requested verification forms but later asserted that it would not provide verification until plaintiff completed a release form tailored to him specifically, indemnifying the clinic from future legal action.

Later, when plaintiff obtained a medical license in South Dakota and began practicing there, he tried to become a "preferred provider" for a number of health insurance companies. Because of defendants Marshfield Clinic's and St. Joseph's Hospital's refusal to verify his dates of employment, he was not approved by several companies. Consequently, many of plaintiff's patients must seek care from another doctor or pay out-of-pocket for their surgical care. Other patients must complete complicated paperwork in order to be reimbursed for the cost of the medical care plaintiff provides them.

As a result of defendants' actions, plaintiff experienced acute fear, anxiety, humiliation, "related manifestations" and emotional distress that was extreme and disabling. Plaintiff also suffered damage to his reputation and career.

OPINION

A. Infliction of Emotional Distress

Defendants Marshfield Clinic, Liss, Gribble, Kelman, Neal, Sorenson, Faciszewski, Ruggles, Conterato, Wesbrook, Maxeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller contend that plaintiff has failed to state a claim for intentional or negligent infliction of emotional distress because he has not pleaded facts consistent with his

allegation that defendants' actions caused him "extreme and disabling" distress, a required element of claims for intentional infliction of emotional distress brought under Wisconsin law. Defendants concede that plaintiff's complaint alleges that he "suffered emotional distress that was extreme and disabling, and has suffered injury to his professional reputation, as well as great anxiety, humiliation and emotional distress." Cpt., dkt. #2, at 44. However, they assert that plaintiff's ability to appeal the termination of his job, find work at Luther Midelfort and work throughout the pendency of his appeal process are conclusive proof that plaintiff was not suffering from extreme or disabling emotional harm.

First, I note that neither party has separated the elements of plaintiff's claim for intentional infliction of emotional distress from the elements of his claim for negligent infliction of emotional distress. Although the overlap between these claims is substantial, because plaintiff has pleaded the torts separately and because slightly different standards govern each claim, I will address them separately.

1. Intentional infliction of emotional distress

Wisconsin common law has "historically distrusted emotion" as the sole basis for a compensable tort claim because of the difficult proof problems associated with such claims. Finnegan ex rel. Skoglind v. Wisconsin Patients Compensation Fund, 2003 WI 98, ¶ 16, 263 Wis. 2d 574, 666 N.W.2d 797. Indeed, Wisconsin did not recognize the tort of intentional infliction of emotional distress until 1963 and did not authorize suits for loss of

consortium until 1967. Bowen v. Lumbermens Mutual Casualty Co., 183 Wis. 2d 627, 638 n. 5, 517 N.W.2d 432, 437 (1994). To insure that claims grounded on emotional injury are sincere, Wisconsin has created stringent proof requirements for claims alleging infliction of emotional distress.

To prevail on an intentional infliction of emotional distress claim under Wisconsin law, a plaintiff must demonstrate that (1) the defendant's conduct was intended to cause emotional distress; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) the plaintiff suffered an extreme disabling emotional response to the defendant's conduct. Rabideau v. City of Racine, 2001 WI 57, ¶ 34, 243 Wis. 2d 486, 627 N.W.2d 795 (citing Alsteen v. Gehl, 21 Wis. 2d 349, 359-60, 124 N.W.2d 312, 318 (1963)). For a person's emotional response to be considered extreme and disabling, a jury must find that the person was unable to function in other relationships because of the emotional distress caused by the defendants' conduct. Wis. JI – Civ. 2725. Temporary discomfort is never a ground for recovery. Id.

Federal courts sitting in diversity apply state substantive law and federal procedural law. Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 427 (1996). Both federal courts and Wisconsin courts employ notice pleading standards, which require plaintiffs to include in their complaints only a short, plain statement of their claims showing that they are entitled to relief. Fed R. Civ. P. 8(a); Wis. Stat. § 802.02(1)(a). In order to provide fair

notice to an opposing party, a plaintiff is required to plead the operative facts upon which his claim is based; however, he need not allege *all* relevant facts. Brokaw v. Mercer County, 235 F.3d 1000, 1014 (7th Cir. 2000). "Given the Federal Rules' simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002).

In this case, although plaintiff's ability to seek employment with Luther Midelfort and to continue working as a physician during the time his dismissal from the Marshfield Clinic was pending are facts relevant to the severity of plaintiff's emotional injury, they are not dispositive. The fact that plaintiff did what was required of him to grieve his termination and continue receiving some income is not conclusive proof that he was functioning well in his personal and professional relationships during the time period in question. At this early stage in the proceedings, I cannot say that plaintiff will be unable to offer any evidence to support his allegation that the emotional harm he sustained was extreme. Therefore, the motion to dismiss of defendants Marshfield Clinic, Liss, Gribble, Kelman, Neal, Sorenson, Faciszewski, Ruggles, Conterato, Wesbrook, Maxeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller will be denied with respect to plaintiff's claim that these defendants intentionally caused him emotional distress.

2. Negligent infliction of emotional distress

As discussed above, claims of intentional infliction of emotional distress are subject to strict proof requirements because of the ease with which emotional distress may be asserted and difficulty with which it is disproven. Claims of negligent infliction of emotional distress pose even greater challenges:

> [Wisconsin] courts have struggled with the tort of negligent infliction of emotional distress, concerned that the negligent conduct did not adequately assure the authenticity of the plaintiff's claim of severe emotional harm. Courts have historically been apprehensive that psychological injuries would be easy to feign and that suits would be brought for trivial emotional distress more dependent on the peculiar emotional sensitivities of the plaintiff than upon the nature of the tortfeasor's conduct. People should not, courts reasoned, be able to sue for everyday minor disturbances. Furthermore courts feared that opening the courts to claims for negligent infliction of emotional distress would open the floodgates of litigation and lead to unlimited liability for a negligent tortfeasor.

Bowen, 183 Wis. 2d at 639.

The decisions of the Wisconsin Supreme Court regarding claims of negligent infliction of emotional distress have focused almost exclusively on claims brought by third party bystanders. Pierce v. Physicians Ins. Co. of Wisconsin, Inc., 2005 WI 14, ¶ 42, 278 Wis. 2d 82, 692 N.W.2d 558 (Prosser, J., concurring) ("The court has not said before and the court does not say now what elements must be present for the tort of 'negligent infliction of emotional distress' when the claim is not a bystander claim."). Nevertheless, because the foundational elements of a claim for negligent infliction of emotional distress brought by bystanders are merely "the traditional elements of a tort action in negligence," that is, negligent conduct, causation and injury in the form of severe emotional distress, it is

reasonable to import these elements to claims of negligent infliction of emotional distress brought by individuals harmed directly by the alleged negligence of a defendant.

The "severe emotional distress" requirement is equivalent to the "extreme and disabling emotional injury" required for claims alleging intentional infliction of emotional distress. See, e.g., Hicks v. Nunnery, 2002 WI App 87, ¶ 26, 253 Wis. 2d 721, 643 N.W.2d 809. Severe emotional distress has been described as "anxiety of such substantial quantity or enduring quality that no reasonable person could be expected to endure it." Id.; Evrard v. Jacobson, 117 Wis. 2d 69, 73, 342 N.W.2d 788 (Ct. App.1983).

As in the case of plaintiff's claim for intentional infliction of emotional distress, it is too soon to tell whether plaintiff will be able to come forward with sufficient proof of the severe and debilitating nature of the emotional injuries he allegedly sustained. For now, he has alleged sufficient facts to put defendants on notice of his claim against them. Consequently, the motion to dismiss of defendants Marshfield Clinic, Liss, Gribble, Kelman, Neal, Sorenson, Faciszewski, Ruggles, Conterato, Wesbrook, Maxeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller will be denied with respect to plaintiff's claim against defendants for negligent infliction of emotional distress.

B. Tortious Interference with Prospective Contracts

In his complaint, plaintiff alleged that defendant St. Joseph's Hospital interfered with his prospective employment contracts by refusing to verify the dates during which he was

affiliated with the hospital, which resulted in his loss of employment and insurance opportunities. Defendant St. Joseph's Hospital has moved to dismiss this claim, contending that (1) interference with a contract requires some affirmative action on the part of a defendant and (2) if failure to act may constitute interference, it should do so only when a defendant is under a duty to take action and does not. Because plaintiff's claim against defendant St. Joseph's Hospital is grounded on the allegation that the hospital failed to engage in acts it was under no legal duty to perform, defendants assert that plaintiff has failed to state a claim for tortious interference.

Under Wisconsin law, there are five elements to the tort of interfering with a contract: (1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere." Aon Risk Servs. v. Liebenstein, 2006 WI App 4, ¶ 20, --- Wis.2d at ----, 710 N.W.2d at 189. To have the requisite intent, the defendant must "act with a purpose to interfere with the contract." Dorr v. Sacred Heart Hosp., 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).

Wisconsin courts have never had occasion to decide whether a failure to act may constitute "interference" with a prospective contract. However, Wisconsin's civil jury instructions define "interference" as "any *conduct* or *words* conveying to [a] third party the defendant's desire to influence the third party to refrain from dealing with the plaintiff." Wis. JI – Civ. 2780 (emphasis added). Plaintiff does not deny that some affirmative action on the part of a defendant is required. Instead, he contends that "refusing to verify dates of [hospital affiliation] is done through words and/or conduct and thereby meets the requirements" for a claim of tortious interference. Plt.'s Br., dkt. #15, at 3.

There is a significant difference between interfering with a contract and failing to assist in its formation. By conflating acts with omissions, plaintiff has ignored the purpose for making interference an actionable tort, which is to "protect[] legitimate competition from predatory tactics by subjecting anyone who wrongfully interferes with existing or prospective contractual relations to liability." Cudd v. Crownhart, 122 Wis. 2d 656, 659, 364 N.W.2d 158, 160 (Ct. App.1985). When a person (or entity) affirmatively engages in an act of interference, he "meddles" with a transaction to which he is not party. On the other hand, when someone fails to perform an act he is not otherwise obligated to perform, he does nothing to discourage the parties from entering into their contract; he simply does not assist them in doing so.

Furthermore, although plaintiff discounts defendants' emphasis on the fact that it had no duty to verify his dates of affiliation with St. Joseph's Hospital, the absence of a duty to

act is relevant to the question whether the hospital was "justified or privileged" not to respond when plaintiff's prospective employers and insurers asked for verification of plaintiff's dates of affiliation with the hospital. In a case not wholly unlike this one, Humana Medical Corp. v. Peyer, 155 Wis. 2d 714, 719, 456 N.W.2d 355, 359 (1990), the Wisconsin Supreme Court declined to adopt a "tort duty" that would have required hospitals "to furnish employment and performance information for purposes of [medical] board certification." The court explained:

> [Plaintiff's] counsel argues that this court should declare a new "public policy" standard requiring hospitals such as Humana to furnish employment and performance information for purposes of Board certification. This we decline to do because the matter is one easily resolved by inserting into contracts, such as the one entered into by the parties here, a provision that the employing hospital will furnish on request reasonable certification of employment and performance information to future employers or state and local medical boards or specialty boards.

Id. Although there are differences between the question the court confronted in Peyer and the question presented by this case, one matter is clear: Wisconsin courts have not recognized any duty on the part of hospitals to provide information to third parties that they are not obligated to provide by contract. Without duty, there can be no tort.

Plaintiff's understanding of what constitutes "interference" is broader than defendants'. Perhaps at some future time, Wisconsin courts will adopt plaintiff's expansive approach; at present, they have not done so. When federal courts are faced with opposing plausible interpretations of state law, they must "generally choose the narrower

interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability." Birchler v. Gehl Co., 88 F.3d 518, 521 (7th Cir. 1996) (citing Todd v. Societe Bic, S.A., 21 F.3d 1402, 1412 (7th Cir. 1994)). The Court of Appeals for the Seventh Circuit has stated repeatedly, "Our policy will continue to be one that requires plaintiffs [who wish to succeed] on novel state law claims to present those claims initially in state court." Id. (citing Shaw v. Republic Drill Corp., 810 F.2d 149, 150 (7th Cir. 1987). Because Wisconsin law has not established that a defendant may "interfere" with another person's prospective contract by failing to perform an act not required by law, the motion to dismiss of defendant St. Joseph's Hospital will be granted with respect to plaintiff's claim that the hospital tortiously interfered with his prospective employment contracts by failing to confirm his dates of affiliation.

ORDER

IT IS ORDERED that

1. The motion to dismiss of defendants Marshfield Clinic, Paul Liss, Robert Gribble, Donald Kelman, John Neal, Rodney Sorenson, Tom Faciszewski, Kevin Ruggles, James Conterato, Frederic Wesbrook, Gary Maxeux, Robert Carlson, David Simenstad, Timothy Boyle, Daniel Cavanaugh, Gary Degerman, Douglas Reding and Ivan Schaller is GRANTED with respect to plaintiff's claims that defendants breached a duty of good faith and fair dealing, misrepresented facts, and acted negligently toward him and DENIED with respect

to plaintiff's claim that these defendants negligently and intentionally caused him emotional distress;

2. The motion to dismiss of defendant St. Joseph's Hospital's motion to dismiss is GRANTED with respect to plaintiff's claim that defendant St. Joseph's Hospital tortiously interfered with his prospective employment and insurance contracts;

Entered this 2d day of May, 2006.

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