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 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) defendants Marshfield Clinic, Paul Liss, Robert Gribble, Donald Kelman, John Neal and Rodney Sorenson tortiously interfered with his employment contracts with defendant Marshfield Clinic; unspecified defendants tortiously interfered with his

employment contracts with the Luther Midelfort Clinic; defendants Marshfield Clinic, Liss, John Neal, James Conterato and other unspecified defendants tortiously interfered with his prospective contracts with other employers and insurers; defendants Marshfield Clinic, Neal and Tom Faciszewski defamed him; and all defendants inflicted emotional distress upon him both intentionally and negligently. Jurisdiction is present under 28 U.S.C. § 1332.

Now before the court is defendants' motion for partial summary judgment, in which defendants contend that they are entitled to qualified immunity under the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-12, for all actions taken in connection with plaintiff's termination from employment at the hospital. Because plaintiff has not come forward with evidence rebutting the presumption in favor of immunity for members of the clinic's executive committee, defendants' motion will be granted with respect to defendants Conterato, Frederic Wesbrook, Gary Mayeux, Robert Carlson, David Simenstad, Timothy Boyle, Daniel Cavanaugh, Gary Degerman, Douglas Reding and Ivan Schaller. In addition, the motion will be granted with respect to defendant Liss's decision to suspend plaintiff summarily on December 4, 2003. However, disputed material facts preclude the court from determining as a matter of law whether defendants Liss, Gribble, Kelman, Neal and Sorenson and Ruggles are entitled to immunity from damages arising in connection with their decision to terminate plaintiff's employment on December 17, 2003. Consequently, defendants' motion for summary judgment will be denied with respect to the request of defendants Liss, Gribble, Kelman, Neal and Sorenson and Ruggles to be granted

immunity for the actions they took as members of plaintiff's professional review committee.

Before turning to the undisputed facts, some mention must be made of plaintiff's proposed findings of fact, which do not conform to this court's procedures. This is not the first time plaintiff has disregarded summary judgment procedures in this court. See, e.g., Order dated Aug. 7, 2006, dkt. #96, at 3 ("the facts proposed by plaintiff . . . are irrelevant to the legal questions at issue in the cross-motions for summary judgment"); Order dated Aug. 18, 2006, dkt. #135, at 3-4 ("The problem with plaintiff's amended supplement is not its untimeliness but the fact that it fails to comport with this court's procedures for summary judgment. . ."); Order dated Aug. 18, 2006, dkt. #134 (striking plaintiff's proposed findings of fact and providing him "one final opportunity to comply with this court's procedures"). Although the court's August 18, 2006 order, dkt. #134, directed plaintiff to redraft his proposed findings of fact to comply with the court's procedures, he did not do so. The changes he has made are minimal and do little to resolve the problems present in his first draft. Repeatedly, plaintiff has proposed facts that are not supported by citations to admissible evidence. Moreover, the vast majority of plaintiff's proposed findings are not legally relevant to the pending motion. Where plaintiff's proposed findings of fact are immaterial or unsupported by proper citation to admissible evidence, they have been disregarded.

From the parties' remaining proposed findings of fact, 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.

Defendants Paul Liss, Robert Gribble, Donald Kelman, John Neal and Rodney Sorenson are doctors employed by the Marshfield Clinic. Each was a member of plaintiff's professional review committee. Each is a citizen of Wisconsin.

Defendant Kevin Ruggles is a doctor formerly employed by the Marshfield Clinic. He is a citizen of Illinois and was a member of plaintiff's professional review committee.

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. 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 doctors employed by the Marshfield Clinic and members of the clinic's executive committee.

Each is a citizen of Wisconsin.

B. Plaintiff's Employment with the Marshfield Clinic

Plaintiff was employed by the Marshfield Clinic from August 19, 2002, to December 18, 2003. In August 2002, he was hired as an associate physician and entered into a two-year contract with the clinic that provided he would not be fired without cause.

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. The concerns noted on plaintiff's 15-month evaluation included his interactions with other staff members and "excess wound problems." The written evaluations do not mention any of the patients whose cases later became the subject of plaintiff's professional review.

C. The Professional Review Subjects

1. M. J.

In June 2003, the Marshfield Clinic's risk management committee received a letter from the wife of M. J., a man who had suffered permanent neurological deficits following a surgery plaintiff performed on him. Although the letter was prompted by the wife's dissatisfaction with another doctor who had treated her husband, it launched an investigation into plaintiff's role in the case. The investigation revealed that plaintiff had not reported a surgical complication to the clinic's risk management committee, although he did mention the complication to defendant Ruggles in October or November 2003.

Risk management personnel identified four concerns relating to plaintiff's treatment of the patient: whether (1) the patient was an appropriate candidate for surgery; (2) plaintiff's surgical plan was too extensive; (3) the complication was a result of poor surgical technique; and (4) plaintiff was honest in his conversations with M. J. and his wife following surgery. Although the risk management committee investigated the incident, plaintiff was never provided with formal notice of the investigation and the incident was not addressed in his November 2003 personnel review.

2. R. S.

On June 23, 2003, plaintiff performed surgery on a 77-year-old patient identified as R. S. During the surgery, R. S. lost a significant amount of blood and was later re-

hospitalized.

3. W. K.

On June 18, 2003, plaintiff operated on a patient identified as W. K. During surgery, W. K. lost a significant amount of blood. After the operation, plaintiff complained to the chair of the Anesthesiology Department that one of the anesthesiologists assisting on the surgery made mistakes that led to the patient's excessive blood loss. Plaintiff asked to meet with members of the Anesthesiology Department to discuss proper procedures for the types of complex spine operations plaintiff performed. Although the department chair indicated that she and defendant Conterato would meet with plaintiff to discuss the patient's blood loss, plaintiff was not given an opportunity to meet with the department as a whole.

Some time in the fall of 2003, defendant Neal became aware of W. K.'s case. It was his understanding that the chair of the Anesthesiology Department had investigated the incident and determined that no action needed to be taken.

4. T. S.

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 complication T. S.

experienced had not occurred before in any similar surgery performed at the Marshfield Clinic.

5. Reserve funds

When the Marshfield Clinic believes a patient may make a legal claim against the clinic, it creates a "reserve fund" for the patient's case. The clinic established reserve funds for M. J., R. S., W. K. and T. S.

Professional Review

1. Suspension

The day after T. S.'s surgery, defendant Liss spoke with defendant Neal about the complication that had occurred. Defendant Neal expressed concern to defendant Liss that plaintiff had improperly exposed T. S.'s spinal cord, leaving it vulnerable to damage. Defendant Neal explained that he handled trial spacers differently from plaintiff. He was concerned that plaintiff used a technique that was dangerous to patients. 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. The department generated a list of ten 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. Plaintiff was given permission to follow up briefly with his post-surgical patients.

2. Professional review committee

The Marshfield Clinic has 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. Dkt. #140, Exh. 70, at § 3.1.2.

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." Id. 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) . . . .

Id. at § 3.1.5.

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.

Id. at § 3.2.4. 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." Id.

The committee assigned to conduct plaintiff's professional review included defendant Liss (chief medical officer), defendant Ruggles (division medical director), defendant Neal (chair of the neurosurgery department), defendant Gribble (director of quality improvement), defendant Sorenson (chair of the neurology department) and defendant Kelman (a neurosurgeon).

a. December 8, 2003 meeting

The professional review committee met for the first time on December 8, 2003.

Defendant Neal was absent from the meeting because he was performing a brain surgery that lasted longer than anticipated. Defendants Ruggles, Gribble, Sorenson, Kelman and Liss attended the meeting. Committee members were told that their investigation would focus on T. S.'s surgery and the cases of W. K., R. S. and M. J. The committee members were asked to review the four cases in preparation for a December 17, 2003 meeting, at which plaintiff would be present to discuss the cases and answer questions.

On December 9, 2003, defendant Liss informed plaintiff of the December 17 meeting and provided him with a list of the ten cases generated from the risk management database. (The parties dispute whether Liss identified the four specific cases that would be discussed at the December 17 meeting.) Defendants did not provide plaintiff with copies of relevant patients' records. Nevertheless, plaintiff obtained some computerized records for these patients before the meeting. Plaintiff did not request a different meeting date, ask to submit documents before the meeting or object to the composition of the professional review committee.

b. December 17, 2003 meeting

On December 17, 2003, a second professional review committee meeting was held. Defendant Ruggles did not attend because he was on vacation.

When plaintiff arrived for the meeting, defendant Liss spoke with him briefly and explained that plaintiff would be asked questions regarding specific cases and given an

opportunity to describe the care he had provided to his patients. The meeting was scheduled to begin at 5:00 p.m., but was delayed because defendants Kelman, Sorenson and Gribble arrived 15-30 minutes late.

When the committee assembled, the members spoke briefly, then asked plaintiff to join them. Plaintiff discussed the four cases and answered questions from several of the doctors on the committee. When defendant Kelman asked plaintiff whether he "felt he had done anything wrong" with respect to the care of each of the four patients," plaintiff answered no. When defendant Kelman asked plaintiff whether he "would do anything differently," with respect to the care of each patient, plaintiff answered no with respect to each patient except W. K. Plaintiff told the committee that he took responsibility for W. K.'s blood loss and the poor anesthesia set-up in that case.

While plaintiff was speaking, defendant Gribble left the meeting early in order to attend another hospital function. Defendant Gribble heard plaintiff's discussion of the T. S. case and the beginning of his discussion of the M. J. case, but did not hear plaintiff discuss any of the remaining cases.

When plaintiff finished answering questions, he was asked to leave the room so the committee could deliberate. 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.

Before deciding to terminate plaintiff, defendants Liss, Neal, Kelman, Sorenson and Gribble did not conduct a random review of plaintiff's cases, consult relevant neurosurgical literature or discuss the case with any independent experts. Of the members of the professional review committee, only defendants Neal and Kelman had any experience in neurosurgery but Kelman was partially retired.

Defendants Kelman, Sorenson and Liss took notes at the meeting, but the meeting was not transcribed.

c. Termination

On December 18, 2003, defendant Liss dictated a memorandum summarizing the meeting from the notes he had taken. In relevant part, the memo stated:

> On Wednesday, December 17, 2003, Dr. Schindler met with the Professional Review Committee . . . The purpose of this meeting was to review specific incidents of concern with Dr. Schindler, and specifically obtain his version of the events leading to the adverse outcomes for four of his patients.
>
> The first case was T. S. . . . Dr. Schindler reported the event happened because, although he had two hands on the [trial] spacer, one inserting pressure toward the spinal column and the other inserting counter pressure away, something popped and the spacer was inserted into the spinal column. Dr. Schindler's belief is that the excessive laxity of the anterior cervical ligament caused the disks at L6-7 to move, which resulted in the adverse

event. When questioned about the case, Dr. Schindler did not feel in retrospect he would have done anything differently, except advise the company to weld a washer onto the spacer to prevent this from occurring in future surgeries. . . . Neither Dr. Neal nor Dr. Kelman felt that ligament laxity was the reason for the mishap.

The second case discussed was that of M. J. . . . Dr. Schindler's description of what happened in this situation is that the anterior cervical ligaments retracted after the first surgery [he performed] causing a cord injury requiring [additional surgery] . . . Dr. Schindler demonstrated on x-ray the end result and hardware installed, and stated at a recent spine meeting he was told this case should be published. The Committee felt that the indications for this surgery in the first place were suspect, secondly, that the complication of retraction of the anterior cervical ligaments after surgery had never occurred at this institution before and the Committee did not accept that as a likely answer for the patient's complications. The neurosurgeons remained skeptical of the long-term effects this degree of hardware would have on this individual.

The third case reviewed was R. S. . . . Dr. Kelman questioned Dr. Schindler specifically about the wisdom of doing this advanced surgery on a 77 year old patient whom he would have managed more conservatively. Dr. Schindler felt that his assessment of the case was that the patient had severe spinal stenosis and that conservative management had already failed. He attributed the profound blood loss to the patient's advanced age.

The last case that was discussed was W. K. . . . The patient had problems in the peri-operative and post-operative period which Dr. Schindler suggested was the fault of anesthesia who only had one peripheral IV line, which was inadequate access. When asked specifically who was responsible for making sure the patient had adequate intravenous access, Dr. Schindler agreed that the responsibility was his and that he would not make the error again . . .

The Committee deliberated for approximately one half-hour. Their unanimous opinion was that Dr. Schindler was too aggressive in his decision to take at least three of these patients to the OR, that his operative technique with regard to surgical fusions was suspect, and that his insight into his deficiencies and contribution to these adverse outcomes was minimal if existent. Therefore, based on this Committee's evaluation, our current contract with Dr. Schindler will be terminated with 60 days severance . . .

Dkt. #136, Exh. 90. Portions of the memo (not quoted above) describing patients' surgical complications contained statements that were medically inaccurate and made reference to anatomical structures that do not exist.

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 and was not provided with a copy of defendant Liss's memorandum.

3. Executive committee

On January 7, 2004, plaintiff wrote to the Marshfield Clinic requesting a hearing before the executive committee, which defendant Wesbrook chaired. On January 27, 2004, defendant Wesbrook wrote to plaintiff and informed him that a hearing would be held on March 2, 2004. The letter stated in part:

> . . . [T]he Scope of the Review will be whether the initiated Professional

> Review is arbitrary or without any factual basis . . . . At the time of the Hearing, you may present the testimony of two (2) physicians in addition to whatever presentation/testimony you wish to present individually. Similarly, the Clinic will be permitted to call no more than three (3) physicians. At the present time, witnesses designated on behalf of the Clinic are Dr. Paul Liss, Chief Medical Officer; Dr. John Neal, Chair, Department of Neurosurgery; and Dr. Rodney Sorenson, Chair, Department of Neurology. Either you or your attorney, but not both, will be permitted to cross-examine any/all witnesses called on behalf of the Clinic.

Dkt. #55, Exh. 10.

On February 10, 2004, the Marshfield Clinic provided plaintiff with a copy of his personnel file and the memorandum from defendant Liss summarizing the December 17, 2003 professional review committee meeting. Later, at plaintiff's request, the clinic agreed to let plaintiff call four doctors to testify on his behalf.

Before the March 2, 2004 meeting was held, defendant Wesbrook asked defendant Liss to provide the executive committee with a written summary of the actions of the professional review committee, along with the records on which the committee had relied. On February 18, 2004, defendant Liss sent a memorandum to the executive committee members describing his version of the events leading up to plaintiff's termination.

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 Drs. Michael Ebersold, William Krauss and David Piepgras, all neurosurgeons at the Mayo Clinic. Each of these witnesses testified that

they had experienced surgical complications similar to the one plaintiff experienced with T. S. and M. J. and testified that such complications are not uncommon. The clinic presented the testimony of defendants Faciszewski, Sorenson and Neal. Plaintiff submitted 99 exhibits, including medical journal articles, letters of recommendation from neurosurgeons throughout the country and patient care records. After the hearing concluded at 11:00 p.m., the committee deferred deliberation.

On March 9, 2004, the executive committee reconvened to deliberate. After two hours of discussion, the committee voted 7-0 to uphold the professional review committee's decision. Although defendant Reding attended the March 9 meeting, he did not vote because he had not been present at the March 2 hearing. (Defendant Wesbrook did not vote because, as president of the clinic, he did not vote unless other committee members tied.)

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.

* * * *

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.

4. Board of directors

On March 29, 2004, plaintiff requested the Marshfield Clinic's board of directors to review the executive committee's decision. A review hearing was scheduled for June 22, 2006, and plaintiff was notified that he would be able to make a personal statement to the board at the meeting. Before the meeting was held, board members were sent a copy of the December 18, 2003 letter informing plaintiff of his termination, a copy of defendant Liss's December 17 memorandum summarizing the professional review committee's decision and the executive committee's March 22, 2004 decision.

A quorum of board members attended the June 22, 2004 meeting. Plaintiff's lawyer presented a statement on his behalf, although her presentation was limited to thirty minutes. Afterward, the board deliberated and voted. Only one board member voted in favor of reversing the executive committee's decision.

OPINION

As its name suggests, "the purpose of the Health Care Quality Improvement Act (HCQIA) [i]s to improve the quality of medical 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). The Act establishes a national reporting system requiring insurance companies to report medical malpractice payments, boards of medical examiners to report sanctions imposed against physicians and hospitals to report adverse professional review information. Id.; 42 U.S.C. §§ 11131-33.

To insure that both hospitals and doctors will engage in meaningful professional review, Congress provided immunity from damages to persons who participate in professional review activities by serving on review committees or by providing information to such committees. Gordon, 423 F.3d at 201; 42 U.S.C. § 11111(a)(1)-(2). Under the Act, participants in a peer review action are entitled to immunity so long as they act:

> (1) in the reasonable belief that the action [i]s in the furtherance of quality healthcare; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of [adequate notice and hearing procedures].

42 U.S.C. § 11112(a); Gordon, 423 F.3d at 202. The standard for determining whether immunity applies is one of objective reasonableness after looking at the "totality of the circumstances." Singh v. Blue Cross/Blue Shield of Massachusetts, Inc., 308 F.3d 25, 32 (1st Cir. 2002) (citing Imperial v. Suburban Hospital Ass'n, 37 F.3d 1026, 1030 (4th Cir. 1994)).

The Act creates a rebuttable presumption in favor of immunity, requiring the plaintiff to prove that the defendant did not comply with the standards set forth in § 11112(a).

Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461, 468 (6th Cir. 2003); see also 42 U.S.C. § 11112(a) ("A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence."). As appellate courts have noted, "[t]he statutory presumption included in section 11112(a) adds a rather unconventional twist to the burden of proof" for deciding summary judgment decisions. Lee v. Trinity Lutheran Hospital, 408 F.3d 1064, 1070 (8th Cir. 2005); see also Gordon, 423 F.3d at 202. When a defendant invokes HCQIA immunity, the question is whether "a reasonable jury, viewing the facts in the best light for [plaintiff, might] conclude that he has shown, by a preponderance of the evidence, that [defendants'] actions are outside the scope of 1112(a)?" Lee, 408 F.3d at 1070. If so, immunity should not be granted.

Unlike forms of immunity that guarantee immunity from suit (such as qualified immunity under § 1983), immunity under HCQIA provides defendants with immunity from damages only. Singh, 308 F.3d at 35. The difference is not unimportant:

> Qualified immunity determinations under § 1983 are questions of law, subject to resolution by the judge not the jury, while HCQIA immunity determinations may be resolved by a jury if they cannot be resolved at the summary judgment stage. This distinction is appropriate because qualified immunity analysis under § 1983 involves a quintessential legal question: whether the rights at issue are clearly established. There is no comparable legal question involved in the immunity analysis under the HCQIA.

Id. at 34-35 (internal citations omitted). Because a jury may be asked to decide the ultimate issues of reasonableness set forth in the immunity statute, there is "no reason why juries

should be excluded entirely from immunity determinations under the HCQIA" when questions exist regarding the reasonableness of a peer review action. Id. at 35; but see Bryan v. James E. Holmes Regional Medical Ctr., 33 F.3d 1318, 1332 (11th Cir. 1994) ("HCQIA immunity is a question of law for the court to decide and may be resolved whenever the record in a particular case becomes sufficiently developed."). Nevertheless, "if there are no genuine disputes over material historical facts, and if the evidence of reasonableness within the meaning of the HCQIA is so one-sided that no reasonable jury could find that the defendant health care entity failed to meet the HCQIA standards, the entry of summary judgment does no violence to the plaintiff's right to a jury trial." Singh, 308 F.3d at 36.

With those governing principles in mind, I turn to the question whether defendants are entitled to immunity for their decision to summarily suspend plaintiff's medical practice and terminate his employment.

A. Reasonable Belief that the Action Furthered Quality Health Care

As described above, a plaintiff wishing to defeat HCQIA immunity must show that a defendant acted without (1) a reasonable belief that the action would further quality healthcare; (2) a reasonable effort to obtain the relevant facts; (3) adequate notice and hearing procedures; and (4) a reasonable belief that the action was warranted. Generally, courts examine the first and fourth elements of immunity in combination. Id. at 38 n.13 ("[W]e evaluate together standards (1) and (4) of HCQIA immunity. As their wording

suggests, they are closely related.").

In this case, plaintiff contends that defendants took two adverse actions against him: his summary suspension on December 4, 2003 and his termination on December 17, 2003. Plaintiff contends that defendants suspended and fired him out of jealousy for his high surgical "production rate" and in retaliation for his willingness to criticize other staff members when he believed their behavior was unprofessional. According to plaintiff, the adverse actions taken against him were unjustified and did nothing to further patient health and safety.

A plaintiff wishing to show that a defendant's actions were not taken in furtherance of quality health care faces a heavy burden. The plaintiff must do more than show that the action was undertaken out of personal animosity toward him or that the action taken was flat out wrong. The Act does not require a professional review to result in the *actual* improvement in the quality of health care, but only that the review be undertaken in the "reasonable belief" that quality health care is being furthered. Imperial, 37 F.3d at 1030. Moreover, "quality health care" is not limited to clinical competence, but includes matters of general behavior and ethical conduct." Meyers, 341 F.3d at 469.

The test for determining whether an action furthers quality health care is objective; therefore, the court does not consider the bad faith of the actual members of a litigant's professional review committee. See, e.g., Id. at 468 (HCQIA's reasonable belief standard for immunity "is an objective standard, rather than a subjective good faith requirement.");

Austin v. McNamara, 979 F.2d 728, 734 (9th Cir. 1992) ("The test [for immunity] is an objective one, so bad faith is immaterial."). Therefore, to the extent that plaintiff contends that defendants acted in bad faith, whether out of jealousy for his productivity or out of retaliation for his alleged "whistleblowing," his arguments are unavailing. The real question is whether an impartial reviewer with access to the information available to decisionmakers at the time of the professional review action would "reasonably have concluded that [the peer review] actions would restrict incompetent behavior or would protect patients." Lee, 408 F.3d at 1073; see also H. R. Rep. No. 903, 99th Cong., 2d Sess. 10 (1986).

1. Summary suspension

HCQIA's emergency provision, 42 U.S.C. § 11112(c), lays out the standard for suspending a physician's clinical privileges. In its entirety, § 11112(c) states:

> For purposes of section 11111(a) of this title, nothing in this section shall be construed as--
> (1) requiring the procedures referred to in subsection (a)(3) of this section--
> (A) where there is no adverse professional review action taken, or
> (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
> (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

Section 11112(c)(1)(B) permits a physician to be suspended for 14 days or less while an

investigation is conducted; defendants acting pursuant to this emergency investigation provision are not required to provide any procedural protections to the suspended physician before or during this time.

Although it is undisputed that plaintiff's summary suspension lasted for only 13 days, plaintiff contends that defendants are not entitled to immunity with regard to his summary suspension because no patients were in "imminent danger" from his continued medical practice. There are two problems with plaintiff's argument. First, because nothing in § 11112(c)(1)(B) requires that a patient be in imminent danger before a physician is suspended temporarily, it is not clear that § 11112(c)(2) applies to suspensions of less than 14 days' duration. Second, even if § 11112(c)(2) does apply, defendants satisfied the standard.

On December 3, 2003, while plaintiff was performing surgery, a surgical instrument slipped and plaintiff's patient was rendered quadriplegic for an unspecified period of time. Although plaintiff wishes to characterize the incident as a regrettable but isolated surgical complication unrelated to the health and safety of other patients, it was reasonable for the hospital to investigate the complication before permitting plaintiff to perform further surgeries.

Despite plaintiff's assertions to the contrary, nothing in the Act requires imminent danger to exist before a summary restraint is imposed. Lee, 408 F.3d at 1072. It requires only that the danger *may* result if the restraint is not imposed. Fobbs v. Holy Cross Health

Systems Corp., 29 F.3d 1439, 1443 (9th Cir. 1994). Given the information available to defendant Liss at the time he decided to summarily suspend plaintiff, he had adequate reason to believe, rightly or wrongly, that plaintiff's continued surgical practice could pose an immediate threat to patient safety. Given that reality, defendant Liss was permitted to suspend plaintiff's practice for a short period of time without prior procedure, and is entitled to immunity for his decision to do so.

2. Termination

With respect to plaintiff's termination, the analysis is much the same. So long as an objective participant in either the professional review committee or the executive committee would "reasonably have concluded that [the peer review] actions would restrict incompetent behavior or would protect patients," Lee, 408 F.3d at 1073, defendants have acted "in furtherance of quality health care" within the meaning of § 11112(a)(1) and (a)(4). Plaintiff does not dispute that T. S. and M. J. experienced serious neurological complications from their surgeries or that R. S. and W. K. lost excessive amounts of blood. Rather, plaintiff contends that the complications each of these patients experienced were known risks of the surgeries they underwent, and that his complication rate was reasonable given the riskiness of the procedures themselves. Assuming plaintiff is correct, the fact that the risks were known does not undermine the fact that defendants had objective concerns regarding patient safety. To the degree that plaintiff challenges the facts upon which defendants relied, his

complaint is with defendants' fact-finding under § 11112(a)(3), not with the question whether their actions could be thought to objectively advance quality health care as required under §§ 11112(a)(1), (4).

Defendants' peer review investigation focused on serious surgical complications experienced by four patients within a span of six months. From an objective viewpoint, defendants acted in the reasonable belief that their decision to suspend and terminate plaintiff was warranted in order to further quality healthcare for patients of the Marshfield Clinic.

B. Reasonable Fact Gathering

The second requirement for HCQIA immunity is that defendants must have made a reasonable effort to obtain facts relevant to their decision. 42 U.S.C. § 11112(a)(2). The question is "whether the totality of the process leading up to the . . . professional review action . . . [demonstrates] a reasonable effort to obtain the facts of the matter." Sugarbaker v. SSM Health Care, 190 F.3d 905, 914 (8th Cir. 1999); Brader v. Allegheny General Hospital, 167 F.3d 832, 841 (3d Cir. 1999).

1. Suspension

To the degree plaintiff challenges defendant Liss's failure to undertake a full investigation of the facts of his case before suspending him, his arguments are unavailing.

It is undisputed that defendant Liss spoke with plaintiff after one of plaintiff's patients experienced a serious complication that rendered her temporarily quadriplegic. Defendant Liss spoke with other senior physicians, including defendant Neal, and asked the clinic's legal department to generate a list of cases involving plaintiff in which complaints had been filed. That search yielded ten cases, including the four that later became the subject of the professional review. Under the circumstances, Liss's investigation was adequate to justify his belief that a short-term suspension was appropriate in the interest of protecting patients and providing time for "an investigation . . . to determine the need for a professional review action." 42 U.S.C. §§ 11112(c)(1)(B), (c)(2). No more was required.

2. Termination

a. Professional review committee

Plaintiff's challenge to the adequacy of the professional review committee's fact-finding process focuses not on what the committee did, but on what it did not do. Plaintiff objects to the committee's failure to perform a random sampling of his cases, review relevant medical literature or consult an outside expert before determining that he was an unsafe surgeon. In support of his position, plaintiff points to the testimony of Dr. Lawrence Huntoon, an expert who asserts that plaintiff was the subject of sham review proceedings.

Unfortunately for plaintiff, Dr. Huntoon's report does nothing to support plaintiff's contentions. In his expert report, Huntoon admits that the law does not require the kind

of investigation plaintiff wanted. Huntoon laments that HCQIA "provides a shield of nearly absolute immunity for peer reviewers who make trumped up, false or unsubstantiated charges against a physician under the guise of 'peer review.'" Dkt. #140, Exh. 174, at 4. However, he does not state that defendants failed to do what the law required of them. Although professional review committees are required to engage in adequate factual investigation, they are not required to do so in any particular manner. The question is whether the committee's factual investigation was reasonable under the circumstances.

It is undisputed that the professional review committee members reviewed the records of the four patients whose complications formed the basis for the decision to terminate plaintiff's employment. During the December 17, 2003 meeting, plaintiff was permitted to explain each case and answer questions posed to him by the committee. At no time did he ask to submit additional information or request more time in which to prepare his response to the committee's inquiry. These facts all counsel in favor of finding that the committee's investigation was satisfactory under the circumstances.

Nevertheless, on a motion for summary judgment, the court must consider the facts in the light most favorable to the non-moving party. It is undisputed that the professional review committee convened a mere two weeks after plaintiff's suspension and only eight days after providing plaintiff with a copy of the list of ten patients generated by the legal department, leaving little time for factual investigation. The parties dispute whether plaintiff had access to all relevant medical records of the patients whose complications he was

required to explain (three of whom had been operated on more than six months before the meeting date). Although defendants Gribble and Neal were absent for a portion of plaintiff's testimony in his defense, each voted to terminate plaintiff's employment. Moreover, as discussed above, the professional review committee members did not review relevant medical literature, did not consult outside experts and did not perform any random sampling of plaintiff's cases before voting to terminate his employment. Although none of these omissions is dispositive on the question whether defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles are entitled to immunity for their decision to terminate plaintiff's employment, their failure to gather potentially important data is relevant to determining whether the committee members made "a reasonable effort to obtain the facts of the matter" before taking adverse action against plaintiff. Sugarbaker, 190 F.3d at 914. Because facts and the inferences to be drawn from those facts remain disputed with respect to the reasonableness of the professional review committee's fact-gathering, I cannot find as a matter of law that defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles are entitled to immunity. Therefore, defendants' motion for summary judgment will be denied with respect to these defendants in connection with their decision to terminate plaintiff's employment.

b. Executive committee

Unlike the professional review committee, which was convened quickly and had

access to relatively sparse information regarding the patients and surgical procedures that were the subject of the committee's review, the executive committee had access to a plethora of information. At the March 2, 2004 committee hearing, plaintiff was represented by counsel. He presented the testimony of three expert witnesses, testified himself, cross-examined the clinic's experts and submitted 99 exhibits. The hearing lasted nine hours. The committee considered all the evidence, deliberated for two hours and issued a lengthy written opinion.

Although plaintiff alleges that the committee limited the duration of his testimony, he acknowledges that he was permitted to submit extensive evidence in his defense. Given these facts, there can be no question that members of the executive committee made reasonable efforts to obtain the facts relevant to their decision. Plaintiff has not pointed to any facts not presented to the committee that he did not have the ability to provide. Although plaintiff disagrees with the conclusion the committee reached after examining the facts of each his case, there can be no question that they had access to all information relevant to their decision. Consequently, defendants Conterato, Faciszewski, Wesbrook, Mayeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller conducted adequate fact gathering as required under § 11112(a)(2).

C. Adequate Notice and Hearing Procedures

As discussed above, plaintiff was not entitled to procedural protections in connection

with his 14-day suspension. Therefore, the focus of inquiry under § 11112(a)(3) is whether adequate notice and procedures were provided to plaintiff in connection with the professional review committee's decision to terminate plaintiff's employment.

Section 11112(b) contains a "safe harbor" provision, setting forth exemplary procedures that insure immunity for defendants who employ them. So long as defendants follow the notice and hearing procedures set forth in the provision, they are "deemed to have met the adequate notice and hearing requirement of subsection (a)(3)['s adequate hearing and notice requirements]." § 11112(b). To be entitled to immunity under the safe harbor provisions, a health care entity must provide the physician with a notice explaining why a professional review action is being commenced against him, provide him with 30 days or more to request a hearing, and provide him with a summary of the rights he would have at a hearing. § 11112(b)(1). Furthermore, if a hearing is requested, the entity must provide the physician with notice of the hearing date at least 30 days in advance, along with a list of witnesses who will testify on behalf of the professional review body. § 11112(b)(2). The hearing itself must be conducted before an arbitrator or a hearing officer or panel, no members of which are in direct economic competition with the physician; the physician must be permitted to obtain counsel, cross-examine witnesses, submit a written statement and present relevant evidence; and a record must be made of the proceedings. § 11112(b)(3)(A-C). Finally, after a decision has been made, the physician has the right to receive a written decision explaining the grounds for the professional review panel's action. §

11112(b)(3)(D).

The professional review committee's decision to terminate plaintiff in December 2003 does not fall within the safe harbor provisions for several reasons. First, the committee did not provide plaintiff with notice of his right to a hearing or an explanation of the specific content of the committee's inquiry. (Apparently, plaintiff was not notified of his right to a hearing because the clinic's policy does not guarantee him such a right until *after* an initial decision has been rendered by the committee). The committee met a mere thirteen days after plaintiff's suspension and only eight days after plaintiff was notified of the meeting date and of the ten cases that had been generated from the legal department's risk management database. At the December 17, 2003 committee meeting, although plaintiff was given an opportunity to speak, he was not permitted to introduce evidence, call witnesses or submit a written statement. Finally, after the committee voted to terminate plaintiff's employment, he was given a letter of termination, but was not provided with a thorough written explanation of the grounds for his termination.

Defendants argue that the court should view the professional review committee's decision and the executive committee's review of that decision as a seamless process that falls within the ambit of § 11112(b). In the alternative, defendants assert that the process they afforded plaintiff met the spirit of § 11112(a)(3), if not the letter, of § 11112(b). I am not convinced, for one key reason.

The heart of the notice requirement contained in § 11112(a)(3) is the opportunity

for "adequate notice and hearing." Although the Marshfield Clinic's Professional Review Policy provides all of the safeguards recommended in the safe harbor provision, it provides them too late to be of much use to the affected physician. Under the policy, the professional review committee is authorized to take adverse action against a physician without a prior hearing (and even, if the committee so chooses, without permitting the physician to explain himself beforehand). It is only *after* an adverse decision has been rendered that the physician may request a hearing before the executive committee at which he may submit evidence in his defense.

But what good can a hearing do? Under the terms of the policy, the executive committee is bound to uphold the professional review committee's decision unless "the initiated Professional Review is arbitrary or without any factual basis." Dkt. #140, Exh. 70, § 3.2.4. Such a standard is nearly insurmountable, and eviscerates the force of almost any evidence the physician may be able to produce at his hearing.

That is not to say that, as a matter of law, the professional review committee's process was inadequate. "[A] professional review body's failure to meet the conditions described in . . . [the safe harbor provisions] shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." § 11112(b)(3)(D). In other words, although the procedural protections set forth in § 11112(b)(3) are those envisioned by Congress as "best practices" for peer review, failure to provide those specific procedures is not fatal to an immunity defense. Again, the issue is the reasonableness of the procedures afforded to

plaintiff before his termination. Were they fair? Were they adequate? These are questions not amenable to resolution on summary judgment. Therefore, to the extent that plaintiff challenges the adequacy of the notice and process given to him in connection with the professional review committee's decision to terminate his employment on December 17, 2003, I find again that material facts and the inferences to be drawn from them preclude summary judgment in favor of defendants Liss, Neal, Gribble, Sorenson, Kelman and Ruggles.

Once again, however, a distinction must be drawn between the defendant members of the professional review committee and the defendant members of the executive committee. Unlike members of the professional review committee, defendants Conterato, Faciszewski, Wesbrook, Mayeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller provided plaintiff with more than one month's notice of his hearing before the executive committee, the opportunity to present evidence, call witnesses, cross-examine witnesses and submit written statements.

Although plaintiff has identified a host of alleged procedural violations with respect to the executive committee, none of the alleged flaws makes the immunity provision of HCQIA inapplicable. Plaintiff makes much of the fact that the executive committee hearing was not transcribed by an impartial court reporter but he cites no authority for his assertion that HCQIA requires a transcript to be made. Although the Act provides that "a record [will be] made of the [disciplinary] proceedings, copies of which may be obtained by the physician

upon payment of any reasonable charges associated with the preparation thereof," nothing in the statute dictates the form the record must take or the qualifications of the person who must make the record. Although the opinion issued in his case was not as detailed as plaintiff may like, it creates an adequate summary of the proceeding as required by the Act. Plaintiff's remaining challenges to the executive committee's deliberations are equally meritless.

The executive committee provided plaintiff with adequate notice and procedure in connection with its review of the professional review committee's decision, as required under HCQIA. Because the committee also made reasonable efforts to obtain relevant facts and acted in the objectively reasonable belief that its action was warranted to further quality healthcare, defendants' motion for summary judgment will be granted with respect to the decision of defendants Conterato, Faciszewski, Wesbrook, Mayeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller to uphold the professional review committee's decision to terminate plaintiff's employment with the Marshfield Clinic.

ORDER

IT IS ORDERED that the motion for summary judgment 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

1. DENIED with respect to the actions taken by defendants Paul Liss, Robert Gribble, Donald Kelman, John Neal and Rodney Sorenson in connection with their decision to terminate plaintiff's employment following the December 17, 2003 professional review committee meeting;

2. GRANTED with respect to the actions taken by defendants Paul Conterato, Tom Faciszewski, Frederic Wesbrook, Gary Mayeux, Robert Carlson, David Simenstad, Timothy Boyle, Daniel Cavanaugh, Gary Degerman, Douglas Reding and Ivan Schaller in connection with their decision to uphold the professional review committee's decision to terminate plaintiff's employment.

FURTHER, IT IS ORDERED that

3. Counts I, II and V of plaintiff's complaint are DISMISSED with respect to defendants Conterato, Faciszewski, Wesbrook, Mayeux, Carlson, Simenstad, Boyle, Cavanaugh, Degerman, Reding and Schaller; and

4. To the extent that the claims relate to plaintiff's termination from the Marshfield Clinic, counts VI, VII, IX, X and XI of plaintiff's complaint are DISMISSED with respect to defendants Conterato, Faciszewski Wesbrook, Mayeux, Carlson, Simenstad, Boyle,

Cavanaugh, Degerman, Reding and Schaller.

Entered this 12th day of October, 2006.

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