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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CARL BLAU, **Petitioner and Appellant,** **v.** **NORTHRIDGE HOSPITAL MEDICAL CENTER, et al.,** **Respondents.**	**A111845** **(San Francisco County Super. Ct. No. 503719)**

Respondent the Northridge Hospital Medical Center barred Carl Blau, M.D., from its premises, effectively revoking his privileges to practice at the hospital, due to disruption he caused in one of the hospital's labs. Blau appeals from denial of his petition for a writ of administrative mandamus. We conclude that Blau is collaterally estopped from making the principal legal argument he advances on appeal. On the narrow ground presented by the procedural posture of this case, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1979, Carl Blau, M.D. (Blau) became a member of the medical staff at Northridge Hospital Medical Center (Hospital). He practiced in the Hospital's G.I. Endoscopy Center (G.I. Lab) and was co-director of the G.I. Lab until 1994.

On May 10, 2000, the Hospital sent a letter to Blau barring him from the Hospital premises, effective immediately. The letter stated, "[t]his action is required to protect the

employees who work in the NHMC GI Lab, and to end the ongoing and serious disruption of NHMC Hospital operations that your conduct has caused, including but not limited to your behavior in the GI Lab." The letter detailed the charges against Blau, starting with the charge that "[o]ver a period of many years, you have continuously engaged in harassment, intimidation, and verbal abuse" of the G.I. Lab employees. The letter stated that the action against Blau was not being taken " 'as a result of a determination of a peer review body' " or for a " 'medical disciplinary cause or reason' as that term is defined in Bus. & Prof. Code Section 805(a)." Consequently, the Hospital asserted that the disciplinary procedures specified in Business and Professions Code section 809 et seq.[1] did not apply to its action. The letter did advise Blau that he would be afforded "fair procedure," including administrative review of the charges against him.

Following a hearing, the Hospital's action was approved by a three person panel, including a physician and two nurses, none of whom was associated with the G.I. Lab. Blau appealed internally and an Appellate Review Committee affirmed the panel's decision. The Hospital Community Board upheld the committee's decision.

Blau took the position during the administrative proceedings that the Hospital had illegally denied him the section 809 procedures, including the right to a pre-discipline hearing under section 809.1. Before the completion of the administrative appeal, he brought suit in the Superior Court for Los Angeles County. The trial court sustained the Hospital's demurrer on the ground that Blau had not exhausted his administrative remedies. The trial court judgment was affirmed on appeal by the Second District Court of Appeal. (*Blau v. Catholic Healthcare West* (Feb. 27, 2003, B157516) (*Blau I*).)

Following completion of the administrative appeal process, Blau filed the instant action, seeking a writ of administrative mandamus (Code Civ. Proc., § 1094.5). The trial court denied the request and dismissed the action.

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[1] All statutory references are to the Business and Professions Code unless otherwise indicated.

In this appeal, we granted the request of the California Medical Association (CMA) to file an amicus curiae brief in support of Blau and the request of the California Hospital Association to file an amicus curiae brief in support of the Hospital.

DISCUSSION

I. *Collateral Estoppel*

The Hospital argues that Blau is collaterally estopped from contending in this action that the section 809 procedures were applicable to the Hospital's action barring Blau from its premises. We agree.

We begin with some background regarding section 809. Sections 809 through 809.9 were enacted in 1989 "for the purpose of opting out of the federal Health Care Quality Improvement Act of 1986 (42 U.S.C. § 11101 et seq.), which was passed to encourage physicians to engage in effective peer review. California chose to design a peer review system of its own, and did so with the enactment of these sections. (Stats. 1989, ch. 336, § 1, pp. 1444-1445.) Section 809 provides generally that peer review, fairly conducted, is essential to preserving the highest standards of medical practice and that peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care. (§ 809, subd. (a)(3), (4).) The statute thus recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616-617 (*Unnamed Physician*).)

Hospitals have a dual organizational structure: an administrative governing body takes ultimate responsibility for the quality and performance of the hospital and a medical staff (composed of health care professionals) takes responsibility for providing medical services. (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1224, disapproved on another ground in *Hassan v. Mercy American River Hosp*. (2003) 31 Cal.4th 709, 724, fn. 4.) The Legislature delegated implementation of section 809 primarily to the medical staff, mandating that medical staff bylaws include written procedures implementing

sections 809 to 809.8. (§ 809, subd. (a)(8); *Unnamed Physician*, *supra*, 93 Cal.App.4th at p. 617.) If a medical staff peer review committee recommends that the privileges of a staff physician be restricted or revoked "for a medical disciplinary cause or reason," the physician is entitled to notice and a hearing *before* the proposed discipline is implemented. (§§ 805, subd. (b) & 809.1; *Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1147-1150; *Unnamed Physician*, at p. 622.)

In May 2001, before completion of the Hospital's administrative appeal process, Blau filed a lawsuit in Los Angeles County Superior Court. He alleged that the Hospital wrongfully terminated his privileges without first holding the hearing required under section 809.1. (*Blau I*, *supra*.)[2] The trial court sustained the Hospital's demurrer, which contended that the suit was premature because Blau had failed to exhaust the administrative remedies. (*Ibid.*) Blau appealed to the Second District Court of Appeal. The main thrust of Blau's appeal was that his exclusion from the Hospital was within the scope of section 809, and he was not required to exhaust the administrative remedies because the Hospital refused to follow the procedures required by section 809. Blau cited *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 829, for the proposition that the exhaustion doctrine "has no application in a situation where an administrative remedy is unavailable or inadequate." Blau also cited *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 478, for the proposition that "[w]hen a hospital denies staff privileges to a doctor without affording him the basic procedural protection to which he is legally entitled, the hospital and parties acting in concert with the hospital can offer no convincing reason or justification why they should be insulated from an immediate tort suit for damages." The CMA made the same argument in an amicus brief filed in support of Blau.

[2] Under California Rules of Court, rule 8.1115(b), this court may rely on the unpublished *Blau I* decision in resolving the collateral estoppel issue. Previously, we granted the Hospital's motions for judicial notice of the *Blau I* decision, Blau's briefs in *Blau I*, the CMA's brief in *Blau I*, and Blau's petition for review to the California Supreme Court. We now take judicial notice of the brief filed by the Hospital in *Blau I*. (See Evid. Code, §§ 452, subd. (d), 459.)

The Second District held that Blau was required to exhaust the Hospital's administrative remedies. (*Blau I*, *supra*.) The court examined the relationship between sections 805 and 809 and expressly concluded that the procedures in section 809 were inapplicable to the Hospital's exclusion of Blau. The court concluded, "We reject Blau's related contentions that section 809.1 obligated the Medical Center to provide an administrative forum to him before it suspended his staff privileges based upon his failure to work well with others, and that section 809.5 precluded his suspension because the Medical Center did not claim that he posed a danger to any patient. By their plain terms, sections 809.1 and 809.5 apply only to suspensions and other disciplinary actions taken for 'a medical disciplinary cause or reason,' which is limited to 'that aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care.' (§ 805, subd. (a)(6).) . . . .[¶] Quite plainly, the record keeping statute and its peer review provisions apply only to medical disciplinary actions, not to administrative decisions." (*Blau I*, *supra*.)

Blau challenged the Second District's holding regarding the scope of section 809 in a petition for review to the California Supreme Court. Blau argued that review was necessary because the Court of Appeal had erred in interpreting section 809, and Blau listed four issues for review, each relating to section 809. The first issue framed the question as "Who will control physician discipline, other physicians through peer review as intended by the California Legislature with the enactment of Section 809, et seq., or hospital administrators." The Supreme Court denied review on May 21, 2003.

The *Blau I* decision has collateral estoppel effect in the instant appeal. "Collateral estoppel precludes a party from relitigating in a second proceeding the matters litigated and determined in a prior proceeding. The requirements for invoking collateral estoppel are: (1) the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated; (2) the previous proceeding terminated with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party to or in privity with a party in the previous proceeding." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1201, fn. 1.) Collateral estoppel is intended "to preserve

the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.) Collateral estoppel applies even though a party failed to assert all legal arguments which could have been presented in the prior proceeding. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 387.)

Blau contends that *Blau I's* holding regarding the applicability of section 809 was not necessary to the decision because "whether or not [section 809 et seq.] apply to Dr. Blau's case, he was required to exhaust his administrative remedies first." The Hospital made the same argument in *Blau I*. *Blau I* does not address that argument. *Blau I* concluded that Blau was required to exhaust the administrative remedies based on its conclusion that section 809 did not apply. That conclusion was necessary to the decision because the decision does not disclose any other basis to affirm dismissal of Blau's suit. The possibility that the court could have affirmed under another rationale does not render the ground actually relied on by the court unnecessary. This follows from the fact that if *Blau I* had stated both grounds as alternate bases for its holding, we would give collateral estoppel effect to *both* grounds, particularly where, as here, the parties had the opportunity and motive to fully litigate both bases and did so. (*Wall v. Donovan* (1980) 113 Cal.App.3d 122, 126.) In light of this rule, we certainly must give collateral estoppel effect where the court only stated one basis for its judgment. Blau cites no authority supporting his contention that we may decline to give collateral estoppel effect to the issue actually decided in *Blau I* because the court could have employed a different rationale in affirming dismissal of the action.[3]

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[3] Notably, the cases cited by Blau, *Eight Unnamed Physicians v. Medical Executive Committee* (2007) 150 Cal.App.4th 503 and *Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, do not stand for the proposition that he had to exhaust his remedies even if the Hospital wrongfully denied him the procedural protections in section 809 et seq. In those cases the physicians were provided peer review hearings but challenged certain aspects of the proceedings. Arguably, Blau was not required to exhaust his administrative remedies where he claimed complete deprivation of the

Blau also contends that *Blau I* was not a final judgment because the court stated, "Blau is not without a remedy. If his pending administrative review is unsuccessful, he may file a petition for a writ of mandate (Code Civ. Proc. § 1094.5); if he prevails in that proceeding, he will then be in a position to sue the Medical Center. But this action was premature, and was properly disposed of by demurrer on the ground that Blau has not exhausted his administrative remedies." (*Blau I*, *supra*.) That language cannot be read to mean that *Blau I* did not result in a final determination on the section 809 issue. Although *Blau I* did not reach the merits of the Hospital's asserted grounds for excluding Blau, it did reach the merits of the section 809 issue, as relevant to Blau's claim of exemption from the exhaustion requirement. The court's conclusion on that issue was the sole stated basis for rejecting Blau's claim of exemption, the parties briefed the issue, the court provided a reasoned opinion, and Blau sought review in the California Supreme Court. The determination is final for purposes of collateral estoppel. (See *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1557, fn. 5.)

It is not significant that *Blau I* decided the scope of section 809 in the context of the exhaustion requirement while here the issue arises in the context of a mandamus petition following exhaustion of the administrative remedies. Collateral estoppel may "preclude a party to prior litigation from redisputing *issues* therein decided against him, even when those issues bear on different claims raised in a later case." (*Vandenberg v. Superior Court*, *supra*, 21 Cal.4th at p. 828.) Consequently, "the loss of a particular dispute against a particular opponent in a particular forum may impose adverse and unforeseeable litigation consequences far beyond the parameters of the original case." (*Id.* at p. 829.)

The parties were the same in *Blau I*, the identical section 809 issue was actually litigated and necessarily decided on the merits in *Blau I*, and the *Blau I* decision is final. (*Coscia v. McKenna & Cuneo*, *supra*, 25 Cal.4th at p. 1201, fn. 1.) Applying well-

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section 809 procedures. (See *Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th at pp. 1152-1155.) We need not and do not decide this issue.

established law, we give collateral estoppel effect to the Second District's holding in *Blau I* that the procedures in section 809 were inapplicable to the Hospital's action against Blau.[4] We need not and do not express any opinion on the merits of the issue decided in *Blau I*.

II. *The Common Law Fair Procedure Requirement*

Blau I's determination that the procedures in section 809 were inapplicable does not mean that the Hospital's procedures and findings are immune from judicial scrutiny. We must review the Hospital's action under the common law standards of fair procedure independent of the statutory requirements.

Before enactment of section 809, it was established that "when a hospital wishes to terminate the staff privileges of a doctor, it must do so in a 'procedure comporting with the minimum common law requirements of procedural due process' wherein it is shown that the hospital has 'adequate cause' for termination. [Citation] The right of a qualified physician to use the facilities of a hospital is fundamental; it is a property interest which directly relates to the pursuit of the physician's livelihood." (*Abrams v. St. John's Hospital & Health Center* (1994) 25 Cal.App.4th 628, 636, quoting and citing *Anton v. San Antonio Community Hosp.*, *supra*, 19 Cal.3d at pp. 815, 823, 825.) "The purpose of the common law right to fair procedure is to protect, in certain situations, against arbitrary decisions by private organizations. As this court has held, this means that, when the right to fair procedure applies, the decisionmaking 'must be both substantively rational and procedurally fair.' " (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1066.)

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[4] *Blau I* also has collateral estoppel effect with respect to any argument that the Hospital failed to follow the peer review procedures in the Medical Staff Bylaws. The procedures in the bylaws are those specified by the statute; accordingly, the determination of the scope of section 809 in *Blau I* also determined the scope of the bylaws.

In light of our conclusion on the collateral estoppel issue, we deny CMA's November 30, 2006 request for judicial notice. The materials are relevant only to the section 809 issue. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

A. *The Procedurally Fair Standard*

Assuming that this case involved the termination of vested medical staff privileges, fair procedure requires "that a physician be afforded, among other rights, 'a hearing before the deciding board'; 'a written statement of the charges against him'; and 'the right to call his own witnesses.' " (*Sahlolbei v. Providence Healthcare, Inc.*, *supra*, 112 Cal.App.4th at p. 1147.)[5]

Blau was provided detailed written notice of the charges against him in the same May 10, 2000 letter which barred him from the Hospital premises; attached to the letter were eight previous letters relating to concerns about Blau's conduct in the G.I. Lab. The letter also explained the procedures that would be provided to Blau to contest the charges. The hearing ultimately commenced in February 2001 and extended through 12 sessions. The hearing was conducted by a hearing officer in front of a three person panel comprised of a doctor and two nurses; Blau had an opportunity to question the hearing officer and the members of the panel for potential bias. Blau was represented by counsel at the hearing, and he had the opportunity to cross-examine the Hospital's witnesses and present his own witnesses and documentary evidence. The hearing panel issued its decision in August 2001; the decision was affirmed by the Appellate Review Committee in October 2002 and upheld by the Hospital Community Board in November 2002.

On appeal, Blau does not dispute that the Hospital's procedures complied with the common law standards of procedural fairness.[6] Blau does argue in passing that the

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[5] It is appropriate to use the phrase "fair procedure" rather than "due process." As explained in *Goodstein v. Cedars-Sinai Medical Center* (1998) 66 Cal.App.4th 1257, 1265, " '[s]ince the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process. Fair procedure rights apply when the organization involved is one affected with a public interest, such as a private hospital.' " (See also *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 fn. 7.)

[6] Blau does make various objections to the Hospital's procedures based on section 809, as incorporated into the Medical Staff Bylaws. Blau objects to the lack of a pretermination hearing, to inadequate notice of the charges and opportunity for cross-

composition of the hearing panel violated his right to fair procedure because the members of the panel were hospital employees. However, the cases he cites to support the contention hold only that where the decision-makers on a company's review board are employees, those proceedings do not constitute arbitrations. (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 688-689; *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 268-269.) Blau has not identified the types of pecuniary interests or personal embroilment that might render a panel biased under the common law standards. (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657; see also *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 582-583.)

B. *The Substantively Rational Standard*

In terminating a physician's privileges, a private hospital must not only employ procedurally fair process, but also the action must rest on grounds that are neither arbitrary or "substantively irrational." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 626 (*Miller*); *Gaenslen v. Board of Directors* (1985) 185 Cal.App.3d 563, 568; *Miller v. National Medical Hospital* (1981) 124 Cal.App.3d 81, 91-92.) In *Miller*, the California Supreme Court discussed the substantive component of the fair procedure rule in the context of denial of staff privileges to a disruptive doctor.

In *Miller*, a hospital refused a physician medical staff privileges based primarily on his reputation within the medical community for having difficulty working and cooperating with others. (*Miller*, *supra*, 27 Cal.3d at pp. 620-622.) The hospital relied on a bylaw which specified a physician's "ability to work with others" as a requirement for medical staff membership. (*Id.* at pp. 621-622 & fn. 5.) In order to avoid the exclusion of physicians on substantively irrational grounds, the Court construed the bylaws to mean that there must be "a demonstrable nexus between the applicant's ability to 'work with' others and the effect of that ability on the quality of patient care provided." (*Id.* at p. 628.)

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examination, and to the composition of the hearing panel. *Blau I* has collateral estoppel effect with respect to those claims.

Miller further explained: "The bylaw provision . . . must be read to preclude the rejection of an otherwise qualified physician from medical staff membership unless it can be shown that he manifests an inability to 'work with others' in the hospital setting which, by reason of its particular character, presents a real and substantial danger that patients treated by him at the facility might receive other than a 'high quality of medical care' if he were admitted to membership. This standard, in our view, is neither so broad as defendant conceives it nor so narrow as plaintiff asserts. On the one hand, there may well be circumstances in which a doctor's limited ability to 'work with' other hospital personnel, although it results in no demonstrable conflict in the joint care of individual patients, might nevertheless be shown to have a clear adverse effect on the overall 'quality of medical care' offered by the facility—and therefore on the quality of care to be offered the applicant's patients as well. On the other hand, we do not believe that that nexus may be presumed. The fact that a physician seeking admission to staff membership is shown to manifest characteristics of personality which other staff members or administrators find personally disagreeable or annoying is not in itself enough, in our view, to justify rejection under the subject bylaw provision. An otherwise competent physician, although considered 'controversial,' outspoken, abrasive, hypercritical, or otherwise personally offensive by some of his hospital colleagues, may nevertheless have the ability to function as a valuable member of the hospital community and should not be denied the opportunity to do so as a result of personal animosities or resentments alone." (*Miller*, *supra*, 27 Cal.3d at pp. 631-632.)

We review the record to determine whether the evidence showed the required nexus with the quality of patient care to sustain the Hospital's action as substantively rational. Our role in this appeal in an administrative mandamus action is to determine whether the hearing panel's findings are supported by substantial evidence in light of the entire record. (Code Civ. Proc., § 1094.5, subd. (d); *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286, 1293.) We consider the evidence in the light most favorable to the Hospital, and we are "without power to judge the effect or value of the evidence, weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or

in the reasonable inferences that may be drawn from it. [Citation.] Unless a finding, viewed in light of the entire record, is so lacking in evidentiary support as to render it unreasonable, it may not be set aside." (*Huang*, at p. 1294.)

1. *Summary of the Relevant Evidence*

The evidence at the hearing showed that the problems with Blau started in approximately 1996, after the break-up of a professional partnership between Blau and two other G.I. Lab doctors. Blau had been co-director of the G.I. Lab with one of them, Dr. Neil Fagen, and Fagen subsequently became the sole director. Blau accused the G.I. Lab nursing staff of showing favoritism to other doctors, including Fagen. In April 1996, the staff wrote Blau a letter denying showing favoritism and asking him to keep his personal problems out of the G.I. Lab because the situation was causing them stress. They specifically asked Blau not to "question everything that we do" and not to cause "tension and turmoil" in front of patients. The nurses also asked for help from the Hospital's Human Resources Department.

Later in April 1996, Blau met with the Medical Staff Well Being Committee to address the tensions in the G.I. Lab. In May and September 1996 the Medical Staff temporarily suspended Blau's use of the G.I. Lab due to his failure follow through on an agreement to obtain psychiatric treatment. Those suspensions were upheld after hearings which took place over the space of nearly a year.

Nonetheless, the types of conduct described in the April 1996 letter continued until Blau was barred by the Hospital in May 2000. Blau complained incessantly, often in front of patients and visitors to the G.I. Lab. For example, he complained about the nurses assigned to work with him, the equipment used, two of the four examination rooms, scheduling, the record keeping practices of other doctors, the copy machine, the fax machine, the toilet, the lock on the bathroom door, and the cleanliness of the lab. He falsely complained that the lab had lost specimens or orders for antibiotics, and that the lab had failed to notify him of meetings. It accelerated to the point where he complained

almost every time he was in the G.I. Lab. Although Blau did not use profanity, he raised his voice and his tone was often angry, intimidating, and threatening.

Blau dictated numerous complaints about the G.I. Lab into patient medical records. For example, he dictated complaints about the forceps and dilators provided by the lab, the experience level of a nurse assigned to assist with a procedure, a false statement that he had not been provided an informed consent form at the time of a procedure, and a false statement that a nurse handed him a needle when in fact the lab was using a needleless IV system. The record contains numerous other examples. The Hospital's Director of Medical Records averred in a declaration that Blau's notations were contrary to Hospital and industry practices with respect to patient records and that she had never seen any other doctor include the sort of critical commentary included by Blau in patient records.

Blau continued to include the improper notations even after Dr. Paul Buzad, President of the Medical Staff, warned him in July 1999 that it was inappropriate to include those types of complaints in patient records. Buzad repeated this warning in September 1999, writing, "[i]n case there was some misunderstanding… please be advised that it simply is not acceptable for you to write comments such as those quoted above in patient records. Any questions, comments, criticisms, or disagreements that you may have regarding Hospital equipment, supplies, policies, procedures, or personnel (or their conduct) should and must be directed to the appropriate supervising professional and/or to Hospital Administration. If the distinction between patient information (which belongs in patient records) and critical commentary (which does not) is in any way unclear to you, I urge you to discuss the matter with me immediately." Blau continued to include critical commentary in patient records.[7]

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[7] On appeal, Blau contends that many of his criticisms and concerns were valid. Even assuming that to be true, the argument misses the point. It was the incessant nature of Blau's direct criticism and the fact that the criticism was often placed in patient records and voiced in front of patients that caused disruption. The President of the Medical Staff urged Blau to raise his concerns through appropriate channels.

Blau's conduct reduced several of the nurses to tears. Nurse Jean Baker testified that Blau's behavior caused her heart palpitations, sleeplessness, and nightmares. In Fall 1999 she was admitted to the Hospital due to chest pains and filed a workers' compensation claim. In March 2000, nurse Christine Benton was hospitalized for a rapid heart rate resulting from stress that she attributed to Blau. On her doctor's advice, she submitted a declaration rather than testifying at the hearing.

The nurses in the G.I. Lab were long-term employees with exceptional records of performance. The other physicians who used the G.I. Lab did not have complaints about the staff or how the lab was run. The Hospital surveyed the other "high volume" physicians who used the G.I. Lab; they indicated that the lab was excellent. For example, one doctor wrote "this is by far the best GI lab I have ever worked in. They are professional, caring, accommodating—they set the standard for all other GI labs to try to emulate."

The situation in the G.I. Lab was investigated by Paul Salomon, a vice president in the Human Resources Department, and Ronald Rozanski, a Hospital vice president ultimately responsible for the G.I. Lab. Both testified that the nurses' concerns were valid and it was Blau who was causing the problems in the lab. Salomon could find no reason other than Blau for the stress and tension in the lab. Between March and May 2000, a monitor assigned by the Hospital administration observed Blau's conduct in the G.I. Lab; she confirmed the validity of the nurses' concerns.

Despite efforts by the Hospital and Medical Staff to persuade Blau to alter his conduct, the situation got worse between 1996 and 2000. In June 1999, Salomon, the Human Resources Vice President, drafted a memorandum to a Hospital risk manager outlining the concerns expressed by the G.I. Lab staff, which concerns largely mirrored

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We find it unnecessary to discuss the appropriateness of Blau's report to the Joint Commission on the Accreditation of Healthcare Organizations regarding a damaged gastroscope, which was addressed extensively in the hearing and in the briefing on appeal. Blau cites no evidence that the Hospital retaliated against him for the report, and Blau's conduct relating to the gastroscope was not a significant basis for the hearing panel's decision.

those expressed in the April 1996 letter to Blau. Salomon provided a copy of the memorandum to Blau at a meeting later that month during which members of the Medical Staff and Hospital administration took statements from three G.I. Lab staff members in the presence of Blau. The situation did not improve after that meeting. Salomon and Buzad testified that they could not recall a single instance when Blau expressed any remorse or acknowledged that any of his behavior might have been inappropriate.

Between March and May 2000, the G.I. Lab nurses informed the Hospital that they were no longer willing to work with Blau. After the last nurse submitted a letter refusing to work with Blau on May 5, there was no nurse willing to work with Blau in the lab. The nurses also discussed retaining an attorney to help them force the Hospital to remedy the situation. In April 2000, Human Resources Vice President Salomon completed an internal "notice of employment practice claim" indicating a possible imminent claim by the G.I. Lab staff arising from the "hostile work environment" created by Blau.

Before barring Blau from the Hospital, the Hospital consulted with the Medical Staff's Medical Executive Committee, which gave its unanimous approval. On May 10, 2000, the Hospital barred Blau from its premises. Since then, the G.I. Lab has functioned smoothly and there have been no complaints.

2. *Application of the* Miller *Standard*

Based on its review of the evidence, the hearing panel found that the Hospital's action barring Blau from the Hospital premises was "reasonable and warranted." The hearing panel agreed with a witness' characterization of Blau as "aggressively impenitent." The panel stated, "Among the consequences of Dr. Blau's unprofessional behavior was that it created an atmosphere that could have an adverse impact on patient care. The Hearing Panel believes that this was a train wreck waiting to happen. There was no showing of any direct adverse impact on any patient of Dr. Blau's, but the Panel feels that he had created a situation in which the uniquely qualified, experienced team of professional nurses in the GI Lab might not be available or, if available, not calm and

focused enough to adequately assist with his patients who might require care in the GI Lab." The panel continued, "under the circumstances in which the Administration found itself in May of 2000, the only solution to the problems created by Dr. Blau's conduct was to bar him from the premises of [the Hospital]. At that time . . . the registered nurses in the GI Lab all had refused to work with [Dr. Blau]. The Hearing Panel finds that the action of the registered nurses in this regard was understandable and reasonable. The termination of these registered nurses, voluntarily or otherwise, would have deprived many additional physicians (and their patients) of the . . . nurses' services."

The panel's findings are amply supported by the evidence summarized above. The level of anxiety in the G.I. Lab was something that had the potential to increase the likelihood of mistakes and affect patient care. Moreover, all of the nurses in the lab refused to work with Blau by the time he was barred from the Hospital. Disciplining the nurses for refusing to work with Blau would have been problematic because the Hospital had concluded that their concerns were appropriate and, in any event, the Hospital was facing the possibility of a mass departure by the nurses if Blau were permitted to continue to use the lab. That would have required the Hospital to turn away patients and would have negatively impacted all of the doctors and patients who used the G.I. Lab.[8]

Also, Salomon, the Human Resources Vice President, testified that there is an overall nursing shortage and that it is "very, very difficult" to hire an experienced G.I. nurse. During his tenure at the Hospital he hired a new G.I. nurse, and it took him about six months to do so. The Hospital, appropriately concerned with its ability to continue to provide high quality patient care, logically sought to avoid losing all its highly valuable G.I. Lab nurses where its investigation had shown that the problem was Blau's inability

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[8] Blau asserts that the Hospital had no legal duty to protect the nurses from harassment or a hostile working environment not relating to a protected characteristic. We need not decide whether Blau's conduct gave rise to a valid legal claim against the Hospital. The Hospital properly sought to ensure the functioning of the G.I. Lab for the benefit of the staff, the other doctors, the patients, and the Hospital as a whole.

to work with the lab staff and not any fault of the nurses, who were well regarded by all of the other doctors.

Accordingly, the evidence in the record discloses a patient care nexus adequate to satisfy the *Miller* standard. *Miller* itself acknowledged that " '[I]n the modern hospital, staff members are frequently required to work together or in teams, and a member who, because of personality or otherwise, is incapable of getting along, *could* severely hinder the effective treatment of patients.' " (*Miller*, *supra*, 27 Cal.3d at p. 629 & fn. 16.) This case involves the scenario described in *Miller* in which a doctor is medically competent but due to his inability to work with other hospital personnel, he has a clear adverse effect on the overall quality of care offered by the hospital. (*Id.* at p. 632.) *Miller* was not confronted with circumstances in which a doctor's demonstrated and documented long-term behavior had harmed his co-workers and disrupted the effective operation of part of a hospital, because the plaintiff doctor in *Miller* had never worked at the defendant hospital and none of the doctors who testified had experienced any difficulty mutually caring for patients with the plaintiff. (*Id.* at pp. 619, 622.) Consequently, in *Miller* it was merely " 'conjectural' " whether the plaintiff's difficult personality would affect the quality of care offered by the hospital. (*Id.* at p. 630.) The facts before us do not require conjecture. (See *Marmion v. Mercy Hos. and Medical Ctr.* (1983) 145 Cal.App.3d 72, 86 [distinguishing *Miller* on similar grounds].)[9]

Blau contends that if there is a sufficient nexus to patient care to satisfy *Miller*, then the Hospital's action necessarily is within the scope of section 809. The Hospital counters that *Miller's* patient care nexus requirement is not equivalent to the "medical disciplinary cause or reason" standard which triggers the section 809 procedures. That is, the Hospital argues that a disciplinary action can have a sufficient nexus to patient care to

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[9] Blau contends that the Hospital should not be permitted to rely on any effects on patient care because the notice of charges did not allege those effects. The patient care nexus sufficient to satisfy *Miller* flows from Blau's inability to work with the G.I. Lab staff, a situation prominently noticed in the charges. Blau was apprised of the conduct that was at issue.

satisfy the substantive rationality requirement without obligating the use of the peer review process, which relates to "[t]hat aspect of a licentiate's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care." (§ 805, subd. (a)(6).) Because *Blau I* has collateral estoppel effect on the applicability of section 809, we do not reach this important issue. We leave for a future court to decide whether evidence showing a sufficient nexus to satisfy *Miller* necessarily brings a disciplinary action within the scope of section 809.

In light of *Blau I*, the only issue in this case is whether the Hospital's action comported with common law standards of fair procedure. We conclude that it did.[10]

DISPOSITION

The trial court's judgment is affirmed.

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GEMELLO, J.

We concur.

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JONES, P.J.

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SIMONS, J.

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[10] On appeal, Blau contends that the Hospital's action barring him from its premises was illegal under the Unruh Civil Rights Act (Civil Code, § 51) and because the facts did not establish a basis for a criminal trespass charge. Both contentions have been forfeited; neither contention was presented to the trial court and the Unruh Civil Rights Act claim was raised for the first time in Blau's reply brief. (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 530; *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334, fn. 1.)