THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ANTHONY C. CATIPAY, M.D.,	:	**PER CURIAM OPINION**
Plaintiff-Appellant,	:	**CASE NO. 2003-T-0136**
- vs -	:	
TRUMBULL MEMORIAL HOSPITAL FORUM HEALTH,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 02 CV 1708.

Judgment: Affirmed.

Michael J. Jordan and *Kevin M. O'Connor,* 3500 The Tower at Erieview, 1301 East Ninth Street, Cleveland OH 44114 (For Plaintiff-Appellant).

Catherine M. Ballard and *Allen Killworth*, 100 South Third Street, Columbus, OH 43215 (For Defendants-Appellees).

PER CURIAM

{¶1} Appellant, Anthony C. Catipay, appeals from the trial court's grant of summary judgment in favor of appellees. The trial court determined appellees were immune from liability in damages to appellant under 42 U.S.C. §11111 et seq., the Health Care Quality Improvement Act ("HCQIA"). We affirm.

{¶2} Appointment to the medical staff of Trumbull Memorial Hospital ("hospital") is for a period of not more than two years. Before the expiration of an appointment, a

member of the medical staff desiring reappointment must submit an application for reappointment. The procedure for reappointment is set forth in the hospital's "Medical Staff Bylaws, Procedural Policy, Rules and Regulations" ("Bylaws"). Under the Bylaws, the applicant submits his application to the chief of his department. The chief of the department then forwards the application to the Credentials Committee. The Credentials Committee reviews all pertinent information and submits a report and recommendation to the Executive Committee. The Executive Committee in turn submits a written recommendation to the Board of Trustees ("Board"). The Board then determines whether to reappoint the applicant to the medical staff. The Bylaws set forth a hearing procedure before the Board enters its final decision when the Board has determined not to reappoint the applicant to the medical staff.

{¶3} Appellant has had a tumultuous relationship with appellees. Appellant was appointed to the medical staff in 1984. The record indicates that as early as 1988 appellant had disagreements with his colleagues in committee or department meetings. Appellant has been reprimanded for leaving self-promotional materials in the hospital's cafeteria, for his verbal and written attacks on colleagues and the hospital, and for inappropriate sexual comments toward nurses.

{¶4} Matters came to a head over three issues: (1) the hospital's lack of a twenty-four hour pediatric house officer to aid in the resuscitation of distressed newborns; (2) appellant's belief that certain pediatricians were not responding immediately to calls to assist distressed newborns; and (3) his department chief, Dr. Parisa Khavari's ("Khavari"), refusal to serve a rotation on the house emergency obstetrics schedule.

{¶5} Because of his concerns, appellant wrote numerous letters in an effort to resolve these issues to his satisfaction. Many of these letters were pointedly critical of his colleagues. Appellant engaged in numerous verbal altercations with staff members, including Khavari. These disputes placed appellant at odds with John Vlad, M.D. ("Vlad"), who was not only chairman of the Board, but also a pediatrician who was the target of some of appellant's criticisms, and Khavari who was head of appellant's department. It was following one of these exchanges with appellant that Khavari stated she would not forward appellant's reappointment application to the Credentials Committee unless appellant completed a mental and physical exam. These events ultimately led to the instant action.

{¶6} In accordance with hospital policy, appellant applied for reappointment in January 2001. Khavari, declined to make a report to the Credentials Committee on appellant's application unless appellant submitted to a physical and mental health examination.

{¶7} The Credentials Committee interviewed appellant and reviewed his application. The Credentials Committee recommended to the Executive Committee appellant's reappointment for a probationary period of one year with a written warning advising appellant any further disruptive behavior and written communications could jeopardize his staff privileges. The Executive Committee agreed with the Credentials Committee and forwarded a recommendation to the Board that appellant be reappointed for a one-year probationary period with a written warning.

{¶8} On May 23, 2001, the Board, faced with an unusual recommendation, decided to appoint an ad hoc committee to review appellant's reappointment. The

Board also voted to continue appellant's "full staff appointment and privileges, for a probationary period of one year as recommended by the Credentials Committee" until the ad hoc committee made its recommendation. On July 3, 2001, appellant received a letter stating he was a member in good standing and that his credentials file contained no evidence of pending or final disciplinary action.

{¶9} On July 25, 2001, the ad hoc committee recommended that the Board not reappoint appellant to the medical staff. By letter dated July 25, 2001, the Board notified appellant that he would not be reappointed to the medical staff and that his privileges were suspended pending a final determination of the Board following the conclusion of the hearing and appeal process.

{¶10} A peer review hearing was held in February 2002; following the hearing, the hearing officer recommended that the Board affirm its denial of reappointment. Appellant appealed the hearing officer's decision as permitted under the Bylaws. On July 13, 2002, the Board notified appellant it had rejected his appeal and that it was the Board's final decision that he not be reappointed.

{¶11} On July 24, 2002, appellant filed suit against appellees Trumbull Memorial Hospital, John Vlad, M.D., Parisa Khavari, M.D., and William H. McCoy, M.D. ("McCoy").[1] Appellant's suit alleged claims of tortuous interference with a business relationship, breach of contract, defamation, and violation of Ohio public policy. Appellees moved for partial summary judgment arguing they were immune from liability for damages pursuant to 42 U.S.C. §11111(a)(1). The trial court granted appellees' motion. Appellant appeals asserting one assignment of error, "The trial court erred to

1. Vlad was chair of the Board of Trustees; Khavari was the chair of appellant's department (obstetrics and gynecology); McCoy was senior vice president of medical affairs.

the prejudice of plaintiff-appellant in granting the motion for partial summary judgment of defendants-appellees."

{¶12} We review a grant of summary judgment de novo, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, i.e., independently and without deference to the trial court's determination. *Lexford Prop. Mgmt., L.L.C. v. Lexford Prop. Mgmt., Inc.* (2001), 147 Ohio App.3d 312, 315, 316.

{¶13} Summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion is made, that conclusion is adverse to that party. *Harless v. Willis Day Warehousing, Inc.* (1978), 54 Ohio St.2d 64, 66.

{¶14} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

{¶15} If the moving party has satisfied this initial burden, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing there is a genuine issue for trial. Id. at 293; see also, *Meyers v .Columbia/HCA Healthcare Corp.* (6 C.A. 2003), 341 F.3d 461, 466.

{¶16} Congress intended HCQIA to provide effective peer review and interstate monitoring of incompetent physicians. *Austin v. McNamara* (9 C.A. 1992) 979 F.2d 728,

733. HCQIA also provides limited immunity to those who participate in the peer review process. Id. To this end, HQCIA provides:

{¶17} "If a professional review action *** of a professional review body meets all the standards specified in [42 U.S.C. §1112(a)], except as provided in subsection (b) - -

{¶18} "(A) the professional review body,

{¶19} "(B) any person acting as a member or staff to the body,

{¶20} "(C) any person under a contract or other formal agreement with the body, and

{¶21} "(D) any person who participates with or assists the body with respect to the action,

{¶22} "shall not be liable in damages under any law of the United States or of any State *** with respect to the action." 42 U.S.C. §11111(a)(1).

{¶23} 42 U.S.C. §11112(a) sets forth the standards for professional review actions. This section states:

{¶24} "For purposes of the protection set forth in [42 U.S.C. §11111(a)], a professional review action must be taken - -

{¶25} "(1) in the reasonable belief that the action was in furtherance of quality health care,

{¶26} "(2) after a reasonable effort to obtain the facts of the matter,

{¶27} "(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

{¶28} "(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 paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in [42 U.S.C. §11111(a)] unless the presumption is rebutted by a preponderance of the evidence." 42 U.S.C. §11112(a).

{¶29} Because of the rebuttable presumption established by 42 U.S.C. §11112(a)(3) the question we ask in this summary judgment exercise is: "Might a reasonable jury, viewing the facts in the best light for [appellant], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of §11112(a)?" *Austin,* supra at 734.

{¶30} Appellant presents five issues for our review. The first two concern whether appellees made reasonable efforts to obtain the facts of the matter as required by 42 U.S.C. §11112(a)(2), and will be addressed together. These issues as framed by appellant are:

{¶31} "[1] Where a hospital ignores its own bylaws and the decision making of its physician member credentials and executive committees and relies on a secret committee to strip a physician of his staff privileges, a reasonable jury could find that the [d]efendants-[a]ppellees did not make reasonable efforts to obtain the facts before taking professional review action and therefore are not entitled to immunity under the Health Care Quality Improvement Act."

{¶32} "[2] A professional review action, such as the summary suspension of a physician's privileges, based on two hours of meetings by an unauthorized ad hoc

committee that never meets with the physician and conducts no independent investigation of the facts, is not an action taken after reasonable efforts to obtain the facts."

{¶33} 42 U.S.C §11151(9) defines a professional review action as:

{¶34} "*** an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action ***."

{¶35} A professional review activity is:

{¶36} "*** an activity of a health care entity with respect to an individual physician

{¶37} "(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

{¶38} "(B) to determine the scope or conditions of such privileges or membership, or

{¶39} "(C) to change or modify such privileges or membership." 42 U.S.C. §11151(10).

{¶40} With respect to appellant's suspension effective July 25, 2001, and viewing the evidence in the light most favorable to appellant, appellant has not presented sufficient evidence to create a genuine issue of material fact as to whether appellees acted after a reasonable effort to obtain the facts. The review process in the instant case was extensive, spanning several months.

{¶41} Appellant first argues the use of the ad hoc committee violated the hospital's Bylaws and was therefore improper. The Board had the sole authority to reappoint appellant to the medical staff. Thus, the Board was free to accept or reject the recommendations of the Credentials and Executive Committees. This process is in complete compliance with the Bylaws. Appellant has presented no evidence that the Bylaws, or any other document, prohibit the Board from forming an ad hoc committee for the purpose of providing an additional recommendation.

{¶42} Appellant also contends Khavari exceeded her authority when she demanded appellant submit to a mental health exam before she forwarded his application to the Credentials Committee. The Bylaws required Khavari to make a recommendation as to whether appellant should be reappointed. The Bylaws did not prohibit Khavari from demanding a mental health exam if such was relevant to her recommendation. Given appellant's history of verbal altercations with other staff members such a demand was warranted. Appellant has failed to present evidence to establish Khavari exceeded her authority when she demanded appellant submit to a mental health exam.

{¶43} Appellant next argues the ad hoc committee did not make reasonable efforts to obtain the facts. We disagree.

{¶44} Appellant takes issues with the fact he was not told of the appointment of the ad hoc committee and that he was not interviewed by the ad hoc committee. Nothing in the HCQIA or the Bylaws require the Board to notify a physician of the manner in which an investigation is being conducted, or to participate in that investigation. While appellant was not interviewed by the ad hoc committee, he was interviewed by the Credentials Committee and this information was provided to the ad hoc committee.

{¶45} Further, while the ad hoc committee may have met for only two hours, the totality of the process shows the Board made reasonable efforts to obtain the facts. See, *Mathews v. Lancaster General Hospital* (3 C.A. 1996), 87 F.3d 624, 637. The ad hoc committee had the benefit of the Credentials and Executive Committees recommendations, as well as access to all of the information reviewed by those committees. The Board, in turn, had the recommendations of all three committees before it acted. Thus, the totality of the process demonstrates that the Board made reasonable efforts to obtain the facts before it took its professional review action. Appellant has failed to present evidence of a genuine issue of material fact on this issue.

{¶46} Appellant also argues the Board's final decision failed to comply with the requirements of 42 U.S.C. §11112(a)(3), requiring adequate notice and hearing procedures or such other procedures as are fair to the physician under the circumstances.[2] Specifically, the issues raised by appellant are as follows:

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2. 42 U.S.C. §11112(c) provides:
{¶a} "For purposes of [42 U.S.C. 11111(a)], nothing in this section shall be construed as –
{¶b} "(1) requiring the procedures referred to in subsection (a)(3) [adequate notice and hearing procedures] –

{¶47} "[1.] Where a hospital notifies a physician that he is a member of the medical staff in good standing with no pending disciplinary action and twenty-two days later summarily suspends his privileges based on the recommendation of a secret committee that never met with the physician, a reasonable jury could find that the [d]efendants-[a]ppellees did not afford adequate notice and hearing procedures."

{¶48} "[2] In a peer review action predicated on accusations by one physician against another, the failure of the accusing physician to present testimony to the hearing officer deprives the accused physician of adequate hearing procedures."

{¶49} "[3.] A [h]ospital's violation of its by-laws and violation of the confidentiality Ohio law affords peer review proceedings taints a peer review hearing and deprives the physician who is the subject of the hearing of adequate due process."

{¶50} We first note the Board's action of July 25, 2001, constituted a suspension of appellant's privileges, not a termination of those privileges. The letter of July 25, 2001 notified appellant of his procedural rights.

{¶51} With respect to the July 3, 2001 letter, nothing in the record indicates this letter constituted "professional review action" as defined in 42 U.S.C. §11151(9). Therefore, it cannot support a finding that appellees did not comply with the requirements of 42 U.S.C. §11112(a)(3).

{¶c} "(A) where there is no adverse professional review action taken, or

{¶d} "(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

{¶e} "(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."

{¶52} Appellant also argues that Khavari's failure to testify at the hearing denied him adequate hearing procedures. We disagree. 42 U.S.C. §11112(b) is a safe harbor provision with respect to adequate notice and hearing procedures.[3] 42 U.S.C. §11112(b)(3)(C)(iii) recognizes appellant's right to call, examine, and cross-examine witnesses; however, nothing in the HCQIA grants appellant the power to compel the attendance of witnesses. Appellant has presented no evidence appellees failed to

3. This section provides:

{¶a} "(b) Adequate notice and hearing. A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

{¶b} "(1) Notice of proposed action. The physician has been given notice stating—

{¶c} "(A) (i) that a professional review action has been proposed to be taken against the physician,

{¶d} "(ii) reasons for the proposed action,

{¶e} "(B) (i) that the physician has the right to request a hearing on the proposed action,

{¶f} "(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

{¶g} "(C) a summary of the rights in the hearing under paragraph (3).

{¶h} "(2) Notice of hearing. If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

{¶i} "(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

{¶j} "(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

{¶k} "(3) Conduct of hearing and notice. If a hearing is requested on a timely basis under paragraph (1)(b)—

{¶l} "(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

{¶m} "(i) before an arbitrator mutually acceptable to the physician and the health care entity,

{¶n} "(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

{¶o} "(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

{¶p} "(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear; "(C) in the hearing the physician involved has the right—

{¶q} "(i) to representation by an attorney or other person of the physician's choice,

{¶r} "(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

{¶s} "(iii) to call, examine, and cross-examine witnesses,

{¶t} "(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

{¶u} "(v) to submit a written statement at the close of the hearing; and

{¶v} "(D) upon completion of the hearing, the physician involved has the right—

{¶w} "(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

{¶x} "(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

comply with the requirements of 42 U.S.C. §11112(b); therefore, appellees are deemed to have complied with the requirements of 42 U.S.C. §11112(a)(3) regarding adequate notice and hearing procedures.

{¶53} Appellant also contends McCoy violated Ohio's law making peer review proceedings and records confidential[4] when he discussed allegations against appellant with the vice president of medical affairs of St. Joseph Health Center where appellant also had privileges. Appellant also claims McCoy's actions violated the hospital's Bylaws. Appellant argues these violations tainted the peer review process and denied him a fair hearing. Appellant fails to direct us to any evidence that establishes how McCoy's actions tainted the peer review process or denied him a fair hearing. Further, a review of the record demonstrates these discussions were had in furtherance of the peer review process. Thus, appellant's contention with respect to this issue is without merit.

{¶54} In conclusion, viewing the evidence in the light most favorable to appellant, appellant has failed to present evidence sufficient to raise a genuine issue of material fact as to whether appellees were entitled to immunity under the HCQIA. For the foregoing reasons the judgment of the Trumbull County Common Pleas Court is affirmed.

DONALD R. FORD, P.J., JUDITH A. CHRISTLEY, J., CYNTHIA WESTCOTT RICE, J., concur.

{¶y} "A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3)."

{¶z} R.C. 2305.252.