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SOUTHERN ILLINOIS UNIVERSITY
NATIONAL HEALTH LAW MOOT COURT COMPETITION

Transcript of Record
Docket No. 13-1076

Supreme Court of the United States
October Term, 2013

**Hanover University General Hospital; Anthony B. Glower;
Mary Elizabeth Kreutzer; Seamus O. Milk;
Alicia Polishov, Petitioners,**

v.

Thomas L. Rutherford, Respondent.

COMPETITION PROBLEM

SPONSORED BY:

*Center for Health Law and Policy
Southern Illinois University School of Law*

*Department of Medical Humanities
Southern Illinois University School of Medicine*

The American College of Legal Medicine

The American College of Legal Medicine Foundation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HANOVER

THOMAS L. RUTHERFORD,)
Plaintiff,)
) No. Civ-12-523
v.)
)
HANOVER UNIVERSITY GENERAL)
HOSPITAL, ANTHONY B. GLOWER, MARY)
ELIZABETH KREUTZER, SEAMUS O. MILK,)
and ALICIA POLISHOV,)
Defendants.)

Dakowitz, District Judge

Introduction

In an Amended Complaint filed in this court, Thomas L. Rutherford, M.D., asserts claims against the Hanover University General Hospital (HUGH) for what he describes as a deprivation of his constitutional rights under 42 U.S.C. § 1983. Dr. Rutherford has also brought claims under the common law of the state of Hanover against HUGH and four individual defendants. Defendants have moved for summary judgment. For the reasons stated below, the motion is **GRANTED**. Defendants are entitled to judgment as a matter of law on all claims.

Facts and Background

Few facts are in dispute between the parties. To the extent that the parties disagree, this Court resolves their divergences in favor of the Plaintiff. *See Ullrich v. United States Sec’y of Veterans Affairs*, 457 F. App’x 132 (3d Cir. 2012), *Rivera-Colón v. Mills*, 635 F.3d 9 (1st Cir. 2011) (summary judgment standard requires resolution of ambiguities in favor of the non-moving party). From the vantage point of Dr. Rutherford, the story begins on Monday, June 11, 2012.

On that morning Dr. Rutherford, co-inventor of the Doda Stent and an esteemed cardiac surgeon who had held surgical privileges at HUGH for 26 years, published on his ConnectSpace page the following passage (“the post”):

First, Do No Harm to Children?

Confirmed. On Thursday, Declan [Dr. Rutherford’s grandson, then aged 19 months] was diagnosed: autism. Funny how the news feels shocking even though we pretty much knew. Kudos to his speech pathologist Lisa, a hero.

A year ago Declan was vaccinated--the full battery so to speak. I approved. We all did. And then....

We docs like to scoff at the autism-vaccines link. I personally won't do so any more. Vaccination → the great American uncontrolled experiment on little kids. Whatever happened to informed consent?

The HDRI pays for vaccination in my county. We have a grant: the more we jab, the more cash HUGH gets. And photos with the governor. And trinkets. Susan [Dr. Rutherford's wife] remembers Declan liked the balloon his pediatrician gave him that day. Tax dollars at work. ConnectSpace needs a sarcasm emoticon ;-(

Meanwhile we're hoping. Lisa took this great picture of Declan. No smile yet but Susan says one's coming.



ConnectSpace is a social media platform that allows a user to interact with persons whose “friend” requests are accepted by the user. A ConnectSpace page can be set to “private,” which allows only those whose friend requests have been accepted to see what a user posts on his page. At the time of the post Dr. Rutherford had 1,011 “friends” on his private ConnectSpace. Before the end of the day, three of these “friends” had separately forwarded the post to Anthony B. Glower, M.D., chief of pediatrics at HUGH and chief investigator of HUGH’s “99 Percent” grant. Three hospitals in the state of Hanover have received this prestigious and competitive appropriation from the Hanover Disease Research Institute (HDRI), a state agency. The 99 Percent grant, which the HDRI will renew if benchmarks are achieved, aims to increase vaccination rates. Presumably the ConnectSpace friends of Dr. Rutherford who forwarded the post believed that it would interest Dr. Glower, who does not have a ConnectSpace page.

That afternoon Dr. Glower forwarded a link to the post to Alicia Polishov, the HUGH Chief of Medicine and chair of its Medical Executive Committee, to Dr. Polishov’s mobile phone:

“Tom takes a swipe @99% [copied text]

Dr. Polishov texted him back: “Let’s talk” .

At his deposition, Dr. Glower recounted a conversation the next day, June 13, with Dr. Polishov:

A: I told her I thought Dr. Rutherford was disrupting the initiative. When you do public health, vaccination is fragile. Parents get put off pretty easily. If they're passing around this ConnectSpace post, and they associate it with the hospital.

BY MS. DESJARDINS:

Q: You say Dr. Rutherford "was disrupting," but the post had gone up just that morning, isn't that right?

A: Yes, I believe so.

Q: How could it have been disrupting the initiative when it was just a few hours old?

A: It got forwarded a lot right away, we saw. And Dr. Rutherford—well, he expresses opinions. If he said something once he'd be saying it again.

Q: Why do you think Dr. Rutherford questioned the initiative?

A: I can't speculate about his—

Q: I'm asking you to.

BY MR. McAVOY:

Go ahead, Tony.

A: Well, I work with children, I see autism every day. But it's new to Dr. Rutherford. And he's used to being in charge, as a surgeon. Plus it's human nature to want an explanation if things go wrong. So you say "It's something I did," even though it's not about you. Maybe he felt responsible for the grant. (Glower Dep. 36:2-37:10.)

In an e-mail message to Dr. Polishov on June 13, Dr. Glower was blunter in his speculation about Dr. Rutherford's motive:

Simple envy. Doda Stent went off patent 4 years ago & he has no new ideas. He's 64, I'm 47. He lost with NIH, I won with HDRI. He even resents the pic of you & me with Avery [the governor of Hanover].

The next morning, Dr. Glower continued in another e-mail to Dr. Polishov:

Terrible about his grandson but that doesn't give him the right to badmouth my program! Guy's a trainwreck. He'll take us down with him if he can & you know it.

That week, Dr. Polishov initiated what the HUGH Medical Staff Bylaws call a "request for corrective action." A "corrective action" at HUGH addresses the performance of members of the Active Staff inquiring whether their professional conduct is "detrimental to patient safety or

to the delivery of quality patient care, disruptive to Hospital operations, contrary to the bylaws, or below applicable professional standards.” Medical Staff Bylaws § 19.01(a).¹ Pursuant to her authority as chair of the Medical Executive Committee (MEC), Dr. Polishov appointed an ad hoc review committee to investigate Dr. Rutherford’s performance as a member of the Active Staff.²

The ad hoc committee had three members: Seamus O. Milk, M.D., a retired cardiac surgeon who volunteers his time to raise funds for HUGH and who continues to hold courtesy privileges there; Dr. Glower; and Ronald Ling, M.D., a general surgeon who chairs the HUGH Surgery Department and also serves as Director of Quality Enhancement Initiatives.³ Serving ex officio to provide information from the nursing staff was Mary Elizabeth Kreutzer, R.N., D.N.P., the Director of Nursing at HUGH. Dr. Polishov informed Dr. Rutherford of the formation of the ad hoc committee by letter sent by certified mail, dated July 1, 2012 (“the July 1 letter”).

The July 1 letter informed Dr. Rutherford that pursuant to Article XIX of the HUGH bylaws, the MEC would consider whether a recommendation to restrict or revoke Dr. Rutherford’s membership and/or privileges should be made to the Board based on the ad hoc committee’s investigation. The letter also informed Dr. Rutherford of numerous rights he held, including the right to counsel and a “fair hearing” should the ad hoc committee recommend any disciplinary action and the Medical Executive Committee adopted such recommendations or took actions of its own. The letter further warned Dr. Rutherford that if his privileges were affected for more than 30 days, HUGH would be obliged, under the federal Health Care Quality Improvement Act of 1986, to so inform the Medical Board of Hanover and the National Practitioner Data Bank.

As for the substance of the investigation, the letter advised Dr. Rutherford that the ad hoc committee would consider information about Dr. Rutherford’s infection rates following Dr. Rutherford’s surgeries and complications noted in patient records, such as adverse drug reactions and improper drug utilizations. The letter informed Dr. Rutherford that to the extent pertinent the committee would consider autopsy findings, “sentinel events” (a term of art defined by the Joint Commission, f/k/a The Joint Commission for Accreditation of Healthcare Organizations), malpractice claims, and patient complaints. It added that the committee would also consider Dr. Rutherford’s “temperament” and “compliance with Hospital staff rules,” both of which the HUGH bylaws identify as considerations that pertain to patient care. Medical Staff Bylaws § 19.01(a). The July 1 letter made no mention of the ConnectSpace controversy.

The ad hoc review committee gathered documents pertaining to Dr. Rutherford’s work as a member of the Active Staff at HUGH. It limited its examination to the last six years, July 2006 through June 2012. Supplementing this review of documents, Dr. Milk and Director Kreutzer

¹ “The Active Staff” is a term of art noted in Article III of the HUGH Bylaws. It includes physicians who regularly perform a hospital-based specialty at HUGH and who participate in teaching or research. Medical Staff Bylaws § 3.01(c). Dr. Rutherford has been active in teaching and research at HUGH, alongside his work performing cardiac surgical procedures.

² HUGH’s bylaws specify that the Medical Executive Committee may appoint an ad hoc committee to investigate a member of the Active Staff but do not prescribe how that appointment is to occur or who may serve on an ad hoc committee. Medical Staff Bylaws § 19.01(c).

³ Drs. Glower and Ling are also members of the MEC, along with Dr. Polishov and two other physicians, an OB/GYN and a general surgeon.

conducted interviews with a few members of the Hospital's staff; both reported their findings orally to the full committee at its second meeting. The ad hoc review committee's operation, which was described by committee members as "somewhat informal," meant no official chair, no secretary, no minutes, no observance of Robert's Rules of Order, and no tape recording of deliberations, but Dr. Ling took notes on an iPad.

On July 31, 2012, Norbert Flax, M.D., the HUGH Chief Executive Officer, wrote to Dr. Rutherford informing him that the MEC, in response to the investigation by the ad hoc review committee, had voted to revoke Dr. Rutherford's privileges at HUGH and terminate his appointment to the Active Staff. This communication ("the July 31 letter") stated that the reasons for this decision were Dr. Rutherford's "unacceptably high rates of morbidity and post-operative complications," "failure to meet the Hanover University General Hospital standard of care," and "conduct that impedes quality patient care" Effective immediately, Dr. Flax's letter concluded, Dr. Rutherford was barred from performing surgery at HUGH and no longer held privileges at the hospital. Dr. Rutherford was again informed of his right to request a "fair hearing" to address the MEC's determination. By letter, Dr. Rutherford declined to attend such a hearing but detailed his disagreement with the ad hoc committee's investigation process and findings. Specifically, Dr. Rutherford asserted that his patients, needing the Doda Stent, tend to be the most physically vulnerable and that his track record relative to these patients was "extraordinarily good." He further asserted his post-operative infection rate was related to a four month period when the Hospital's HVAC system was malfunctioning and piping sewer exhaust into recovery rooms, during which time there was an overall spike in patient infections.

Asked during discovery why he chose to forgo the opportunity to appear in-person before a Hearing Board, Dr. Rutherford said he saw little point:

A: There was nothing to say. I assumed I'd be fine when this whole thing started, and if not, if it's a kangaroo court, then I can't do anything in it. My record speaks for itself. It's numbers, not verbiage.

BY MR. McAVOY:

Q: What about your temperament?

A: I think mine is fine. I sure couldn't prove it at a hearing. Could you? So I basically made a record of the real facts and knew they were going to do what they were going to do. This so-called "fair hearing" would just waste time. I knew the Board was going to be the one to do the right thing here. (Rutherford Dep. 46:5-26.)

Dr. Rutherford went on to speculate about a hidden agenda related to the grant.

I was a problem. Here's Polishov and Glower bragging about HDRI money, hoping for more in 2015, and here I'm saying whoa, let's slow down, let's think for a sec about what vaccination is doing and not doing. It's just ConnectSpace but they're embarrassed. I figure Alicia and the people above her have to rough me up a little, you know, reassure the HDRI and whoever that Hanover University and its hospital

are on board, right thinking. Tony's her pal, Seamus is her boyfriend, Ron goes along to get along, he always did. Kreutzer pushes papers in another building, I don't deal with her.

BY MR. McAVOY:

Q: Doctor, with your permission--

A: Yes, the review. They can tell everybody they double-checked I'm okay as a surgeon even though I'm an ass about pediatrics on my ConnectSpace page, right? That's what I figured. I had no idea they intended to put me out of work. You'd think they'd be rational. I make money for them, I have nothing to say about whether any kid in Hanover gets vaccinated. They drank the Kool-Aid and couldn't stop. (Rutherford Dep. 47:7-24.)

Dr. Rutherford then retained counsel and, on August 7, 2012, initiated two proceedings, one an appeal to the HUGH Board of Trustees ("the HUGH action") and the other a civil action in this court. In the Board of Trustees proceeding, Dr. Rutherford sought a reversal of the revocation decision and reinstatement of his privileges.

The other action--the one filed in this court in which Defendants now seek summary judgment--includes both constitutional and common law claims. Dr. Rutherford contends that the reasons stated in the July 31 letter were a cover for HUGH's decision to dismiss him for the opinions expressed in his ConnectSpace post. This revocation of privileges, according to Dr. Rutherford, abridged his First Amendment right to speech under color of state law, and Dr. Rutherford brought a claim under 42 U.S.C. § 1983, asserting a violation of his constitutional rights.⁴ In a separate count, Dr. Rutherford also contended that the revocation of privileges deprived him of a property interest in violation of his right to procedural due process under the Fifth and Fourteenth Amendments. The common law counts of his complaint, which Dr. Rutherford brings against HUGH and the individual defendants, allege breach of contract, intentional infliction of emotional distress, and defamation.

Dr. Rutherford won an early victory at his home institution. By letter dated August 24, 2012, Hugo Borelli, chair of the HUGH board of trustees, informed Dr. Rutherford that the Board of Trustees had reversed the revocation of his privileges. Mr. Borelli's letter stated no reason for the decision. On August 28, Dr. Rutherford returned to full duties at HUGH, including surgeries and research; in an Amended Complaint filed in this court on September 8, 2012, Dr. Rutherford withdrew the claim that had pertained to procedural due process. The Amended Complaint preserved the First Amendment/42 U.S.C. § 1983 and common law counts of the original complaint.⁵

⁴ HUGH, as a public hospital, has agreed that for § 1983 purposes it is a state actor. Neither HUGH nor any of the individual defendants raise any issues under § 1983 regarding qualified immunity or municipal liability.

⁵ The parties have agreed for purposes of this motion that Dr. Rutherford's common law claims are not mooted by the Board of Trustees' decision. Dr. Rutherford still has a claim for his lost income as the result of being denied privileges at HUGH for a month, see Amended Complaint, Count II; unrepaired harm to his reputation, Amended Complaint, Count IV; and continuing emotional distress, Amended Complaint, Count III.

None of the remaining claims may proceed. Dr. Rutherford has not shown that the views he expressed in the post were entitled to First Amendment protection. Even if, *arguendo*, these expressed views were protected by the First Amendment, and even if HUGH revoked Dr. Rutherford's privileges not for the reasons that it articulated in the July 31 letter but because of his views about vaccination, such action was permissible under the First Amendment because expression of those views impeded The 99 Percent initiative, central to the operations of HUGH. As for Dr. Rutherford's common law claims, they are barred by the Health Care Quality Improvement Act of 1986.

Analysis

I. The First Amendment claim

Dr. Rutherford contends that HUGH revoked his privileges because he expressed an opinion on a matter of public concern. HUGH disagrees, contending that it revoked Dr. Rutherford's privileges following peer review because of his failure to provide quality care to hospital patients. As I will elaborate below, I find this peer review record sufficient to immunize HUGH from common law damages claims. *See* discussion *infra* Part II. The ad hoc review committee's documents show Dr. Rutherford's failure to provide quality care and thus ample grounds to revoke his privileges even if he had not expressed an opinion that gave offense. I discuss the § 1983 claim first, however, as it is the basis for this Court's jurisdiction.

Suggesting that HUGH might have commenced the peer review in bad faith, Dr. Rutherford notes that he holds a First Amendment right to comment on matters of public interest, a right he did not relinquish when he began his relationship with HUGH. *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968). Although Dr. Rutherford is an independent contractor rather than a state employee, I agree that *Pickering* applies to his claim. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678-79 (1996) (finding no "difference of constitutional magnitude" between government employees and independent contractors of the government).

Pickering established a balancing test for First Amendment retaliation claims that has been developed and elaborated in the lower courts. Two values in tension must both be honored. On one hand, "the public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *Pickering*, 391 U.S. at 573. On the other hand, the Court also noted "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

In a later case the Supreme Court upheld the dismissal of a governmental employee for circulating a questionnaire in the office that solicited complaints from co-workers. Conceding that this questionnaire contained expressive value, the Court deemed it of insufficient public concern: the employee was mostly just expressing her discontent and disrupting the function of the office. *Connick v. Myers*, 461 U.S. 138, 148 (1983). Similarly, in *Garcetti v. Ceballos*, 547

U.S. 410 (2006), the Court held when public employees make statements pursuant to their official duties, the Constitution does not insulate them from employer discipline in response.

The *Pickering* balance, as informed by *Connick* and *Garcetti*, sets a sequence of criteria for a public employee to establish.⁶ First, Dr. Rutherford must prove that his speech involved a matter of public concern. If he can satisfy this threshold requirement, then his interest in commenting on matters of public concern is weighed against the interest of the state hospital in promoting the efficiency of the services it offers through its employees. HUGH must show its interests in efficient operations outweigh the Doctor's right to speak. Even if HUGH cannot make that showing, Dr. Rutherford must show that his speech was a substantial or motivating factor in the adverse action taken. If he can make this showing, the burden shifts to HUGH to show that it would have taken the same action absent the protected speech.

1. *Public concern.* Speech is of course a constitutionally protected activity, but it is also true that “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Connick*, 461 U.S. at 146. Accordingly, the Supreme Court instructs courts that “the First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern.” *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 600 (2008). Speech that is merely about personal matters is not protected. *Ruotolo v. City of New York*, 514 F.3d 184 (2d Cir. 2008). Courts should consider the content, form, and context of the speech, in light of the record as a whole, to determine whether the speech is protected citizen speech on a matter of public concern. *Connick*, 461 U.S. at 147-48.

Dr. Rutherford's post, one part hallway quarrel and two parts photo-update about a grandchild, with a pinch of *Just Asking!* anti-vax conjecture thrown in, falls outside the realm of public concern. His ConnectSpace page resembles the MySpace page in *Snyder v. Millersville Univ.*, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008), in which the court denied a First Amendment claim and refused to enjoin the defendants. The large picture of Dr. Rutherford's grandson, chatty references to “Susan” and “Lisa,” and the report of how Dr. Rutherford felt when he heard the news all bespeak private rather than public motives behind the ConnectSpace post.⁷

2. *Weighing the interests of the employer.* I consider these interests for the record even though my conclusion about the first factor, “a matter of public concern,” ends the inquiry. As a private citizen, Dr. Rutherford may say anything he likes about vaccination with no penalty from the government. He may say the moon is made of green cheese. He may wear a jacket—a hospital white coat, if he likes—that blazons “Fuck the Draft.” See *Cohen v. California*, 403 U.S. 15, 91 (1971). As a physician associated with HUGH, however (though not literally “on the

⁶ Some formulations of the analysis add a requirement that the plaintiff show he suffered an adverse employment action. See, e.g., *Johnson v. Ganim*, 342 F.2d 105, 112 (2d Cir. 2003). The parties have stipulated that the revocation of privileges was an adverse action, and so that element has been met in this case.

⁷ Not just the content but also the medium of Dr. Rutherford's text evidences private rather than public content. ConnectSpace is essentially an electronic version of a personal journal. See *Tienda v. State*, 358 S.W. 3d 633, 634 n.3 (Tex. Crim. App. 2012) (describing MySpace and Facebook). If he had intended to join a public dialogue about vaccines as a cause of autism, Dr. Rutherford could have taken his speculation to the notoriously pseudo-scientific HuffingtonPost. See RationalWiki, http://rationalwiki.org/wiki/The_Huffington_Post.

payroll” as he said), Dr. Rutherford must speak with enough care not to disrupt the operations of his workplace.

HUGH is engaged in a public health initiative, The 99 Percent, aimed at increasing the proportion of children who are vaccinated. The initiative was funded by the HDRI following a competitive statewide call for applications. Renewal of the grant will depend in part on how well vaccination progresses in Clarahara County and whether investigators and providers can maintain their commitment to an ambitious plan.

The HDRI grant aside, in June 2012 when the “First, Do No Harm” post attracted extraordinary attention, HUGH may have rightly worried about harm to its mission of advancing health. A physician like Dr. Rutherford holds a role of trust at the research hospital with which he is associated. He must comport himself with care. No doubt skepticism feels rational to a skeptic, but this particular challenge to medical orthodoxy has had a notorious effect on public health around the world. Public health experts struggle against parental resistance to vaccination; respectable endorsements of the anti-vaccine posture enlarge this resistance. *See* Jennifer Steinhauer, *Public Health Risk Seen as Parents Reject Vaccines*, New York Times, March 21, 2008, http://www.nytimes.com/2008/03/21/us/21vaccine.html?_r=0 (noting that “[w]hile many parents meet deep resistance and even hostility from pediatricians when they choose to delay, space or reject vaccines, they are often able to find doctors who support their choice”).

HUGH need not have waited for the harm to ripen before taking decisive action. *See Waters v. Churchill*, 511 U.S. 661, 681 (1994) (noting, in a hospital-discipline decision, that “potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had”). Dr. Rutherford’s post on ConnectSpace imperiled the work of his hospital. The First Amendment does not give him a license to publish it without consequences. Accordingly, I find that the second element of the *Pickering-Connick* framework weighs in favor of the Hospital.

3. *The causal connection.* Even if the first two elements of the *Pickering-Connick* test favored Dr. Rutherford, to prevail before a jury he must show that his speech was a substantial or motivating factor in the adverse action taken. The question is subject to disposition before trial. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990). Although on a motion for summary judgment the non-movant is entitled to have ambiguity resolved in his favor, summary judgment is warranted because Dr. Rutherford has no more than unsubstantiated speculation about a hidden agenda as the true cause of an adverse action.

To explain HUGH’s decision, all Dr. Rutherford can suppose is that the individuals who govern HUGH “drank the Kool-Aid.” (Rutherford Dep. 47:24.) This phrase is a metaphor about deadly insanity. Eric Zorn, *Have You Drunk the ‘Kool-Aid’ Kool-Aid?*, CHI. TRIB., Nov. 18, 2008. Dr. Rutherford has no other support for the accusation that underlies his § 1983 claim. When opposing a motion for summary judgment, a non-movant “may not rest upon mere allegations.” *Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991).

Although a reasonable jury might conclude that Dr. Rutherford's ConnectSpace post might have prompted HUGH to act in response, no reasonable jury could conclude that HUGH would punish Dr. Rutherford, a prominent and successful surgeon, with revocation of privileges to do surgery for his private expression of an opinion about vaccination.⁸ For this reason and because what Dr. Rutherford said about vaccination impeded the operations of HUGH, I find that the necessary elements for Dr. Rutherford's § 1983 claim are not met. Summary judgment for HUGH on the claim necessarily follows.

II. The Common Law Claims

The complaint also includes three counts based on Hanover common law; this Court has jurisdiction over these state law claims. *Mestayer v. Wisconsin Physicians Serv. Ins. Corp.*, 905 F.2d 1077 (7th Cir. 1990). In his first of these three counts, Dr. Rutherford contends that the revocation of privileges constituted a breach of contract by HUGH. His acceptance of an appointment to the Active Staff of HUGH created a contractual relation between HUGH and him, Dr. Rutherford contends, obliging HUGH to act in accordance with its Medical Staff Bylaws. Dr. Rutherford alleges as damages the lost economic value of his work as a surgeon at HUGH.⁹ The second and third counts allege intentional infliction of emotional distress and defamation respectively; Dr. Rutherford brings these two claims against HUGH and individual defendants. The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a)(1) (HCQIA), provides full immunity for all defendants against these claims. Because the legal analysis is the same for all parties, for the sake of ease I will refer to these claims as being against "HUGH."

The HCQIA Standard

To qualify for HCQIA immunity under 42 USC § 11111(a)(1), HUGH's actions must conform with four objective standards. The HCQIA presumes that a professional review action meets these standards unless this presumption is rebutted by a preponderance of the evidence. Dr. Rutherford must show that HUGH's actions were *not* undertaken

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (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

⁸ The opinion presents itself as the heartfelt concern of a devoted grandparent, inviting the rejoinder that grandparents like Dr. Rutherford were alive during the polio era that blighted the health of political leaders like Franklin Delano Roosevelt, actors like Donald Sutherland and Mia Farrow, and musicians like Renata Tibaldi and Neil Young. Survivors of polio remind us that the existence of vaccines makes us better off. And I question when HUGH physicians last saw a case of measles, mumps, or diphtheria. If they have seen any, anti-vaccination sentiment shares the blame.

⁹ Even if a hospital other than HUGH would be willing to grant privileges to him, Dr. Rutherford cannot easily relocate because of his family obligations. The parties have stipulated that the surgery in which Dr. Rutherford specializes can be performed in only one other facility in the state of Hanover, St. Kevin's Hospital, a private institution located 278 miles from Dr. Rutherford's home.

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 paragraph (3).

42 U.S.C. § 11112(a) (2006).

If a plaintiff challenging peer review can prove by a preponderance of the evidence that even one of the four requirements was not satisfied, then immunity no longer protects defendants from damages. *See id.* Dr. Rutherford has focused on elements (1), (3), and (4).

HUGH's Reasonable Belief That Its Investigation
Was in the Furtherance of Quality Health Care

Although Dr. Rutherford appears to believe that HUGH mounted an attack on his competence as a surgeon because of an agenda related to his ConnectSpace post about vaccination, this hidden agenda on its part, even if present, does not limit or destroy HCQIA immunity. As the Ninth Circuit instructed in the first federal appellate decision on point, because the reasonableness standards of § 11112(a) establish an objective test, “bad faith is immaterial.” *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992). Under the *Austin* objective standard, widely applied in U.S. courts, HUGH is immune if its reviewers “would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.” *Badri v. Huron Hosp.*, 691 F. Supp. 2d 744, 765 (N.D. Ohio 2010) (quoting *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1323 (11th Cir.1994)).

This conclusion is well supported by data that were gathered by the ad hoc committee, accepted by vote of the Medical Executive Committee, and endorsed by the chief executive officer of HUGH. As noted in the July 31 letter sent by Dr. Alicia Polishov, the six years reviewed by the ad hoc committee revealed “unacceptably high rates of morbidity and post-operative complications.” During this period, seven of Dr. Rutherford’s patients died on the operating table. Only four other cardiac surgeons who held Active Staff privileges at HUGH during this period lost more than seven patients this way; Dr. Rutherford ranked #12 of 15. Dr. Rutherford’s patients’ post-operative infection rate was 22%, compared to a hospital average of 15%. I find that these data support the ad hoc committee’s conclusion that Dr. Rutherford failed to meet the Hanover University General Hospital standard of care as set out by the Medical Bylaws § 19.01(a).

In addition, the ad hoc committee examined incidents that gave more support to its conclusion. Its report noted instances of what it described as “aggressive rudeness” by Dr. Rutherford toward surgical nurses; an episode in 2006 in which Dr. Rutherford “for more than five minutes” and in front of witnesses had shouted at the wife of a patient whose Doda Stent had led to complications; and two complaint letters, one sent in 2007 to Dr. Polishov and another sent in 2009 to an addressee labeled only “Chief of Cardiology,” objecting to what the writers characterized as abusive behavior by Dr. Rutherford toward his patients or prospective patients.

Adequate Notice and Hearing Procedures

Conceding that the MEC informed him of his right to a hearing and that he waived the right to appear in person, Dr. Rutherford nevertheless objects to the fairness of the procedures he received.

Noncompliance with Corrective Action Protocol as Provided in the Bylaws. Dr. Rutherford notes that Article XIX of the Medical Staff Bylaws at HUGH, titled “Corrective Action,” lays out a scheme of procedures to be put into effect when the activities or conduct of a member of the Medical Staff is identified as “detrimental to patient safety or to the delivery of quality patient care, or disruptive to Hospital operations.” Medical Staff Bylaws §19.1(a). According to this scheme, employees and officers of HUGH can articulate complaints as they arise. *See id.* All such complaints must be in writing and are to be reported to the MEC, whose Chair is empowered to appoint a review committee if he or she concludes that further action is required. Medical Staff Bylaws § 19.01(b). The Bylaws suggest that collegial intervention should be attempted first. Medical Bylaws § 19.01(a).

Apparently these processes were not strictly followed to consider the question of Dr. Rutherford’s privileges. Dr. Polishov, formed the ad hoc committee without a written complaint, and thus, there is no record of the “reliable information” that justified the inception of the investigation. Dr. Polishov also did not attempt any collegial intervention before initiating the investigation. No formal record was made when the committee was initiated, and the ad hoc committee made no written report to the MEC. It never interviewed Dr. Rutherford or any of the other cardiologists on staff at the Hospital. It does not appear that the MEC considered whether the corrective action was required, or at least, there is no formal indication in its records.

These protests by Plaintiff cannot defeat summary judgment. HCQIA immunizes individuals and entities that participate in “a professional review action,” 42 U.S.C. § 1111(a)(1). The statute defines “professional review action” as “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.” *Id.* at § 11151(9). HUGH’s review fits this description. For HCQIA immunity, a hospital need not have hewed to the protocols provided in its bylaws. *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 609 (4th Cir. 2009); *Poliner v. Texas Health Sys.*, 537 F.3d 368, 380-81 (5th Cir. 2008).

Members of the ad hoc committee as peer reviewers. A similar rejoinder addresses Dr. Rutherford’s protest about the three members of the ad hoc review committee membership. Dr. Rutherford complains that Dr. Milk held only courtesy privileges at HUGH (Dr. Milk has not performed surgery in HUGH since 2011); Dr. Ling is a general surgeon rather than a cardiac surgeon; Dr. Glower is a pediatrician. “True peer review,” Dr. Rutherford contends, requires a closer fit between the reviewers’ credentials and experience on one hand and Dr. Rutherford’s on the other. Again, the HCQIA makes no such demand. Its terminology is “professional review,” not “peer review.” 42 U.S.C. § 1111(a)(1).

“*Sham Peer Review.*” Dr. Rutherford says that individuals came to the ad hoc review committee with biases, conflicts of interest, and hostile agendas. He claims that Seamus Milk is not only “the life partner” but also “in effect the agent” of Alicia Polishov; that Ronald Ling, as Director of Quality Enhancement Initiatives, “was invested in the 99 Percent initiative,” and was both personally and professionally aligned with Dr. Glower; that Mary Elizabeth Kreutzer attended meetings of the ad hoc committee “for the sole purpose of relaying hearsay complaints about Plaintiff from nurses.” HUGH has not challenged any of these statements; I will assume they are correct. In sum, contends Dr. Rutherford, the ad hoc committee imposed “sham peer review” on him.

The contention fails. As far as HCQIA immunity is concerned, there is no such thing as “sham peer review.” Even bad faith does not defeat statutory immunity, as noted above. Dr. Rutherford has identified neither a sham nor bad faith, just biographical information about a few committee members that causes him to doubt their bona fides. I note in passing that the professional experiences of Dr. Ling, who oversees quality enhancement, and Director Kreutzer, whose doctorate is in practical nursing, suggest good credentials to consider whether Dr. Rutherford’s record as a surgeon presented conduct “detrimental to patient safety or to the delivery of quality patient care, or disruptive to Hospital operations.” Medical Staff Bylaws, § 19.1(a). HUGH holds immunity under HCQIA anyway, even if those skills did not inform the work of its review committee. *Bryan v. James E. Holmes Reg’l. Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994).

HUGH’s Reasonable Belief That Its Action Was Warranted by the Facts Known

Under the facts of this action, the final HCQIA consideration is redundant of (1) and (3) as discussed above. Because Dr. Rutherford failed to show that HUGH lacked a reasonable belief that the action it took was in the furtherance of quality health care, 42 U.S.C. § 11111(a)(1), and also failed to show that he did not receive “adequate notice and hearing procedures” or “other such other procedures [that] are fair to [him] under the circumstances,” 42 U.S.C. § 11111(a)(3), he cannot establish the absence of a “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).”

Conclusion

This Court finds that no genuine issue as to material facts exists as to Plaintiff Thomas L. Rutherford’s claim for relief against Defendant Hanover University General Hospital under 42 U.S.C. § 1983.

This Court further finds that Plaintiff has not rebutted by a preponderance of the evidence the statutory presumption that Defendant Hanover University General Hospital’s professional review action comported with the objective professional standards provided in § 11112(a)(1) of the Health Care Quality Improvement Act. Accordingly, Plaintiff’s claims of breach of contract,

intentional infliction of emotional distress, and defamation may not proceed against Hanover University General Hospital nor the individual defendants Anthony B. Glower, Mary Elizabeth Kreutzer, Seamus O. Milk, and Alicia Polishov.

This Court grants Defendants' motion for summary judgment on all claims.

Order

AND NOW, on this day of December 19, 2012, upon consideration of Defendants' Motion for Summary Judgment and Plaintiff's Response thereto, consistent with Plaintiff's and Defendants' accompanying memoranda, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and Plaintiff's claims for relief are **DISMISSED**.

A handwritten signature in cursive script that reads "Lucy M. Dakowitz". The ink is dark and the signature is centered on the page.

Lucy M. Dakowitz
Senior Judge, United States District Court for the District of Hanover

**In the
United States Court of Appeals
for the Twelfth Circuit**

No. 13-275

THOMAS L. RUTHERFORD,
Plaintiff-Appellant

v.

**HANOVER UNIVERSITY GENERAL HOSPITAL; ANTHONY B. GLOWER; MARY ELIZABETH
KREUTZER; SEAMUS O. MILK; ALICIA POLISHOV,**
Defendants-Appellees.

Appeal from the United States District Court for the District of Hanover
No. LMD-12-1002 Lucy M. Dakowitz, *Senior Judge.*

Argued March 14, 2013. Decided June 3, 2013.

Before AKIMOTO, C.J., SHANDY, J., and VAN METER, J.

SHANDY, J.

An ad hoc review committee at Hanover University General Hospital (HUGH) recommended the revocation of privileges for Thomas L. Rutherford, M.D., co-inventor of the Doda Stent and the former chief of cardiology at HUGH. This decision was swiftly implemented by the HUGH Medical Executive Committee and, with almost equal speed, reversed upon internal appeal: Dr. Rutherford's loss of privileges at HUGH lasted less than a month.

Though short-lived this action, according to Dr. Rutherford, caused him financial loss, severe emotional distress, and reputational harm. Dr. Rutherford filed an action in the District Court seeking recovery for these damages under both 42 U.S.C. § 1983 and Hanover common law. The § 1983 action was brought only against HUGH as a state actor; for his common law claims, Dr. Rutherford named both HUGH and four individuals as defendants.

The court below, Dakowitz, J., granted Defendants' motion for summary judgment, dismissing all of Dr. Rutherford's claims. It concluded that Dr. Rutherford had experienced no violation of a First Amendment right. It also found that the Health Care Quality Improvement

Act of 1986, 42 U.S.C. §§ 11111-11115 (HCQIA), provided immunity to all defendants against Dr. Rutherford's common law claims.

In this appeal, Dr. Rutherford argues that the trial court erred by (1) holding that a post that Dr. Rutherford had made on the social media site ConnectSpace was not speech protected by the First Amendment; (2) misapplying the *Pickering-Connick* balancing test that governs the responses a state actor may make to speech that it finds troublesome or objectionable with respect to the state-furnished services; (3) misconstruing the standards for immunity provided in the HCQIA; and (4) refusing to consider, for HCQIA purposes, evidence of bias present in the formation and operation of a professional review panel. With a qualm about HCQIA, we agree. We reverse the entry of summary judgment and remand for trial.

Facts and Background

A stereotype about “the surgical personality”—“decisive, well organised, practical, hard working, but also cantankerous, dominant, arrogant, hostile, impersonal, egocentric, and a poor communicator”¹⁰—pervades the record below, a tale of how a high-achieving individual was forced out of work. Since 2009, Dr. Rutherford has maintained a page on ConnectSpace. True to the stereotype, on this site he appears to be a not especially eloquent communicator. Yet Dr. Rutherford has attracted more than a thousand “friends” to consume the prose he posts.

The professional review action at the heart of this dispute took place almost immediately after a ConnectSpace post by Dr. Rutherford aired on June 12, 2012. The post made its way immediately to Anthony Glower, M.D.—not a “friend” of Dr. Rutherford's in any sense of the word—and from Dr. Glover to Alicia Polishov, M.D., the HUGH Chief of Medicine.

Bylaws at HUGH provide that the Chair of the Medical Executive Committee (MEC), i.e. Dr. Polishov, is one of the officers empowered to initiate a “request for corrective action” against any member of the Active Staff. By a letter dated July 1, Dr. Rutherford learned that, for the first time in his career at HUGH, the question of his privileges would be considered through peer review. HUGH formally configured an ad hoc peer review committee on July 8, staffing it with detractors of Dr. Rutherford's. The notorious summer torpor of Hanover notwithstanding, by July 31 the ad hoc committee had concluded its investigation, recommended revocation of Dr. Rutherford's privileges, and had its recommendation accepted by the Hospital's MEC. Dr. Rutherford's summary suspension was subsequently reversed by HUGH's Board of Trustees.

The court below has summed up what the review committee said it found: “[T]he reasons for this decision were Dr. Rutherford's ‘unacceptably high rates of morbidity and post-operative complications,’ ‘failure to meet the Hanover University General Hospital standard of care,’ and ‘conduct that impedes quality patient care.’” Judge Dakowitz credited this statement as an accurate and sufficient set of reasons for HUGH's decision. Dr. Rutherford takes a different view of the reason he lost his privileges—a view that, as indicated below, we are inclined to share. He suspects that his ConnectSpace post, and not actual patient care, motivated the “corrective action” that harmed his livelihood and reputation.

¹⁰ From the blog KevinMD, Aug. 28, 2010 <http://www.kevinmd.com/blog/2010/08/stereotypical-surgical-personality-exist.html>

Dr. Rutherford's brief (149-word) ConnectSpace essay reflected on a recent diagnosis of autism in his family. It included comments that might be read as critical of HUGH's hard-won and highly esteemed "99 Percent" grant, a state-funded initiative that aspires to vaccinate almost every child in Clarahara County, home of HUGH and Dr. Rutherford. It also mused on the possibility of a link between vaccination and autism, although Dr. Rutherford refrained from saying that he believed his grandson had been rendered autistic by a vaccine.

For purposes of this appeal, Dr. Rutherford's stance may be phrased as follows. Regarding the § 1983 claim, Plaintiff posted an expression on his ConnectSpace page and was made to suffer for what he said, in violation of his First Amendment right to speech. State actors may penalize employees (or quasi-employees like Dr. Rutherford) for what they say only under conditions not present here. Regarding the common law claims, Defendants would have been entitled to immunity from damages if the ad hoc review committee had hewed to the objective standards provided in the HCQIA, but it did not do so.

Dr. Rutherford has established that his ConnectSpace post was speech on a matter of public concern, entitled to First Amendment protection that it did not receive. He has also rebutted the statutory presumption in favor of HUGH by challenging the adequacy of the evidence gathered to support the committee's decision and presenting evidence of bias. Accordingly, we hold that Plaintiff has offered enough evidence on both points to defeat Defendants' motion for summary judgment.

Analysis

The First Amendment Claim

Because we would have no jurisdiction over the common law claims but for the constitutional claim that brought the Plaintiff to federal court we, like the court below, start with the First Amendment/§ 1983 claim.

As the parties and the court below agree, the leading decision on point is *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968). Elaboration on the *Pickering* standard emerges from later decisions of the United States Supreme Court, including *Connick v. Myers*, 461 U.S. 138 (1983) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). What may be called the *Pickering-Connick* balancing test requires courts to consider what the court below noted: both the First Amendment right of an individual to speak on matters of "public importance," *Pickering*, 391 U.S. at 573, and "the efficiency of the public services" offered by a State. *Id.* at 568.

For purposes of the First Amendment claim we consider the revocation of Dr. Rutherford's privileges functionally equivalent to the termination of an employment relationship. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678-79 (1996). We adopt the version of the *Pickering-Connick* balancing test articulated by the First Circuit, as we believe this formulation hews faithfully to what the Supreme Court held in those two decisions and later cases like *Garcetti*.

First, the employee must have been speaking “as a citizen on a matter of public concern.” *Garcetti*, 547 U.S. at 418. Second, the employer’s interest in avoiding disruption in the workplace must outweigh the employee’s interests in speaking. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Third, the employee’s speech must have been a substantial or motivating factor behind the adverse action. *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 56 (1st Cir. 2003). Even if the employee establishes the speech motivated the employer’s adverse actions, the governmental employer can still prevail if it proves that it would have taken the same action “even in the absence of the protected conduct.” *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). We take up the elements in turn.

A matter of public concern. The court below read Dr. Rutherford’s ConnectSpace post as “one part hallway quarrel and two parts photo-update about a grandchild, with a pinch of *Just Asking!* anti-vax conjecture.” We disagree. A reasonable jury could find that Dr. Rutherford was commenting on a host of topics that engaged the public concern.

That Dr. Rutherford did his speaking on a private ConnectSpace page does not remove his publication from the realm of public concern and the First Amendment. *See Givhan v. W. Line Consol. School. Dist.*, 439 U.S. 410, 415-16 (1979) (finding employees who communicate in private may still be speaking on matters of public concern). The suggestion by the district court that “Dr. Rutherford could have taken his speculation to the notoriously pseudo-scientific HuffingtonPost” if he really wanted to reach the public has no place in a discussion of what the First Amendment covers, a wide category that includes post on social media. *E.g., Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920-21 (3d Cir. 2011) (MySpace page). The closely related category of blogging illustrates the role of social media like ConnectSpace in public discourse; blogging in the twenty-first century will often be “a person’s avenue of choice for self-expression.” Lindsay A. Hitz, *Protecting Blogging: The Need for an Actual Disruption Standard in Pickering*, 67 Wash. & Lee L. Rev. 1151, 1189 (2010). Like social media posts, blog commentary enjoys First Amendment protection. *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012).

Here, we find the content of the post was on a matter in the public debate. We additionally find that the doctor’s message was communicated in a way that suggested he did not intend to be making a merely private comment among only close friends. The courts need to adjust to new forums as technology advances, and Dr. Rutherford’s post was indeed citizen speech on a matter of public concern.

Outweighing the employer’s interest in avoiding disruption. Against the expressive value noted above, we weigh HUGH’s interest in avoiding disruption of its functions as a teaching hospital, a holder of a 99 Percent grant, and a source of improved health in its community. This second factor too supports Dr. Rutherford. HUGH argues that in June 2012 its managers worried that the post “might well go viral,” lend aid and comfort to anti-vaccine prejudice generally, and thereby increase the amount of staff time necessary to maintain cooperation with the initiative. To the extent that the post threatened future HDRI funding, HUGH argues, it threatened the operations of the hospital that depend on these appropriations.¹¹

¹¹ Defendants also note that the controversy became a matter of internal interest among staff and patients at HUGH, a topic of “water-cooler and break room conversation.” This contention does not aid Defendants, because the

Possible disruption of the 99 Percent initiative is a concern, but as described by HUGH, it is not enough to outweigh Dr. Rutherford's First Amendment rights. Any employer that terminates an employee based on the employee's expression of opinion is necessarily displeased by the employee speech that impelled the termination. If HUGH had not been displeased, it would have left Dr. Rutherford alone. Employer displeasure by itself is not disruption, however. The court below read *Waters* too narrowly. It is not enough that there be some potential disruption; the court must consider whether the facts the government relied upon reasonably support its conclusion about disruptiveness. See *Waters v. Churchill*, 511 U.S. 661, 677 (1994). HUGH has provided no reasonable basis to believe a ConnectSpace post would have any significant effects on its operations, beyond that conjured in the active imaginations of Doctors Glower and Polishov.

On remand, if it wishes to prevail on the § 1983 claim, HUGH must show more than its mere disapproval of what an outspoken physician said. The First Amendment value of Dr. Rutherford's post now established, we direct the trial court to consider whether at the time HUGH formed the ad hoc review committee, it had reason to believe that failing to respond to Dr. Rutherford's post as it did would have impaired the "efficiency of the public services" that it offered.¹² *Pickering*, 391 U.S. at 568. HUGH must show not only that the post posed a risk of disruption but that it had reason to believe that revoking Dr. Rutherford's privileges would lessen this risk. If revocation would not have alleviated the disruption that HUGH identified, it amounts to nothing more than retaliation for speech, which the First Amendment prohibits. See *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998).

Motive for the Revocation and the Mt. Healthy Refutation Opportunity. On the question of whether the Medical Executive Committee revoked Dr. Rutherford's privileges because of the views expressed in his ConnectSpace post, we agree with the district court that the question of discerning motive for an action is a conundrum. We cannot really know why we act, let alone why others act.

Nevertheless, Dr. Rutherford has shown enough evidence to take the question of motive before a jury. The short lapse of time between his June 12 post and his July 31 loss of privileges strongly suggests it was the post—rather than flaws in his record as a surgeon dating back to 2006, which apparently had not troubled any higher-ups enough to launch peer review—that motivated the decision to revoke Dr. Rutherford's privileges. A reasonable jury could find that Dr. Glower's July 12 text message to Dr. Polishov was the first of a chain of actions taken to remove Dr. Rutherford from HUGH for reasons unrelated to patient care and safety.

The jury may well find otherwise, especially should HUGH avail itself of the opportunity presented in the fourth element of the *Pickering-Connick* test that was announced in *Mt. Healthy City School District Board of Education*. First, the jury is free to reject Dr. Rutherford's evidence

"controversy" stemmed from HUGH's decision to revoke Dr. Rutherford's privileges, not Dr. Rutherford's post. HUGH here resembles the apocryphal boy who kills his parents and then asks for mercy on the ground that he is an orphan. Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 467 (1993).

¹² So, for example, the conclusory statement by Dr. Glower that he "thought Dr. Rutherford was disrupting the initiative" does not suffice.

about motive. Second, the jury may determine that even if the Medical Executive Committee was motivated to take action against Dr. Rutherford because of his post, it would have taken the same action even without the post. *Id.* at 287. Possibilities like these are questions of fact that we, mindful of our Rule 56 obligation to resolve ambiguity in favor of the non-movant, leave to the factfinder.

HCQIA Immunity

Although HUGH and the individual defendants have no HCQIA immunity in the § 1983 action, Congress may have granted them immunity against Dr. Rutherford's action for civil money damages. Health Care Quality Immunity Act of 1986, 42 U.S.C. § 11111; *see also Reyes v. Wilson Mem'l Hosp.*, 102 F. Supp. 2d 798, 821 (S.D. Ohio 1998) (no HCQIA immunity for § 1983 claims). The court below concluded that HCQIA precluded Dr. Rutherford from recovering damages for his state law claims breach of contract, intentional infliction of emotional distress, and defamation. As did that court, we will refer to the appellees combined as "HUGH."

Summary judgment with respect to HCQIA immunity is resolved by application of a unique standard. As described in the earliest federal appellate decision on point, our inquiry is a "somewhat unusual" one: "Might a reasonable jury, viewing the facts in the best light for [Dr. Rutherford], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?" *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992).

Austin answered that question in the negative, and the large majority of published decisional law that followed has agreed. Since the effective date of the HCQIA, it has been hard for a physician to prevail on HCQIA immunity. Anthony W. Rodgers, Comment, *Procedural Protections During Medical Peer Review: A Reinterpretation of the Health Care Quality Improvement Act of 1986*, 111 Penn. St. L. Rev. 1047, 1054 (2007). Nevertheless, we join a handful of other courts, both state and federal, in concluding that a physician has rebutted the presumption of immunity provided in 42 U.S.C. § 11112(a).

As was noted by the court below, to defeat HCQIA immunity Dr. Rutherford must show must show that HUGH's actions were not undertaken

- (1) in the reasonable belief that the action was in the furtherance of quality health care,
- (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, [or]
- (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).

42 U.S.C. § 11112(a) (2006). We substitute “or” for the statute’s “and” between paragraphs (3) and (4) because establishing any one of the four criteria is absent suffices to end immunity for Defendants.

As the HUGH Board of Trustees (which reversed the revocation of privileges) may have agreed, the professional review action taken against Dr. Rutherford appears highly questionable. We have already remarked on two troubling aspects: the hastiness of the decision to revoke privileges and the fact that Dr. Rutherford’s long record at HUGH had never been the subject of inquiry until his post appeared on ConnectSpace on June 12, 2012. We also note the membership of the ad hoc committee: one surgeon who was not a cardiac surgeon; one cardiac surgeon who is retired from surgery and is also the domestic partner of Alicia Polishov, the physician-administrator whom Dr. Glower promptly texted when he learned of the ConnectSpace post; and Dr. Glower himself, inside HUGH a vigorous opponent of the Plaintiff. Sitting in on meetings was the director of nursing, whose contribution to the inquiry consisted of gathering and repeating a small number of complaints about Dr. Rutherford from HUGH nurses.

Though worrisome, the professional background of the review committee members is not in itself fatal to HUGH’s immunity. *See Rogers v. Columbia/HCA of Cent. Louisiana, Inc.*, 971 F. Supp. 229 (W.D. La. 1997) (condoning, for purposes of HCQIA immunity, a review committee that had included economic competitors of the plaintiff). Some state laws provide that the majority of members on a professional review committee must hold particular credentials, but neither the HCQIA nor Hanover state law imposes this restriction.

Even more troubling than who the committee members were, we think, was how they performed. In its report to the MEC, the committee recommended that Dr. Rutherford forfeit his privileges at HUGH for what it called “unacceptably high rates of morbidity and post-operative complications,” anecdotes about rudeness toward nurses, one incident where Dr. Rutherford apparently had words with the wife of a patient, and two complaint letters. Only the first of these condemnations could possibly be serious enough—successful surgeons, as we have noted, score low on bedside manner¹³—and Dr. Rutherford refuted it thoroughly in his letter to the MEC: Patients who need a Doda Stent are the sickest persons known to cardiology, making Dr. Rutherford’s mortality data extraordinarily good even though they are worse than average at HUGH. His post-operation infection rate scored seven points higher than his peers’ because, in the interests of saving lives, he continued to perform surgeries during a four-month period in 2009-10 when the HVAC system at HUGH was not working properly. It was Dr. Rutherford, only an amateur engineer, who figured out that the HVAC system was piping sewer exhaust into the recovery rooms and that was causing a spike in patient infections. His actions, therefore, helped to cure the problem.

We understand why the court below believed that a misleading record—cherry-picked by colleagues who disagreed with Dr. Rutherford on a matter extrinsic to patient care—was good enough to immunize HUGH. Case law appears tolerant of even blatantly unfair adverse actions taken against physicians, as long as they are done in the name of professional review. HCQIA has been read to enable not only the breach of contract, intentional infliction of emotional

¹³ The ad hoc review committee did not bother to compare these levels of alleged rudeness with those of any other HUGH physicians.

distress, and defamation alleged here but also anticompetitive interferences with a physician's livelihood. *Cohlma v. St. John Med. Ctr.*, 693 F.3d 1269 (10th Cir. 2012); *Poliner v. Texas Health Sys.*, 537 F.3d 368 (5th Cir. 2008).

Confusion may have originated in an unfortunate dictum in *Austin v. McNamara*. There Judge Canby of the Ninth Circuit stated that for purposes of HCQIA, "bad faith is immaterial." *Austin*, 979 F.2d at 734. Courts, including the court below, frequently quote those four words when ruling in favor of health care entity defendants. See, e.g., *Poliner*, 537 F.3d at 380; *Bryan v. James E. Holmes Med. Ctr.*, 33 F.3d 1318, 1335 (11th Cir. 1994). The statute says no such thing, and legislative history indicates that in enacting the HCQIA, Congress intended "to encourage *good faith* professional review activities of health care entities." *Austin*, 979 F.2d at 741 (Pregerson, J., dissenting) (emphasis supplied).

Recourse to legislative history or legislative intent is not necessary, however, as the plain language of HCQIA shows that Dr. Rutherford has rebutted the presumption of immunity. Dr. Rutherford need rebut only one of HCQIA's stated conditions for immunity; he has rebutted more than one. We start with 42 U.S.C. § 11112(a)(1), which eliminates immunity if Dr. Rutherford can show that the revocation decision was not taken "in the reasonable belief that the action was in the furtherance of quality health care." An action taken in the reasonable belief that the action was in the furtherance of quality health care means that "the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." *Meyers v. Columbia/HCA Health Care Corp.*, 341 F.3d 461, 468 (6th Cir. 2003). A revocation recommendation bolstered by flimsy evidence that was jerry-rigged to support a foreordained result does not restrict incompetent behavior or protect patients.

In addition, Dr. Rutherford's MEC letter suffices to rebut two other provisions in section § 11112(a). We cannot confidently say that he has rebutted the standard calling for "a reasonable effort to obtain the facts of the matter," § 11112(a)(2), because it is unclear what "the matter" in this case was. *But see Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324 (10th Cir. 1996) (holding that reliance on a thin and misleading portion of the physician's record showed the absence of "a reasonable effort to obtain the facts of the matter"). "[A]dequate notice and hearing procedures" as required by § 11112(a)(3) are absent here, which can be seen in the opinion of the court below. Per the district court, Dr. Rutherford was told that

the peer review committee would consider information about Dr. Rutherford internal to HUGH, including mortality and infection rates following Dr. Rutherford's surgeries and complications noted in patient records, such as adverse drug reactions and improper drug utilizations. The letter informed Dr. Rutherford that to the extent pertinent the committee would consider autopsy findings, "sentinel events" (a term of art defined by the Joint Commission, f/k/a the Joint Commission for Accreditation of Healthcare Organizations), malpractice claims, and patient complaints. It added that the committee would also consider Dr. Rutherford's "temperament" and "compliance with Hospital staff rules," both of which the HUGH bylaws identify as considerations that pertain to patient care.

Dr. Rutherford received little if any warning of the review committee's true agenda. The topics noted in the letter would lead a reader to infer that the ConnectSpace post was not part of the picture. If he had received accurate notice, Dr. Rutherford might well have consulted a lawyer to consider his First Amendment rights before deciding to forego the hearing before the MEC.

Moreover, while we agree with Judge Canby that "alleged animosity" and "hostility" alone do not rebut the statutory presumption of immunity, we cannot agree that those conditions have no relation to immunity from claims for damages, as many lower courts have concluded. The HCQIA directs courts to consider whether procedures were "fair to the physician *under the circumstances*." 42 U.S.C. § 11112(a)(3) (emphasis added). Impartiality of the decision-maker has long been a hallmark of procedural due process protection. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (noting, when considering eligibility for welfare benefits, that "of course, an impartial decisionmaker is essential" to fair procedures). We understand we may be taking a distinctly minority position, but we conclude that impartiality of the participants in a professional review is pertinent to what HCQIA has required for immunity: fair procedures under the circumstances. *See Braswell v. Haywood Reg'l. Med. Ctr.*, 352 F. Supp. 2d 639, 651-52 (W.D.N.C. 2005) (finding plaintiff sufficiently "alleged that he was not provided fair procedures under the circumstances because those individuals reviewing his patient care were personally biased against him"). The trial court was in error to exclude all evidence about impartiality.

Lastly, Dr. Rutherford has shown the absence of any "reasonable belief" on the part of HUGH that its "action was warranted by the facts." 42 U.S.C. § 11112(a)(4). This standard is easier to rebut than paragraph (2) because it references "facts" of a particular kind, those that justify acting adversely. The "action" was the revocation of Dr. Rutherford's privileges. The "facts" HUGH garnered to support its action—occasional yelling by Dr. Rutherford, two complaint letters, a handful of anecdotes from nurses, and performance data that may be interpreted as good rather than bad—cannot support the revocation of privileges of an eminent cardiac surgeon who renders care to very sick patients. The record of Dr. Rutherford might include misbehaviors serious enough to warrant discipline; but this particular sanction, which disables a surgeon from doing surgery, is plainly out of proportion to the wispy adverse data assembled by the ad hoc committee. If any members of the MEC believed that revocation of privileges was warranted by these facts, then their belief was not reasonable.

In sum, plaintiff has presented evidence that would permit a reasonable jury to conclude that he has rebutted by a preponderance of the evidence the presumption that a professional review action conformed with the objective standards prescribed in the Health Care Quality Improvement Act of 1986. 42 U.S.C. § 11112(a); *Meyers v. Columbia/HCA Health Care Corp.*, 341 F.3d 461, 467-68 (6th Cir. 2003). His common law claims for damages, along with his § 1983 claim, may proceed.

Reversed and remanded to the district court for further proceedings consistent with this opinion.

All concur.

Jean-Louis Shandy, J.
Marlon P. Akimoto, C.J.
Winifred Van Meter, J.

June 3, 2013

HANOVER UNIVERSITY HOSPITAL BYLAWS (excerpt)

ARTICLE XIX Corrective Action

19.01 Request for Corrective Action and Investigations

(a) Any person or committee may provide information, in writing, to any member of the Medical Executive Committee (MEC) about the conduct, performance, or competence of any physician member of the medical staff (“physician member”). If reliable information indicates a physician member may have exhibited acts, demeanor (temperament), or conduct, reasonably likely to be detrimental to patient safety or to the delivery of quality patient care, disruptive to Hospital operations, contrary to the bylaws or Hospital staff rules, or below applicable professional standards, the MEC may initiate an investigation against such member, after considering whether collegial intervention may be appropriate.

(b) If the MEC determines that an investigation would be appropriate, it shall make a record of this action in its official minutes.

(c) If the MEC determines that an investigation would be appropriate, the Chair of the MEC may appoint an ad hoc committee to undertake that investigation. The ad hoc committee will be given such charge as deemed appropriate.

(d) The investigating committee shall conduct an appropriate review of the relevant medical records, and may, but need not, conduct interviews with persons knowledgeable about the practitioner under review. The investigating party should give strong consideration to outside peer review, especially if there is a lack of expertise among medical staff members in the subject under review, there is likely to be a lack of consensus among the committee members, or there is a reasonable probability of litigation.

(e) If the investigation is delegated to an ad hoc committee, the committee shall proceed in a prompt manner and submit a written report of the committee’s findings.

(f) The physician member shall be notified, in writing, that the investigation is being conducted, along with its basis and intended scope, and shall be given an opportunity to provide information in a manner and upon such terms as the investigating body deems appropriate. The investigation shall not be considered a “hearing” at any point in the process.

(g) The investigation report should be submitted to the MEC as soon as practicable, but in any case, no longer than ninety days after initiation of the investigation. The report may include recommendations for appropriate corrective action.

(h) At all times the MEC retains the authority and discretion to take whatever action it feels are warranted by the circumstances to protect the Hospital, its staff and its patients, including suspension or limitations on the exercise of privileges.

19.02 Determination of Corrective Action; Fair Hearing

(a) At the conclusion of the investigation and receipt of the investigation report, the MEC will determine whether corrective action is warranted. The MEC will indicate this finding in its minutes and so notify the physician member. If an ad hoc committee investigation has taken place, the MEC will notify the member of its determination no later than seven business days after receiving the ad hoc committee's report.

(b) Upon notification of the MEC's decision, if it determines that corrective action is appropriate, the physician member shall promptly be given special notice thereof by the Chair of the MEC. This special notice will include a description of the adverse action and the reasons for it, a copy of these Bylaws, and an offer to provide the physician member a fair hearing regarding the MEC's determination. The notice will also inform the physician member that the adverse action or recommendation, if finally adopted by the Board, may result in a report to the state licensing authority (or other applicable state agencies) and the National Practitioner Data Bank.

(c) The physician member shall have thirty (30) days following the date of receipt of such notice within which to request a fair hearing, which shall take place as soon as practicable but no later than seven business days after the request is made. The MEC will appoint a Hearing Board to preside over the fair hearing. The physician member may waive the right to the fair hearing by submitting such waiver in writing to the MEC.

(c) After completion of the fair hearing, if one is requested, the MEC shall provide its final determination to the physician member within three business days. If no fair hearing is requested, the final determination will be provided within three business days after last date for requesting a fair hearing.

(d) The physician member may appeal the decision of the MEC to the Hospital Board of Trustees within seven business days of receipt of the MEC's final determination. [process of appeal deleted] The Board of Trustee's decision will be final.

SUPREME COURT OF THE UNITED STATES

Hanover University General Hospital; Anthony B. Glower;
Mary Elizabeth Kreutzer; Seamus O. Milk;
Alicia Polishov, Petitioners,

v.

Thomas L. Rutherford, Respondent.

No. 13-1076

July 16, 2013

Petition for writ of certiorari to the Twelfth Circuit Court of Appeals is **GRANTED** limited to the following Questions:

1. Whether Respondent's social media post was speech protected by the First Amendment, and if so, whether the lower court applied the *Pickering-Connick* balancing test to that speech correctly; and
2. What evidence may be considered to overcome the presumption that a peer review panel's actions meet the standard for immunity under the Health Care Quality Improvement Act, including whether the trial court should consider evidence of decision-maker bias, and did the lower court properly find that Respondent had overcome that presumption?