UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

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U.S. DISTRICT COURT
EASTERN DIST. TENN.
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MAZEN ABU-HATAB, M.D.,	)	
	)	
Plaintiff,	)	
	)	**No. 3:06-CV-436**
v.	)	**(Guyton)**
	)	
BLOUNT MEMORIAL HOSPITAL, INC., NASEEM H. SIDDIQI, M.D.	)	
	)	
Defendants.	)	

BLOUNT MEMORIAL HOSPITAL'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

In an attempt to create a factual dispute and avoid summary judgment in this case, Plaintiff Mazen Abu-Hatab, M.D. ("Plaintiff") provides misleading accounts of testimony, in many cases simply ignoring facts in evidence, and cites irrelevant case law in his Response to Blount Memorial Hospital, Inc.'s ("BMH") Motion for Summary Judgment.[1] More importantly, however, Plaintiff once again refuses to acknowledge that a disruptive physician causes serious problems in a hospital setting. Disruptive physicians not only interfere with the orderly operation of a hospital, but they also potentially cause significant unnecessary risks in patient care.

During his appeal to BMH's Board of Directors following the fair hearing, Plaintiff's counsel stated that Plaintiff was "certainly not completely innocent in terms of complying with the expectations that were given to him [in the Code of Conduct Letters]." (See Appeal Hearing Transcript, pp. 8, 20.) Nevertheless, Plaintiff now argues in his Response that his disruptive behavior was not the basis for BMH's disciplinary actions against him, and presumably even if it

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[1] All deposition excerpts and exhibits not previously cited in BMH's Memorandum of Law in Support of Its Motion for Summary Judgment are attached hereto.

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were the basis, the investigation and hearing about his behavior problems were technically flawed. However, a review of BMH's lengthy history with Plaintiff detailed in BMH's Memorandum of Law In Support of Motion for Summary Judgment, most of which Plaintiff completely disregards or fails to address in his Response,[2] reveals that BMH revoked Plaintiff's privileges after countless warnings, methodical investigation, appropriate notice and all necessary due process were provided as required under the BMH Bylaws and the Constitutions of the State of Tennessee and the United States.

Plaintiff's strategy in his Response apparently is to direct the Court's attention away from the irrefutable evidence of his ongoing disruptive behavior. Such disruptive behavior can lead to problems that are far greater than just unhappy support staff. For example, a physician's refusal to respond to pages, to communicate with nurses and to follow hospital policy about scheduling procedures for patients will no doubt cause an overall decline in the medical care his patients receive. This notion that a disruptive physician can diminish the quality of care a hospital renders to its patients has been recognized by the medical profession. Specifically, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), the body responsible for accreditation of hospitals, recently enacted Standard LD.03.01.01. This standard requires hospitals to adopt a code of conduct that "defines acceptable, disruptive and inappropriate behaviors." JCAHO Standard LD.03.01.01 (A copy of JCAHO Standard LD.03.01.01 is attached hereto as Exhibit J.) The Standard further mandates that hospital leadership "create and implement a process for managing disruptive behaviors." Id. JCAHO states that such requirements are necessary because "[d]isruptive behavior that intimidates others and affects

[2] In his response Plaintiff does not address the history of disruptive behavior and disciplinary actions against him from 2000 to 2002, which are detailed at length in BMH's Memorandum. These facts, therefore, are undisputed.

morale or staff turnover can be harmful to patient care." Id. Accordingly, when a hospital such as BMH has worked in good faith to address issues with a disruptive physician within the parameters of its Bylaws and applicable law, a physician like Plaintiff should not be permitted to avoid the consequences of his actions by obfuscating the real issues with bogus claims of bias and technicalities.

I. Plaintiff's Half-Hearted Arguments About the HCQIA and the TPRL Do Not Meet the Burden of Overcoming the Rebuttable Presumption of Their Applicability By a Preponderance of the Evidence.

In his Response Plaintiff appears to address BMH's arguments that it is entitled to qualified immunity on Plaintiff's breach of contract claim under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. §§ 11101, et seq., and the Tennessee Peer Review Law ("TPRL"), Tenn. Code Ann. § 63-6-219, almost as an afterthought. He produces no evidence creating a factual dispute about the applicability of either law.

To avoid the qualified immunity from monetary damages provided by the TPRL, Plaintiff has the burden of producing evidence to overcome the presumption that BMH acted in good faith and without malice when it conducted its peer review activities. Tenn. Code Ann. § 63-6-219(d)(3); Eyring v. Fort Sanders Parkwest Med. Ctr., 991 S.W.2d 230, 236 (Tenn. 1999). In his Response, Plaintiff includes two sentences vaguely alleging that BMH's investigation and decision to revoke his privileges were flawed, claiming this creates a disputed fact as to whether the TPRL provides BMH with qualified immunity. Clearly Plaintiff has not met the burden of producing evidence of BMH's bad faith or malice. Assuming *arguendo* there were some technical flaws in BMH's procedure, which is denied, there is no evidence that BMH took any action against Plaintiff in bad faith or with malice. Consequently, the TPRL applies, and BMH is entitled to qualified immunity from monetary damages on Plaintiff's breach of contract claim.

Moreover, as Plaintiff concedes in his Response, the HCQIA includes a rebuttable presumption in favor of the reviewing entity (in this case BMH) that the four standards of the HCQIA have been met. See 42 U.S.C. § 1112(a); Peyton v. Johnson City Med. Ctr., 101 S.W.3d 76, 78 (Tenn. Ct. App. 2002). To overcome this presumption, even at the summary judgment stage, Plaintiff must prove by a preponderance of the evidence that BMH did not take the professional review action against him 1) with a reasonable belief that the action was furthering quality health care; 2) after a reasonable effort to obtain the facts; 3) after providing Plaintiff with adequate notice and hearing procedures; and 4) with a reasonable belief that the action was warranted by the facts known after making reasonable efforts to obtain the facts. Id.; Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 462, 470 (6th Cir. 2003).

Plaintiff's cursory argument about the inapplicability of the HCQIA highlights his continued refusal to recognize that disruptive behavior of a physician is a "quality care basis" for a professional review action. (Response, p. 40.) The specific reasons BMH revoked Plaintiff's privileges were not based on the technical quality of nephrology care he rendered. His behavior problems, however, ultimately contributed to a decrease in the quality of health care BMH provided to its patients. In addition, rather than producing evidence to rebut the HCQIA's presumption in favor of BMH, Plaintiff ignores the evidence in BMH's Memorandum, including the sworn testimony of multiple witnesses, and makes blanket unsupported and self-serving statements about inadequacies in BMH's investigation. Such uncorroborated statements do not overcome the presumption that BMH complied with the HCQIA by a preponderance of the evidence. As a result, qualified immunity on Plaintiff's breach of contract claim is also warranted under the HCQIA.

II. Plaintiff's Free Speech Arguments Are Not Supported By the Undisputed Facts.

As expected, Plaintiff argues that his speech in favor of a "neutral" dialysis unit was a matter of public concern using the pretext that the concerns he voiced were motivated by the desire to improve the "safe and effective operation of a public hospital's dialysis unit." (Response, p. 7.) Plaintiff, however, is unable to cite to any testimony, including from his own deposition, to prove his desire for a neutral dialysis unit was motivated by anything other than an effort to create a better work environment for himself. In fact, when asked in his deposition why he wanted the dialysis unit contract taken from Dr. Siddiqi, Plaintiff stated his intent was "to avoid problems" he perceived with his competitor running the clinic. (Hatab depo., pp. 96-97.) (Relevant portions of the Deposition of Mazen-Abu Hatab, M.D. not previously cited in BMH's initial Memorandum are attached hereto as Exhibit K.)

Speech about a public hospital and its policies only qualifies as a matter of public concern if "the public or the community is likely to be truly concerned with or interested in the particular expression..."[3] Braswell v. Haywood Reg. Med. Ctr., 352 F.Supp.2d 639, 646 (W.D.N.C. 2005); Jackson v. Leighton, 168 F.3d 903, 909-10 (6th Cir. 1999) ("'The mere fact that public monies and government efficiency are related to the subject of a public employee's speech does not, by itself, qualify that speech as being addressed to a matter of public concern.'" (internal citations omitted)). In this case, it is obvious that the Blount County community would not be "truly concerned" with whether Plaintiff worked in a dialysis unit run by a competitor so long as the dialysis unit continued to provide quality health care. Plaintiff has not cited any evidence to support his allegation that his proposal was intended to, or in fact could, improve the

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3 Whether an expression is a matter of public concern is a question of law to be determined by the Court. Braswell, 352 F.Supp.2d at 646.

safe and effective operation of the dialysis unit. For this reason, the Court should conclude that his speech about the dialysis unit contract was not a matter of public concern, and BMH's Motion for Summary Judgment on the free speech claim should be granted.

Even if the Court finds Plaintiff's speech was a matter of public concern, Plaintiff has not produced any evidence that his speech was a substantial or motivating factor in the revocation of his privileges, or that BMH would not have terminated his privileges in the absence of his protected speech. See Jackson, 168 F.3d at 909 (holding that a governmental entity can avoid liability for terminating an employee because of protected speech if it proves it would have taken the same action in absence of such speech). As Plaintiff appears to concede in his Response, the only way he can prevail on his free speech claim is to prove causation through a temporal proximity inference about his speech and the adverse credentialing action. To make this temporal proximity argument, though, Plaintiff must ignore his own testimony about his long history of requests that BMH cease contracting with Dr. Siddiqi for dialysis services that began soon after his split from Dr. Siddiqi's practice in 1999. (Hatab depo., pp. 16-17.) Specifically, Plaintiff disregards his testimony that he talked to "multiple people, including the [BMH] administration" about taking the dialysis contract from Dr. Siddiqi "all along" and "over the years" from 2000 until 2005. (Id.) Despite this testimony, Plaintiff insists the temporal proximity of his request for a neutral dialysis unit in June of 2004 and the initiation of the investigation in the fall of 2004, which led to MEC's recommendation to terminate his privileges in February of 2005, proves that the termination was triggered by his alleged protected speech. Plaintiff further asserts that this is the only plausible explanation for his termination because there had been a period of "relative quiescence" from 2002 to 2004 during which BMH did not discipline him for any behavioral issues.

Plaintiff's temporal proximity argument fails because, as noted above, Plaintiff admitted in his deposition that he made repeated requests that BMH discontinue contracting for dialysis services from 2000 to 2005 without suffering a revocation of his privileges as a result. It is illogical, therefore, to argue that when BMH received yet another such request from Plaintiff in June of 2004, it finally decided that this was a good reason to revoke his privileges. If BMH wanted to revoke Plaintiff's privileges because of his insistence on creating a neutral dialysis unit, it would not have responded to approximately four years of repeated requests (and endured years of disruptive behavior) before taking action.

Further, the only evidence Plaintiff cites to demonstrate an alleged period of "relative quiescence" during 2002 to 2004 is Plaintiff's quality file.[4] Plaintiff does not point to any testimony to dispute the depositions of Taylor Weatherbee, M.D., Debbie Griffin, R.N., and Liddi Berry, R.N., all of whom testified about consistent ongoing problems with Plaintiff throughout this period. In fact, Dr. Weatherbee testified that from 2002 to 2004 he spent approximately five to ten percent of his time dealing with the problems with Plaintiff. (Weatherbee depo., p. 95.) Ms. Berry similarly testified about the significant time she spent addressing issues with Plaintiff from 2002 to 2004, as is discussed at length in BMH's Memorandum. (Berry depo., pp. 37-38; 53-56; 79-80; 90-92.) Ms. Griffin testified that she began having difficulty with Plaintiff almost immediately after starting her job as the clinical manager of the BMH dialysis unit in January of 2004. (Griffin depo., pp. 10; 23-25.)

The lack of written documentation or complaints in Plaintiff's quality file does not prove there was a period of "relative acquiescence" from 2002 to 2004. Dr. Weatherbee testified that

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[4] Generally quality files are files protected by the peer review privilege that hospitals maintain on each medical staff physician. Quality files typically contain credentialing materials and any other documents regarding a physician's performance at the hospital.

he rarely documented his multiple attempts at collegial intervention with Plaintiff from 2002 to 2004. (Weatherbee depo., pp. 30-31.) Moreover, Ms. Berry explained that by 2003 the dialysis nurses were so "exhausted" by the problems with Plaintiff that they too no longer documented their complaints. (Berry depo., pp. 38; 91; 100.) There is no disputed evidence, including the testimony of Plaintiff, to contradict the testimony of Dr. Weatherbee or Ms. Berry, and the lack of written documentation in Plaintiff's quality file does not support a reasonable inference to the contrary. If Plaintiff believed 2002 to 2004 was a period of relative quiescence at BMH, he certainly would have testified to that effect in his deposition. In fact, Plaintiff specifically testified that he talked to Dr. Weatherbee and Ms. Berry, as well as various other people, about his problems in the dialysis unit throughout 2002 to 2004. (Hatab depo., pp. 38-40.) His testimony does not support his temporal proximity theory, which is likely why Plaintiff now points to the undocumented quality file as support for this position. The undisputed testimony is that problems with Plaintiff, while consistent, were typically not documented during this timeframe. Plaintiff's attempts to characterize the investigation and subsequent termination of his privileges as "out of the blue" and a result of his speech are based on a complete disregard for the only testimony presented on this point. Since Plaintiff has presented no evidence of a factual dispute on this issue, summary judgment on his First Amendment claim is appropriate.

III. Plaintiff Has Produced Insufficient Evidence of a Factual Dispute on his Due Process Claims to Avoid Summary Judgment.

Plaintiff attempts to characterize various aspects of BMH's investigation and fair hearing procedures as technically flawed in an effort to create a factual dispute about whether he received due process prior to the revocation of his privileges. The issues he addresses, however, do not indicate he was denied the opportunity to be heard "at a meaningful time and in a meaningful manner" about the claims against him. Yashon v. Hunt, 825 F.2d 1016, 1022 (6th

Cir. 1987) (internal quotations omitted). In light of the Court's narrow scope of review in a credentialing case, which is "generally limited to determining whether the procedures used violated any federal rights and whether the administrative body was presented with substantial evidence to support its ultimate action," it is indisputable that BMH provided Plaintiff with all due process prior to terminating his privileges. Id.

A. BMH's investigation of Plaintiff was adequate.

Plaintiff focuses a great deal of attention on alleged inadequacies in the investigation, but he does not cite any authority to support his claims that BMH was required to take additional steps in its investigation of him. Procedural due process requires only that Plaintiff be afforded notice and the opportunity to be heard on the charges against him, and the type of procedure that is acceptable varies according to the context of the case. Id. at 1022; Benjamin v. Brachman, 246 Fed. Appx. 905, 914 (6th Cir. 2007). Plaintiff has not presented any evidence that BMH's investigation denied him notice or the opportunity to be heard. To prove a substantive due process claim, Plaintiff must demonstrate that BMH's decision was not supported by substantial evidence, rendering it arbitrary, capricious or unreasonable. Benjamin v. Schuller, 400 F.Supp.2d 1055, 1076 (S.D. Oh. 2005). Plaintiff also has not presented any evidence that the investigation failed to produce substantial evidence to support the termination of his privileges.

In his arguments about the "flawed" investigation, Plaintiff again attempts to deflect attention from his years of disruptive conduct at BMH in an effort to support his claim that further investigational efforts were required to determine that he was indeed causing problems at the hospital. Rather than presenting evidence to dispute BMH's arguments, he relies on mischaracterizations of deposition testimony and inaccurate accounts of facts to persuade the Court that a factual dispute exists when no countervailing evidence actually has been identified.

For example, Plaintiff tells the Court that the investigating committee only interviewed dialysis nurses. In fact, one of the nurses interviewed, Helen Reneau, was the clinical director of ICU, CCU, CRU, and special procedures at BMH, not a dialysis nurse. (Hatab depo., Ex. 14, Bates No. BMH-001022.) Plaintiff further cites testimony from investigating committee member Dr. Beard that not all people with relevant information were interviewed, but he fails to provide the context of the testimony, in which Dr. Beard states that the investigation committee "interviewed all persons with relevant information that [the committee] deemed necessary to makes [its] recommendation." (Beard depo., pp. 146-47.) Moreover, Plaintiff disregards Dr. Beard's testimony that the committee also reviewed all relevant documentation about the history of disruptive behavior and recent concerns that had been raised. (Id.) Plaintiff, in fact, discounts the testimony of all three investigative committee members about the extent of their investigation and the substantial evidence of disruptive behavior that it produced.

Also, Plaintiff incorporates a long list of potential witnesses he claims the investigating committee should have interviewed.[5] Despite the length of Plaintiff's list, he never identifies any person whose testimony would have created a factual dispute about the adequacy of BMH's investigation. Plaintiff even concedes in his Response that he is "not suggesting that the investigating committee was required to interview *all* persons with relevant knowledge..." (Response, p. 14 (emphasis in original).) Thus this list is nothing more than an unsupported, self-serving claim that more interviews would have somehow changed the outcome of the investigation.

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[5] BMH did not involve Dr. Siddiqi in its proceedings against Plaintiff in an effort to avoid any conflict of interest issues. Several physicians specifically testified in their depositions that Dr. Siddiqi had no involvement in the peer review process. (Weatherbee depo., pp. 161-62; Milhollin depo., pp. 89-90; McCarty depo., p. 94; Beard depo., pp. 207-08.)

Plaintiff also asserts arguments about the investigating committee's failure to review medical records or hire an outside consultant to review his practice. This is but one more effort to shift the focus of this case away from Plaintiff's ongoing disruptive behavior. As BMH has confirmed throughout the fair hearing and this proceeding, its decision to revoke Plaintiff's privileges was not based on the quality of his technical skills as a nephrologist, but on his disruptive behavior and refusal to comply with hospital policy. As the investigating committee members plainly testified, when faced with the overwhelming evidence of Plaintiff's disruptive behavior and his persistent rejection of all attempts to assist him in complying with hospital policy, the committee determined that an outside consultant's review of Plaintiff's quality of care was not necessary. Similarly, the investigating committee did not need to review medical records to determine that the problems Plaintiff created demanded immediate and decisive action.[6] Consequently, Plaintiff's allegations on this issue are irrelevant to the analysis of his due process claim.

Finally, Plaintiff claims the investigation violated his due process rights because he was not able to explain his "side of the story" before the investigating committee reached its final decision. Plaintiff neglects to mention that he was interviewed before the investigating committee prepared its report to the Medical Executive Committee ("MEC"). Plaintiff, therefore, cannot claim he was denied due process, as even in the investigation he was given an

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[6] One particularly egregious mischaracterization of testimony involves Plaintiff's account of Ms. Berry's testimony about certain medical records. (Response, p. 16.) Plaintiff argues Ms. Berry testified that information she gave the investigating committee does not comport with medical records. A review of the complete testimony, however, reveals that Ms. Berry actually testified that the one page of a medical record she was shown in her deposition did not reflect the information she stated in her interview with the committee. (Berry depo., pp. 131-32.) (Relevant portions of the Deposition of Elizabeth "Liddi" Berry, R.N. not previously cited in BMH's initial Memorandum are attached hereto as Exhibit L.) Plaintiff's counsel even acknowledged in his questioning: "Ma'am, I realize we're just dealing with page 2 of 2. That's the only page I have." (Id.)

opportunity to be heard on the charges against him, which is the fundamental requirement of due process. Yashon, 825 F.2d at 1022; Brachman, 246 Fed. Appx. at 914. Furthermore, the investigation obviously produced substantial evidence to support the revocation of his privileges, as is detailed in BMH's Memorandum. Schuller, 400 F.Supp. 2d at 1076.

B. Plaintiff has not presented sufficient evidence to rebut the presumption that the investigating committee and hearing panel were unbiased.

Plaintiff bears a heavy burden of overcoming the presumption of honesty and integrity of decision makers in claiming that BMH's investigating committee and the members of the hearing panel were biased. Braswell, 352 F.Supp.2d at 646 and n. 3 ("The Court notes that to ultimately prove his due process claim based on personal bias, the Plaintiff bears a heavy burden of putting forth evidence of the presence of 'actual bias or a high probability of bias.'" (internal citations omitted)). Plaintiff has not met this burden.

To the contrary, Plaintiff's "evidence" of bias is completely unimpressive. Plaintiff points to the fact that many of the physicians who served on the investigating committee or hearing panel knew each other, saw each other at church, or sat near each other at football games as proof that they could not exercise fair and impartial judgment in their roles as investigators or panel members. In an area the size of Blount County, it would be virtually impossible to find physicians to serve in this capacity who did not know someone involved in the matter, particularly in light of the lengthy history of problems with Plaintiff's disruptive behavior. These superficial ties, to the extent they exist, do not make the physicians incapable of being

impartial in their roles on the investigating committee or hearing panel, and the evidence of these relationships does not create a factual dispute about bias necessitating a trial on this issue.[7]

Plaintiff further claims that the investigation was tainted because Dr. Beard served on the investigating committee and Dr. Thurston was asked to, but did not, serve on the investigating committee. BMH asked Dr. Thurston, and in his absence Dr. Beard, to assist with the investigation because, as former Chiefs of Staff, they could provide historical context to the committee about Plaintiff's past disruptive behavior.[8] If Dr. Beard had not served on the committee, either he or Dr. Thurston or both likely would have been interviewed at length to provide the same information that Dr. Beard offered as a member of the committee. In addition, "to run afoul of due process, 'personal bias must stem from a source other than knowledge a decision maker acquires from participating in a case.'" Braswell, 352 F.Supp.2d at 645 (quoting Simpson v. Macon Co., N.C., 132 F.Supp.2d 407, 411 (W.D.N.C. 2001)). Dr. Beard acquired is

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[7] The Manual specifically states that a contractual relationship with BMH does not prohibit one from serving on a fair hearing panel. (Manual, § 4.B.5(a)(1).) Nevertheless, Plaintiff tries to create an issue about hearing panel member Dr. Pittenger's impartiality based on the fact that he and a business partner lease an office to BMH for an indigent patient clinic. Plaintiff ignores Dr. Pittenger's testimony that this lease for a community clinic did not hinder his ability to render a fair decision in the hearing. (Pittenger depo., p. 50.) (Relevant portions of the Deposition of John W. Pittenger, M.D. not previously cited in BMH's initial Memorandum are attached hereto as Exhibit M.) Plaintiff further does not identify any evidence that contradicts Dr. Pittenger's testimony.

[8] Dr. Milhollin, on the other hand, presumably was selected because Dr. Milhollin frequently used Plaintiff for consultations, and he considered Plaintiff to be a capable physician. (Milhollin depo., pp. 23-24.) (Relevant portions of the Deposition of James L. Milhollin, M.D. not previously cited in BMH's initial Memorandum are attached hereto as Exhibit N.)

knowledge from his involvement in the repeated disciplinary actions against Plaintiff which resulted in the termination of his privileges. This does not constitute bias.[9]

C. The standards and burdens of proof in the investigation and fair hearing were appropriate.

In an attempt to argue that the standard for summary suspension[10] was inappropriate, Plaintiff inexplicably cites a provision of the Tennessee Code regarding licensing through state agencies. See Tenn. Code Ann. § 4-5-320. BMH took no action with respect to Plaintiff's medical license, nor did it have any authority to do so. Section 4-5-320 is inapplicable to the issues in this case.

Plaintiff also asserts that BMH's Bylaws should not permit summary suspensions based on a physician's interference with the orderly operation of the hospital because the HCQIA states that immediate suspension is permitted "where the failure to take such action may result in an imminent danger to the health of any individual." 42 U.S.C. § 1112(c). This position is again a reflection of Plaintiff's persistent refusal to recognize that a physician's disruptive behavior and refusal to follow hospital policy can result in imminent danger to patients' health. As noted above, JCAHO has clearly recognized that a physician's disruptive conduct may cause imminent danger to a patient. JCAHO Standard LD.03.01.01. ("Disruptive behavior that intimidates others and affects morale or staff turnover can be harmful to patient care.") Plaintiff's argument that the hospital's bylaws providing for summary suspension for interference with the orderly

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9 The reference to possible bias on the part of Dr. Thurston is a red herring. He did not serve on either the investigating committee or the hearing panel so whether or not he was biased against Plaintiff is immaterial.

10 Under the Manual, a physician's privileges may be summarily suspended if the failure to suspend may result in "imminent danger to the health and/or safety of any individual or may interfere with the orderly operations of the hospital." (Manual, § 3.D.1.)

operation of the hospital not only fails legally, but also is evidence of Plaintiff's refusal to appreciate the dangers his disruptive behaviors caused.

Plaintiff also claims that an improper burden of proof at the fair hearing denied him due process. The Sixth Circuit has clearly held, though, that the lack of **any** governing standards about how a hospital makes credentialing decision does not violate due process. Yashon, 825 F.2d at 1025 ("[T]he lack of established standards does not render the [hospital committee's] decision arbitrary and therefore violative of due process.") Moreover, in making his argument, Plaintiff relies on a factually-distinguishable case from a California state court in which the governmental entity that terminated the plaintiff deputy sheriff was not required to produce any evidence to support its decision to terminate. See Pipkin v. Bd. of Supervisors of the Co. of Shasta, 147 Cal. Rptr. 502 (Cal. Ct. App. 1978). In contrast, in this matter BMH was required to present evidence of the reasons for the MEC's recommendation at the outset of the hearing, and only then was Plaintiff required to prove that the MEC's recommendation was arbitrary and capricious. Furthermore, the arbitrary and capricious standard employed at the fair hearing and set forth in the Manual is the same standard that has been approved by numerous courts in similar proceedings. See, e.g., Friedman v. Del. Co. Mem'l Hosp., 672 F. Supp. 171, 197, n. 13 (E.D. Penn. 1987) (concluding that plaintiff physician's contentions about inappropriate burden of proof at hearing were not well-founded where hospital was required to present evidence and physician was then "obligated to support his challenge to the adverse recommendation by an appropriate showing that the charges lack[ed] factual basis or the underlying decision [was] arbitrary, unreasonable or capricious."); Deming v. Jackson-Madison Co. General Hosp. Dist., 553 F.Supp.2d 914 (W.D. Tenn. 2008) (acknowledging appropriate use of arbitrary and capricious standard); Johnson v. Christus Spohn, No. C-06-138, 2008 WL 375417 (S.D. Tex.

2008) (noting burden on plaintiff to prove hospital's adverse credentialing action was arbitrary and capricious); Poe v. Charlotte Mem'l Hosp., Inc., 374 F.Supp. 1302 (W.D.N.C. 1974) (noting that physician at hearing would have burden of proving action against him was arbitrary, unreasonable or capricious). Plaintiff's due process rights were not violated by BMH's use of this standard in the fair hearing.

Plaintiff has failed to identify any facts that are in dispute about whether his rights to due process were violated. Consequently, BMH is entitled to summary judgment on this issue.

IV. Plaintiff Has Not Presented a Factual Dispute on his Breach of Contract Claim.

Plaintiff's theory on his breach of contract claim appears to be similar to his due process claim – that identifying a technicality in the process provided to him prior to the revocation of his privileges will create a factual dispute sufficient to overcome BMH's summary judgment motion. One major flaw in this theory is that under Tennessee law, BMH is required only to substantially comply with it Bylaws in revoking his privileges. Gekas v. Seton Corp., No. M2006-00454-COA-R3-CV, 2008 WL 836399, at *1 (Tenn. Ct. App. 2008). Because perfect compliance with the Bylaws is not required, identifying a minor technicality in BMH's procedures, if any even exists, is not enough to defeat BMH's motion. Id. at *7 ("Under [the substantial compliance] standard, mere technical violations of procedures or policies will not give rise to a cause of action.")

The Gekas court holds that "if the hospital has substantially complied with the requirements of its bylaws, then it has met its contractual obligations." Id. Moreover, Gekas confirms a hospital's credentialing decisions are subject to "limited judicial review." Id. (emphasis added.) The court's role in reviewing a credentialing case "is not to reweigh the evidence and substitute [its] own judgment for that of the hospital, but only to determine if the

hospital has substantially complied with its bylaws and given the affected party adequate notice and the opportunity for a fair hearing before an impartial tribunal." Id. The hospital's decision, therefore, must be given "utmost deference." Id. at *11. Although Plaintiff fails to mention it in his thorough recitation of the case's facts, the Court of Appeals determined in Gekas that the trial court's grant of summary judgment in favor of the defendant hospital was warranted, "even if there was a technical non-compliance with the Bylaws." Id. at *10-12. BMH does not concede that there was any technical non-compliance with it Bylaws in Plaintiff's case, but in the unlikely event that the Court finds such a technical flaw exists, under Gekas BMH's Motion for Summary Judgment still should be granted.

A. Plaintiff received proper notice.

Interestingly, Plaintiff frames his allegations about improper notice predominately as a breach of contract claim rather than a due process claim, presumably because he recognizes that BMH's notice to him complied with constitutional due process requirements. See Yashon, 825 F.2d at 1025 ("Notice in this type of informal setting need only be specific enough to enable the individual to respond to the charges against him; it need not rise to the level of specificity required of a criminal indictment.") Plaintiff, however, has not produced any evidence that BMH failed to substantially comply with the notice requirements of its Bylaws either.

As a matter of fact, Plaintiff's argument about insufficient notice includes ample evidence to demonstrate that he actually did receive notice as required in the Manual. Section 4.B.1 requires only that a statement of the "general reasons" for the adverse credentialing recommendation, notice of his right to request a hearing, and a copy of the Manual provision outlining his hearing rights be provided when the MEC recommends an adverse credentialing action. (Manual, § 4.B.1.) Plaintiff concedes without argument that BMH provided him notice

of his hearing rights and a copy of the Manual provisions. He further acknowledges receiving a February 24, 2005 letter that specified that the MEC's recommendation was based on his "multiple violations of hospital policy, a pattern of inappropriate conduct, and the failure of all previous collegial, educational, and disciplinary actions to correct these problems." (See February 24, 2005 letter, attached to Plaintiff's Response as Ex. 6.) This letter indisputably states the general reasons the MEC recommended the termination of Plaintiff's privileges, as is required by the Manual.

Plaintiff refuses to admit BMH also provided him with repeated notice of the specific reasons for the MEC's recommendation in accordance with section 4.B.3 of the Manual. In addition to the February 24, 2005 letter, on November 11, 2004, Chief of Staff Dr. Weatherbee sent Plaintiff a letter stating that the MEC was suspending his privileges because of his recurring violations of the June 1, 2001 Code of Conduct Letter and the February 7, 2002 Last Chance Letter that outlined specific requirements with which Plaintiff must comply to maintain his privileges at BMH.[11] (Hatab depo., Ex. 12.) On February 8, 2005, the investigating committee provided Plaintiff with a memorandum identifying the issues it was investigating about his disruptive behavior and refusal to comply with specific hospital policies. (Hatab depo., Ex. 15.) On May 26, 2005, as Plaintiff concedes in his Response, BMH's counsel sent his attorneys a letter enclosing the above-mentioned documents, as well as the investigating committee's report, all of which listed the specific reasons for the MEC's recommendation. (Stipulation, Ex. 10.)

Furthermore, Plaintiff acknowledged in his deposition that the issues that the MEC considered were discussed with him "all the time" and were "repeated at many occasions."

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[11] The Code of Conduct Letter and Last Chance Letter were attached to Dr. Weatherbee's November 11, 2004 letter.

(Hatab depo., pp. 32-33.) The Sixth Circuit has concluded that "[w]ritten notice of specific charges is not required where past events or discussion have provided a physician with notice of the charges against him." Yashon, 825 F.2d at 1025. Nevertheless, BMH gave Plaintiff written notice of the problematic behaviors he needed to correct time and time again. Plaintiff should not be permitted to ignore these facts in an attempt to avoid summary judgment. It is indisputable that BMH substantially complied with the notice provision of its Bylaws.[12]

B. Plaintiff was not denied the right to cross examine witnesses.

BMH's Manual makes clear that "there is no right to discovery in connection with the hearing" and that Plaintiff and his attorneys were not permitted to contact hospital employees about the subject matter of the hearing "unless specifically agreed upon by counsel."[13] (Manual, § 4.C.1.) While it is true Plaintiff did not have the opportunity to interview every possible witness prior to the hearing, that is not a breach of the Bylaws. Because Plaintiff is unable to argue that he was denied his right to discovery, including interviews of witnesses, he instead claims he was denied his right to cross examine witnesses. Once again, Plaintiff mischaracterizes the facts in an effort to create a factual dispute. It is clear from the hearing transcript that Plaintiff's counsel was allowed to cross-examine every witness called to testify at trial. Moreover, the Sixth Circuit has stated that a physician's due process rights are not violated even if he is unable to call any witnesses at the fair hearing. Yashon, 825 F.2d at 1023. Because

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[12] Plaintiff complains in his Response about the multiple issues his counsel had to address at the fair hearing. This only serves to demonstrate the significant reasons BMH had to terminate his privileges.

[13] Despite the Manual provision stating there is no right to discovery in advance of a fair hearing, BMH notified its employees of Plaintiff's request to interview them and informed them that it was their choice as to whether they were interviewed. BMH made sure all employees were aware that BMH was not opposed to their being interviewed if they chose to do so. (Stipulation, Exs. 11, 13, 14.)

Plaintiff was permitted to cross examine all witnesses the hospital presented at the fair hearing, BMH substantially complied with its Bylaws on this issue.

C. Dr. Pittenger did not "actively participate" in the issues with Plaintiff prior to serving on the fair hearing panel.

Plaintiff's claim that Dr. Pittenger should not have been a member of the fair hearing panel because of his attendance at a prior Medical Department meeting is another mischaracterization in an attempt to create a factual dispute. Plaintiff asserts that Dr. Pittenger's participation on the panel violates section 4.B.5 of BMH's Manual, which states that the panel must be composed of members of the medical staff "who did not actively participate in the matter at any previous level…" (Manual, § 4.B.5.) As Dr. Pittenger testified in his deposition, his only "involvement" in the issues with Plaintiff before the hearing was when he apparently attended a Medical Department meeting at which Plaintiff made a presentation about the dialysis unit. (Pittenger depo., pp. 23-24.) Dr. Pittenger testified that he did not recall attending the meeting, he did not know if he stayed the whole time, and he did not remember Plaintiff's presentation at the meeting. (Id.) He acknowledged that he had heard at some point that Plaintiff was "upset that Dr. Siddiqi had the contract, for lack of a better word, for providing nephrology services," but he did not remember any details about why Plaintiff was upset. (Id.) Attendance at a meeting of the entire Medical Department that Dr. Pittenger does not remember hardly qualifies as "active participation" in the matter requiring the hearing. Accordingly, BMH did not breach its contract with Plaintiff when it appointed Dr. Pittenger as a member of the fair hearing panel.

D. The admission of Plaintiff's quality file into evidence was not a failure to substantially comply with the Manual.

Plaintiff argues that the admission of his entire quality file into evidence at the fair hearing was a breach of the Bylaws because it contained various documents that were irrelevant to the issues discussed in the hearing.[14] Hospitals routinely maintain "quality files" on all their staff in the normal course of business. In this case, BMH's quality file on Plaintiff was reviewed by Dr. Weatherbee, the investigating committee, and the MEC as part of the investigation and evaluation prior to the revocation of his privileges. As a result, BMH introduced his quality file into evidence at the fair hearing in an effort to provide the hearing panel with "all information relevant to the physician's qualifications for the appointment and/or clinical privileges," as section 4.C.6 of the Manual requires. (Manual, § 4.C.6.) Despite Plaintiff's contention to the contrary, it is not noteworthy that the entire quality file was part of the evidence at the fair hearing, and, in fact, several of the "irrelevant" documents about which he complains are actually fax cover sheets, transmittal letters, and other such documents.[15] (See Response, Ex. 11.) Plaintiff also asserts in his Response that all documents that he claims should have been excluded "were considered by the hearing panel." (Response, p. 35.) Plaintiff has no knowledge of what exactly the hearing panel considered in its deliberations, and he provides no citation to any deposition or other evidence to support this statement. In addition, several of the documents

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[14] In fact, Plaintiff relies on the quality file in his argument about a period of "relative quiescence" to support his free speech claim.

[15] In arguing that inappropriate documents were admitted into evidence at the fair hearing, Plaintiff relies in part on his prehearing motion requesting the exclusion of certain documents that his counsel submitted to the hearing officer. Plaintiff does not provide BMH's response to this motion, any documentation of the hearing officer's ruling on the request, or any explanation of the specific content of the various documents he sought to have excluded. The Court should not consider his unsupported motion to exclude documents filed prior to the fair hearing as evidence of a factual dispute in this proceeding.

Plaintiff alleges deal solely with quality issues contain information about his disruptive behavior and have proven to be relevant in this lawsuit. (See, e.g., Griffin depo., Exs. 3, 5, 6.)

The law is clear that "mere technical violations of procedures or policies will not give rise to a cause of action" and that substantial compliance, rather than absolute or perfect compliance, with a hospital's bylaws is all that is required to avoid a breach of contract claim. Gekas, 2008 WL 836399, at *7. Thus, even if certain documents reflecting quality of care information were introduced at the fair hearing, Plaintiff has not demonstrated that a factual dispute exists about BMH's substantial compliance with section 4.C.2 of the Manual.

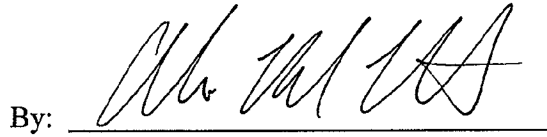
Plaintiff has failed to produce any evidence that creates a factual dispute about whether BMH substantially complied with its Bylaws or breached its contract with him. Accordingly, BMH's Motion for Summary Judgment on Plaintiff's breach of contract claim should be granted.

V. Conclusion

Plaintiff's attempts to obscure the issues cannot cover up the simple fact that BMH revoked his privileges because he was a disruptive physician who for many years repeatedly refused to conform his behavior to the requirements for physicians practicing at BMH despite BMH's multiple efforts to modify Plaintiff's behavior. It is indisputable that he received notice and a meaningful opportunity to be heard prior to the revocation, therefore his rights to due process were not violated. Moreover, BMH clearly substantially complied with its Bylaws in all phases of the credentialing action. Plaintiff has not met his burden of going beyond the pleadings to identify specific facts demonstrating a genuine issue for trial. See Celotex, 411 U.S. at 323-24. Consequently, BMH's Motion for Summary Judgment should be granted in its entirety.

Respectfully submitted,

MILLER & MARTIN PLLC



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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing pleading has been filed manually under Seal with delivery of a hard copy and electronic copy of this document and all exhibits thereto to the Court's chambers via Federal Express. All other parties have been served by regular U.S. Mail, Federal Express, and/or e-mail.

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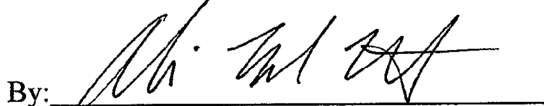

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