

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4652-05T2

SANFORD L. KLEIN, D.D.S. and M.D.,

Plaintiff-Appellant,

v.

LAWRENCE KUSHINS, M.D., and UNIVERSITY
OF MEDICINE AND DENTISTRY OF NEW JERSEY,

Defendants-Respondents.

Submitted April 17, 2007 – Decided August 1, 2007

Before Judges Coburn, Axelrad and R. B. Coleman.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-867-04.

Resnick Nirenberg & Siegler, attorneys for appellant Sanford L. Klein, D.D.S. and M.D. (Gerald Jay Resnick and Jonathan I. Nirenberg, on the brief).

Lum, Danzis, Drasco & Positan, attorneys for respondent Lawrence Kushins, M.D. (Wayne J. Positan, of counsel; Richard A. West, Jr., of counsel and on the brief; Lauren M. Craig, on the brief).

Stuart Rabner, Attorney General, attorney for respondent University of Medicine and Dentistry of New Jersey (Michael J. Haas, Assistant Attorney General, of counsel; Jean P. Reilly, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Sanford L. Klein, D.D.S. and M.D., appeals from a grant of summary judgment in favor of defendants, Lawrence Kushins, M.D., and the University of Medicine and Dentistry of New Jersey (UMDNJ), in relation to his complaint for malicious interference with prospective economic advantage and intentional and negligent infliction of emotional distress. After carefully considering plaintiff's arguments, in light of the facts and the applicable law, we affirm.

From 1983 through June 1999, plaintiff was Chairman of the Robert Wood Johnson Medical School Department of Anesthesiology and Chief of Anesthesia Services at Robert Wood Johnson University Hospital, a private institution that serves as a teaching hospital for defendant UMDNJ. During his tenure, he had a number of disagreements with the dean of the medical school, and was eventually removed from his positions. Plaintiff filed two lawsuits against defendants under the Conscientious Employee Protection (CEPA), N.J.S.A. 34:19-1 to -4; both were fully litigated and dismissed with prejudice. Plaintiff took a two-year leave of absence from the hospital and UMDNJ, returning in March 2001. During his absence, defendant Kushins replaced plaintiff as Department Chair and Chief of

Anesthesiology and, upon plaintiff's return, became his supervisor.

Plaintiff's hospital privileges were due to expire on June 30, 2002, and, pursuant to the bylaws of the hospital, his Medical Staff Reappointment Application was sent to defendant Kushins for review and recommendation. Kushins recommended that the Credentials Committee deny plaintiff's application, citing numerous allegations against plaintiff after his return to the hospital. Kushin's letter to the committee detailed fifteen incidents that occurred over the six-month period from plaintiff's return to clinical practice in April 2001 to his cessation of clinical activities in October 2001. Kushins concluded that plaintiff's competence in performing basic anesthesia services was unsatisfactory, resulted in the cancellation of several procedures and caused significant distress in several patients. He characterized plaintiff's behavior in the presence of hospital patients and staff as disrespectful, lacking in sensitivity, and detrimental to patients' rights and the quality of hospital care.

After their own review of plaintiff's application, the Credentials Committee recommended that the hospital's board of directors deny plaintiff's reappointment. In light of that recommendation, plaintiff was entitled to a hearing before the

Fair Hearing Committee. The Fair Hearing Committee heard testimony and received evidence for almost two years thereafter. Ultimately, plaintiff was allowed to continue practicing medicine at the hospital, but the Fair Hearing Committee recommended that plaintiff undergo a period of retraining and supervision. The Credentials Committee affirmed the Fair Hearing Committee's recommendation, but required in addition that plaintiff's physical, mental and emotional condition be evaluated, and that his clinical activities remain under supervision. Plaintiff refused to accept those restrictions, and this lawsuit ensued.

In his complaint, filed June 11, 2004, plaintiff alleged that: (1) defendant Kushins acted in a malicious manner to interfere with plaintiff's job status and reputation in the medical community; (2) the actions taken by defendant Kushins were intentional and negligent, and resulted in extreme emotional distress to plaintiff. On defendants' motion, Judge Victor Ashrafi granted summary judgment in favor of defendants, dismissing plaintiff's complaint in its entirety. On appeal, plaintiff contends that: (1) Dr. Kushins is not immune under the Health Care Quality Improvement Act (HCQIA), 42 U.S.C.A. § 11101 - 11152; (2) a reasonable jury could find that defendants maliciously interfered with his prospective economic advantage;

(3) there is a genuine issue of material fact as to plaintiff's claim of intentional infliction of emotional distress; and (4) Dr. Kushins is not immune under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 59:12-3.

The HCQIA was passed to increase the quality of medical care in this country, in part by encouraging candid peer review that would expose incompetent physicians. Singh v. Blue Cross/Blue Shield of Mass., Inc., 308 F.3d 25, 31 (1st Cir. 2002). The HCQIA was intended to shield health care entities and individual physicians from lawsuits resulting from the candid monitoring and reporting of incompetent health care professionals. Ibid. Under the law, professional review actions are presumptively immune if made "in the reasonable belief that the action was in furtherance of quality health care." Gordon v. Lewistown Hospital, 423 F.3d 184, 202 (3d Cir. 2005) (quoting 42 U.S.C.A. 11112(a)). This test will be satisfied if the reviewing body, based on the information before it, could reasonably conclude that its action would combat incompetence or protect patients. Ibid. The reasonableness of peer reviewers' actions is judged by an objective standard. Id. at 205.

Since professional review actions carry a rebuttable presumption of immunity, a plaintiff seeking to sue a reviewing

body has the burden not only of producing evidence, but the burden of persuasion as well. Singh, supra, 208 F.3d at 33. Therefore, on the motion for summary judgment, plaintiff bears the burden of proving, by a preponderance of the evidence, that the professional review was not objectively reasonable. Gordon, supra, 423 F.3d at 202.

In assessing immunity under the HCQIA, courts must consider the professional review as a whole, including all component portions of it. Singh, supra, 308 F.3d at 37. Here, the entire review process included evaluations by two separate committees, extended over two years, and included a hearing, expert testimony, and the submission of documentary evidence. When viewed in its entirety, the peer review process was neither unreasonable nor unfair, despite any animosity that might have existed between plaintiff and defendant Kushins.

The standard for judging the fairness of the peer review process is objective reasonableness and bad faith is largely irrelevant. Id. at 32. Therefore, if defendant Kushins's criticisms of plaintiff were based on accurate facts and were objectively reasonable, he is protected by the HCQIA. Plaintiff presented no evidence that Kushins presented false statements, and the Fair Hearing Committee finding of insufficient evidence to uphold the recommendation of Kushins does not mean the

statements are false. Plaintiff failed to show that Kushins did not conduct a reasonable inquiry and did not have a reasonable belief that his actions were in furtherance of quality healthcare. Defendant Kushins's recommendation for non-renewal is based on facts, can be considered objectively reasonable, and entitled him to immunity under the HCQIA.

N.J.S.A. 59:2-2(b) provides that a "public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." Since defendant Kushins is immune from liability, that immunity extends to defendant UMDNJ. Based upon the HCQIA's provision of immunity for entities and individuals participating in reasonable peer review actions, the trial judge properly granted summary judgment in favor of defendants.

Furthermore, defendants are protected by the section of the Tort Claims Act which provides immunity to entities and individuals involved in professional licensing, as long as the decisions are objectively reasonable and made in good faith. With regard to public employees, N.J.S.A. 59:3-6 provides, in pertinent part:

A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization

where he is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked.

There is no evidence that Kushins's actions were not objectively reasonable or based on false information. Defendant Kushins's actions could reasonably have been motivated by a concern for the quality of healthcare at the hospital. His allegations were based on accurate facts and plaintiff has not provided any significant evidence to support his claim that said actions were malicious. Therefore, the Tort Claims Act shields defendant Kushins from liability. Since defendant Kushins is not liable under the Tort Claims Act, neither is UMDNJ. See N.J.S.A. 59:2-2(b).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION