No. 13-1076

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2013

HANOVER UNIVERSITY GENERAL HOSPITAL, Anthony B. Glower, Mary Elizabeth Kreutzer, Seamus O. Milk and Alicia Polishov, Petitioners,

v.

THOMAS L. RUTHERFORD, Respondent.

On Writ of Certiorari from the

United States Court of Appeals for the Twelfth Circuit

BRIEF FOR PETITIONERS

Team 1304

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether Respondent has met his burden in proving that the social media post was speech protected by the First Amendment and, if so, whether the lower court misapplied the *Pickering-Connick* balancing test; and

2. Whether evidence of decision-maker bias should be included amongst the evidence considered in determining whether Respondent has rebutted the presumption of immunity provided in the Health Care Quality Improvement Act, and whether the lower court properly found that Respondent overcame the presumption by a preponderance of the evidence?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Twelfth Circuit (No. 13-275) is set out in the record. (R. at 15-24). The opinion of the United States District Court for the District of Hanover (No. Civ-12-523) is set out in the record. (R. at 1-14).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable…

The pertinent statutory provisions of the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 (1986), are reproduced below.

42 U.S.C. § 11111(a)(1)

> If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section—
>
> (A) the professional review body,
> (B) any person acting as a member or staff to the body, and
> (C) any person under a contract or other formal agreement with the body, and
> (D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 20003, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of Title 15, where such an action is otherwise authorized.

42 U.S.C. § 11112

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in 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, 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).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician,
(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,
(ii) any time limit (of not less than 30 days) within which to request such a hearing, and
(C) a summary of the rights in the hearing under paragraph (3).

….

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

42 U.S.C. § 11151

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on—

(A) the physician's association, or lack of association, with a professional society or association,
(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain businesses,
(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,
(D) the physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or
(E) any other matter that does not relate to the competence or professional conduct of a physician.

….

(11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review

activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

STATEMENT OF THE CASE

Petitioner Hanover University General Hospital (hereinafter "HUGH") is a public hospital that receives the 99 Percent grant from the Hanover Disease Research Institute (hereinafter "HDRI"). (R. at 2). The 99 Percent grant is a prestigious and competitive state-funded appropriation of money which aims to increase vaccination rates. (R. at 2). HUGH is one of three hospitals in the state of Hanover to receive the esteemed grant. (R. at 2). The grant is renewed if benchmarks are achieved. (R. at 2). Respondent is Dr. Thomas L. Rutherford (hereinafter "Respondent"), co-inventor of the Doda Stent and cardiac surgeon who has had surgical privileges at HUGH for twenty-six years. (R. at 1). Respondent's brief loss of privileges at HUGH is the basis for this action.

On June 11, 2012, Respondent published a post titled "First, Do No Harm to Children?" on his private ConnectSpace page (hereinafter "the post"). The post discussed his grandson Declan's recent diagnosis of autism and alluded to a link between autism and vaccinations, referring to vaccines as "the great American uncontrolled experiment on little kids." (R. at 2). Respondent also spoke about HUGH's 99 Percent grant in the post, writing, "the more we jab, the more cash HUGH gets. And photos with the governor. And trinkets." (R. at 2). Respondent's post could only be seen by his ConnectSpace "friends".[1] (R. at 2). Several of Respondent's ConnectSpace friends forwarded the post to Dr. Anthony B. Glower (hereinafter "Dr. Glower"), chief of pediatrics at HUGH and chief investigator of the 99 Percent grant. (R. at 2). Concerned that the post would disrupt the 99 Percent grant, HUGH's vaccine initiative, and the operations of the hospital that depend on these appropriations, Dr. Glower forwarded the post to Dr. Alicia

[1] To see what is on a person's private ConnectSpace page, that person must first accept them as a "friend".

Polishov (hereinafter "Dr. Polishov"), chief of medicine and chair of HUGH's Medical Executive Committee (hereinafter "MEC"). (R. at 2-3; R. at 18; Glower Dep. 36:2).

Pursuant to HUGH's Medical Staff Bylaws and her right as chair of the MEC, Dr. Polishov initiated a "request for corrective action" to perform an inquiry into Respondent's professional conduct. (R. at 3); Hanover University General Hospital Medical Staff Bylaws §19.01a. The purpose of the inquiry was to assess whether Respondent's conduct was "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." (R. at 3); Hanover University General Hospital Medical Staff Bylaws §19.01a. Dr. Polishov appointed an ad hoc review committee[2] to review Respondent's performance and sent a letter to Respondent informing him of the inquiry on July 1, 2012. (R. at 4). The letter informed Respondent that the ad hoc committee would propose a recommendation to the MEC on whether to restrict or revoke his membership and/or privileges. (R. at 4). The letter further informed Respondent of his rights, including the right to counsel and a fair hearing should the ad hoc committee recommend, and the MEC adopt, disciplinary action against him. (R. at 4). The letter also set out what information would be investigated, including: infection rates following surgeries, complications noted on patient records, autopsy findings, "sentinel events", malpractice claims, patient complaints and Respondent's temperance and compliance with Hospital staff rules. (R. at 4).

The ad hoc committee examined over six years of documents pertaining to Respondent and conducted interviews with HUGH staff members. (R. at 4-5). The ad hoc committee found that, over a course of six years, Respondent had seven patients die on his operating table and his post operation infection rate was more than seven percent above the hospital average, at an astounding twenty-two percent. (R. at 11). Further, there were multiple incidents of

[2] The ad hoc committee was comprised of: Dr. Seamus O. Milk, a retired cardiac surgeon with courtesy privileges at HUGH, Dr. Ronald Ling, chief of surgery and director of quality enhancement initiatives, Dr. Glower and ex-oficio member Mary Elizabeth Kreutzer, director of nursing.

Respondent's unruliness and abusive behavior in dealing with nurses and patients, including shouting at the wife of a patient. (R. at 11). HUGH had also received two anonymous letters complaining of Respondent's abusive behavior toward his patients. (R. at 11). The committee then presented its findings and recommendations to the MEC.[3] (R. at 4-5). The MEC voted to revoke Respondent's privileges at HUGH and to terminate his appointment to the active staff due to Respondent's "unacceptably high rates of morbidity and post-operative complications," his failure to meet HUGH's standard of care and "conduct that impedes quality patient care."(R. at 16). On July 31, 2012, HUGH's Chief Executive Officer wrote to Respondent to inform him of the MEC's decision to revoke his privileges, explained the rationale for his termination and reiterated Respondent's right to a "fair hearing" to address the determination. (R. at 5). Respondent declined his right to attend a hearing, asserting that his "record speaks for itself," but wrote a letter explaining the reasons as to why his statistics were so poor. (R. at 5; Rutherford Dep. 46:9-10). The letter asserted that his patients tended to be the most physically vulnerable and that his post-operative infection rate was due to a four-month period when HUGH's HVAC system was malfunctioning. (R at 5). On August 7, 2012, Respondent initiated an appeal to the HUGH Board of Trustees (hereinafter "the Board") to reverse the revocation decision. (R. at 6). The Board granted Respondent's request on August 24, 2012, and Respondent returned to his full duties at HUGH by August 28, 2012, within thirty days of his revocation. (R. at 6).

On August 7, 2012, Respondent also initiated a civil action in the United States District Court for the District of Hanover. An Amended Complaint was filed on September 8, 2012, which included a 42 U.S.C. § 1983 and common law claims for breach of contract, intentional infliction of emotional distress and defamation. (R. at 6). Respondent claims a violation of his constitutional right to freedom of speech and alleges that HUGH is not entitled to its

[3] The MEC was comprised of: Dr. Polishov, Dr. Glower, Dr. Ling, an unnamed OB/GYN and an unnamed general surgeon.

presumption of immunity from common law claims because the hospital did not heed the Health Care Quality Improvement Act (hereinafter "HCQIA") standards. (R. at 17). The District Court granted HUGH's motion for summary judgment against all claims, holding that Respondent's ConnectSpace post was not entitled to First Amendment protection and that HUGH was immune from Respondent's common law claims due to HCQIA's provision of immunity. (R. at 7).

Respondent appealed to the United States Court of Appeals for the Twelfth Circuit, which reversed and remanded the District Court's entry of summary judgment. (R. at 17). HUGH, and the four individuals implicated as defendants in the action, now appeal to this Court on the basis that the Twelfth Circuit erred in finding that Respondent had offered enough evidence to withstand Petitioners' motion for summary judgment on the 42 U.S.C. § 1983 and common law claims.

SUMMARY OF THE ARGUMENT

Summary judgment must be granted for the defendant as a matter of law when a plaintiff has failed to support every element of his claim and there are no genuine issues of material fact. Fed. R. Civ. P. 56(a); *see also Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986)(plurality opinion)("the non-moving party must put in sufficient evidence on each and every element of the claim in order for it to move forward"). Once the moving party has shown an absence of dispute of the material facts, the nonmoving party must produce sufficient evidence such that a jury could return a verdict in his favor. If the nonmoving party fails to offer sufficient evidence to demonstrate a genuine issue of material fact, summary judgment must be granted for the moving party as a matter of law. *Celotex*, 477 U.S. at 323; *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50 (1986). A properly supported motion for summary judgment will not be defeated by a "mere scintilla of evidence" if the non-moving party has the burden of proof in the underlying

case. *Invest Almaz v. Temple-Inland Forest Prods. Corp.*, 243 F.3d 57, 76 (1st Cir. 2001) (*quoting Katz v. City Metal Co.*, 87 F.3d 26, 28 (1st Cir. 1996)).

In the case at hand, Respondent bears the burden of proving a violation of his First Amendment rights, thus warranting a 42 U.S.C. § 1983 claim. What has come to be known as the *Pickering-Connick* balancing test puts the burden on the employee to prove that his speech was on a matter of public concern, that his interest in speaking outweighed the employer's interest in promoting the efficiency of its services and that the speech was a substantial or motivating factor in the employer's adverse action against him. *Connick v.* Myers, 461 U.S. 138, 146 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 56 (1st Cir. 2003). Further, Respondent bears the burden of overcoming HUGH's presumed immunity against common law claims by providing a preponderance of evidence showing HUGH's failure to meet one of HCQIA's four requirements. 42 U.S.C. § 11112(a); *Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir. 1992). To warrant immunity under HCQIA, HUGH's actions had to have been undertaken in the reasonable belief that the action was in furtherance of quality health care, after a reasonable effort to obtain the facts of the matter, after adequate notice and hearing procedures were afforded to Respondent and in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts. 42 U.S.C. § 11112(a). Since HCQIA has been acted, however, physicians have rarely overcome a health care entity's presumed 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).

Respondent's social media post was not speech protected by the First Amendment. The District Court correctly applied the *Pickering-Connick* balancing test, holding that Respondent's post was not on a matter of public concern and that HUGH's interest in promoting the efficiency of its services outweighed Respondent's interest in posting on his ConnectSpace page. The

District Court also correctly found that Respondent failed to overcome HCQIA's presumption of immunity for HUGH's action. As such, this Court should vacate the Twelfth Circuit's finding that Respondent's speech was constitutionally protected and that Respondent rebutted HCQIA's presumption of immunity. The Court should reinstate the District Court's decision to grant HUGH's motion for summary judgment as a matter of law.

I.

In *Connick* and *Pickering*, this Court recognized the government's interest in restricting the speech of its employees to promote the efficiency of the services it provides to the public. *Connick*, 461 U.S. at 138; *Pickering*, 391 U.S. at 568; *see also Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Waters v. Churchill*, 511 U.S. 661, 683 (1994) (plurality opinion); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977). This Court has acknowledged that although government employees have First Amendment rights, "[W]e have consistently given greater deference to government predications of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters*, 511 U.S. at 673.

This Court established the *Pickering-Connick* balancing test to determine when a public employee is warranted in bringing a First Amendment claim against his public employer. First, Respondent must prove that his speech involved a matter of public concern. *Garcetti*, 547 U.S. at 418. If he can successfully prove this point, he must then demonstrate that his interest in commenting on matters of public concern outweighs HUGH's interest in promoting the efficiency of the services it provides to the public. *Rankin*, 483 U.S. at 388. These first two prongs are questions "of law for the court." *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1998) (*citing Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998)).

Even if Respondent can successfully prove these two elements, he must still demonstrate that his ConnectSpace post was a substantial or motivating factor behind HUGH's decision to revoke his privileges. *Guilloty Perez*, 339 F.3d at 56. This prong of the analysis is subject to disposition before trial. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990). Only after Respondent has pled evidence sufficient to satisfy the first three prongs does the burden fall on HUGH to demonstrate that it would have taken the same action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. If HUGH can successfully prove this individual prong, Respondent's claim that the revocation of his privileges abridged his First Amendment right to free speech must fail as a matter of law.

The District Court correctly struck the balancing test in HUGH's favor. Respondent's ConnectSpace post was entirely a matter of private concern, as he was speaking as a grandfather upset about his grandson's newly diagnosed condition; this alone defeats Respondent's claim. *Assuming arguendo* that his post was considered protected speech, HUGH's interest in promoting the efficiency of its services outweighs Respondent's interest in making the post; the content of Respondent's post, criticizing HUGH's 99 Percent grant, was likely to have an adverse effect on HUGH's ability to provide quality healthcare services and maintain a cooperative working environment. Furthermore, Respondent's argument that his post was a substantial or motivating factor in HUGH's decision is based on unsubstantiated allegations, which is not sufficient to defeat a motion for summary judgment. *E.g., Liberty Lobby*, 477 U.S. at 247-48; *Kelly v. United States*, 924 F.2d 355, 357 (1st Cir. 1991). Lastly, even if Respondent's post was a motivating factor in HUGH's decision, no reasonable juror could conclude that HUGH would not have taken the same adverse actions based on Respondent's record.

Respondent's 42 U.S.C. § 1983 claim must therefore fail as a matter of law. The Appellate Court's denial of HUGH's motion for summary judgment should be reversed and the District Court's granting of summary judgment affirmed.

II.

Congress enacted HCQIA to remedy the concern that physicians with a history of malpractice suits and insubordination could move from one state to another undetected because no interstate monitoring mechanism was available. HCQIA's purpose is to increase and promote patient safety by providing a framework for hospitals to report the adverse behavior of sub-par physicians to the National Practitioner Data Bank. If a physician's conduct is called into question, HCQIA provides a mechanism for physicians and hospital administrators to form a "professional review body" and engage in a "professional review action" of the physician's conduct. 42 U.S.C. § 11151(9), (11).

HCQIA sets out four requirements that a hospital's professional review action must satisfy in order to be immune from any claims arising with respect to the action. 42 U.S.C. § 11112(a). First, the review action must be taken in the reasonable belief that the action was in furtherance of quality health care. 42 U.S.C. § 11112(a)(1). Second, the review body must make a reasonable effort to obtain the facts of the matter. 42 U.S.C. § 11112(a)(2). Third, the review body must provide adequate notice and hearing procedures, or other fair procedures under the circumstances, to the physician being reviewed. 42 U.S.C. § 11112(a)(3). Lastly, the professional review action must be taken in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts and after meeting the third requirement. 42 U.S.C. § 11112(a)(4).

Congress specifically designed HCQIA to afford hospitals a wide degree of deference in reviewing the conduct of its employees. Accordingly, a peer review action is presumed to have met the preceding standards necessary for immunity. *See Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1333 (10th Cir. 1996). HCQIA further provides that when a hospital's review action meets the requisite standards, the hospital is immune from all legal liability

associated with the professional review action. 42 U.S.C. § 11112(a). Congress included this in an effort to encourage physicians to engage in peer review without fear of liability.

Congress put a high bar in place for any physician trying to allege that a hospital should not be warranted immunity. To rebut the presumption of immunity, a physician must show by a preponderance of the evidence that the review action failed to comport with one of HCQIA's four requirements. *Austin*, 979 F.2d at 734. Federal courts have interpreted the presumption of immunity almost exclusively in favor of finding immunity for peer review board members.[4] As stated by the Appellate Court, it is a distinctly minority position to find in favor of a "disgruntled physician." (R. at 20).

When a physician attempts to rebut the presumption of immunity, courts can look to a wide variety of evidence to determine whether the professional review action comported with HCQIA requirements. The court may look to: the extent of the investigatory effort taken, what evidence was considered, what HCQIA requires for a professional review action and professional review body, what notice the physician was given, what hearing opportunities he was afforded, decision-maker bias, adherence to Hospital bylaws, and whether the action taken was reasonable based on the circumstances. Unless a physician can prove by a preponderance of the evidence that any of the aforementioned evidence shows noncompliance with HCQIA guidelines, a hospital's presumption of immunity will not be overcome.

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[4] *See, e.g., Pamintuan v. Nanticoke Mem'l Hosp.,* 192 F.3d 378 (3d Cir. 1999); *Sugarbaker v. SSM Health Care,* 190 F.3d 905 (8th Cir. 1999); *Brader v. Allegheny Gen. Hosp.,* 167 F.3d 832 (3d Cir. 1999); *Wayne v. Genesis Med. Ctr.,* 140 F.3d 1145 (8th Cir. 1998); *Mathews v. Lancaster Gen. Hosp.,* 87 F.3d 624 (3d Cir. 1996); *Imperial v. Suburban Hosp. Ass'n, Inc.*, 37 F.3d 1026 (4th Cir. 1994); *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994); *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992)*; Meyers v. Logan Mem'l Hosp.,*82 F. Supp. 2d 707 (W.D. Ky. 2000); *Rogers v. Columbia/HCA of Cent. La, Inc.,* 971 F. Supp. 229 (W.D. La. 1997); *Egan v. Athol Mem'l Hosp.,* 971 F. Supp. 37 (D. Mass. 1997); *Benjamin v. Aroostook Med. Ctr.*, 937 F. Supp. 957 (D. Me. 1996).

HUGH's actions were taken in the reasonable belief that it would further quality health care. HUGH conducted an investigation and determined that his record reflected an inadequate standard of care. As such, action needed to be taken against him to further the quality of care HUGH provides. Although Respondent did not contest the second HCQIA requirement, HUGH nonetheless has demonstrated that it put in reasonable effort to obtain the facts of the matter by looking at six years of Respondent's records. Furthermore, HUGH provided adequate notice and hearing procedures to Respondent. HUGH repeatedly informed Respondent of the ad hoc committee's agenda and that Respondent had the right to a hearing. Respondent denied his opportunity for a hearing, so it is improper for him to now contend that he was not afforded adequate notice and hearing procedures. Additionally, based on fact that Respondent did not refute the committee's findings until after they had revoked his privileges, HUGH reasonably believed that its action was warranted based on the facts known at the time of the review action. Respondent has therefore failed to rebut HCQIA's presumption of immunity by a preponderance of the evidence.

HCQIA immunity is a question of law that the court may decide at the summary judgment stage. *See Rogers v. Columbia/HCA of Cent. La., Inc.*, 971 F. Supp. 229 (W.D. La. 1997) (*citing Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1332 (11th Cir. 1994)). The current record is sufficiently developed as Respondent has failed to prove any genuine disputes of material facts. As HUGH is thus immune from legal liability in connection with this action, Respondent's common law claims must fail as a matter of law. The District Court's granting of summary judgment in HUGH's favor should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED HUGH'S MOTION FOR SUMMARY JUDGMENT AGAINST RESPONDENT'S 42 U.S.C. § 1983 CLAIM.

A. The Government Has a Strong Interest in Regulating The Speech of its Employees Under The First Amendment.

This Court has consistently recognized that the government has a strong interest in regulating the speech of its employees. While the purpose of the First Amendment, is to protect the public's interest in receiving information and preserving an "uninhibited marketplace of ideas," it is recognized that First Amendment cases involving government employees are different than those involving private citizens. *See Pacific Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Prior to *Pickering*, public employee speech received almost no First Amendment protection from adverse employer action. Randy J. Kozel, Reconceptualizing Public Employee Speech, 99 Nw. U. L. Rev. 1007, 1009 (2005). *Pickering* and its progeny established certain circumstances under which public employees receive First Amendment protection, but this Court has recognized that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. For government employees, therefore, the First Amendment protection has been limited to speech that is "on matters of public concern." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 600 (2008).

The *Pickering-Connick* balancing test considers both the interest of the employee in speaking freely and the interest of the employer in promoting the "efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. In *Connick*, this Court recognized that public employers must be able to enjoy wide latitude in managing their employees. 461 U.S. at 146. This Court expanded the scope of this latitude in *Waters*, stating that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as an employer." 511 U.S. at 675. As such, this Court acknowledged the public

employer's power to restrain an employee who "begins to do or say things that detract from the agency's effective operation." *Id*. at 674.

These cases have reinforced the employer deference present in the *Pickering-Connick* balancing test by imposing a high burden on any employee trying to bring a First Amendment violation claim. This is evidenced by the fact that the employee has the burden of satisfying each of the first three prongs of the test. If, and only if, the employee can surpass these obstacles does he reach the fourth prong. At this point, the employer can refute the employee's entire claim by showing that it would have taken the same action even in the absence of the protected speech. The fact that the employee must win on every single prong of the *Pickering-Connick* balancing test to successfully bring a First Amendment claim, while the employer need only win on one to refute such an action, evidences this Court's desire to protect government employers from this type of claim.

B. The District Court Properly Held that Respondent's ConnectSpace Post Was Not Protected Speech Because it Did Not Address Issues of Public Concern.

The District Court properly granted summary judgment to HUGH on Respondent's 42 U.S.C. § 1983 claim, as Respondent's post was not protected speech. As a matter of law, courts are to consider whether the employee's speech is protected as on a matter of public concern by looking to the "content, form, and context of the speech, in light of the record as a whole." *Connick*, 461 U.S. at 147-48. The First Amendment does not protect speech about purely personal matters. *See Ruotolo v. City of New York*, 514 F.3d 184, 189 (2d Cir. 2008). Even if speaking on a private ConnectSpace page does not necessarily remove the publication from the

realm of the First Amendment,[5] the personal content of Respondent's post, as an unhappy grandfather, does.

In order to meet the "on a matter of public concern" standard, the posting must relate to any matter of political, social, or other concern in the community, or be the subject of legitimate news interest. *Connick*, 461 U.S. at 146; *City of San Diego*, 543 U.S. at 83-84. Respondent's post reflected an unhappy grandfather rambling about his grandson's recent diagnosis of autism. The post initially discussed the diagnosis, but then turned to a discourse about the potential link between autism and vaccines and about perks HUGH receives for vaccinating patients. Had Respondent posted a critical comment about HUGH not keeping its equipment functioning properly, a jury may have considered the post to be on a matter of public concern.[6] This was not the substance of Respondent's post, however, and simply the "controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387.

Courts have also found that a public employee commenting on, or seeking colleague affirmation of, their workplace situation does not warrant First Amendment protection. *See Guilloty Perez v. Pierluisi*, 339 F.3d 43 (1st Cir. 2003). (personal complaints about working conditions, stated to other employees); *Connick v. Meyers*, 461 U.S. 138 (1983) (intra-office questionnaire to work colleagues soliciting responses about the office's transfer policy, supervisors, office morale, the need for a grievance committee and whether others felt pressured to work on particular political campaigns); *Richerson v. Beckon*, No. 08-35310, 2009 WL 1975 (9th Cir. Aug. 27, 2009) (public school director of curriculum's personal blog post critical of the person replacing her position). Respondent's post is merely a negative comment on the practices

[5] *See Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (holding that a public employee's private communication does not necessarily negate First Amendment protection).
[6] *See David v. City and Cnty. of Denver*, 101 F.3d 1344, 1355 (10th Cir.1996) ("[s]peech that pertains to a public agency's discharging its governmental responsibilities ordinarily will be regarded as speech on a matter of public concern).

his workplace chooses to engage in, namely the vaccination initiative. The post refers to vaccination as "the great American uncontrolled experiment on little kids" and alleges that, through HUGH's HDRI grant, "the more we jab, the more cash HUGH gets." (R. at 2). Respondent's critical comment of his workplace initiative is nothing more than an employee voicing frustrations about his working environment, and therefore fails to warrant First Amendment protection. This Court has explicitly stated that it will decline to question a government employers' decision regarding an employees' private speech. *See Waters*, 511 U.S. at 674 (*stating* "[w]e have refrained from intervening in government employer decisions that are based on [such] speech") (*citing Connick*, 461 U.S. at 146-49). Accordingly, as a matter of law, HUGH's actions regarding Respondent's private post should not be scrutinized.

The private content of Respondent's post is dispositive on the question of whether or not it addresses an issue of public concern. The forum that he chose for his post additionally favors viewing the speech as an entirely private matter. The forum of social media and blog posts remains a relatively new arena for First Amendment discussion. This case is one of first impression on such an issue and if the Court decides to entertain the question, it should find that posts made by government employees on private social media pages do not warrant First Amendment protection.

The Appellate Court's comparison of the post to a blog commentary, thus warranting First Amendment protection, is not determinative, as courts remain divided over the issue of whether social media posts warrant First Amendment protection.[7] Cases such as *City of San Diego v. Roe* and *Richerson* suggest that public employee "bloggers" might have a difficult time finding First Amendment protection under *Connick*'s public concern test, given the personal nature of many blog postings. Paul M. Secunda, Blogging While (Publicly) Employed: Some

[7] Cases such as *Farrah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29 (D.D.C. 2012) and *Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) have held social media posts enjoy First Amendment protection whereas *Snyder v. Millersville Univ. 2008 WL 5093140* (E.D. Pa. Dec. 3, 2008) held that a MySpace page does not warrant First Amendment claim.

First Amendment Implications, 47 U. Louisville L. Rev. 679, 690-91 (2009). Further, the post was on a private page, where only Respondent's ConnectSpace friends could see it.

C. HUGH's Interest in Providing Undisrupted Health Care Services to its Patients Outweighs Respondent's Interest in Posting on his ConnectSpace Page.

Although Respondent's post was not protected speech, which would end his 42 U.S.C. § 1983 claim, should his claim survive analysis under the first prong, it cannot withstand scrutiny under the second prong of the *Pickering-Connick* balancing test as a matter of law. The weighing of an employee's right to engage in protected speech against the employer's right to promote the effective and efficient fulfillment of its responsibilities to the public is a question of law to be determined by the court. *Jantzen*, 188 F.3d at 1257 (*citing Horstkoetter*, 159 F.3d at 1271. The District Court correctly held that HUGH's legitimate interest in preserving the effective operation of its enterprise outweighed Respondent's interest in posting on his ConnectSpace page.

1. Pickering's Progeny Have Recognized the Importance of Giving Deference to the Employer

After the adoption of the *Pickering-Connick* balancing test, this Court illuminated the importance of giving deference to the employer at this stage of the analysis,

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer…When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her…The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively insubordinate interest when it acts as a sovereign to a significant one when it acts as employer.

Waters, 511 U.S. at 674-75 (citation omitted). The Court further stated that if, when looking at the facts, the employer reasonably believed the speech had the potential for disruptiveness in the workplace, the employer need not wait for disruptiveness to occur; potential disruptiveness can

be enough to outweigh the value of an employee's speech. *Id*. at 677, 681. Therefore, the actual effect of an employee's speech is irrelevant if the public employer reasonably concludes that the speech will have an adverse effect on the employer's operations. *Connick*, 461 U.S. at 154.

In *Rankin*, this Court recognized that relevant factors to consider when weighing the interest of the employer include whether statements could disrupt the regular operations of the enterprise, as well as whether the speech could have a detrimental impact on close working relationships for which personal loyalty and confidence are necessary. 483 U.S. at 388; *see Pickering*, 391 U.S. at 570-73. Such factors reinforce the notion that this element of the test centers upon the efficient functioning of the government employer's institution and establishes that avoiding any disruption of this functioning is a strong state interest. *Rankin*, 483 U.S. at 388.

2. HUGH Reasonably Believed that Respondent's Post Had the Potential to Disrupt Its Operations and Harmony Among Employees

As highlighted by the District Court, there is a heightened level of trust associated with the words of a doctor. Where a public employee's position entails a high degree of authority, public accountability and public contact, the damage the employee's private speech could have on the agency's successful functioning is heightened. *Id.* at 390-91 (recognizing that "the burden of caution employee's bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails").[8] As such, Respondent's position as an esteemed surgeon at a state hospital requires him to act in a manner not disruptive to his employer. While Respondent has a right to post certain information on his ConnectSpace page, his negative post directly implicated HUGH's practices, thus making it reasonable for HUGH to believe such a post would disrupt its services.

[8] In *Rankin,* the Court found that a clerical employee's speech would have minimal effect on the law enforcement activity of the employer.

HUGH has a legitimate interest in promoting the efficiency of its services, including its vaccination initiative. The language of Respondent's post, "vaccination is the great American uncontrolled experiment on little kids," and "the more we jab, the more cash HUGH gets," have the potential to greatly disrupt HUGH's 99 Percent grant and overall hospital services. The 99 Percent grant is an esteemed source of funding for HUGH and represents a fundamental aspect of the hospital. Due to HDRI's selectivity in dispensing the 99 Percent grant, HUGH had reasonable concern that if they failed to respond to Respondent's post criticizing the grant, HDRI may have withheld future funds. A termination of the 99 Percent grant would have impaired the efficiency of HUGH's mission to vaccinate and damaged the operations of the hospital that depend on these appropriations. Additionally, Respondent's post creates the appearance of corruption regarding HUGH's 99 Percent grant by implying that HUGH only seeks to vaccinate to increase their paycheck. The combination of Respondent's statements could significantly undermine public confidence in HUGH and adversely impact the hospital's performance, as a reasonable patient would likely avoid what appeared to be a "corrupt" hospital.

Respondent's critical post of the 99 Percent grant could additionally create disharmony among HUGH's employees. In *Connick*, this Court stated that "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. A hospital is the quintessential setting for which close working relationships are necessary to fulfill public responsibilities. It is imperative that doctors and nurses trust one another as their day-to-day activities involve relying on this trust to save patients' lives. HUGH has a strong interest in maintaining this harmony and preserving a close working relationship between doctors and nurses to ensure proper patient care in the hospital and the efficient delivery of appropriate health care services.

As previously stated, the 99 Percent grant is a highly esteemed and competitive grant that HDRI administered to select hospitals in the state of Hanover. HUGH and its employees value

this grant as an essential part of the hospital's mission to vaccinate and as an integral source of funding for HUGH's basic operations. Respondent's post could create adversity among HUGH employees who resent the post's implications of corruption and deception. This could directly interfere with the trust and reliance necessary between HUGH's employees. Once HUGH reasonably believed that Respondent's post would disrupt employee collaboration, HUGH was permitted to revoke his privileges to ensure that Respondent's preceding and future actions would not impair the efficiency of the public services that HUGH offers.

In striking the *Pickering-Connick* balancing test, the Appellate Court failed to weigh these legitimate interests of the hospital against Respondent's interest in posting on ConnectSpace. HUGH reasonably believed that Respondent's post had significant potential to disrupt its operation, and as such, the District Court was correct in holding that HUGH's interest in promoting the efficiency of its services outweighed Respondent's interest posting on ConnectSpace.

D. Summary Judgment is Warranted Because Respondent's Claim that his Post Was a Substantial Factor in HUGH's Decision was Based on Mere Conjecture and Speculation.

Even if the Court determines that HUGH's interest in preserving the quality of services it offers to the public does not outweigh Respondent's interest in speaking, Respondent still has the burden of proving that his ConnectSpace post was a substantial or motivating factor in HUGH's decision to revoke his privileges. *Guilloty Perez*, 339 F.3d at 56. The question of whether speech was a substantial or motivating factor in the adverse action taken is subject to disposition before trial. *Bradley*, 913 F.2d at 1075. The nonmoving party must do more than rely on mere allegations of the existence of a factual dispute to defeat summary judgment. *E.g., Basith v. Cook Cnty.*, 241 F.3d 919, 928 (7th Cir. 2001); *Kelly*, 924 F.2d at 357. By relying on mere allegations, the nonmoving party fails to "make a sufficient showing on an essential element of [his] case"

and, as such, the moving party is entitled to summary judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323.

Respondent failed to produce sufficient evidence that his post was a substantial or motivating factor in HUGH's decision to revoke his privileges. He does nothing more than speculate that his post was the reason HUGH revoked his privileges[9] and fails to "produce some facts linking that action to his conduct." *Guilloty Perez*, 339 F.3d at 56. As the Court of Appeals acknowledges, temporal proximity could be used to argue a causal nexus between the employee's speech and the employer's subsequent adverse action. Temporal proximity alone, however, is not enough to establish such a nexus. *See Hughes v. Bedsole*, 48 F.3d 1376, 1387 (4th Cir. 1994) (three week period between speech and alleged retaliation was not sufficient to establish temporal proximity). Six weeks elapsed between Respondent's June 11th post and HUGH's July 31st decision to revoke his privileges. HUGH's decision was based upon the in-depth review of six years of Respondent's record as a physician and was not a result of Respondent's ConnectSpace post. The Appellate Court's implication, that the "short lapse of time" between Respondent's post and subsequent loss of privileges suggests that the post motivated such a decision, is unsubstantiated and fails to take into account the legitimate findings of HUGH's investigation. (R. at 19).

Respondent's mere speculation that his post motivated the revocation of his privileges is not sufficient to oppose a motion of summary judgment. Respondent's claim must therefore fail as a matter of law.

[9] Respondent stated comments such as "I was a problem," "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," "..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." (R. at 5-6).

E. HUGH Would Have Taken the Same Action Against Respondent in the Absence of the ConnectSpace Post.

Summary judgment granted to the defendant as a matter of law will be upheld if the evidence on record "compelled the conclusion that the plaintiff would have suffered the adverse employment action in any event for nondiscriminatory reasons." *Acevedo Diaz v. Aponte*, 1 F.3d 62, 67 (1st Cir. 1993). Even if Respondent's post initially prompted HUGH's investigation, "the fact that the protected conduct played a substantial part in the actual decision" does not necessarily amount to a constitutional violation. *Mt. Healthy*, 429 U.S. at 285 (internal quotations omitted). This Court's decision in *Mt. Healthy* ensured "that a plaintiff-employee who would have been dismissed in any event on legitimate grounds is not placed in a better position merely by virtue of the exercise of a constitutional right irrelevant to the adverse employment action." *Id.* at 285-86; *see also Guilloty Perez*, 339 F.3d at 58 (*citing Acevedo Diaz*, 1 F.3d at 66). The record in this case revealed a tendency of sub-standard patient care by Respondent and, regardless of his ConnectSpace post, warranted the revocation of his privileges.

To ensure it is providing the best care possible to its patients, a hospital must periodically examine employee records to assess whether they are comporting with the requisite standards of care and professional conduct. Even if Respondent's ConnectSpace post prompted the formation of the ad hoc committee, the committee performed a legitimate inquiry into his professional conduct to assess whether it comported with professional standards, was disruptive to hospital operations, was contrary to hospital bylaws, or was detrimental to patient safety or the delivery of quality patient care. Hanover University General Hospital Medical Staff Bylaws §19.01a. The ad hoc committee reviewed six years of documents including patient records, complaints against Respondent and adverse incidents involving Respondent. The investigation revealed statistics far below the requisite standard of care: seven of Respondent's patients died on the operating table

in the past six years and his patients had a post-operation infection rate of twenty-two percent. (R. at 11). Further, Respondent was involved in many disruptive incidents, including shouting at the wife of a patient and displaying aggressively rude behavior towards nurses. (R. at 11). HUGH even received two anonymous letters complaining of Respondent's abusive behavior toward his patients. (R. at 11).

HUGH invested twenty-six years into shaping Respondent as a cardiac surgeon and granted him opportunities to explore his interests, such as the invention of the Doda Stent. A reasonable juror could not find that HUGH would revoke an esteemed doctor's privileges based on nothing more than a social media post that spoke negatively about a hospital initiative; to do so would be to disregard twenty-six years of commitment to an employee.

Any doctor with comparable patient morbidity and infection rates who had engaged in similar abusive behavior would accordingly have his privileges revoked. To allow Respondent to remain in his position and continue to impede quality patient care simply because his post may or may not have initiated the investigation would be detrimental to HUGH's mission of providing quality health care and in contradiction with the standard asserted by this Court in *Mt. Healthy*. This Court has recognized that Respondent may not assert a constitutional claim for actions irrelevant to the decision to revoke his privileges as a defense to such adverse employer action. Correspondingly, Respondent's 42 USC § 1983 claim must fail as a matter of law.

II. THE DISTRICT COURT PROPERLY GRANTED HUGH'S MOTION FOR SUMMARY JUDGMENT AGAINST RESPONDENT'S COMMON LAW CLAIMS.

A. The Purpose of HCQIA is to Protect Patients and Improve Safety.

Congress enacted HCQIA to help protect patients from sub-standard doctors by improving physician monitoring on a national scale. Prior to HCQIA's enactment, there was an increasing problem of "incompetent and unprofessional physicians" affecting the United States'

medical system. H.R. Rep. No. 99-903, at 2 (1986). Physicians were able to avoid restrictions or revocations of their privileges and their history of malpractice suits by simply practicing medicine in another state. Congress sought to remedy these situations in which a physician with a "long history of incompetence or unprofessional conduct" was able to continue practicing medicine and "cause needless deaths and injury for years after their damaging behavior was noticed." H.R. Rep. No. 99-903, at 2 (1986).

Congress enacted HCQIA to put an end to this cycle by providing physicians with a mechanism to monitor one another by engaging in a "professional review action" of fellow physicians. A professional review action is

> 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…

42 U.S.C. §11151(9) (citation omitted). Disciplinary actions affecting a physician's privileges for more than thirty days are reported to the National Practitioner Data Bank so that every hospital in the United States can have access to the results of the disciplinary proceedings.

In conjunction with the monitoring system, HCQIA provides that doctors who participate in professional review actions "shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action". 42 U.S.C § 11111(a)(1). In creating this provision of HCQIA, Congress explicitly sought to promote hospital safety by providing immunity to both doctors and hospitals that engage in professional review actions; Congress did not seek to provide a recourse for disgruntled doctors who were not happy with the reviewer's ultimate decision. *Doe v. U.S. Dep't of Health & Human Servs.*, 871 F. Supp. 808, 812 (E.D. Pa. 1994), *aff'd*, 66 F.3d 310 (3d Cir. 1995). This immunity is vital to HCQIA's purpose because it encourages doctors to review their colleague's conduct and

professional standards of care without fear of being individually subject to litigation. This is necessary to ensure patient safety as only those physicians who meet certain standards of care will be able to continue practicing medicine. Furthermore, it is essential that fellow doctors are the ones to evaluate their peers because they are in the best position to assess whether the doctor is comporting with the requisite standard of care.

B. HUGH Was Reasonable in its Belief that the Action Taken Against Respondent Was in the Furtherance of Quality Health Care.

1. The Test for Reasonableness Under HCQIA is an Objective Standard.

HCQIA's legislative history and relevant case law assert that investigatory bad faith in a professional review action does not eliminate immunity. Thus, *assuming arguendo*, even if the initial motivation for convening the ad hoc committee was for reasons distinct from those found during the investigation, HUGH's immunity is not destroyed. Congress considered making the standard for professional review actions a subjective "good faith" standard, but realized that good faith "might be misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action." H.R. Rep. No. 99-903, at 10 (1986). Congress instead implemented an objective "reasonable belief" standard. This standard is satisfied if 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 protect patients. H.R. Rep. No. 99-903, at 10 (1986). "[T]he Act does not require that the professional review result in an actual improvement of the quality of health care, nor does it require that the conclusions reached by the reviewers were in fact correct." *Poliner v. Texas Health Sys.*, 537 F.3d 368, 378 (5th Cir. 2008) (internal quotations omitted).

Austin formally established the objective test for reasonableness, holding "bad faith is immaterial. The real issue is the sufficiency of the basis for the defendants' actions." 979 F.2d at

734. Multiple courts have continued to recognize an objective reasonableness standard. *See Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 635 (3d Cir. 1996) ("assertions of bad faith and anticompetitive motive are irrelevant to the question of whether a decision was taken in a reasonable belief that it would further quality health care"); *Bryan,* 33 F.3d at 1323 ("[t]he legislative history of section 11112(a) indicates that the statute's reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard"); *Imperial v. Suburban Hosp. Ass'n, Inc.*, 37 F.3d 1026, 1030 (4th Cir. 1994) ("[a]n objective [standard of review] looks to the totality of the circumstances").

2. The Action of the Ad Hoc Committee was in Furtherance of Providing Quality Health Care Under the Reasonableness Standard.

The ad hoc committee had reason to believe that revoking Respondent's privileges would further quality health care at HUGH. "This prong of the test is met if 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." *Brader v. Allegheny Gen. Hosp.,* 167 F.3d 832, 840 (3d Cir.1999). The committee considered information such as: post-operative infection rates, complications noted in patient records, autopsy findings, "sentinel events," malpractice claims, patient complaints, Respondent's temperament and compliance with Hospital staff rules. (R. at 4). The committee looked to this information to identify whether Respondent's professional conduct was "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." (R. at 3-4); Hanover University General Hospital Medical Staff Bylaws §19.01a.

The ad hoc committee found that Respondent had "unacceptably high rates of morbidity and postoperative care complications," and failed to meet HUGH's standard of care by acting in

a way that impeded the quality of care due to patients. (R. at 5). Specifically, the ad hoc committee found that, over a course of six years, Respondent had seven patients die on his operating table and his post operation infection rate was more than seven percent above the hospital average, at an astounding twenty-two percent. (R. at 11). Further, there were multiple incidents of Respondent's unruliness and abusive behavior in dealing with nurses and patients. (R. at 11).

Respondent's overall record, including multiple incidents and poor statistics over a six-year period, is indicative of a reoccurring tendency of sub-standard care and warrants legitimate health care quality concerns. *See also Imperial,* 37 F.3d at1029.[10] Minor disciplinary action or training would not have remedied a fundamental flaw in Respondent's standard of care and abrasive behavior. HUGH's action was therefore reasonable under the circumstances in order to protect patients from harm and to further quality health care. The Appellate Court's claim that the revocation of Respondent's privileges was not proportionately warranted by the facts is therefore unsubstantiated. The ad hoc committee did an expansive investigation of Respondent's practices that could affect quality health care services. In reaching their decision to revoke his privileges based off of the information found during their inquiry, HUGH was reasonable in thinking the action was in furtherance of providing quality health care.

Respondent has failed to prove by a preponderance of the evidence that HUGH did not satisfy this requirement of HCQIA. Consequently, he has failed to overcome HCQIA's presumption that the ad hoc committee made its decision in the reasonable belief that it would further quality health care.

[10] Medical records, which showed physician's inappropriate use of antibiotics, unavailability to nurses and to medically necessary meetings, as well as his failure to learn or show improvement in patient care, were considered grounded in legitimate health care quality concerns.

C. HUGH's Reasonable Effort to Obtain the Facts of the Matter is Not in Contention.

Respondent focused his claim on elements one, three and four of the HCQIA requirements and did not dispute that HUGH put forth a reasonable effort to obtain the facts of the matter. The Appellate Court acknowledged this, stating that "[w]e cannot confidently say that he has rebutted the standard calling for a reasonable effort to obtain the facts of the matter, §1112(a)(2)..." (R. at 22) (internal quotations omitted). While reliance on a "thin and misleading portion of the physician's record" may show a lack of reasonable effort to obtain the facts of the matter, HUGH put forth a legitimate investigatory effort by compiling six years of records which included morbidity rates, post-operation infection rates, medical notes and reports of hostile incidents between Respondent and fellow staff, as well as between Respondent and his patients. Further, as HCQIA only requires a "reasonable effort to obtain the facts," an independent review body need not investigate the matter so it is immaterial that HUGH did not have its findings independently assessed. *See Gabaldoni v. Wash. County Hosp. Ass'n*, 250 F.3d 255, 261 (4th Cir. 2001).

D. Adequate Notice and Hearing Procedures Were Afforded to Respondent.

1. HUGH Abided by HCQIA's Requirement of a "Professional Review Action" When Considering the Respondent's Conduct.

In order to maintain HCQIA immunity, a hospital must abide by the requirements for participating in a "professional review action." 42 U.S.C. § 11111(a)(1). The law does not, however, require strict adherence to HCQIA bylaws or safe harbor provisions in order for immunity to still apply. *Wieters v. Roper Hosp., Inc.*, No. 01-2433, 2003 WL 550327 (4th Cir. Feb. 27, 2003). Further, HCQIA does not require that a professional review body's entire course of investigative conduct meet particular standards in order for a hospital to be immune from

liability. *Fobbs v. Holy Cross Health Sys. Corp.*, 789 F. Supp. 1054 (E.D. Cal. 1992), *aff'd*, 29 F.3d 1439 (9th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). All that is required under HCQIA's definition of a "professional review action" is "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. 42 U.S.C. §11151(9).

HUGH's review action comports with such "professional review action" standards. The ad hoc committee convened out of concerns that Respondent's conduct would have a negative effect on HUGH's delivery of health care services. The review body was composed of other hospital professionals who examined Respondent's conduct to determine whether it was "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." (R. at 3; Hanover University General Hospital Medical Staff Bylaws §19.01a).Though the review process did not strictly adhere to the procedures in the Medical Staff Bylaws, such adherence is not required by HUGH in order to maintain HCQIA immunity, so long as, generally, the requirements of HCQIA for participating in a professional review action were met. *See Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 609 (4th Cir. 2009) (*quoting Poliner,* 537 F.3d at 380-81) ("HCQIA immunity is not coextensive with compliance with an individual hospital's bylaws. Rather, the statute imposes a uniform set of national standards. Provided that a peer review action ... complies with those standards, a failure to comply with hospital bylaws does not defeat a peer reviewer's right to HCQIA immunity from damages").

2. *The Ad Hoc Committee Afforded Respondent Opportunities for Adequate Notice and Hearing Procedures.*

The ad hoc committee's professional review action met HCQIA's requirement of adequate notice and hearing procedures. HCQIA only requires notice of the proposed action, reasons for the proposed action, that the physician has a right to request a hearing on the proposed action, a time limit of not less than thirty days within which to request a hearing and a summary of the physician's rights in the hearing. 42 U.S.C. § 11112(b)(1). As Respondent did not request a hearing, the other requirements under 42 U.S.C. § 11112(b)(2)-(3) are inapplicable.

HCQIA specifies "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section." 42 U.S.C. § 11112(b). The legislative history of HCQIA reinforced this, providing, in part, "[i]f other procedures are followed, but are not precisely of the character spelled out in [42 U.S.C. § 11112(b)], the test of "adequacy" may still be met under other prevailing law. H.R. Rep. No. 99-903, at 10 (1986).

Respondent was given notice of the proceedings and was informed of his right to a hearing on more than one occasion. The July 1 letter stated that the ad hoc committee had convened pursuant to Article XIX of HUGH bylaws and would be proposing a recommendation to the MEC that would ultimately decide whether or not to restrict or revoke Respondent's membership or privileges. (R. at 4). The July 1 letter also noted what information the ad hoc committee would be considering and indicated Respondent's right to counsel and a fair hearing if the ad hoc committee recommended, and the MEC adopted, disciplinary action against him. (R. at 4). The July 31 letter re-iterated his right to a fair hearing to address the MEC's decision. (R. at 5). As such, HUGH's procedures met the test of adequacy required in HCQIA.

Though the letters did not specify the time period within which Respondent had to request a hearing, or a summary of his rights in the hearing, Respondent nevertheless denied any such opportunity. Furthermore, HCQIA does not require the doctor to even participate in the hearing. *Egan v. Athol Mem'l Hosp*., No. 97-1565, 1998 WL 10266 (1st Cir. Jan. 6, 1998) (*quoting Sklaroff v. Allegheny Health Educ. Research Found.*, No. 95-4748, 1996 WL 383137, at *8 (E.D. Pa. July 8, 1996)) ("nothing in the Act requires that a physician be permitted to participate in the review of his care"). Respondent waived his right to a hearing and, as such, it is improper for him to now contend that he was not afforded adequate notice and hearing procedures.

3. Respondent's Claims of a Lack of "True Peer Review" and a "Sham Peer Review" are Unsubstantiated.

While Respondent contends that a "true peer review" would have involved different ad hoc committee members who more closely resembled his credentials and experience, HCQIA only requires that the committee represent a "professional review body." 42 U.S.C. § 11151(11); *see Rogers*, 971 F. Supp. at 234 ("we do not interpret §11151(9) to require that a professional review action necessarily involve consultation with a sub-specialist in the same field as the physician being reviewed") (internal citations omitted). A professional review body is "a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." 42 U.S.C. § 11151(11). HCQIA only mandates that the professional review body members be a part of the medical staff of the health care entity involved; no further restrictions exist as to who is allowed to sit on the committee. As the members of the ad hoc committee were all medical staff of HUGH, Respondent's argument on the matter is moot.

Further, Respondent argues that HUGH engaged in a "sham peer review," a concept not identified in HCQIA. While evidence of decision-maker bias can be considered in determining whether an employee has been given a truly fair process with adequate notice and hearing, Respondent still has the burden of proving such bias by a preponderance of the evidence. His contention that the members were biased, had conflicts of interest and had hostile agendas must fail as a matter of law. The professional background of the review committee members is not in itself fatal to HUGH's immunity and Respondent failed to meet his evidentiary burden to identify a sham or bad faith review. *See Rogers v. Columbia/HCA of Cent. La., Inc.*, 971 F. Supp. 229 (W.D. La. 1997) (finding that a professional review committee with members in direct economic competition with the individual being reviewed did not disqualify the professional review action). Respondent merely alleges that Dr. Milk, Dr. Polishov, Dr. Glower and Mary Elizabeth Kreutzer are biased, and it is recognized that the nonmoving party must do more than rely on mere allegations of the existence of a factual dispute to defeat summary judgment. *E.g., Basith*, 241 F.3d at 928; *Kelly*, 924 F.2d at 357. If, as Respondent seems to contend, HUGH would have found any reason to revoke his privileges despite the evidence he presented, then the information he subsequently offered would not have changed the Board's decision. The Board's willingness to reinstitute Respondent's privileges after he asserted a rationale for his record evidences HUGH's lack of bias.

As a matter of law, Respondent has failed to prove that the ad hoc committee did not provide him with adequate notice and hearing procedures. The Appellate Court's contrary assertion that the true agenda of the ad hoc committee's investigation was Respondent's ConnectSpace post is irrelevant because, as previously stated, "bad faith is immaterial." *Austin,* 979 F.2d at 734. HCQIA only requires that the professional review activity comport with specific

standards and procedures in order to provide adequate notice and hearing procedures; a "true peer review" and claims of a "sham peer review" are not considered within such requirements.

E. HUGH Reasonably Believed That the Action Was Warranted by the Facts Known at the Time of its Investigation.

As the District Court acknowledged, the analysis under this requirement of HCQIA is remarkably similar to the analysis under the first requirement that the action was reasonably believed to be in furtherance of quality health care. HUGH's reasonable belief that revoking Respondent's privileges would further quality health care is bolstered when analyzing what evidence the ad hoc committee was aware of at the time of its investigation.

As the Appellate Court points out, reasonable belief is based on the "information available to them at the time of the professional review action." *Meyers v. Columbia/HCA Health Care Corp.*, 341 F.3d 461, 468 (6th Cir. 2003). In alleging that the ad hoc committee disingenuously arrived at its findings concerning Respondent's conduct, the Appellate Court fails to acknowledge the timing of Respondent's retort. Respondent did not offer any extrinsic evidence explaining his record until after the MEC arrived at its decision, and after he had denied his opportunity for a hearing. As such, the committee was precluded from considering the faulty HVAC system and vulnerable state of Respondent's patients when they voted to revoke Respondent's privileges. Case law supports that, "[e]ven if [the plaintiff] could show that these doctors reached an incorrect conclusion on a particular medical issue because of a lack of understanding, that does not meet the burden of contradicting the existence of a *reasonable belief* that they were furthering health care quality in participating in the peer review." *Imperial*, 37 F.3d at 1030(emphasis added). Respondent has thus failed to show by a preponderance of evidence that the ad hoc committee did not reasonably believe that the action was warranted by the facts known at the time of the professional review action.

CONCLUSION

For the reasons stated above, the Court should reverse the Twelfth Circuit's finding that Respondent has produced evidence sufficient to bring his 42 U.S.C. § 1983 and common law claims before a jury. There are no genuine issues of material fact as to whether Respondent's ConnectSpace post was protected under the First Amendment, nor is there sufficient evidence to rebut the presumption that HUGH has immunity against Respondent's common law claims under HCQIA. As such, HUGH's motion for summary judgment should be granted.

Respectfully submitted,

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Team 1304