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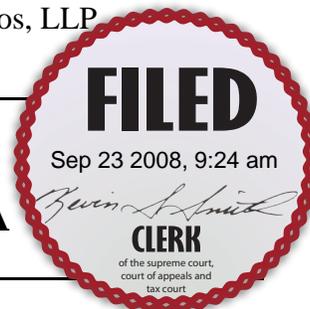
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**IN THE
COURT OF APPEALS OF INDIANA**



CHARLES N. POLLACK, M.D.)

Appellant-Plaintiff,)

vs.)

No. 49A02-0802-CV-120)

SISTERS OF SAINT FRANCIS HEALTH)
SERVICES, INC. d/b/a ST. FRANCIS)
HOSPITAL & HEALTH SERVICES)
f/k/a SAINT FRANCIS HOSPITAL & HEALTH)
CENTERS, INC.)

Appellee-Defendant.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D13-0407-PL-1352

September 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Charles N. Pollack, M.D. (Dr. Pollack) appeals the trial court's grant of summary judgment in favor of Sisters of St. Francis Health Services, Inc. d/b/a St. Francis Hospital & Health Centers f/k/a St. Francis Hospital & Health Centers, Inc. (St. Francis) on Dr. Pollack's complaint for damages resulting from a claimed breach of contract over the termination of his medical staff privileges at St. Francis. On appeal, Dr. Pollack presents six issues for our review, which we consolidate and restate as: did the trial court properly grant summary judgment in favor of St. Francis?

We affirm.

Prior to and during 1996, Dr. Pollack was a surgeon in Indianapolis and one of four physician shareholders of an independent practice group, Cardiac & Vascular Surgery Associates, P.C. (CVSA). Also during that time, Dr. Pollack held thoracic and cardiovascular surgery privileges at St. Francis. The medical staff at St. Francis is organized and operates under its Medical Staff Constitution and Bylaws and other promulgated Rules and Regulations. Dr. Pollack last renewed his privileges at St. Francis for the calendar years 1995 and 1996.

In June 1996, Dr. Pollack became concerned that one of his business partners with CVSA and a fellow cardiothoracic surgeon at St. Francis (Dr. Doe) was suffering a relapse of a previous substance abuse problem. Dr. Pollack made several unsuccessful attempts to persuade Dr. Doe to seek treatment. On June 18, 1996, the shareholders of CVSA met to discuss Dr. Pollack's concerns about Dr. Doe. The other shareholders, however, did not agree with Dr. Pollack's assessment of Dr. Doe and did not respond in a manner deemed appropriate by Dr. Pollack. In fact, rather than taking action against Dr. Doe, the other

shareholders recommended that Dr. Pollack seek help from a mental health professional – a recommendation with which Dr. Pollack agreed because of the strain the Dr. Doe matter was placing on him.

On June 24, 1996, Dr. Pollack told his partners and the other surgeons of CVSA that because of his mental distress and distraction over the Dr. Doe situation, he believed he could not safely perform surgery. That same day, Dr. Pollack informed the CVSA Administrator that he was taking an indefinite leave of absence from CVSA until such time as his conflict with Dr. Doe was resolved. Dr. Pollack's employment agreement with CVSA contained a two-year non-compete agreement that prohibited him from practicing cardiovascular surgery at St. Francis outside of CVSA.¹

The following day, June 25, 1996, Dr. Pollack spoke with Dr. Donald Kerner, Vice President of Medical Affairs for St. Francis, and expressed his concerns about Dr. Doe. Dr. Pollack told Dr. Kerner that he was so distressed over the Dr. Doe situation that he believed he could no longer safely perform surgery. Dr. Kerner invited Dr. Pollack to a meeting later that day to discuss his concerns with other members of the St. Francis medical staff. Present at the meeting were Dr. Kerner; Kevin Leahy, CEO of St. Francis; Robert Brody, Executive Vice President and COO of St. Francis; Dr. Eve Olson, Vice President of the Medical Staff; Drs. Fry and Knudson, two of Dr. Pollack's partners at CVSA; Dr. Doe; Dr. Frick, personal physician to Dr. Doe; and Candace Backer of the Indiana State Medical Association's Physician Assistance Program. Mr. Leahy opened the meeting by saying they had all been called to discuss Dr. Pollack's concerns about Dr. Doe and that they were also going to

¹ Dr. Pollack never returned to his practice with CVSA and was eventually terminated as an employee.

discuss Dr. Pollack's failure to attend to a surgical case that morning.² During the ensuing discussion among the meeting participants, Dr. Pollack stated that he was not in a state of mind to be able to safely perform surgery. Dr. Pollack felt that he was too emotionally distraught and unable to process issues well enough to continue to function as a surgeon. According to Dr. Pollack, Dr. Kerner and Dr. Olson encouraged him to take a leave of absence or time off from his practice. Dr. Pollack did not respond, positively or negatively, to their suggestions.

Because of Dr. Pollack's comments and apparent distress at the meeting, Dr. Kerner was concerned enough about Dr. Pollack's well-being that he called Dr. Pollack later that evening to see how he was feeling. Dr. Pollack assured Dr. Kerner that he was alright and agreed to see Dr. Stephen Matney, a psychiatrist, for a mental health assessment and to have Dr. Matney contact Dr. Kerner about his status.

Dr. Kerner then wrote Dr. Pollack a letter dated June 27, 1996, in which he outlined his understanding of what transpired at the June 25 meeting. Dr. Kerner noted the following:

1. You are currently on a pre-scheduled one week vacation beginning June 26, 1996.
2. You stated that the stresses that you are experiencing prevent you from conducting your surgical practice for an indefinite period.
3. We agreed that you will extend your vacation with a leave of absence until further notice and will request in writing an end to your leave of absence prior to resuming your surgical practice. The Board of Directors was informed of your request for a leave of absence at their meeting today. The Board has granted this request.

² At some point Dr. Kerner learned that Dr. Pollack did not appear for a surgery scheduled for that morning (June 25) for which the patient had been prepped and was waiting in the operating room.

4. Further, we agreed your counselor is expected to communicate with me this week for reassurance that you are receiving appropriate and professional assistance given your current mental status.
5. Before resuming your practice in the hospital, you provide the hospital and Medical Staff leadership with written documentation of your physical and mental status related to performing the privileges you normally carry out.
6. Before resuming your practice in the hospital, we request that all delinquent medical records must be completed.

Appellant's Appendix at 1540-41. Although Dr. Pollack maintains that he never requested a leave of absence from St. Francis, as alluded to in paragraph 3 of Dr. Kerner's letter, Dr. Pollack never requested a hearing or challenged the decision of the Board approving a leave of absence.

In a letter dated June 18, 1997, nearly one year after Dr. Pollack's leave of absence began, Dr. Kerner requested that Dr. Pollack advise him as to his intentions with respect to his medical staff status at St. Francis. At Dr. Pollack's request, his treating psychiatrist, Dr. Matney, wrote to Dr. Kerner on June 26, 1997, and advised him that during Dr. Pollack's leave of absence Dr. Pollack suffered from a clinical depression that rendered him "quite incapacitated." *Id.* at 1543. Dr. Matney further stated that although Dr. Pollack's symptoms had "improved significantly" with medication and therapy, Dr. Pollack had "no immediate plans for return to work." *Id.*

On July 22, 1997, Dr. Pollack wrote to Dr. Kerner that he could not "predict with certainty the precise date for [his] return to active practice." *Id.* at 1606. Dr. Pollack requested a continuance of his leave of absence for an additional ninety days. The Board approved Dr. Pollack's request and extended his leave of absence to October 28, 1997.

In a letter dated October 31, 1997, three days after the extension of his leave of absence expired, Dr. Pollack informed Dr. Kerner that he was “prepared to return to the active practice of medicine” and inquired into the necessary steps to reinstate his privileges with St. Francis. *Id.* at 1608. In a letter dated December 1, 1997 and sent by certified mail, Dr. Kerner advised Dr. Pollack that the Board had asked the Officers’ Committee to review his request and that, prior to an interview, the Officers’ Committee wanted Dr. Pollack to provide information to the Credentials Committee regarding (1) the specifics of his intended practice; (2) what continuing education or other medical activity he had participated in over the last twelve to fifteen months to demonstrate his current competency; and (3) what medical and surgical privileges he intended to pursue. Dr. Kerner advised Dr. Pollack that after Dr. Pollack supplied the requested information, an interview before the Officers’ Committee could be held on January 15, 1998. In order to allow the Credentials Committee sufficient time to review Dr. Pollack’s response, the Credentials Committee recommended that Dr. Pollack’s leave of absence be extended to February 28, 1998. The Board approved this recommendation.

Dr. Pollack subsequently raised a concern that it would be a conflict of interest for Dr. Fry, one of his former business partners with CVSA with whom he was engaged in litigation, to sit in on the requested interview as a member of the Officers’ Committee. At a January 15, 1998 meeting, the Officers’ Committee discussed Dr. Pollack’s concern and determined that Dr. Fry could be present during the interview, but that he would not take part in any discussion or vote on the recommendation with respect to Dr. Pollack. The Officers’ Committee felt that it was important for Dr. Fry to be present during Dr. Pollack’s interview

because he was the Chairman of the Surgery Department and an elected member of the Officers' Committee. Dr. Pollack was notified of this determination by certified letter. In the same letter, Dr. Pollack was also advised of the date of his interview, February 12, 1998, and again reminded to provide the information requested. Dr. Pollack never provided the requested information to the Credentials Committee and failed to attend the scheduled interview with the Officers' Committee.

Dr. Pollack's leave of absence expired on February 28, 1998. Because of Dr. Pollack's failure to provide the requested information or meet with the Officers' Committee and given the expiration of his leave of absence, the Credentials Committee recommended to the Board that, as provided in the Medical Staff Constitution and Bylaws³ and the Rules and Regulations of the Credentials Manual,⁴ Dr. Pollack be deemed to have voluntarily resigned his privileges at St. Francis. The Officers' Committee confirmed the recommendation of the

³ The Medical Staff Constitution and Bylaws provide:

If at any time an appointee fails to provide required information pursuant to a formal request by the Credentials Committee, Medical Executive Committee, Officers' Committee or the Chief Executive Officer, the appointee's clinical privileges shall be deemed to be voluntarily relinquished until the required information is provided to the satisfaction of the requesting party. For purposes of this section "required information" shall refer to (1) physical or mental examination reports as specified elsewhere in this policy, or (2) information from another health care facility or agency.

Id. at 1247.

⁴ The Rules and Regulations of the Credentials Manual provide the following with regard to the procedure for a leave of absence:

Individuals appointed to the Medical Staff may, for good cause, be granted leaves of absence by the Board for a definitely stated period of time not to exceed one (1) year. The reason for the requested leave of absence must be stated in writing. Absence for longer than one (1) year shall constitute voluntary resignation of Medical Staff appointment and clinical privileges unless an exception is made by the Board upon recommendation of the Medical Executive Committee.

Id. at 1448.

Credentials Committee, and the Board accepted the recommendation thereby approving the determination that Dr. Pollack had voluntarily resigned his privileges.

Dr. Pollack was notified that his “voluntary” resignation and relinquishment of his privileges at St. Francis were approved by the Board. Dr. Pollack was also informed that St. Francis’s records would reflect that he was in good standing and that he resigned from the medical staff. He was further advised that the action taken would not reflect negatively on any future application he may wish to make to the St. Francis medical staff. Dr. Pollack never requested a hearing nor did he appeal or otherwise protest the Board’s decision to accept his “voluntary” resignation.

Over six years later, on May 18, 2004, Dr. Pollack filed a complaint alleging that St. Francis Hospital breached its contract with him by (1) arbitrarily and unilaterally placing him on a leave of absence from the hospital without notice or hearing in violation of the policies and procedures outlined in the Medical Staff Constitution and Bylaws and Rules and Regulations; (2) placing arbitrary restrictions on him for resumption of his staff privileges in violation of the procedures outlined in the Medical Staff Constitution and Bylaws and Rules and Regulations; (3) conditioning his resumption of his medical staff privileges on his attendance at a meeting with Dr. Fry, with whom he was engaged in an ongoing dispute over CVSA; and (4) otherwise failing to abide by the Constitution and Bylaws and Rules and Regulations.⁵ Dr. Pollack alleged that he suffered damages and requested monetary relief. St. Francis filed its answer and affirmative defenses on August 31, 2004. On November 2,

⁵ Here, the parties do not dispute that the Constitution and Bylaws and Rules and Regulations constituted a contract between St. Francis and Dr. Pollack. See *Pepple v. Parkview Mem’l Hosp., Inc.*, 536 N.E.2d 274

2007, St. Francis filed its motion for summary judgment. The trial court held a hearing on St. Francis's motion on January 11, 2008, and entered an order granting summary judgment in favor of St. Francis on January 24, 2008. Dr. Pollack filed his notice of appeal on February 1, 2008.

“The trial court’s grant of summary judgment is clothed with a presumption of validity and the appellant bears the burden of proving that the trial court erred.” *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933, 936 (Ind. Ct. App. 1996).

Our review of a grant of summary judgment is governed by the following standard:

[W]e apply the same standard as the trial court: we must decide whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to a judgment as a matter of law. Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing summary judgment must respond by designating specific facts establishing a genuine issue for trial. We may consider only those portions of the pleadings, depositions, and any other matters specifically designated to the trial court by the parties for purposes of the motion for summary judgment. Any doubt as to the existence of an issue of material fact, or an inference to be drawn from the facts, must be resolved in favor of the nonmoving party. Although the nonmovant has the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court’s decision to ensure that the nonmovant was not improperly denied his or her day in court.

City of Mishawaka v. Kvale, 810 N.E.2d 1129, 1132-33 (Ind. Ct. App. 2004) (citations omitted). The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which can be determined as a matter of law. *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933.

(Ind. 1989) (citing *Terre Haute Reg'l Hosp., Inc. v. El-Issa*, 470 N.E.2d 1371 (Ind. Ct. App. 1984), *trans. denied*) (hospital staff bylaws can constitute a contract between the hospital and its staff).

We begin by noting that St. Francis is a private as opposed to a government-operated hospital. The decision of a private hospital concerning staff privileges is accorded great deference. *Kiracofe v. Reid Mem'l Hosp.*, 461 N.E.2d 1134 (Ind. Ct. App. 1984). The role of the court in such a case is limited to a determination of whether the hospital complied with the procedures set out in its bylaws. *Id.* In reviewing a private hospital's procedural compliance, the test is one of substantial rather than strict compliance. *Stiller v. La Porte Hosp. Inc.*, 570 N.E.2d 99 (Ind. Ct. App. 1991). Once it is determined that the hospital has substantially complied with the procedures in its bylaws, any decision reached by the hospital board is not subject to judicial review. *Kiracofe v. Reid Mem'l Hosp.*, 461 N.E.2d 1134.

On appeal, Dr. Pollack maintains that St. Francis breached the contract it had with him by failing to substantially comply with the Constitution and Bylaws and Rules and Regulations "when it placed Dr. Pollack on a leave of absence and later terminated his medical staff privileges." *Appellant's Brief* at 26. Specifically, Dr. Pollack argues that St. Francis committed at least ten violations of its own policies and procedures by failing to involve the appropriate governing board, failing to refer Dr. Pollack to a proper peer review committee, failing to provide Dr. Pollack with notice that he was being subjected to peer review, failing to follow the proper investigative procedures, failing to afford Dr. Pollack a proper hearing, failing to maintain confidentiality, failing to refer Dr. Pollack's request to return to the medical staff to the appropriate committee, failing to exclude Dr. Fry from the committee that was to rule on his request to return to the medical staff of St. Francis, and failing to have the appropriate board consider the termination of his privileges.

We first consider St. Francis's actions prior to the Board's approval of a leave of absence for Dr. Pollack. Dr. Pollack's arguments in this regard center around his alleged failure to attend a surgical procedure on the morning of June 25. Dr. Pollack argues that he was not given proper notice that during the meeting on June 25, his alleged missed surgery was to be a topic of discussion. He further argues that St. Francis wholly failed to follow the policies and procedures for designating a proper peer review committee and initiating an investigation into the matter of the alleged missed surgery prior to taking adverse action against him in the form of an involuntary leave of absence.

Dr. Pollack's arguments focus on a narrow set of facts and ignore the bigger picture. There is no dispute that the June 25 meeting was not a meeting before a formal peer review committee. It was an informal meeting called primarily to discuss Dr. Pollack's concerns about a colleague and the even greater concern over Dr. Pollack's mental health. The record clearly demonstrates that Dr. Pollack readily admits his mental state and distress over his perceived problem with Dr. Doe caused him to voluntarily take a leave of absence from his practice. According to his psychiatrist, Dr. Pollack stopped practicing medicine because he suffered a "debilitating episode of depression". *Appendix* at 1543. Dr. Pollack stopped performing surgery and ceased his practice of his own volition. The missed surgery was not the main topic of the June 25 meeting, nor was it the impetus behind the leave of absence.

Moreover, Dr. Pollack neither said nor did anything that indicated to those present at the June 25 meeting that he did not want a leave of absence from St. Francis. Most telling is that at no time did Dr. Pollack request a hearing or appeal the decision of the St. Francis

Board approving his leave of absence.⁶ Further evidencing his acquiescence in the leave of absence is that nearly a year after his leave of absence began, Dr. Pollack requested that his leave of absence be extended.

Furthermore, under the terms of his employment contract with CVSA, Dr. Pollack was subject to a two-year non-compete agreement that prohibited his practice at St. Francis outside of CVSA. Thus, given his request for a leave of absence from his practice with CVSA, it follows that Dr. Pollack was likewise taking a leave of absence from St. Francis. To be sure, Dr. Pollack admitted that while he was on his leave of absence from CVSA he would not be seeing patients at St. Francis. From the day of the June 25 meeting, Dr. Pollack saw no patients at St. Francis or at his clinic and he did not perform any surgeries. The designated evidence clearly demonstrates that St. Francis did not force Dr. Pollack to take a leave of absence and that Dr. Pollack did not stop practicing medicine or exercising his privileges at St. Francis because he was placed on a leave of absence or because of any other action taken by St. Francis. Under the facts and circumstances of this case, we conclude that St. Francis cannot be said to have breached its contract with Dr. Pollack by placing him on a leave of absence.

We also note that Dr. Pollack suffered no harm to his reputation as a result of the leave of absence. Regardless of whether St. Francis placed Dr. Pollack on a leave of absence with or without his request, it remains that no stigma attached to Dr. Pollack as a result

⁶The Constitution and Bylaws and Rules and Regulations provide that a practitioner has thirty days to make a written request for a hearing following receipt of notice of an adverse action. Where no request is made in the time and manner provided, the individual is deemed to have waived the right to a hearing and to have accepted the action taken. This is not to say, however, that a leave of absence constitutes an adverse action. As noted, *infra*, a leave of absence carries no stigma and has no negative impact on the resumption of medical staff privileges.

thereof. A leave of absence does not negatively impact resumption of medical staff privileges. It is not reported as misconduct or as any other negative act to any agency. In fact, without labeling the cessation of his practice as a leave of absence, it would have appeared that Dr. Pollack simply abandoned his practice, which would have likely had more of a stigmatizing effect on Dr. Pollack.

We next consider the actions of St. Francis leading up to the termination of Dr. Pollack's medical staff privileges. The evidence shows that after being placed on a leave of absence, Dr. Pollack was treated for a severe clinical depression. After the standard one-year period for a leave of absence expired,⁷ St. Francis accommodated Dr. Pollack by granting his request to extend his leave of absence beyond one year and, upon his request for reinstatement, providing him with more than ample time to comply with its request for information related to his mental health and competency to practice medicine.⁸ Dr. Pollack, however, failed to appear for the scheduled hearing, of which he was notified, and failed to provide St. Francis with the information requested. Dr. Pollack does not claim that the

⁷ See footnote 4, *supra*.

⁸ The request for information was in line with the procedure set forth in the Rules and Regulations for considering a request for reinstatement following a leave of absence, which provides as follows:

(c) At the conclusion of the leave of absence, the individual may be reinstated upon filing a written statement with the Vice President for Medical Affairs summarizing the professional activities undertaken during the leave of absence. The individual shall also provide such other information as may be requested by the hospital at that time.

(d) If the leave of absence was for medical reasons, then the appointee must submit a report from his or her attending physician indicating that the appointee is physically and/or mentally capable of resuming a hospital practice and exercising the clinical privileges requested. The appointee shall also provide such other information as may be requested by the hospital at that time. All information shall be forwarded by the Vice President for Medical Affairs to the Credentials Committee. After considering all relevant information, the Credentials Committee shall then make a recommendation regarding reinstatement to the Board for final action.

information requested was unreasonable. Rather, he excuses his failure to provide the information and to appear at the scheduled hearing arguing that the presence and participation of Dr. Fry as a member of the Officers' Committee presented a conflict of interest. Yet, the evidence shows that, in accordance with the Constitution and Bylaws and Rules and Regulations, Dr. Fry, although permitted to attend Dr. Pollack's interview, would not be permitted to discuss or vote on the resumption of Dr. Pollack's privileges. The committee concluded that it was necessary for Dr. Fry, as the head of the surgery department, to be present to answer any questions the other committee members may have in deciding whether to allow Dr. Pollack to resume his privileges at St. Francis. The Committee's determination to allow Dr. Fry to attend was reasonable and consistent with the Rules and Regulation of the Credentials Manual concerning conflict of interest.⁹ By the terms of Constitution and Bylaws and Rules and Regulations, Dr. Pollack, by his failure to provide the requested information and the fact that his leave of absence had expired, was deemed to have voluntarily resigned and relinquished his privileges. Dr. Pollack's failure to cooperate with St. Francis, not any action by St. Francis, resulted in the termination of his medical staff privileges.

Id. at 1449.

⁹ Specifically, the Credentials Manual provides:

In any instance where an officer, or department chairman or committee chairperson, or member of any Medical Staff committee has or reasonably could be perceived to have a conflict of interest or to be biased in any matter involving another Medical Staff appointee that comes before such individual or committee, or in any instance where any such individual or committee member brought the complaint against the appointee, such individual or member shall not participate in the discussion or voting on the matter, and shall be excused from any meeting during that time, although the individual or committee member may be asked, and may answer, any questions concerning the matter before leaving. . . .

Id. at 1423.

Furthermore, Dr. Pollack failed to request a hearing after being notified that he was deemed to have voluntarily resigned. Indeed, Dr. Pollack took no action until he filed his lawsuit against St. Francis over six years later. The procedure employed by St. Francis to consider the reinstatement of Dr. Pollack's privileges at the very least substantially complied with the Constitution and Bylaws and other promulgated rules and regulations.

From the designated evidence, it is clear that St. Francis acted reasonably and within the provisions of the Constitution and Bylaws and Rules and Regulations.¹⁰ In instances where St. Francis did not follow the letter of its rules, i.e., in extending Dr. Pollack's leave of absence beyond one year after it had expired, it did so to the benefit of Dr. Pollack, extending him every opportunity to resume his practice at St. Francis. Finding no dispute in the material facts, we conclude that the trial court properly granted summary judgment in favor of St. Francis on Dr. Pollack's complaint for breach of contract.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur

¹⁰ Having concluded that the designated evidence demonstrates that St. Francis did not breach its contract with Dr. Pollack or at the very least substantially complied with its Constitution and Bylaws and Rules and Regulations, we need not address the issues of whether St. Francis was immune from liability under applicable state or federal laws or whether the release provision accompanying Dr. Pollack's application for reappointment to the St. Francis medical staff precluded Dr. Pollack's claim against St. Francis.