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**MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JUNE 7, 2019)**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAA ELKHARWILY,

*Plaintiff-Appellant,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant-Appellee.*

No. 17-35009

D.C. No. 3:15-cv-05579-RJB

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

ALAA ELKHARWILY,

*Plaintiff-Appellant,*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant-Appellee.*

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No. 18-35090

D.C. No. 3:17-cv-05838-RBL

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Submitted June 5, 2019**

Before: FARRIS, TROTT, and SILVERMAN,
Circuit Judges.

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In No. 17-35009 ("Elkharwily I"), Alaa Elkharwily, M.D., appeals the district court's judgment after a jury trial his action against Franciscan Health System ("FHS"), alleging defamation and disability discrimination. In No. 1835090 ("Elkharwily II"), Dr. Elkharwily appeals the district court's dismissal of a second action that he brought against FHS. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's judgments in both actions.

## I. Elkharwily I

The district court properly granted summary judgment on Dr. Elkharwily's defamation claim because

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

he did not establish a genuine issue of material fact as to whether FHS's report to the National Practitioner Data Bank was an unprivileged communication under Washington law. *See Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017) (a grant of summary judgment is reviewed de novo); *McNamara v. Koehler*, 429 P.3d 6, 11 (Wash. Ct. App. 2018) (setting forth elements of defamation). FHS's report was demonstrably a privileged communication.

The district court properly exercised its discretion in denying Dr. Elkharwily's motion for a new trial on his claim of disability discrimination under the Washington Law Against Discrimination. *See* Fed. R. Civ. P. 59(a)(1)(A); *Flores v. City of Westminster*, 873 F.3d 739, 748 (9th Cir. 2017) (standard of review); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000) (standard for granting new trial motion). The verdict was not against the clear weight of the evidence because there was evidence in the record from which the jury could have found that Dr. Elkharwily's disability was not a substantial factor in FHS's denial of his application for hospital privileges and whether he could perform the essential functions of the job of a nocturnist. *See Crowley v. Epicept Corp.*, 883 F.3d 739, 751 (9th Cir. 2018) (explaining that there must be an absence of evidence to support the verdict); *Flores*, 873 F.3d at 748 (holding that a new trial will be granted "only if the verdict is against the clear weight of the evidence, and not simply because the evidence might have led [the court] to arrive at a different verdict"); *Stewart v. Snohomish Cty. PUC No. 1*, 262 F. Supp. 3d 1089, 1106 (W.D. Wash. 2017) (setting forth elements of claim), *aff'd* 752 Fed. Appx. 449 (9th Cir. 2018).

Dr. Elkharwily's claims of fabricated evidence, false testimony, and "an unconscionable plan [by defense counsel] to defraud the court" are not supported by the record. In an order denying his motion for a new trial, the court rejected these allegations, saying

> None of what Plaintiff presents in support of this motion rises to the level of a proven lie—or lies—that would justify a new trial. Differences in recollection or opinion do not justify a new trial. There are sharp differrences in the evidence in many, if not most, trials, and those differences can usually be attributed to memory differences occurring in good faith rather than to intentional lies.
>
> There is no justification in Plaintiff's moving papers or in the events of the trial that would justify a conclusion that the verdict resulted from intentionally false evidence by Defendant's witnesses.

Not satisfied with the court's ruling, Dr. Elkharwily filed an unsuccessful motion for reconsideration. The court said, "First, the court is not reasonably well satisfied that the testimony given by one or more material witnesses was false. Second, although Plaintiff and Plaintiff's counsel may have been taken by surprise at trial when testimony was different than expected, they had ample opportunity at trial to meet unexpected testimony." (Emphasis in original).

In an order denying his motion for relief from judgment pursuant Rule 60, the court examined these allegation for a third time and determined that Dr. Elkharwily had not shown either intrinsic or extrinsic fraud, misrepresentation, or misconduct by an opposing

party, citing Fed. R. Civ. Pro. 60(b)(2)(3). The court also concluded that "none of defense counsel's statements [to the jury] amounted to fraud, misrepresentation, or misconduct." [*Id.*] As to Dr. Elkharwily's assertions against witnesses, the court said, "The issues about the accuracy and consistency of the testimony of various witnesses over seven days of trial were of the usual kind commonly seen in trials, and there is no showing of any fraud, misrepresentation, or misconduct." [*Id.*] *See Shimko v. Guenther*, 505 F.3d 987, 993 (9th Cir. 2007).

Upon reviewing the record, we find no error in the court's determinations with respect to counsel's allegations of fraud.

Accordingly, the district court properly exercised its discretion in denying Dr. Elkharwily's motions for a new trial and for relief from judgment under Federal Rule of Civil Procedure 60(b). *See United States v. Chapman*, 642 F.3d 1236, 1240 (9th Cir. 2011) (standard of review). Dr. Elkharwily did not present new evidence that could not, with reasonable diligence, have been discovered earlier. *See Jones v. Aero/Chem Corp.*, 921 F.3d 875, 878 (9th Cir. 1990). Nor did Dr. Elkharwily show that FHS presented fraudulent evidence regarding the availability of other nocturnists to proctor him. *See De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

## II. Elkharwily II

The district court did not err in dismissing, as barred by res judicata, Dr. Elkharwily's claim under Rule 60(d)(3) of fraud on the court allegedly committed by FHS in Elkharwily I. *See Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th Cir.

2016) (stating requirements for res judicata). The court correctly concluded that there was (1) identity of parties, (2) a final judgment on the merits of the fraud allegations under Rule 60(b) in Elkharwily I, and (3) identity of claims because Dr. Elkharwily's amended complaint in Elkharwily II repeated his allegations of fraud by FHS's counsel.

The district court properly exercised its discretion in imposing a sanction under Rule 11 because Dr. Elkharwily's claim was plainly barred by res judicata and therefore baseless. *See Edgerly v. City & Cty. of S.F.*, 599 F.3d 946, 962-63 (9th Cir. 2010); *Holgate v. Baldwin*, 425 F.3d 671, 675 (9th Cir. 2005).

AFFIRMED.

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (FEBRUARY 2, 2018)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant.*

Case No. C17-5838-RBL

[DKTS. #12, #13, #28]

Before: Ronald B. LEIGHTON,
United States District Judge.

THIS MATTER is before the Court on Defendant Franciscan Health System's Motion to Dismiss [Dkt. # 12], Plaintiff Alaa Elkharwily's Motion for Leave to File a Second Amended Complaint [Dkt. #13], and Franciscan's Motion for Sanctions [Dkt. #28]. This is the second case arising out of Elkharwily's failure to obtain privileges at St. Joseph Medical Center. Elk-

harwily alleges that Franciscan and its attorneys concealed and fabricated evidence at the first trial, resulting in fraud on the court. Franciscan argues that *res judicata* bars Elkharwily's baseless fraud claims because Judge Bryan previously adjudicated them.

## I. Background

Elkharwily is a physician with a bi-polar disorder diagnosis. In 2012, Group Health (a non-party) offered Elkharwily employment as a night-shift hospitalist (or nocturnist), contingent on him receiving privileges to practice at Franciscan's St. Joseph Medical Center in Tacoma.

Franciscan's medical executive committee (comprised of doctors and hospital administrators) reviewed Elkharwily's application for privileges and granted him temporary privileges. Shortly thereafter, Franciscan's credentials committee issued a report to the executive committee concerning "red flags" in Elkharwily's background. The executive committee rescinded Elkharwily's temporary privileges, and requested that Franciscan Dr.'s deLeon and Haftel interview Elkharwily about the report. After the interview, the doctors expressed concerns to the medical executive committee about Elkharwily's clinical competence.

The executive committee ordered a competency assessment, noting that Group Health could proctor (provide on-the-job supervision and assessment) Elkharwily. Group Health approved a six-week proctoring plan that allowed Elkharwily to shadow the day-shift hospitalist team. The executive committee determined that because Elkharwily is a nocturnist, he needed

nighttime proctoring. Group Health informed the executive committee that it did not have adequate staffing to proctor Elkharwily at night. The executive committee determined that Elkharwily could not gain sufficient clinical experience to obtain hospital privileges and upheld its decision to rescind Elkharwily's temporary privileges.

Elkharwily appealed to a review-hearing panel that consisted of three active Franciscan staff members who were unfamiliar with the case. The panel made a non-binding recommendation that the executive committee should provide Elkharwily the opportunity to respond to its rejection of the proctoring plan. Nevertheless, the executive committee rejected the recommendation, stating that the hearing panel incorrectly focused on process instead of Elkharwily's competence. The executive committee noted that Group Health did not have adequate staff for nighttime proctoring and Franciscan did not have an obligation to provide proctoring—it upheld its decision to rescind Elkharwily's temporary privileges.

Over two years later, Elkharwily sued Franciscan in state court, claiming that Franciscan discriminated against him, in violation of the Washington Law Against Discrimination, RCW 49.60.030, the Rehabilitation Act, 29 U.S.C. § 794, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200(d), and the False Claims Act, 31 U.S.C. § 3729. *See Alaa Elkharwily, M.D. v. Franciscan Health System*, Case No. 15-2-10437-9. Franciscan removed the case to this district. *See Elkharwily v Franciscan*, Cause No.15-cv-05579-RJB,

Dkt. #1.[1] Judge Bryan presided over a jury trial. Ekharwily argued that Franciscan rescinded his temporary privileges because of his bi-polar disorder, asserting that Franciscan falsely documented in committee minutes that Group Health did not have proctors available at night. Judge Bryan instructed the jury that to prevail, Elkharwily had the burden of proving that he was able to perform the essential function of the nocturnist job, and that his disability was a substantial factor in Franciscan's decision to deny privileges. The jury found in Franciscan's favor.

Ekharwily moved for a new trial, claiming that the verdict was the result of false evidence. Dkt. #132. Specifically, Elkharwily alleged that Franciscan Dr. deLeon lied during Elkharwily's hearing panel when he stated that the medical executive committee did not request or sanction proctoring. *Id.* at 7. Additionally, Elkharwily alleged that Franciscan Dr. Cammarano lied when he testified at trial that Franciscan never requested daytime proctoring for Elkharwily. *Id.* at 7–8. Judge Bryan denied the motion, determining "[n]one of what Plaintiff presents in support of his motion rises to the level of a proven lie . . . that would justify a new trial." Dkt. #139 at 3.

Undeterred, Ekharwily filed a motion for reconsideration, trying again to convince Judge Bryan that the verdict was the product of fraud. Elkharwily argued that Franciscan's witnesses and attorney lied to the jury when they claimed that proctoring at night is neither possible nor safe. Dkt. #140 at 7. Judge Bryan denied the motion, ruling that Elkharwily had

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[1] Unless otherwise noted, all in-text citations to the Dkt. are to this prior case.

had the opportunity during discovery, trial preparation, and cross-exam to challenge the evidence. Dkt. #145.

Unwilling to accept the Court's ruling, Ekharwily filed a third post-trial motion seven days later. This time he sought Relief from Judgment under Fed. R. Civ. P. 60(b) and (d), insisting again that Franciscan's attorney committed fraud on the court, alleging he redacted committee minutes to purposely conceal the identity of possible nocturnist proctors:

> Plaintiff has also discovered that Bob Thong, MD, was the 4th nocturnist. . . . [A]mazing what a little chat with few people could reveal . . . Drs. Pujol and [sic] Hasnain and Thong would certainly have been on Defendant's credentialing minutes in 2012, but their names were hidden from Plaintiff.

Dkt. #146 at 6.

While that motion was pending, Elkharwily appealed to the Ninth Circuit, and as a result, Judge Bryan struck the motion. Dkt. #157. Elkharwily asked Judge Bryan to make an "indicative ruling" (under Rule 62.1 and FRAP 12.1) despite the appeal, claiming that the motion raised issues not on appeal. Dkt. #158. The Ninth Circuit remanded the case for that limited purpose. Dkt. #160; Dkt. #174. Judge Bryan denied the motion, concluding that "[t]his allegation appears contrary to the evidence. . . . Plaintiff's counsel was the only person to conclude, without support, 'that Dr. Pujol, Dr. Hasnain, and Dr. Thong were available to proctor [Elkharwily] at night.' This unsubstantiated statement, without any support on the record, is not sufficient to trigger Federal Rule of Civil Procedure 60(b)." Dkt. #184 at 3–4.

Unconvinced, Elkharwily filed a fourth post-trial motion [Dkt. #185], asserting that he now really had discovered new evidence demonstrating his fraud claim. He claimed he spoke to Dr. Bob Thong for the first time, and "developed information since the [last] hearing . . . that there were GHP hospitalists available and [sic] qualified and willing to proctor Plaintiff . . . at and after the Hearing Panel." Dkt. #185 at 2. Judge Bryan again rejected Elkharwily's claim: "much of the alleged new evidence [was] hearsay . . . [and] could have been brought to the court's attention earlier with reasonable diligence." Dkt. #187.

Unsatisfied, Elkharwily sued Franciscan again, in this Court, purporting to bring a "collateral attack" on the judgment now on appeal in the Ninth Circuit. Elkharwily asks this Court to vacate Judge Bryan's final judgement, to effectively moot the appeal and allow him to re-litigate his discrimination claim. His complaint made the same allegations that Judge Bryan already addressed and rejected—that Franciscan's attorney "concealed by redaction and alteration of documents all references to Drs. Pujol, Hasnain and Thong in all minutes . . . [and] falsely stated to the jury . . . [that] 'Group Health . . . did not have staff to monitor Dr. Elkharwily at night.'" 17-cv-05838-RBL, Dkt. #1 at 18 (citation omitted).

Elkharwily filed an amended complaint—claiming new evidence—but it too contains facts and accusations that Judge Bryan already rejected. Elkharwily claims that he recently learned from Thong and other Franciscan personnel that doctors were indeed available to proctor him. This new information caused him to analyze the committee minutes again, and he discovered that Franciscan's attorney "fabricated and altered

those committee minutes so as to conceal evidence of the availability, and qualifications of those three doctors to proctor him . . . " *Id.*, Dkt. #9 at 6–9.

In response to Franciscan's Motion to Dismiss, Elkharwily asks for leave to file a second amended complaint—at least his seventh overall effort to allege and demonstrate fraud.

## II. Discussion

### A. Motion to Dismiss

Franciscan seeks dismissal based on *res judicata*. Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the Court must accept as true the complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper 12(b)(6) motion to dismiss. *Vazquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough

to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnotes omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 556 U.S. at 678 (citing *id.*).

Although *Iqbal* establishes the standard for deciding a Rule 12(b)(6) motion, Rule 12(c) is "functionally identical" to Rule 12(b)(6) and that "the same standard of review" applies to motions brought under either rule. *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 647 F.3d 1047 (9th Cir. 2011), *citing Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989); *see also Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (applying *Iqbal* to a Rule 12(c) motion).

Under *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine of *res judicata* bars a party from re-filing a case where three elements are met: (1) identity of claims; (2) final judgment on the merits; and (3) identity or privity between parties. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850, n.4 (9th Cir. 2000).

Elkharwily argues that *res judicata* does not bar his new claims because they are based on Rule 60(d)(3), unlike his prior arguments under Rule 60(*b*)(3). He relies on three cases, but none provides even tangential support for the proposition that one can avoid the preclusive effect of a prior litigation loss by simply citing a different section of the same rule. Indeed, none even addresses *res judicata*.

Elkharwily cites *Haeger v. Goodyear Tire & Rubber Co.*, 793 F.3d 1122, 1125 n.1 (9th Cir. 2003), for a true but unhelpful statement: "[l]itigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice." He also relies on *United States v. Beggarly*, 524 U.S. 38, 46 (1998), but the Court there determined that allegations of failure to furnish relevant information would "at best form the basis for a Rule 60(b)(3) motion" and that "independent actions should be available only to prevent a grave miscarriage of justice." It certainly did not hold that a claim of fraud already adjudicated could be renamed as an independent action and successfully overcome the *res judicata* bar. Finally, Elkharwily cites *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1129 [1130] (9th Cir. 1995), which did involve fraud on the court, but did not involve serial motions and lawsuits all based on the same, conclusory allegation of "fraud." And it did not address the application of *res judicata,* where, as here, the fraud claims have already been heard and rejected.

There is no authority for the proposition that changing the grounds for relief from Rule 60(b) to Rule 60(d) is an effective way to reargue the same theories free of the effects of *res judicata.* Elkharwily clearly and repeatedly insisted to Judge Bryan that the verdict and the judgment were the result of fraud—he claimed then, as he does now, that Franciscan's attorney altered or forged the committee minutes to conceal the identity of proctors. Judge Bryan fully heard and repeatedly rejected these claims and his judgment and orders are on appeal. The law predictably and wisely does not permit a dissatisfied litigant to keep suing on the same claim until he wins.

Franciscan's Motion to Dismiss [Dkt. #12] is GRANTED.

**B. Motion for Leave to Amend**

Elkharwily amended his complaint once in this case, and seeks leave to do so again, including eight pages that detail 18 specific instances of what he perceives as fraud on the court. Franciscan argues that amendment would be futile because *res judicata* bars Elkharwily's claims.

Leave to amend a complaint under Fed. R. Civ. P. 15(a) "shall be freely given when justice so requires." *Carvalho v. Equifax Info. Services, LLC*, 629 F.3d 876, 892 (9th Cir. 2010) (citing *Forman v. Davis*, 371 U.S. 178, 182 (1962)). This policy is "to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citations omitted). In determining whether to grant leave under Rule 15, courts consider five factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (emphasis added). A proposed amendment is futile "if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Gaskill v. Travelers Ins. Co.*, No. 11-cv-05847-RJB, 2012 WL 1605221, at *2 (W.D. Wash. May 8, 2012) (citing *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1393 (9th Cir. 1997)).

Elkharwily's proposed second amended complaint would be futile because his claims are barred by *res judicata*, as described above. Adding new and more details about facts and events and arguments that

already took place does not change the fact that he either did or could have alleged all of these facts in the prior case and in his prior motions.

Elkharwily's Motion for Leave to Amend [Dkt. #13] is DENIED.

**C. Motion for Sanctions Pursuant to FRCP 11.**

Franciscan asks the court to impose sanctions (in the form of attorney's fees) against Elkharwily for frivolous litigation.

Under Fed R. Civ. P. 11(b), every attorney or unrepresented litigant's filings include a representation that it is not presented for any improper purpose, that the claims and defenses are warranted by law, and that their factual contentions have or will have evidentiary support. Under Rule 11(c), after notice and an opportunity to be heard, a court can impose an appropriate sanction for such violations.

Elkharwily has long been on notice that his fraud claims were or could have been litigated previously, even if they were meritorious. Elkharwily has made no real attempt to articulate why *res judicata* does not apply, and his "b/d" distinction is unavailing.

Franciscan's Motion for Sanctions is GRANTED. Elkharwily shall pay Franciscan $2500 within 21 days of this order, and file a notice in this court that he has done so. If he does not, the Clerk shall enter a judgment in that amount against Elkharwily and in favor of Franciscan. In the meantime, Elkharwily's claims are DISMISSED WITH PREJUDICE and without leave to amend. Elkharwily's Motion for Relief from Deadline for Filing Reply [Dkt. #28] is DENIED AS MOOT.

IT IS SO ORDERED.

Dated this 2nd day of February, 2018.

/s/ Ronald B. Leighton
United States District Judge

## ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT-RULE 60 (MAY 4, 2017)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

This matter comes before the court on the Ninth Circuit's Order remanding the case for the limited purposed of considering Plaintiff's Motion for Relief from Judgment—Rule 60 (Dkt. 146, refiled as Dkt. 172). The court is familiar with the records and files herein, the events of the trial, and documents filed in support of and in in opposition to the motion. Telephonic oral argument was held on April 4, 2017.

For the reasons stated herein, the motion should be denied.

This motion stems from a jury verdict adverse to plaintiff (Dkt. 126) in a disability discrimination case. Plaintiff, a physician, was hired by non-party Group Health to serve as a "nocturnal hospitalist," working in defendant Franciscan Health System's (FHS) Tacoma hospital. The job required that plaintiff be "credentialed" by FHS—that is, authorized by FHS to have privileges to practice in FHS's hospital. His application for such privileges was denied by FHS. Plaintiff claimed that he had a disability that was a substantial factor in the FHS decision to deny his application.

After a seven-day jury trial and a day of deliberation, the jury found for FHS and against plaintiff (Dkt. 126). Judgment of Dismissal (Dkt. 130) was entered. Plaintiff's Motion for a New Trial was denied (Dkt. 139) and Plaintiff's Motion for Reconsideration of that ruling was denied (Dkt. 145). Plaintiff appealed to the Ninth Circuit (Dkt. 151) and filed the instant motion. The appellate court authorized this district court to consider the motion (Dkt. 174)

Somewhat lost in plaintiff's efforts to overturn the verdict are the primary concerns of the trial: Plaintiff had to prove by a preponderance of the evidence the elements of his claim as set forth in the Jury Instructions (Dkt. 128, Instruction No. 9): essentially that "he had a disability; he was able to perform the essential functions of the job in question; and his disability was a substantial factor in FHS' decision to deny his application."

The parties agreed that plaintiff had a disability, bipolar disorder. Therefore the jury had to have found either that (1) plaintiff had <u>not</u> proved, by a preponderance of the evidence, that he could perform

the essential functions of the job in question, or (2) that his disability was not a substantial factor in FHS' decision to deny his application.

The court has read, read, and reread the parties' submissions in support of and in opposition to this FRCP 60 motion and has again considered the events of the trial. The court is firmly of the opinion that in discovery and at trial, there has been no showing, by either a preponderance or a clear and convincing standard, of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 29(b)," nor has there been a showing, by either standard, of "fraud (whether previously called intrinsic or extrinsic) misrepresentation, or misconduct by an opposing party." FRCP 60(b)(2)(3).

Plaintiff's showing has been nothing more than the kind of issues that commonly arise in the give and take of discovery and trial.

Discovery was properly conducted in all respects.

The jury was properly instructed about counsel's statements to the jury (Dkt. 128, Instruction No. 5), and none of defense counsel's statements amounted to fraud, misrepresentation, or misconduct.

The issues about the accuracy and consistency of the testimony of the various witnesses over seven days of trial were of the usual kind commonly seen in trials, and there is no showing of any fraud, misrepresentation, or misconduct.

The post-trial motions have focused on a collateral issue—whether "proctoring" (supervision) was available to assist and train plaintiff as a nocturnal hospitalist.

This issue was relative to the question of whether plaintiff could perform the essential elements of the job in question.

It became non-party Group Health's responsibility to provide nocturnal proctoring to plaintiff. Dr. Dempster of Group Health testified that Group Health could not provide appropriate nocturnal proctoring in spite of hiring four full time equivalent hospitalists. *See* Dkt. 180, page 31 line 14-19 & page 35, line 10. Plaintiff now alleges that there were Group Health nocturnal hospitalists who, unbeknownst to plaintiff, could have proctored plaintiff. This allegation appears contrary to the evidence. No witness testified that that Group Health physicians were qualified and available to proctor plaintiff at night. Plaintiff's counsel was the only person to conclude, without support, "that Dr. Pujol, Dr. Hasmain, and Dr. Thong were available to proctor him [plaintiff] at night." Dkt. 172, page 9 at line 3. This unsubstantiated statement, without any support on the record, is not sufficient to trigger Federal Rule of Civil Procedure 60(b).

Therefore, it is now ORDERED that plaintiff's Motion for Relief from Judgment—Rule 60 (Dkt. 146, refiled as Dkt. 172) is DENIED.

Let the appeal proceed.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address, and to the Court of Appeals for the Ninth Circuit.

Dated this 4th day of May, 2017.

/s/ Robert J. Bryan
United States District Judge

## ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (DECEMBER 27, 2016)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant.*

Case No. 15-5579-RJB

Before: Robert J. BRYAN,
United States District Judge.

This matter comes before the court on Plaintiff's Motion for Reconsideration (Dkt 140). The court is fully advised. Oral argument is not necessary to fairly resolve this motion.

Plaintiff claims that the court erred by using an incorrect legal standard in its Order Denying Plaintiff's Motion for a New Trial (Dkt 139). Citing cases from other circuits, Plaintiff argues that the correct standard, that the court should have applied, is as follows:

> ([A] new trial should be granted where the court is reasonably well satisfied that the testimony given by a material witness is false; that without it, a jury might have reached a different conclusion; that the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.)

For purposes of this Motion, the court will assume that Plaintiff's suggested rule is the correct one. That rule still offers Plaintiff no relief for the following reasons: First, the court is not reasonably well satisfied that the testimony given by one or more material witnesses was false. Second, although Plaintiff and Plaintiff's counsel may have been taken by surprise at trial when testimony was different than expected, they had ample opportunity at trial to meet unexpected testimony. That opportunity was provided by the discovery rules, careful and thorough preparation, and cross-examination. The Motion for Reconsideration (Dkt 140) is HEREBY DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 27th day of December, 2016.

/s/ Robert J. Bryan
United States District Judge

# AGREED PRETRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (OCTOBER 3, 2016)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

## I. Jurisdiction

Jurisdiction is vested in this Court by virtue of supplemental jurisdiction. *See* 28 U.S.C. § 1367.

## II. Claims and Defenses

**As for Plaintiff:**

Plaintiff disputes Defendant's contention that Plaintiff is precluded from pursuing his claim.

1. Plaintiff intends to raise at trial the claim that Defendant discriminated against him on the basis of his disability when it refused to grant him privileges to practice at its hospital in Tacoma, Washington.

**As for Defendant:**

Defendant contends that pursuant to Court Rules and supporting judicial authority, Plaintiff is prohibited from pursuing any claim at trial due to his failure to timely disclose any claim which he intends to present.

Should this matter proceed to trial, Defendant will pursue the following defenses:

1. FHS had a legitimate non-discriminatory basis for denying Plaintiff's application for medical staff membership and his disability was not a reason for denying his application;
2. Extending medical staff membership to Plaintiff could have presented a direct threat to the health and safety of patients; and
3. Failure to mitigate damages.

**III. Stipulated Admitted Facts**

1. Plaintiff completed medical school at the University of Tanta in Egypt in 1998.

2. Plaintiff attended an internal medicine residency program affiliated with the University of Washington in Spokane.

3. Plaintiff has bipolar disorder.

4. The completion of Plaintiff's residency was delayed for six months due to his bipolar disorder.

5. Plaintiff completed his residency program in December 2009.

6. Plaintiff did not provide medical treatment to any patients between the time he completed his residency and when he started his employment with the Mayo Clinic Albert Lea on September 7, 2010.

7. Plaintiff's last day of employment at the Mayo Clinic Albert Lea was December 10, 2010.

8. Plaintiff was offered employment with Group Health Physicians on March 29, 2012.

9. Between Plaintiff's employment with the Mayo Clinic Albert Lea and his offer of employment with Group Health Physicians, Plaintiff applied for positions at other health care facilities and was not offered employment by any of those facilities.

10. Plaintiff was hired by Group Health Physicians to act as a night shift hospitalist, or nocturnist, providing care to Group Health patients at Defendant's hospital, St. Joseph Medical Center in Tacoma. His starting salary was $216,500 annually.

11. Plaintiff's employment with Group Health Physicians was contingent upon successful application for medical staff membership with Defendant and obtaining privileges to provide patient care at St. Joseph's Hospital.

12. Plaintiff applied for medical staff membership with Defendant and to obtain hospitalist privileges on June 13, 2012.

13. During the application process, Plaintiff disclosed to Defendant that he had a diagnosis of bipolar disorder.

14. During the application process, Plaintiff disclosed to Defendant that he had been terminated by the Mayo Clinic Albert Lea.

15. Plaintiff did not provide medical treatment to any patients between the time he left the Mayo Clinic Albert Lea, December 10, 2010, and his application for medical staff membership with Defendant on June 13, 2012.

## IV. Issues of Law

The following are the issues of law to be determined by the Court:

1. The Court will be asked to decide whether Plaintiff is precluded from calling any witnesses or offering any exhibits, and thus whether Defendant is entitled to judgment as a matter of law, as requested by Defendant in its Motion to Dismiss and/or for Imposition of Sanctions. Dkt. 85.

2. The Court will be asked to rule on the parties' motions *in limine* noted for September 23, 2016.

3. The Court will be asked to rule on the parties' requested jury instructions to be filed on September 30, 2016.

## V. Expert Witnesses

(a) On behalf of Plaintiff:

None, pursuant to order of this Court on August 2, 2016.

(b) On behalf of Defendant:

Nancy Auer, M.D.
Former Medical Director for Swedish Health

Services
Mercer Island, Washington

## VI. Other Possible Witnesses Who May Testify at Trial

The names and addresses of witnesses, other than experts, to be used by each party at the time of trial and the general nature of the testimony of each are:

**(a) On behalf of Plaintiff:**

Alaa Elkharwily, MD,-Will testify
c/o Richard Wylie, Esq.
222 South 9th Street
Minneapolis, MN 55402
612-337-9581

Plaintiff herein. Plaintiff is expected to testify about his education and experience, the history and treatment of his bipolar disorder, his employment as a resident and as a hospitalist and researcher in the Mayo Clinic system. He will also testify about his job offer and contract with Group Health in Tacoma and his credentialing there. He will testify about his application for privileges to Defendant, about what representatives of Defendant told him throughout the process about his bipolar disorder, about its effect on his application and about proctoring. He will testify about his damages and his attempts to find employment after Defendant denied his application for privileges. He will testify concerning his emotional distress, mental anguish, humiliation, loss of enjoyment of life and loss of reputation.

Dr. David Dempster-Will testify
Group Health Cooperative

209 Martin Luther King Jr. Way
Tacoma, WA 98405
(206) 988-2073

Dr. Dempster is expected to testify that he participated in hiring Plaintiff at Group Health and communicated in writing and verbally with Defendant's administrators concerning Plaintiff's application for privileges at FHS, including FHS's requirement for proctoring of Plaintiff. He discussed Plaintiff's bipolar disorder with Defendant's administrators Dr. Haftel and Dr. deLeon at Defendant. He has knowledge of Plaintiff's contract with Group Health, including compensation and benefits. He is expected to testify about the impact of denial of privileges on a physician's career.

Dr. Dennis deLeon-Will testify
c/o Defendant's counsel

Defendant's VP Medical Affairs and Associate Chief Medical Officer. He is expected to testify that he reviewed and processed Dr. Elkharwily's application for privileges at St. Joseph's. He granted Plaintiff temporary privileges. He met with and discussed Plaintiff's application with Plaintiff. He talked to Plaintiff about his bipolar disorder. He discussed and corresponded with Dr. Dempster at Group Health about Plaintiff's application. He provided information to the credentialing committee and Medical Executive Committee (MEC) concerning Plaintiff and attended their meetings concerning Plaintiff. He is expected to testify about the minutes of those committees' meetings regarding Plaintiff. He is expected to testify about the impact of denial of privileges on a physician's career.

Dr. Tony Haftel-Will testify
c/o Defendant's counsel

Defendant's VP Quality and Associate Chief Medical Officer during Plaintiff's application process. He is expected to testify that he was involved in reviewing Plaintiff's application for privileges at FHS. He discussed Plaintiff's application and Plaintiff's bipolar disorder with Plaintiff and with Dr. Dempster. He provided information to the credentialing committee and Medical Executive Committee (MEC) concerning Plaintiff and attended their meetings concerning Plaintiff. He is expected to testify about the minutes of those committees' meetings regarding Plaintiff. He is expected to testify about the impact of denial of privileges on a physician's career.

Dr. William Cammarano-Will testify
c/o Defendant's counsel

Defendant's Medical Staff President for Defendant and member of the Medical Executive Committee. He is expected to testify that he was involved in Plaintiff's application for privileges and the decision-making regarding it. He provided information to the Medical Executive Committee (MEC) concerning Plaintiff and attended its meetings concerning Plaintiff. He is expected to identify about the minutes of that committee's meetings regarding Plaintiff. He is expected to testify about the impact of denial of privileges on a physician's career.

Dr. Mark Adams-Will – Will testify deposition.
PeaceHealth
1115 SE 164th Ave.
Vancouver, WA

Defendant's Chief Medical Officer during the time of Plaintiff's application for privileges at FHS. He is expected to testify about Defendant's processing of Plaintiff's application and his involvement in it, about proctoring of physicians and about the impact of denial of privileges on a physician's career.

Cathy Elwess–Will testify.
GHP
320 Westlake Ave. North
Seattle, WA 98109
206-448-6758

GHP HR manager. Witness would provide foundation if necessary for Group Health documents. Witness identified in Dr. David Dempster's deposition.

Cindy Reid, Director, Benefits & Compensation–Will testify.
Group Health Cooperative
320 Westlake Ave N
Seattle, WA 98109
206-448-6549

Ms. Reid is Director of Benefits & Compensation for Group Health Cooperative. Ms. Reed is expected to testify if necessary to authenticate and provide foundation for the Group Health Compensation schedules and benefits for Plaintiff's position as hospitalist and Plaintiff's planned position as a gastroenterologist. GHP001735-1745 (base compensation and retirement) and GHP1000-1734 (benefits.) She is identified in Group Health Permanente Benefits Manual 2016 at GHP001591.

Possible Witnesses:

Dr. Kate Brostoff – Possibly testify

Senior Health Plan Medical Director
Community Health Plan of Washington
Seattle, WA

Dr. Brostoff was a medical director for Group Health and Dr. Dempster's second tier superior. She has knowledge of the business communications between Dr. Dempster and Defendant's administrators.

Jarrett Richardson, M.D.–Possibly testify by deposition
Mayo Clinic
200 First Street SW
Rochester, MN 55905
507-284-2511

Plaintiff's psychiatrist in Minnesota. If necessary would testify as to Plaintiff's diagnosis of bipolar disorder.

Dr. Jay Schmauch-Possibly testify.
Spokane Psychiatric Clinic, P.S.
105 W. 8th Ave., Suite 6055
Spokane, WA 99204
509-455-9090

Plaintiff's psychiatrist in Washington. If necessary would testify as to Plaintiff's diagnosis of bipolar disorder.

**(b) On behalf of Defendant:**

Defendant contends that Plaintiff is not allowed to call any undisclosed witnesses pursuant to CR 37(c)(1) for failure to comply with CR 26(a)(3) and LCR 16(h). As such, Defendant lists all witnesses it intends to call, including those which untimely disclosed and are listed above by Plaintiff.

Also, Defendant objects to witnesses identified above, specifically Cathy Elwess and Cindy Reid since these witnesses have never been previously identified by Plaintiff. This objection is further addressed by way of motion *in limine*. Defendant also objects to Plaintiff's indication that Dr. Jarret Richardson may testify by deposition considering his deposition was never taken in this case.

Dr. Dennis deLeon–Will testify.
c/o Bruce W. Megard, Jr.
Bennett Bigelow & Leedom, P.S.
(206) 622-5511

Vice President Medical Affairs and Associate Chief Medical Officer for Defendant. Dr. deLeon was involved in reviewing Dr. Elkharwily's application for medical staff membership and privileges at St. Joseph's, in discussing the application with Dr. Elkharwily, and in gathering and providing additional information for the committees and administrative bodies making decisions regarding Dr. Elkharwily's application. He is expected to testify regarding his review of Dr. Elkharwily's application, his interactions with Dr. Elkharwily, and his recollection of events surrounding Dr. Elkharwily's application process and hearing process regarding same. Dr. deLeon testified at the Panel Review Hearing regarding

Dr. Elkharwily's application.

Dr. Tony Haftel – Will testify.
c/o Bruce W. Megard, Jr.
Bennett Bigelow & Leedom, P.S.
(206) 622-5511

Former Vice President Quality and Associate Chief Medical Officer for Defendant. Dr. Haftel was involved

in reviewing Dr. Elkharwily's application for medical staff membership and privileges at St. Joseph's, in discussing the application with Dr. Elkharwily, and in gathering and providing additional information for the committees and administrative bodies making decisions regarding Dr. Elkharwily's application. He is expected to testify regarding his review of Dr. Elkharwily's application, his interactions with Dr. Elkharwily, and his recollection of events surrounding Dr. Elkharwily's application process and hearing process regarding same.

Dr. William Cammarano–Will testify.
c/o Bruce W. Megard, Jr.
Bennett Bigelow & Leedom, P.S.
(206) 622-5511

Former Medical Staff President for Defendant and member of the Medical Executive Committee. Dr. Cammarano was involved in reviewing Dr. Elkharwily's credentialing application, and decision-making regarding the same. He is expected to testify regarding his recollection of events surrounding Dr. Elkharwily's application, his recollection of events surrounding Dr. Elkharwily's application, the discussions had by the MEC, and the reasons for the MEC's decision to deny Dr. Elkharwily's application. Dr. Cammarano testified at the Panel Review Hearing related to Dr. Elkharwily's application. He will testify regarding the review process at FHS when an applicant's privileges are denied and the review process conducted in this case.

Jack Peterson–Will testify.
1717 South J Street
Tacoma, WA 98405
(253) 426-4100

Appellate Review Committee Member for Defendant. Mr. Peterson participated in the appellate review hearing which made a recommendation to Defendant's Board of Directors regarding Dr. Elkharwily's application for medical staff privileges. He is expected to testify regarding his recollection of the Appellate Review Committee hearing and the decision by the Appellate Review Committee.

Dr. John Verrilli–May testify.
1708 S Yakima Ave
Tacoma, WA 98405
(253) 572-5140

Panel Review Hearing Member. Dr. Verrilli participated and was a member of the hearing review panel which considered the Medical Executive Committee's recommendation to deny Dr. Elkharwily's credentialing application. Dr. Verrilli is expected to testify regarding his recollection of the Panel Review Hearing, the role of the Panel Review Committee, and the decision of the Panel Review Committee.

Dr. David Dempster–Will testify.
Group Health Cooperative
209 Martin Luther King Jr. Way
Tacoma, WA 98405
(206) 988-2073

Representatives of Defendant corresponded and spoke with Dr. Dempster during the review of Dr. Elkharwily's medical staff membership and privileging application and decision-making regarding the same. Dr. Dempster was also part of the hiring process at Group Health related to Dr. Elkharwily. He was expected to be Dr. Elkharwily's supervisor at Group Health and is familiar with the terms of Dr. Elkhar-

wily's employment with Group Health. Dr. Dempster testified at the panel review hearing related to Dr. Elkharwily's application.

## VII. Exhibits

### A. Plaintiff's Exhibits

***Admissibility Stipulated***

| Exhibit | Description | Bates No. |
|---|---|---|
| 5. | March 28–April 25, 2012 emails between Dr. Dempster and Nancy Longcoy | GHP0142-143 |
| 7. | March 29, 2012 Group Health Offer of Employment to Plaintiff | GHP0670 |
| 8. | March 29, 2012 Group Health Employment Agreement | GHP0660-666 |
| 9. | Plaintiff's Credentialing Application File to FHS | FHS0001-91 |
| 10. | Franciscan Health System Medical Staff Bylaws | FHS0092-260 |
| 11. | March 8 and 13, 2012 emails from Dr. Dempster | GHP0269-270 |
| 13. | August 2, 2012 letter from Dr. deLeon to Plaintiff with email and form re: temporary privileges. | FHS000011-13 |

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| 15. | August 3, 2012 and earlier emails from Dr. Dempster re: hospitalist scheduling | GHP0087-89 |
| 16. | August 6, 2012 Regional Credential Committee Minutes | FHS0261-274 |
| 17. | August 7, 2012 Group Health Performance Expectation Plan | GHP0671-674 |
| 18. | August 7, 2012 Dr. deLeon memo re conversation with Plaintiff | FHS000008-9 |
| 19. | August 8, 2012 Note to File by Dr. Haftel | FHS0279 |
| 20. | August 9, 2012 Medical Executive Committee Meeting Minutes | FHS0280-290 |
| 21. | August 10, 2012 Medical Executive Committee Memo Re: August 2012 Credential Committee Recommendation | FHS0291 |
| 22. | August 10, 2012 letter from Dr. deLeon to Plaintiff | |
| 23. | August 10, 2012 letter from Dr. deLeon to Dr. Dempster | GHP000462 |
| 24. | August 22, 2012 letter from Dr. Jarrett | FHS000292-293 |

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| | Richardson | |
| 26. | August 17 and 18, 2012 emails between Plaintiff and Dr. Dempster | GHP000936-937 |
| 27. | August 22, 2012 email from Dr. deLeon to Dr. Dempster | FHS0294 |
| 29. | August 23, 2012 Executive Committee Minutes | FHS0295-299 |
| 30. | August 23, 2012 email from Dr. Dempster | GHP0055 |
| 32. | August 27, 2012 Regional Credentialing Committee minutes | FHS0880-887 |
| 33. | August 29, 2012 letter from Dr. Jay Schmauch | FHS0300 |
| 34. | August 29, 2012 email from Plaintiff | GHP0996 |
| 35. | August 29, 2012 emails between Plaintiff and Dr. Dempster | GHP0126 |
| 37. | August 31, 2012 emails from Dr. Dempster | GHP0134-135 |
| 40. | September 7, 2012 letter from Dr. Jay Schmauch | FHS0301 |
| 41. | September 12, 2012 email from Dr. Dempster | GHP0037 |
| 42. | September 13, 2012 Medical Executive Committee Meeting | FHS000302-308 |

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| | Minutes | |
| 43. | Emails from Dr. Dempster | GHP000079-83 |
| 47. | September 21, 2012 letter to Dr. Elkharwily | FHS0002-3 |
| 48. | September 27, 2012 Group Health emails between Drs. Dempster, Lee Elkharwily and Cyndee Wohlhueter | GHP0067-69 |
| 49. | October 10, 2012 letter from Dr. Elkharwily re: Request for Panel Hearing Review | FHS000322 |
| 50. | October 11, 2012 Medical Executive Committee Meeting Minutes | FHS000323-327 |
| 51. | November 8, 2012 Medical Executive Committee Meeting Minutes | FHS000624 |
| 54. | 12/31/2012 Plaintiff email to Shickich re opening statement | |
| 57. | 1/31/2012 Megard letter to Schickich re panel hearing | FHS000472-482 |
| 58. | 2/1/2013 email from Plaintiff re panel hearing | |

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| 59. | January 2, 2013 Panel Review Hearing Transcript of Proceedings | FHS000328-392 |
| 60. | January 3, 2013 Panel Review Hearing Transcript of Proceedings | FHS000393-471 |
| 61. | January 10, 2013 Medical Executive Committee Meeting Minutes | FHS000625 |
| 62. | February 14, 2013 Hearing Review Panel Report and Recommendations | FHS000483-505 |
| 63. | February 14, 2013 Medical Executive Committee Meeting Minutes | FHS000626-628 |
| 64. | February 21, 2013 letter to Dr. Elkharwily from Dr. Mark Adams | FHS000506-507 |
| 65. | May 9, 2013 Medical Executive Committee Meeting Minutes | FHS000631 |
| 66. | May 13, 2013 Appellate Review Hearing Transcript of Proceedings | FHS000513-547 |
| 67. | May 24, 2013 Recommendation of the Appellate Review Committee | FHS000548-555 |
| 68. | June 13, 2013 Medical Executive Committee | FHS000632-633 |

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| | Meeting Minutes | |
| 69. | July 9, 2013 letter from Group Health to Plaintiff terminating employment | GHP000647 |
| 70. | July 11, 2013 Medical Executive Committee Meeting Minutes with Exhibits 1-23 | FHS000634-828 |
| 72. | July 15, 2013 Final Recommendation of Medical Executive Committee | FHS000829-831 |
| 73. | July 23, 2013 Final Recommendation to the Board of Managers of Franciscan Health System | FHS000556-560 |
| 76. | Emails between Plaintiff and recruiters between November 19, 2012 and May 27, 2012 re job search | Produced to Defendant with letter dated June 3, 2016 |
| 77. | Text messages between Plaintiff and recruiters | Produced to Defendant with letter dated June 3, 2016 |
| 78. | Emails between Plaintiff and recruiters | FHS000791-799 |
| 90. | Albert Lea Medical Center employment agreement file provided | FHS000767-778 |

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| | by Plaintiff in 2013 | |

***Authenticity Stipulated, Admissibility Disputed***

| Exhibit | Description | Bates No. |
|---|---|---|
| 4. | Group Health reference forms | Dempster Ex. 2 |
| 12. | May 10, 2012 and June 12, 2012 emails from Dr. Dempster to plaintiff | GHP0145-146 |
| 25. | August 17-22, 2012 GHP emails | GHP0106-118 |
| 28. | August 22, 2012 emails from Dr. DeLeon and from Dr. Dempster–incorrectly labeled in plaintiff's proposed list of exhibits | GHP0121-123 |
| 31. | August 23, 2012 email from Dr. Dempster | GHP0078 |
| 36. | August 31, 2012 emails from Dr. Dempster | GHP0866-867 |
| 38. | September 1, 2012 emails between Dr. Elkharwily and Cyndee Wohlhueter | GHP1755-1756 |
| 39. | September 4, 2012 from Deborah Armbruster, Group Health re: LWOP | GHP0024 |
| 45. | September 14, 2012 emails between Dr. Dempster and Dr. Kate Brostoff re: AE Crede- | GHP00310-311 |

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| | ntialing denied by FHS | |
| 52. | 12/31/2012 email exchange between Dr. Dempster and Plaintiff | GHP000034-35 |
| 53. | 12/31/2012 Megard letter to Shickich re panel hearing | FHS000614-621 |
| 71. | July 11, 2013 email from Deborah Armbruster, Group Health re Plaintiff's termination | GHP000017 |
| 74. | July 30, 2013 NPDB "Clinical Privileges Action" report filed by Defendant | FHS000918-909 |
| 86. | Franciscan Inpatient Team Compensation Standards and Plan Last Modified: June 1, 2015 | FHS000977-990 |
| 89. | Mortality Table | 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. Appendix B (6th ed.) |

***Authenticity and Admissibility Disputed***

| Exhibit | Description | Bates No. |
|---|---|---|
| 1. | Plaintiff's resume | GHP0436 |
| 2. | Plaintiff's Application and Credentialing file to | Unknown, not provided by |

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| | GHC | plaintiff in proposed pretrial statement, but then by email on 9/__/2016 |
| 3. | Group Health Cooperative Designated peer Support Review and Evaluation, Initial Credentialing | GHP000160-199 |
| 6. | Plaintiff interview schedule at Group Health | GHP000667-669 |
| 14. | Welcome announcement | GHP000276 |
| 44. | Opinion 9.03 AMA Code of Medical Ethics | Brostoff Dep. Ex. 2 |
| 55. | Memorandum from Plaintiff | GHP000826-844 |
| 56. | ABIM Internal Medicine Cert. Examination appointment details | FHS000744-748 |
| 79. | Group Health Permanente Medical Group Hospitalist Salary Schedules 2012-2016 | GHP001735-1740 |
| 80. | Group Health Permanente Medical Group Gastroenterologist Salary Schedules 2012-2016 | GHP001741-1745 |

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| 81. | Group Health Permanente Benefits Manual 2016 | GHP001581-1734 |
| 82. | Group Health Permanente Benefits Manual 2015 | GHP001434-1580 |
| 83. | Group Health Permanente Benefits Manual 2014 | GHP001289-1433 |
| 84. | Group Health Permanente Benefits Manual 2013 | GHP001142-1288 |
| 85. | Group Health Permanente Benefits Manual 2012 | GHP001000-1141 |
| 87 | Medscape Hospitalist Compensation Report 2016 | Medscape website |
| 88. | Medscape Gastroenterology Compensation Report 2016 | Medscape website |

**B. DEFENDANT'S EXHIBITS**

Plaintiff did not timely disclose any exhibits. Defendant contends that Plaintiff is not allowed to submit any undisclosed exhibits pursuant to CR 37(c)(1) for failure to comply with CR 26(a)(3) and LCR 16(h). Nonetheless, Defendant has removed duplicate exhibits identified by Plaintiff where admissibility is stipulated.

***Admissibly Stipulated***

| Exhibit | Description | Bates No. |
|---|---|---|
| A-1 | December 10, 2010 Letter from Dr. John Grzybowski | FHS000613 |
| A-2 | March 29, 2012 Employment Agreement | GHP0660 to GHP0670 |
| A-5 | September 21, 2012 Letter to Dr. Elkharwily re: Application for Medical Staff Membership and Privileges | FHS000320 to FHS000321 |
| A-6 | March 14, 2013 Medical Executive Committee Meeting Minutes | FHS000629 |
| A-7 | April 11, 2013 Redacted Medical Executive Committee Meeting Minutes | FHS000630 |

***Authenticity Stipulated, Admissibility Disputed***

| Exhibit | Description | Bates No. |
|---|---|---|
| A-4 | July 25, 2012 Group Health Emails between Dr. Dempster and Nancy Longcoy | GHP0058 |
| A-8 | May 29, 2013 Email from Dr. deLeon to Joanne Martin | FHS000622 |

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| A-9 | July 2, 2013 Email from Dr. deLeon to Joanne Martin | FHS000623 |
| A-11 | Plaintiff's; Second Amended Complaint filed in Case No. 0:12- CV-03062 (DSD/JJK) | Dkt. No. 43 |

***Authenticity and Admissibility Disputed***

| Exhibit | Description | Bates No. |
|---|---|---|
| A-3 | July 17, 2012 Group Health Emails between Dr. Dempster, | GHP0062 to |
| A-10 | Declaration of Paul Civello filed in Case No. 0:12-CV- 03062 | Dkt. No. 17 |
| A-12 | Declaration of Maureen Engelstad in Support of Defendant's | Dkt. No. 204 |
| A-13 | Declaration of Charles G. Frohman filed in Case No. 0:12-CV- | Dkt. No. 205 |

## VIII. ACTION BY THE COURT

(a) This case is scheduled for trial before a jury on October 11, 2016, at 9:30 a.m.

(b) Trial briefs shall be submitted to the Court on or before September 30, 2016.

(c) Jury instructions requested by either party shall be submitted to the Court on or before September

30, 2016. Suggested questions of either party to be asked of the jury by the Court on *voir dire* shall be submitted to the Court on or before September 30, 2016.

(d) The only claim to be tried is Plaintiff's claim for disability discrimination under the Washington Law Against Discrimination. All remaining claims by Plaintiff have been dismissed by prior order of this Court including Plaintiff's claim under the False Claims Act, his claim for state law defamation, his claim for race and ethnicity discrimination under the Washington Law Against Discrimination, his claim for disability discrimination under the Rehabilitation Act, and his claim under Title VI .

(e) Rulings on the parties' motions *in limine* will be made by separate orders.

This order has been approved by the parties as evidenced by the signatures of their counsel. This order shall control the subsequent course of the action unless modified by a subsequent order. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

(f) This order should not be read as ruling for or against the admissibility of any of the proposed evidence mentioned herein, except that the Stipulated Admitted Facts are admissible.

DATED this 3rd day of October, 2016.

/s/ Robert J. Bryan
United States District Judge

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON MOTION IN LIMINE (DECEMBER 27, 2016)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

This matter comes before the court on Plaintiff's Motions *in Limine* (Dkt. 87) and Defendant Franciscan Health System's Motions *in Limine* (Dkt. 89). The court is familiar with the records and files herein, documents filed in support of and in opposition to the motions, and heard the arguments of counsel.

Preliminary matters. First, the Federal Rules of Evidence govern admissibility of evidence. The court will do its best to follow those rules in ruling on these

motions and in conducting the trial. The parties should be aware that the court cannot accurately rule on all evidentiary issues in advance. Many rulings are based on the events of the trial, and many issues can best be resolved at trial.

Second, the denial of a motion *in limine* does not mean that the subject evidence will be admissible. It simply means that the court cannot rule on the issue in advance.

Third, the granting of a motion *in limine* that excludes evidence often requires a re-examination of the issue due to the events of the trial.

Fourth, a motion *in limine* for exclusion only attacks an opponent's evidence, not that of the moving party.

The court will address the motions *in limine* in the same order and by the same titles as in the motions.

## PLAINTIFF'S MOTIONS *IN LIMINE*

1. Precluding Defendant from arguing and offering testimony or documents into evidence relating to facts concerning Plaintiff's employment at Mayo Clinic Health System Albert Lea that were not provided by Plaintiff during the process of applying for privileges with Defendant. This motion should be GRANTED. The subject evidence should not be offered or admitted unless this subject matter is opened by Plaintiff. Furthermore, if the subject matter is opened by Plaintiff, the evidence should be limited to the information that is within the scope of what the Defendant would be expected to learn from Mayo, if Mayo had responded to inquiries. It appears to be a proper subject for expert testimony regarding the

standards of inquiry of a former employer in such circumstances, and the standards for response to such inquiries. It is unlikely that all of the details of what happened at Mayo would be admissible, but clearly, an appropriate foundation is required for each item of evidence, even if the subject is opened by Plaintiff.

2. Specifically, precluding Defendant from offering into evidence Defendant's Proposed Exhibits 46, 47 and 48. This motion should be GRANTED without prejudice to the offer of specific exhibits. Proposed Exhibits 46, 47 and 48 suggest issues of double hearsay and relevance.

3. Providing that service of trial subpoenas on Defendant's counsel is sufficient for service on Dr. William Cammarano, Dr. Dennis deLeon, and Dr. Tony Haftel. This motion is not contested and should be GRANTED.

## DEFENDANT'S MOTIONS *IN LIMINE*

A. Any evidence of settlement offers or negotiations should be excluded. This motion should be GRANTED.

B. There should be no mention of the adequacy of the pleadings or discovery disputes. This motion should be GRANTED.

C. The parties should be required to provide a trial schedule or at least give 24 hours notice of witnesses, depositions and exhibits. This motion should be GRANTED IN PART, but such notice should be given not later than the end of a trial day for the next day, and it is the responsibility of the requesting party to make the request each day.

D. Evidence relevant to dismissed claims or claims not pled should be excluded. This motion should be GRANTED.

E. Evidence that was never produced during the course of discovery should be excluded. Many motions *in limine* to exclude evidence are based upon a lack of discovery. In ruling on such matters, the court needs to be made aware of whether discovery on the questioned evidence was required by Rule 26 (a)(1)(A) and (B) *et seq*, or by the exact language of the request for discovery. Parties are entitled to discovery only in accord with the Federal Rules of Civil Procedure, and they can't expect to know everything before trial. Parties can only expect to know those things that were specifically and properly required or requested in formal discovery. This motion should be DENIED WITHOUT PREJUDICE.

F. Drs. Dempster and Brostoff should not be allowed to offer testimony regarding the motivation of FHS in denying Dr. Elkharwily's application for privileges. First, the court notes that this testimony is not listed in the Pretrial Order as within the expected testimony of these physicians. This motion should be GRANTED WITHOUT PREJUDICE. Whether these physicians should be allowed to testify on this subject matter will be based on the foundation laid, and the court cannot make such a determination based on the submissions thus far. Any questions regarding this subject should first be addressed outside the jury's presence.

G. Evidence of other lawsuits involving FHS should be excluded. This motion should be GRANTED.

H. Plaintiff's claimed damages should be limited based on a lack of competent evidence supporting them. What the jury instructions on damages will include depends upon the evidence to be produced at trial, and accordingly, this motion should be DENIED.

1. Plaintiff cannot request indefinite compensation without evidence of his ability to obtain alternative employment. This motion should be DENIED. This subject matter also depends on the evidence to be produced at trial.

2. Evidence of tax consequences requires expert testimony. This motion should be GRANTED. The tax consequences of damages, if any, should be presented to the court after trial consistent with *Blaney v International Asso. of Machinists and Aerospace Workers*, 151 Wash. 2d 203 (2004)("tax liability is incurred after, not during, litigation.").

3. Dr. Elkharwily is not qualified to testify regarding FHS's or GHP's salary structure, advancement opportunities or employment patterns. This motion should be DENIED WITHOUT PREJUDICE. The extent of the Plaintiff's knowledge and the foundation for that knowledge can best be determined at trial.

I. Statements about the costs of litigation should be excluded. This motion should be GRANTED.

J. Testimony or argument regarding the financial conditions of the parties or implying that the jury should considered the relative resources of the parties is inadmissible. This motion should be GRANTED.

K. There should be no statements regarding attorneys or law firms that represent each party or the nature of the representation. This motion should be GRANTED but it applies only to counsel in this pending lawsuit.

L. There should be no references to insurance or insurance coverage for damages. This motion should be GRANTED.

M. There should be no reference to any pretrial rulings of the court's order on these motions *in limine*. This motion should be GRANTED.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and any party appearing *pro se* at said party's last known address.

Dated this 3rd day of October, 2016.

/s/ Robert J. Bryan
United States District Judge

# ORDER ON DEFENDANT FRANCISCAN HEALTH SYSTEMS MOTION TO DISMISS AND/OR FOR IMPOSITION OF SANCTIONS PURSUANT TO FED. R. CIV. P. 37 (SEPTEMBER 26, 2016)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

THIS MATTER comes before the Court on Defendant Franciscan Health System's Motion to Dismiss and/or For Imposition of Sanctions Pursuant to Fed. R. Civ. P. 37. The Court has considered the motion, Plaintiff's Response (Dkt. 93), Defendant's Reply (Dkt. 98), and the remainder of the file herein.

**A. Procedural background**

Defendant and Plaintiff cite to extensive discovery background facts with little bearing on the primary issue presented by the motion, namely, the appropriate sanction for Plaintiff's failure to make timely pretrial disclosures under Fed. R. Civ. P. 26(a). An abbreviated timeline suffices.

Under Washington Local Court Rule 16(h), Plaintiff's Rule 26(a) pretrial disclosures were due 30 days prior to the filing of the agreed pretrial order, on August 24, 2016. Dkt. 41 at 3. *See* LCR 16(h). Defendant filed this motion on September 1, 2016. Dkt. 85. Defendant timely served its pretrial disclosures by the deadline prescribed by the local rule, September 3, 2016, which is 20 days prior to the deadline for the agreed pretrial order. *Id.* Plaintiff made pretrial disclosures beginning on September 6, 2016. Dkt. 94 at 2.

The parties filed an agreed pretrial order on September 23, 2016. Dkt. 100. Trial is set for October 11, 2016, Dkt. 41 at 3.

**B. Discussion**

Under Fed. R. Civ. P. 26(a)(3)(B), plaintiffs must generally make certain pretrial disclosures at least 30 days before trial. Washington Local Court Rule 16(h) modifies the general rule, requiring plaintiffs to make Fed. R. Civ. P. 26(a) pretrial disclosures at least 30 days prior to the filing the agreed pretrial order. Violations of Fed. R. Civ. P. 26(a) may be sanctioned under Fed. R. Civ. P. 37(c)(1), which provides:

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions[.]

Fed. R. Civ. P. 37(c). The party facing sanctions bears the burden of proving that its failure to disclose the required information was substantially justified or is harmless. *Torres v. City of L.A.,* 548 F.3d 1197, 1213 (9th Cir. 2008).

Courts are given wide latitude in determining the proper remedy for Rule 26(a) violations. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101, 1106 (9th Cir. 2001). "[I]n the ordinary case, violations of Rule 26 may warrant evidence preclusion," but where, "in practical terms, the sanction amount[s] to dismissal," courts in this circuit must consider the availability of lesser sanctions, as well as "whether the claimed noncompliance involved willfulness, fault, or bad faith." *R & R Sails, Inc. v. Ins. Co. of Penn.,* 673 F.3d 1240, 1247 (9th Cir. 2012).

Defendant takes issue with Plaintiff's late filing of his Rule 26(a) pretrial disclosures, which Defendant contends was neither substantially justified nor harmless, and is part of a "continuing pattern of noncompliance and/or disregard" for the rules. Dkt. 85 at 5. According to Defendant, the harm is that Defendant has been forced to address some evidentiary issues on a shortened schedule, which lessens Defendant's "valuable trial preparation time." Dkt. 98 at 5. Defendant argues that it has suffered strategic setbacks, because Defendant "has been forced to prepare its initial pretrial statement without knowing exactly what evidence Plaintiff intends to pursue . . . and what exhibits must be included that will not be offered[.]" Dkt. 85 at 6.

Plaintiff concedes the late service of his pretrial disclosures, which apparently occurred due to Plaintiff's lack of familiarity with the local rules. *See* LCR 16(h). Plaintiff distinguishes authority cited by Defendant and argues that dismissal is not an appropriate sanction where Plaintiff served pretrial disclosures 30 days prior to trial, which complies with the default federal rule, and where much of the disclosed content should have reasonably been anticipated and substantially overlaps with Defendant's pretrial disclosures. Dkt. 93 at 4-6. Plaintiff points to efforts made to mitigate the harm to Defendant, such as Plaintiff's offer to a pay a portion of the attorney fees for this motion and to meet in person with Defendant to streamline the submission of the agreed pretrial order. *Id.*

Because Plaintiff has made no showing that would justify Plaintiff's untimely pretrial disclosures (ignorance is no excuse), the focus of the Court's inquiry is

on the harm to Defendant and the appropriate remedy. Plaintiff's late pretrial disclosures impacted Defendant's ability to prepare for trial, due to the compressed timeline, so the Court cannot find that the Rule 26(a) violation was harmless. However, Defendant exaggerates the harm. Review of the parties' agreed pretrial order reveals considerable agreement about the admissibility of witnesses and trial exhibits. For example, Defendant plans to call five witnesses, four of whom Plaintiff has identified as witnesses for his case in chief. Dkt. 100 at 4-9. The parties agree to the admissibility of over sixty trial exhibits, while Defendant objects to thirteen and Plaintiff to eight of the opposing party's trial exhibits. *Id.* 9-14. At most, the prejudice to Defendant is less time to file pleadings, as well as the burden of filing this motion, but this is not an overly complex case. Defendant must defend against one plaintiff alleging a single discrimination claim, and at the time that Plaintiff made his pretrial disclosures, Defendant had one month to prepare for trial.

Defendant ties Plaintiff's untimely pretrial disclosures in this instance to prior discovery violations, arguing that their sum total warrants dismissal. Having ruled on the prior discovery motions in this case, the Court is acutely aware of Plaintiff's missteps. Nonetheless, their sum total does not amount to showing of willfulness or bad faith. Defendant also argues that the Rule 26(a) pretrial disclosures included new discovery not previously disclosed. That issue will be addressed with respect to Defendant's motion *in limine*.

Because Defendant endured only minimal harm due to the Rule 26(a) violation, excluding evidence,

which would effectively result in dismissal, is not an appropriate remedy. Further, the Court cannot find bad faith or a willful disregard of the rules, under circumstances where Plaintiff abided by the general federal rule but apparently was unaware of the local rule, and where Plaintiff offered to pay some costs and to meet with Defendant in-person after learning of the mistake. Dismissal would be an excessive sanction. Rather than excluding evidence, the Court "(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions[.]" Fed. R. Civ. P. 37(c)(1). In this case, the appropriate sanction is for Plaintiff to pay Defendant for expenses incurred in filing this motion. Plaintiff previously offered to pay Defendant $2,000, Dkt. 94-1 at 16, which is a sufficient amount.

[ * * * ]

THEREFORE, it is HEREBY ORDERED that Defendant Franciscan Health System's Motion to Dismiss and/or For Imposition of Sanctions Pursuant to Fed. R. Civ. P. 37 is GRANTED IN PART and DENIED IN PART.

The case is not dismissed, but Plaintiff is ordered to $2,000 to Defendant.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 26th day of September, 2016.

/s/ Robert J. Bryan
United States District Judge

**ORDER ON DEFENDANT FRANCISCAN HEALTH SYSTEMS MOTION FOR SUMMARY JUDGMENT (AUGUST 15, 2016)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

THIS MATTER comes before the Court on Defendant Franciscan Health System's Motion for Summary Judgment. Dkt. 71. The Court has considered the Motion, Plaintiff's Response (Dkt. 78), Defendant's Reply (Dkt. 82), and the remainder of the file herein. Plaintiff has requested oral argument, which the Court deems unnecessary.

## I. Background

### Facts

The Court recites the facts substantiated by the record in the light most favorable to

Plaintiff. Although the parties' briefing extensively details the factual background, only limited facts need be recited to resolve Defendant's motion.

Plaintiff graduated from the University of Tanta School of Medicine in Egypt in 1998, obtaining the equivalent of an M.D. Dkts. 72-1 at 70; 72-3 at 3, 4. After moving to the United States, Plaintiff began a residency program in 2006. During 2009, Plaintiff took a break from the program for six months due to his diagnosed bipolar disorder, which inhibited Plaintiff's ability to function. *Id.* at 8, 9. The disorder followed years of chronic sleep deprivation. *Id.* at 10. Plaintiff completed the residency in December 2009 with assistance from a monitoring psychiatrist. *Id.* at 11.

Plaintiff did not gain any clinical or work experience after the residency until September 2010, when Plaintiff started a hospitalist position at Mayo Clinic, which Mayo Clinic terminated in December 2010. Dkts. 72-2 at 82, 83; 72-3 at 13. The legitimacy of the termination is the subject of another lawsuit and is disputed by Plaintiff. *See Elkharwily v. Mayo Holding Co., et al.*, Case No. 12-cv-03062-DSD/JJK (D.Min.).

Defendant offered Plaintiff a hospitalist position on March 29, 2012, with a start date of August 6, 2012. Dkt. 72-3 at 24, 25, 31. Defendant considered Plaintiff's application for medical privileges, *see*

Dkt.72-1 at 15-38, and provisionally extended them to Plaintiff based on an apparent immediate need for a nocturnal hospitalist. Dkt. 72-3 at 36. Plaintiff's application was sent to the Regional Credential Committee (RCC). The RCC "is the proper process for [screening] all files, including those granted temporary privileges." *Id.* at 37. On August 6, 2012, the RCC discussed Plaintiff's application, which disclosed Plaintiff's bipolar disorder, and thereafter revoked Plaintiff's temporary medical privileges. Dkt. 81-2 at 15. The RCC determined that additional information was needed, and Drs. DeLeon and Haftel of the RCC interviewed Plaintiff on August 7, 2012, asking Plaintiff about the "red flag" of the mental illness, the circumstances of the separation from Mayo Clinic, the time "gap" in Plaintiff's resume, and when Plaintiff planned to take the board exam. *Id.* at 15, 18.

Dr. DeLeon reported his findings, concluding that "given [Plaintiff's] history, Dr. Haftel and I are in full agreement that in the interest of patient safety, Dr. Elkharwily's FHS privileges should remain in a pending state at this time, contingent upon a full psychiatric evaluation." Dr. DeLeon also recommended that if Plaintiff were to be assigned clinical duties, there should be professional proctoring and oversight. Dkt. 72-1 at 9. The Medical Executive Committee (MEC), which considers the recommendations of the RCC, adopted these recommendations in a formal letter to Plaintiff on August 10, 2012. Dkt. 71-2 at 50, 51. Thereafter, Plaintiff did not obtain an independent psychiatric evaluation, but rather submitted two generally positive evaluations from prior treating psychiatrists. *Id.* Plaintiff did not practice as a nocturnal hospitalist with the oversight of a proctor,

but the reason for the failure to secure a proctor is disputed.

The meeting minutes of the MEC, which convened on September 13, 2012, read as follows:

> After careful deliberation the MEC felt that the information provided by [Plaintiff] failed to demonstrate adequate training, experience or competence to be appointed to the Active Medical Staff. This was based on [Plaintiff's] inadequate experience as hospitalist or clinical work in hospital setting, lack of interest in and disregard to Board Certification status and a three year interval during which he had very limited clinical activity in the practice of medicine, including hospital medicine. Therefore, it was M/S/P to recommend that [Plaintiff's] application and request for Active Medical Staff membership and privileges at FHS be denied.

Dkt. 71-2 at 44, 45. The MEC gave notice to Plaintiff of their decision. Dkt. 72-2 at 47.

Plaintiff appealed the MEC recommendation to the Panel Review Committee on January 2 and 3, 2013, which convened on February 6, 2013 and made two recommendations to the MEC: that the MEC "complete the information gather process to more thoroughly evaluate [Plaintiff's] training, experience, and clinical expertise," and that the MEC "provide [Plaintiff and Defendant] the opportunity to respond to the MEC's rejection of the proctoring plan proposed in September." On February 14, 2013, after considering the panel's recommendations, the MEC voted to confirm its initial denial of medical privileges. Dkt. 71-2 at 50. The

MEC gave Plaintiff written notice of its decision. Dkt. 72-2 at 78.

After an Appellate Review Committee affirmed the MEC recommendation, on July 23, 2013 it was provided to the Franciscan Health Systems (FHS) Board of Directors. FHS reported the denial of medical privileges to the National Practitioner Data Bank (NPDB).

The NPDB report stated the following:

> Franciscan Health System's ("FHS") Board of Directors denied the practitioner's request for active medical staff membership and clinical privileges after notice, hearing and appeal and after considering the facts and in furtherance of quality of care. The reasons for this action include practitioner's failure to demonstrate the scope and adequacy of his experience or his current clinical skill and competence for active medical staff membership and privileges.

Dkt. 71-2 at 336-37.

**Complaint**

The Complaint, which Plaintiff previously amended, alleges a claim of defamation (Count I), violations of the Washington Law Against Discrimination (WLAD) (Count II), the Rehabilitation Act (Count III), Title VI of the Civil Rights Act (Count IV), and the False Claims Act (Count V). Dkt. 18-1. *See* Dkt. 1-2. Plaintiff abandoned a previously-alleged claim for an Equal Right to Enforce Contracts under 42 U.S.C. § 1981. *Id.* The Court previously dismissed the False Claims Act claim (Count V), Dkt. 24 at 8, and Plaintiff has now abandoned the Title VI claim

(Count IV), which should be dismissed. Dkt. 78 at 2. Plaintiff has also abandoned the allegations of discrimination based on race and national origin in violation of the WLAD, leaving the allegation of disparate treatment based on disability. *Id. See* Dkt. 18-1 at ¶¶ 18, 19, 22. In sum, Plaintiff is now proceeding on the claim for defamation, as well as the claims for disability discrimination in violation of the WLAD and the Rehabilitation Act.

## II. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical*

*Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—*e.g.*, a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. For purposes of summary judgment motions, the court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

## III. Discussion

### A. Defamation claim (Count I)

The tort of defamation "vindicates a citizen's interest in his or her good reputation." 16A Wash. Prac., Tort Law And Practice § 20:1 (4th ed.), citing to *Corey v. Pierce Cty.*, 154 Wn. App. 752 (2010). Summary judgment of a defamation claim is not appropriate when "the plaintiff's proffered evidence is of a sufficient quantum to establish a *prima facie* case with convincing clarity." *Mark v. Seattle Times*, 96 Wn.2d 473, 486 (1981), quoting *Sims v. KIRO, Inc.*,

20 Wn.App. 229, 237 (1978). The *prima facie* defamation claim is comprised of four elements: (1) a false statement; (2) lack of privilege; (3) fault; and (4) damages. *Id.* Privileges may arise from common law or are creatures of statute. *Compare, .e.g., Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370 (2002) (statutory privilege); and *Gilman v. MacDonald*, 74 Wn. App. 733 (1994) (common law privilege).

The Complaint alleges that Defendant defamed Plaintiff by reporting the denial of privileges to the NPDB. The parties agree that Defendant submitted the NPDB report, but Defendant contends that the defamation claim fails as a matter of law because the NPDB report (1) falls within a statutory privilege created by the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 117 *et. seq.*, and (2) was accurate and truthful. Dkt. 71 at 13-17.

Plaintiff concedes that the statutory privilege under the HCQIA could apply, but argues that the privilege should not apply, for two reasons (Dkt. 73 at 13-20): First, Defendant knew that the NPDB report was false, because Plaintiff's privileges application included positive performance reviews. Second, the privilege only protects "professional review actions," and the submission of the NPDB report does not fit under the term's statutory definition, where the NPDB report was not based on "the competence or professional conduct of a physician," but instead was based on Plaintiff's incomplete application. Dkt. 78 at 14, citing to 42 U.S.C. § 11151(9).

Under the HCQIA, healthcare entities "shall report" any "professional review action that adversely affects the clinical privileges of a physician for a period

of longer than 30 days" to the state board of medical examiners, which reports the information to the NPDB. 42 U.S.C. § 11133(a). *See* 45 C.F.R. § 60.11(b). A "professional review action" is defined as:

> an action or recommendation of a professional review body . . . 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 . . . of the physician.

§ 1151(9). "Immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false." *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 31334 (10th Cir. 1996). *See* § 11137(c).

As a threshold matter, Defendant's submission of the NPDB report falls within the HCQIA privilege to protect "professional review actions. *See* § 11151(9). The NPDB report states that clinical privileges were denied where Plaintiff "failed to demonstrate scope & adequacy of experience & competence," and Plaintiff's argument to the contrary is unavailing. Because the HCQIA privilege applies, the remaining inquiry becomes whether there are issues of material fact pertaining to the NPDB report's falsity or Defendant's knowledge thereof.

In considering whether Defendant's submission of the NPDB report was "false" for purposes of § 11137(c), "courts do not evaluate whether the underlying merits of the reported action were properly

determined" or whether the report contains inaccurate information, but rather they "evaluate whether the report itself accurately reflected the action taken." *Murphy v. Goss*, 103 F.Supp.3d 1234, 1239, 1242 (D.Oreg. 2015). Applied here, there is no material issue of fact as to the consistency between the NPDB report, which states that Plaintiff "failed to demonstrate scope & adequacy of experience & competence," and the action taken, denial of Plaintiff's medical privilege. The content of the statement accurately reflects the conclusion of Defendant, who considered and re-considered Plaintiff's application several times through several layers of deliberation. It is not provably false. Instead, the overwhelming record shows that the NPDB report accurately reflects Defendant's action (although an issue of material fact surrounds Defendant's consideration of Plaintiff's disability—see below).

Because there is no issue of material fact as to the NPDB report's falsity, the Court need not analyze Defendants' knowledge of falsity. Defendant's motion should be granted as to the claim for defamation.

**B. WLAD claim (Count II)**

Plaintiff alleges disparate treatment based on his disability in violation of the WLAD. In analyzing discrimination claims brought under the WLAD, codified at RCW 49.60, Washington courts have adopted the three-part burden shifting scheme from *McDonnell Douglas Corp. v. Green.* Under the *McDonnell Douglas* scheme, the plaintiff first must establish a prima facie case. Then the burden of production shifts to the defendants to produce a nondiscriminatory reason for the employment decision, and then back to the plaintiff to show that the nondiscriminatory reason

offered is actually pretext. *Allison v. Hous. Auth. of City of Seattle,* 118 Wn.2d 79, 88–89 (1991). "Pretext" means that the reason proffered (1) has no basis in fact, (2) was not really the motivating factor for the decision, or (3) was not a motivating factor for other employees in similar circumstances. *Marin v. King Cty.*, 194 Wn. App. 1019 (2016)

To present a prima facie case for a disparate treatment case of disability discrimination, a plaintiff must establish that he was 1) disabled; 2) doing satisfactory work; 3) subject to an adverse employment action; and that 4) the adverse employment action occurred under circumstances that raise a reasonable inference of unlawful discrimination. *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 488 (2004).

Plaintiff has met his *prima facie* burden. Defendant does not dispute elements one and three, conceding that Plaintiff was "disabled" and that denying medical privileges is an "adverse employment action." Regarding the second element, which concerns the quality of Plaintiff's work, or as applied here, the sufficiency of Plaintiff's qualifications, Defendant argues that Plaintiff has not shown that he was qualified for medical privileges, because, *inter alia*, Plaintiff had limited clinical experience, Plaintiff had been terminated after three months from his only other post-residency job, and Plaintiff could not establish clinical competency after a 20-month gap in practice. Dkt. 71 at 18-20. However, Plaintiff's burden element is satisfied under circumstances where Defendant provisionally hired Plaintiff as a hospitalist. Although Defendant later revoked and denied full medical privileges after further consideration of Plaintiff's application, it stands to reason that, at a minimum,

Plaintiff could have possessed the requisite education and experience to be granted full privileges, otherwise Defendant would not have given Plaintiff the temporary appointment.

Regarding the fourth element, Defendant argues that Plaintiff has made no showing that medical privileges were denied because of Plaintiff's disability, given the other deficiencies

Plaintiff's application. The record shows extensive discussion about Plaintiff's disability at every stage of Plaintiff's application appeal, from the initial interview with Drs. DeLeon and Haftel to the MEC recommendation to FHS, so Plaintiff's *prima facie* burden is satisfied.

Defendant argues that Plaintiff has not made a *prima facie* showing because there is no evidence that Defendant has treated other similarly situated employees differently, but showing disparate treatment between employees is not necessarily an essential element to the *prima facie* case. *See Anica*, 120 Wn. App. at 488. "The elements of a prima facie case for disparate treatment based on protected status are not absolute but vary based on the relevant facts." *Marin* at *5.

Next, the Court considers whether Defendant has met its burden to show a legitimate, nondiscriminatory reason for the denial of medical privileges, which it has done. Defendant points to several reasons for the denial of medical privileges, such as Plaintiff's limited hospitalist experience of only three months, the opinion of Plaintiff's psychiatrist that Plaintiff may have difficulty working as a nocturnal hospitalist due to the unusual sleep shift schedule, and questions

raised about Plaintiff's competency based on his residency at the Mayo Clinic. Dkt. 71 at 20. These are substantiated by the record and satisfy Defendant's burden.

Finally, the Court considers whether Plaintiff has met the burden to show that Defendant's reason for the denial of medical privileges was based on pretext. Plaintiff has met the burden, because again, the record shows that Plaintiff's bipolar disorder was at least a factor in Defendant's decision to deny medical privileges at every stage of Plaintiff's application. For example, after the RCC's initial revocation of Plaintiff's privileges, in a letter to Plaintiff from Dr. Dempster, the RCC requested "further information," including "a psychiatric examination and assessment, for the purpose of evaluating the applicant's ability to practice." Dkt. 80-11 at 2. *See also*, *id.* at 3-12. Correspondence between Plaintiff and members of the RCC and MEC also refer directly to Plaintiff's disorder. Defendant argues that consideration of Plaintiff's bipolar disorder was justified, but this argument only reinforces the conclusion that issues of fact remains as to the circumstances surrounding the denial of medical privileges.

Defendant's motion should be denied as to the WLAD claim to the extent Plaintiff's claim alleges discrimination based on disability, but it should be granted as to alleged discrimination based on national origin and race.

**C. Rehabilitation Act claim (Count III)**

Plaintiff alleges discrimination based on his disability status in violation of the Rehabilitation Act. Dkt. 18-1 at ¶ 29. *See* 29 U.S.C. § 794:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]

29 U.S.C. § 794(a) (emphasis added). The plaintiff bears the initial burden to make a prima facie showing that (1) Plaintiff has a "disability," (2) was otherwise qualified for the position sought, (3) was excluded from the position solely[1] by reason of the disability, and (4) the position sought is part of a program that receives federal financial assistance. *Smith v. Barton*, 914 F.2d 1330, 1338 (9th Cir. 1990). *See Weinreich v. Los Angeles Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). Cir. 1996).

Defendant does not dispute that Plaintiff has a disability or that the hospitalist position is connected to federal financial assistance, but Defendant contends that Plaintiff cannot make a showing as to element two, that Plaintiff was "otherwise qualified," or for element three, that Plaintiff was excluded "solely by reason of" the bipolar disorder. Dkt. 82 at 5.

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[1] Some cases recite a broader element that would allow a plaintiff to show that an adverse action was taken "because of" the plaintiff's disability, which tracks language in Title VII. *Walton v. U.S. Marshals Service*, 492 F.3d 998, 1005 (9th Cir. 2007). However, including "solely by reason of the disability" is consistent with (1) the plain text of Section 504, which differs from Title VII, (2) the Ninth Circuit's ADA jury instructions, and (3) multiple cases that recite these elements *pro forma*.

To support his showing that he was "otherwise qualified," element two, Plaintiff points to the hospitalist position at Mayo Clinic and the temporary medical privileges extended by Defendant. As to element three, Plaintiff somewhat confusingly states that "to establish a prima facie case . . . a plaintiff must produce evidence that . . . he was discriminated against solely on the basis of his disability," but later argues that Defendant's "solely by reason of disability" argument is misleading. Dkt. 78 at 24, 26. Plaintiff appears to believe that a showing of pretext overcomes the need to make the showing that discrimination was done solely based on disability, but Plaintiff cites no binding precedent. *Id.*

Plaintiff has made a sufficient showing as to element two, that he was otherwise qualified for the medical hospitalist position, because, as discussed with relation to the WLAD claim above, he was sufficiently qualified to be given temporary medical privileges. Plaintiff has not, however, made a showing as to element three, that he was discriminated against solely on the basis of his disability. Instead, the record is replete of correspondence between administrators and formal letters to Plaintiff that repeatedly and universally point to multiple reasons for the denial of medical privileges. In fact, Plaintiff's deposition reveals as much, where Plaintiff testified to answering interview questions on a multiplicity of topics. Dkt. 81-2 at 15-18. No trier of fact could find for Plaintiff as to this element.

Because the claim is resolved by considering Plaintiff's *prima facie* showing, the Court need not engage in *McDonnell Douglas* burden shifting. Defendant's motion should be granted as to this claim.

## IV. Order

THEREFORE, it is HEREBY ORDERED that Defendant Franciscan Health System's Motion for Summary Judgment (Dkt. 71) is GRANTED IN PART and DENIED IN PART as follows:

Defamation claim (Count I): Granted. This claim is DISMISSED.

Washington Law Against Discrimination claim (Count II): Granted as to alleged discrimination based on race and national origin and DISMISSED to that extent, but denied as to alleged discrimination based on disability.

Rehabilitation Act claim (Count III): Granted. This claim is DISMISSED.

Title VI claim (Count IV): Granted. This claim is DISMISSED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 15th day of August, 2016.

/s/ Robert J. Bryan
United States District Judge

# SECOND ORDER ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES (JULY 29, 2016)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

THIS MATTER comes before the Court on Plaintiff's Motion to Compel Discovery Responses. Dkt. 42. The Court previously ruled on the motion in part and continued it in part for further briefing. Dkt. 59 at 9. The Court has considered the pleadings filed in support of and in opposition to the motion, Dkts. 48, 53, including Defendant's surreply, Dkt. 65, and the remainder of the file herein.

## A. Archived emails

Plaintiff's motion requests, *inter alia*, that the Court compel Plaintiff's Request for Production #8 and Request for Production #9. The Court's Order on Plaintiff's Motion to Compel (Dkt. 59) granted the request in part, as to the production of live emails, and continued the request in part, as to the production of archived emails, for Defendant to have the opportunity to file a surreply. Dkt. 59 at 9. According to the Order, Plaintiff's Reply introduced "new factual representations [that] could be grounds for a motion to strike . . . [but] because of the burden shifting of Fed. R. Civ. P. 26(b)(2)(B), which allows Plaintiff to rebut Defendant's showing that electronic information is reasonably accessible, a surreply . . . is appropriate." *Id* at 6. The Court now considers the merits of Plaintiff's motion to compel archived emails.

### 1. Factual background

#### Discovery requests

Plaintiff's Request for Production #8 seeks Defendant's "[production of] all emails and text messages concerning Plaintiff between employees, agents or attorneys of Defendant." Dkt. 42 at 3. Plaintiff's Request for Production #9 extends the same request to emails and messages between Defendant's employees, agents or attorneys and third parties: "(1) Plaintiff, (2) any employee, agent or attorney of Group Health, (3) any employee, agent or attorney of any former employer of Plaintiff and (4) any employee, agent or attorney of the National Practitioners Data Bank [NPDB]." *Id.*

Defendant provided Plaintiff with the same response to both requests for production as follows:

> Defendant objects to this request on the grounds that this request is overbroad and burdensome. Defendant further objects to the extent that this request seeks documents which are protected by the attorney-client and/or work product privileges. Without waiving and subject to these objections, Defendant responds: Defendant does not have an email archiving system. This means there is no single location or application that can be queried for email matching specified criteria. Email can only be searched if it is maintained in a live email account. To locate documents responsive to this request, Defendant searched the live email accounts of the following custodians: Dr. Dennis De-Leon, Dr. Tony Haftel, Dr. Mark Adams, Dr. William Cammarano, and Ms. Kim Nighswonger. Non-privileged responsive documents are attached as FHS 000968 to FHS 000973. Defendant also refers to the emails previously produced with Defendant's initial disclosures as well as by Plaintiff in this matter.

*Id.*

**Defendants email archiving system**

Defendant represents that it does not maintain an email archiving system, but rather archives emails on a monthly basis on physical backup tapes, as part of a disaster relief program. Dkt. 49 at 5. Defendant represents that in order to retrieve all responsive

discovery, Defendant would need to retrieve, restore, and review each backup tape, which at 14 hours per tape would require 1,400 hours in labor and $157,500 in costs. *Id.*

**Declarations of Plaintiff and Mr. Bruce Megard**

In a signed declaration, Plaintiff declares:

> 5. Right after the end of my last appeal in May 2013 I asked Mr. [Bruce] Megard [Defendant's lawyer] and Josh[ua Weaver] (the lawyer conducting my last hearing) if I could get copies of all emails (whether produced or not), minutes, documents, or any in writing note that was used in the process of my appeal or not produced for any reason. They both refused.
>
> 6. After [Defendant's] Board issued its final decision denying my application for privileges, which was July 2013, I called Mr. Megard immediately again and I asked him to send me copies of everything again and I told him at least I need copies of the emails and documents produced and were used in the entire privilege process. He refused and said Washington law does not allow him to send me any copies. He asked me why I needed those and I told him I am filing a law suit [sic]. Mr. Megard said, "I advise you not to. You are going to lose time and money and you will lose." I said, "Well, I will let the judge and jury decide that."

Dkt. 55 at 2.

Mr. Bruce Megard, Defendant's lawyer, states in a signed declaration that he has no recollection of the telephone conferences referred to in Plaintiff's declaration, but that if Mr. Megard had been asked, he "would have informed [Plaintiff] that all discovery documents under FHS's Medical Staff Bylaws had already been produced during the course of the appeal process and that additional disclosures were not permitted under those same Bylaws. Dkt. 66 at ¶¶ 2, 3. Mr. Megard affirms that he keeps billing entries for teleconferences and has found no time entries for conversations with Plaintiff during the relevant timeframe.

While Mr. Megard did not find any emails directed to him, Mr. Megard was carbon copied in an email from Plaintiff to Joshua Weaver, attorney for FHS' Appellate Review Committee. Dkt. 66-1 at 1-3. The email, dated July 25, 2013, appears to be a response by Plaintiff to the Appellate Review Committee's Final Recommendation to deny Dr. Elkharily's request for Active Medical Staff membership and privileges. Dr. Elkharwily writes, "Thank you Mr. Weaver for letting me know the decision. I guess there is nothing else I can do. Best wishes, Alaa[.]" *Id.* at 2.

**2. Discovery standard**

Fed. R. Civ. P. 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant . . . and proportional[.]" The rule enumerates considerations when weighing proportionality: (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the

discovery in resolving the issues, and (5) whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1). The discovery rule further provides that, "On motion by a party or *sua sponte* courts must limit discovery that is unreasonably cumulative or duplicative, or can be obtained from a more convenient, less burdensome, or less expensive source. Fed. R. Civ. P. 26(b)(2)(C)(ii). Specific to electronically stored information, a party "need not provide discovery . . . [when] not reasonably accessible because of undue burden or cost." However, if that showing is made, "the court may nonetheless order discovery . . . if the requesting party shows good cause[.]" Fed. R. Civ. P. 26(b)(2)(B).

**3. Discussion**

Defendant argues that the archived emails are not readily accessible, costly to restore, and of only minimal discovery value. Defendant also argues that Plaintiff has not exhausted more easily accessible information and has not identified what kind of material Plaintiff believes will be found on the backup tapes, so compelling production of archived emails "amounts to an extremely expensive fishing expedition." Dkt. 48 at 7.

Plaintiff does not discredit Defendant's argument about the burden or cost of producing the archived emails, but, Plaintiff argues, Defendant is at fault. Defendant should have preserved emails in an accessible format, rather than archiving them, because around July of 2013 Plaintiff expressly requested them after his appeal was denied, and he warned Defendant of future litigation, which also triggered their preservation. Dkt. 53 at 2, 3.

The emails that Plaintiff seeks to compel are discoverable under Fed. R. Civ. P. 26(b)(1), but Defendant has met its burden to show that retrieving the electronically stored information would result in an undue burden and cost to Defendant. Fed. R. Civ. P. 26(b)(2)(B). Defendant estimates $157,500 in costs to retrieve, restore, and review the backup tapes for responsive archived emails.

Because Defendant has met its burden, the Court considers whether Plaintiff has shown good cause, because if so, "the court may nonetheless order discovery[.]" Fed. P. Civ. P. 26(b)(2)(B). Plaintiff has not met his burden. *See* Dkts. 42, 53. Tellingly, Plaintiff does not name individuals that Plaintiff believes exchanged emails about Plaintiff, nor does Plaintiff describe suspected content of the emails. Plaintiff does not even represent with any surety that responsive emails exist. Because Plaintiff has not met his burden for good cause, compelling production of the discovery at expense to Defendant is not warranted.

Plaintiff's blame-shifting is unpersuasive, because as between Mr. Megard's and Plaintiff's conflicting declarations, Mr. Megard's should be given more weight, for two reasons. First, Mr. Megard, who practices law and bills time to clients for telephone conferences, has no record of any phonecalls from Plaintiff. Second, Mr. Megard's memory is consistent with the email exchange between Plaintiff and Mr. Weaver in July 2013, where Plaintiff stated that "I guess there is nothing else I can do [to appeal denial of privileges]."

Although Plaintiff has not met his burden to show good cause, which would overcome Defendant's showing that producing the archived emails is costly and

burdensome, the archived emails are "discoverable" under Fed. R. Civ. P. 26(b)(1). Therefore, upon a request by Plaintiff, Defendant should facilitate access to the discovery, but should do so only at Plaintiff's expense, payable in advance. Plaintiff should be responsible for all costs, such as retrieving and restoring the backup tapes to an accessible format, except for costs relating to Defendant's review of the information for privileged material (which is like any other discovery request, *e.g.*, the live emails).

Defendant should not otherwise be compelled to produce the archived emails, and to that extent Plaintiff's motion should be denied.

**B. Request for Clarification**

Plaintiff's Interrogatory #7 requests that Defendant "[i]dentify by name, address, race, and national origin each physician who applied for privileges . . . in 2011-2013," and the Court ordered Defendant to answer "to the extent that Defendant submitted privilege denial data to the [National Practitioners Data Bank] NPDB." Dkt. 59 at 8. Defendant's surreply requests clarification of whether Defendant may redact the names of the physicians in its answer, because of the sensitive nature of privilege denials.

Defendant may not redact the names and addresses, because although it may be sensitive information, the Court is aware of no reason why a protective order, properly raised under the rules, would be inadequate to address Defendant's legitimate concern.

[ * * * ]

Therefore, it is HEREBY ORDERED that the remainder of Plaintiff's Motion to Compel (Dkt. 42), which the Court previously continued for further briefing (Dkt. 59 at 9), is DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 29th day of July, 2016.

/s/ Robert J. Bryan
United States District Judge

# ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL (DECEMBER 6, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

This matter comes before the court on Plaintiff's Motion for New Trial (Dkt. 132). The court is familiar with the records and files herein, the events of the trial, and the documents filed in support of and in opposition to the motion. Oral Argument would not be helpful in resolving this motion, and Plaintiff's request for oral argument is DENIED.

Plaintiff's motion is based on three primary arguments:

1. The defense verdict resulted from false evidence from Defendant's witnesses;
2. The verdict was against the clear weight of the evidence; and
3. The Court made erroneous evidentiary rulings.

The Court will address these matters in the following order: First, regarding evidentiary rulings, second regarding alleged false evidence, and third, the weight of the evidence.

Evidentiary Rulings. Plaintiff argues that the Court erred in rejecting Exhibit 45. Exhibit 45 was an email sent by Plaintiff's witness, Dr. Dempster, that, "simply memorializes Dr. Dempster's views and position on the matter." Dkt. 136-5, page 43 at line 11 (rough transcript of Dr. Dempster's testimony). The email was not an appropriate exhibit. Plaintiff's counsel inquired about the matters covered in the email and the witness, Dr. Dempster, used Proposed Exhibit 45 to refresh his recollection. There was no error nor any prejudice to Plaintiff in rejecting the exhibit.

Plaintiff argues that the Court erred at the rough transcript at Docket Number 136-5 at pages 48-49 of Dr. Dempster's testimony. The question was, "Did you observe or conclude that Franciscan was using the reasons concerning Board Certification and lack of experience to mask the motivation based on his mental disability?" In response to an objection, the Court ruled that the question was leading in form (*see* page

49, line 6). It clearly was leading, and there was no error nor prejudice to Plaintiff in sustaining that objection.

False evidence. Plaintiff makes substantial argument that witnesses testified untruthfully, and refers to many "lies" that were told by various witnesses. A lie is an untrue statement made with the intent to deceive. There are many untrue statements made without the intent to deceive. Memories are inconsistent and often play tricks on witnesses' recollections. It is not appropriate to call every bit of evidence that a party disagrees with a "lie."

Trials allow a search for the truth. They are designed to allow counsel to test all testimony in light of the totality of the evidence and the record. Sometimes the truth is not uncovered. The jury, however, is the arbiter in determining what is more probably true than not true.

Here, the burden of proof was on the Plaintiff to prove that his bipolar disability was a substantial factor in Defendant Franciscan's decision to deny his application for credentials. He also had the burden to prove that he was able to perform the essential functions of the job in question. *See* Instruction Number 9 at Docket Number 128. There was plenty of evidence supporting Plaintiff's position. There was also plenty of evidence supporting the Defendant's position. After a fair trial, the jury found that Plaintiff had not borne his burden to prove that the elements of his claim were more probably true than Defendant's position.

None of what Plaintiff presents in support of this motion rises to the level of a proven lie – or lies –

that would justify a new trial. Differences in recollection or opinion do not justify a new trial. There are sharp differences in the evidence in many, if not most, trials, and those differences can usually be attributed to memory differences occurring in good faith rather than to intentional lies.

There is no justification in Plaintiff's moving papers or in the events of the trial that would justify a conclusion that the verdict resulted from intentionally false evidence by Defendant's witnesses.

Clear weight of the evidence. The verdict was not contrary to the clear weight of the evidence. There was evidence in the record from which the jury could have found for Plaintiff or for Defendant. The jury apparently followed the instructions of the Court, carefully considered the evidence under those instructions, and came to a conclusion contrary to Plaintiff's position. Their conclusion was not contrary to the clear weight of the evidence.

Footnote. The undersigned observer thought that it was Group Health, a non-party, that finally pulled the rug out from under Plaintiff's application for credentials by not arranging for a proctoring program that was satisfactory to the Defendant, and through which Plaintiff would have had the opportunity to prove that he could perform the essential functions of the job in question.

Therefore, it is now

ORDERED that Plaintiff's Motion for a New Trial (Dkt. 132) is hereby DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 6th day of December, 2016.

/s/ Robert J. Bryan
United States District Judge

## ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON ON DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(B)(6) (DECEMBER 1, 2015)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALAA ELKHARWILY, M.D.,

*Plaintiff,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant.*

Case No. 3:15-cv-05579-RJB

Before: Robert J. BRYAN,
United States District Judge.

THIS MATTER comes before the Court on Defendant's Motion to Dismiss Under Rule 12(b)(6). Dkt. 8. Defendant's motion seeks dismissal of Plaintiff's First Amended Complaint. Dkt. 8. *See* Dkt. 1-3. However, prior to Defendant filing Defendant's Reply (Dkt. 16), the Court granted Plaintiff's Motion to File the Second Amended Complaint (Dkt. 14-1) and gave Defendant an opportunity to modify or supplement the

Motion to Dismiss Under 12(b)(6). Dkt. 21. The Second Amended Complaint, which the Court considers below in light of Defendant's motion, adds new facts but does not add new claims. *C.f.* Dkt. 14-1 and Dkt. 1-3. The Court has considered the pleadings filed in support of and in opposition to Defendant's motion and the file herein. Dkt 14, 16.

## BACKGROUND

According to the First Amended Complaint, Plaintiff, a Washington-licensed physician, was offered employment as a physician by Group Health of Tacoma, Washington, contingent upon being granted "privileges to practice medicine" by Defendant. Dkt. 1-3, at 1. Plaintiff alleges that Defendant denied Plaintiff's application for privileges and revoked temporary privileges on the basis of Plaintiff's national origin, creed, race, color, and bipolar mental health status, and because Defendant knew of Plaintiff's wrongful discharge action against former employer, Mayo Health System. Dkt. 1-3, at 1, 2, 4, 6. As a result, Plaintiff has allegedly suffered loss of income and employment benefits. Dkt. 1-3, at 2. Plaintiff also alleges that Defendant harmed Plaintiff by reporting its denial and revocation of privileges to the National Practitioner Data Bank and to Group Health, where Plaintiff had "fail[e]d to demonstrate the scope and adequacy of his experience or his current clinical skill and competence[.]" Dkt. 1-3, at 2. The Second Amended Complaint adds that Defendant knew that its report was false, because "all information" that Defendant had demonstrated only that Plaintiff was competent. Dkt. 23, at 4.

Also alleged in the Second Amended Complaint is that, immediately prior to, during, and following Defendant's denial and revocation of privileges, "Dr. Deleon" told Plaintiff that "[his] mental illness is a red flag." Dkt. 23, at 2. Also around that time, according to Plaintiff, "Dr. Hoftel" told "Dr. Dempster of Group Health" that "you should watch what type of people you are bringing to work at the hospital." Dkt. 23, at 2. Plaintiff also adds additional details about a board appeals process at which "Dr. Cameroni" attested to Plaintiff's inability to do the job because of his disability, and an appellate body "denied and resisted" giving Plaintiff the chance to do a proctorship to alleviate concerns about Plaintiff's mental health. Dkt. 23, at 2.

In Plaintiff's First Amended Complaint, Plaintiff alleges a common law tort claim for Defamation (Count I), as well as violations of the Washington Law Against Discrimination (Count II), the Rehabilitation Act (Count III), Title VI of the Civil Rights Act of 1964 (Count IV), the False Claims Act (Count V), and 42 U.S.C. § 1981 (Count VI). Dkt. 1-3. The Second Amended Complaint does not add additional claims. Dkt. 23.

## STANDARD FOR MOTION TO DISMISS

Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint

attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965. Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

## DISCUSSION

### (1) Defamation (Count I)

Claims for defamation hold in tension "the need to perpetuate an uninhibited marketplace of ideas" with the idea that "there is no constitutional value in false statements of fact." *Taskett v. KING Broad. Co.*, 86 Wn. 2d 439, 444 (1976) (internal quotes omitted). To state a claim for defamation, Plaintiff must allege that Defendant made a false statement that was an unprivileged communication and caused plaintiff harm. *Mark v. Seattle Times*, 96 Wn. 2d 473, 486 (1981). If Plaintiff can establish a prima facie case defamation, then Defendant may raise an immunity defense. *See, e.g., Momah v. Bharti*, 144 Wn.App. 731, 741 (Div. I, 2008). The Health Quality Improvement Act carves out statutory immunity for reports submitted to the National Practitioner Data Bank "without knowledge of the falsity of the information contained in the report." 42 U.S.C. § 11137(c).

Based on the pleadings, Plaintiff has stated a claim for defamation. The false statement alleged is that Defendant submitted a report to the National Practitioner Data Bank declaring that Plaintiff had failed to demonstrate the necessary experience, clinical skill, and competence, under circumstances where "all" that Defendant "had was that [Plaintiff] was competent," including submissions from coworkers and colleagues. Dkt. 23, at 3. Next, Defendant makes only a cursory, unsatisfactory challenge to whether the communication was unprivileged. Finally, Plaintiff has shown harm by alleging that the submitted report, which was communicated to at least one third party, forfeited Plaintiff of employment opportunities and benefits. Dkt. 23, at 2, 3.

At this stage, the defamation claim also survives the immunity defense raised by Defendant. Assuming that Defendant possessed only the documentation alleged (*e.g.*-reports from coworkers declaring Plaintiff's competence), a reasonable inference could be made that Defendant had knowledge that the submitted report was "false," because the documents did not substantiate the conclusions of the report. Discovery may test the strength of Plaintiff's defamation claim, but Plaintiff has stated a claim for defamation.

**2. Washington Law Against Discrimination (Count II)**

Defendant argues that Plaintiff's WLAD claim fails for the same reasons as Plaintiff's Rehabilitation Act claim, namely, because Plaintiff does not sufficiently allege that he is "disabled," and even if so, the complaint lacks any allegation that Defendant denied Plaintiff's application for privileges based on Plaintiff's

disability. Dkt. 8, at 14. However, for the same reasons set forth below, *see Count III*, these arguments fail. Plaintiff has stated a claim under the WLAD.

### 3. The Rehabilitation Act (Count III)

Defendant argues that Plaintiff's Rehabilitation Act claim fails because (1) Plaintiff does not allege facts sufficient to show that Plaintiff is "disabled," when the complaint lacks mention of how Plaintiff's bipolar diagnosis substantially limits a major life activity; and (2) even if Plaintiff is "disabled," Plaintiff fails to allege facts sufficient to show that Plaintiff's disability was the reason that Defendant denied and revoked privileges. Dkt. 8, at 12-14. Defendant's Reply reiterates the same arguments, *see* Dkt. 16, which are both unsuccessful.

The ADA defines "disability" as an impairment that "substantially limits one or more major life activities." 29 C.F.R. § 1630.2(g). "Substantially limits" is defined as follows:

> "[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . bipolar disorder . . . substantially limit[s] brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above. 29 C.F.R. § 1630.2(j)(3)(iii) (emphasis added).

In other words, "bipolar disorder" is a "type of impairment," and "substantially limit[ed] brain function" is one of the enumerated "major life activities." Assuming,

as Plaintiff alleges, that Plaintiff is diagnosed with bipolar disorder, then under the statute Plaintiff is disabled.

Defendant's other argument, that Plaintiff has not alleged that the disability is the cause of Defendant's denial of privileges, is also without merit. Plaintiff alleges that "Defendant withdrew my temporary privileges and denied my application for privileges because of my disability[,]" especially under circumstances where Plaintiff's colleague allegedly commented that "[Plaintiff's] mental illness is a red flag" in the context of denying privileges. Dkt. 23, at 8. Plaintiff has stated a claim under the Rehabilitation Act.

**(4) Title VI of the Civil Rights Act of 1964 (Count IV)**

Defendant argues that Plaintiff's Title VI claim fails because Plaintiff fails to allege that Defendant is a recipient of federal funds. Dkt. 8, at 11, 12. In Plaintiff's Response, Plaintiff cites authority for the proposition that, as a beneficiary of Medicare and Medicaid funds, Defendant receives federal financial assistance for Title VI purposes. Dkt. 14, at 5. Defendant's Reply distinguishes authority cited and charges that Plaintiff has not identified the source of federal funding of which Defendant is a recipient. Dkt. 16, at 3. Defendant also broadcasts an issue likely to be raised in a summary judgment motion, namely, that Plaintiff may not be able to prove that he was the intended beneficiary of the federal funding, an issue not addressed by this order. *Id.*

Defendant's challenge to Plaintiff's Title VI claim is without merit. Although not binding authority, one case cited by Plaintiff, *U.S. v. Harris Methodist*

*Fort Worth*, 970 F.2d 94, 97, 98 (5th Cir. 1992), is at least persuasive to support Plaintiff's argument that Defendant is subject to Title VI as a recipient of federal funds, and Defendant provides no better authority to the contrary. *See* Dkt. 16. Plaintiff alleges that Defendant receives federal assistance "in the form of at least medicare [sic] and Medicaid . . . to employ physicians such as [Plaintiff]." Dkt. 23, at 9. As Defendant acknowledges, the specificity with which Plaintiff can show that he is an intended beneficiary of federal funds may be fodder for a later motion, *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), but at this stage of the litigation Plaintiff has satisfied the threshold of Fed. R. Civ. P. 12(b)(6) by stating a claim under Title VI.

**(5) The False Claims Act (Count V)**

Plaintiff raises an anti-retaliation claim under 31 U.S.C. § 3730(h) of the False Claims Act, alleging that Defendant's denial and revocation of privileges was retaliation for Plaintiff's pursuit of a wrongful discharge claim against Mayo Health System. Dkt. 1-3, at 8. Plaintiff must make a prima facie case that (1) Plaintiff engaged in whistleblowing activity; (2) that Defendant knew of that activity; (3) and that Defendant retaliated against Plaintiff because of that activity. *Moore v. California Inst. Of Tech. Jet Propulsion Lab.,* 275 F.3d 838, 844-45 (9th Cir. 2002). *See* § 3730(h). Claims by "relators" such as Plaintiff typically involve a whistle blower exposing fraud by a government contractor, presenting an opportunity procedurally for the U.S. government to intervene. § 3730(b)(2).

Plaintiff's FCA claim lacks coherency, because nothing alleged connects Plaintiff's whistle blowing activity, pursuing the wrongful discharge claim against Mayo Health System, to the alleged retaliation by Defendant. Nor is such a broad interpretation of the statute warranted based on the statute's construction. *See* § 3730(h) ("employee . . . employer"). Under Plaintiff's theory, the FCA would be expanded to include Defendant, who is a third party to the whistle blowing activity by Plaintiff against Mayo Health System, and the Court is aware of no authority for such an expansive interpretation. *C.f.,* e.g., *Sicilia v. Boeing Co.*, 775 F. Supp. 2d 1243, 1254 (W.D. Wash. 2011); *Neighorn v. Quest Health Care*, 870 F. Supp. 2d 1069, 1101 (D. Or. 2012). But even if so, Plaintiff fails to establish how, why, or under what circumstances denying and revoking privileges could constitute retaliation, and Plaintiff has not followed the unique procedure for FCA claims, for example, by placing the complaint under seal and serving only the federal government and not the defendant. § 3730(b)(2). The FCA should be dismissed, because no opportunity to amend could remedy these defects.

**(6) 42 U.S.C. § 1981 (Count VI)**

Defendant's motion makes only a passing reference to Count VI in the introduction to the briefing and makes no mention of the claim in the body of the argument in the briefing. *See* Dkt. 8 at 3, 4. On the briefing provided, Defendant does not sufficiently identify defects as to this claim.

[ * * * ]

Therefore, it is hereby ORDERED that Defendant's Motion to Dismiss Under Rule 12(b)(6)(Dkt. 8) is GRANTED IN PART and DENIED IN PART.

Defendant's motion is GRANTED as to Count V only. Count V, Plaintiff's False Claims Act claim, is DISMISSED.

Defendant's motion is otherwise DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 1st day of December, 2015.

/s/ Robert J. Bryan
United States District Judge

## ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (SEPTEMBER 5, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ALAA ELKHARWILY,

*Plaintiff-Appellant,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant-Appellee.*

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No. 17-35009

D.C. No. 3:15-cv-05579-RJB
Western District of Washington, Tacoma

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ALAA ELKHARWILY,

*Plaintiff-Appellant,*

v.

FRANCISCAN HEALTH SYSTEM,
a Washington non-profit corporation,

*Defendant-Appellee.*

No. 18-35090

D.C. No. 3:17-cv-05838-RBL
Western District of Washington, Tacoma

Before: FARRIS, TROTT, and SILVERMAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. and recommends denying the petition for rehearing *en banc*.

The full court has been advised of the suggestion for rehearing *en banc* and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing *en banc* are DENIED.

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