South Carolina Law Review

Volume 61
Issue 3 *THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT: ITS TRADITION, ITS JURISPRUUDENCE, AND ITS FUTURE SYMPOSIUM and ANNUAL FOURTH CIRCUIT SURVEY*

Article 13

Spring 2010

Moore v. Williamsburg Regional Hospital

Andrew R. deHoll

MOORE V. WILLIAMSBURG REGIONAL HOSPITAL

The Health Care Quality Improvement Act of 1986[1] (HCQIA) provides medical peer reviewers with immunity from damages for actions based on the reviewers' competence or medical conduct.[2] Congress provided this immunity as "incentive and protection for physicians engaging in effective professional peer review."[3] Corresponding to this immunity are HCQIA's physician reporting provisions, which require hospitals to report incidents of physician misconduct and actions hospitals take against physicians.[4] For example, a hospital that suspends a doctor's practice privileges for over thirty days on grounds related to professional competence or conduct must report the suspension to the Board of Medical Examiners, and the information is included in the National Practitioner Data Bank (NPDB).[5] This reporting requirement gives hospitals more information to prevent "incompetent physicians [from moving] from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance."[6]

Peer reviewer immunity under HCQIA is not unlimited; rather, it immunizes only participants in "'professional review action[s]'" based on a doctor's "competence or professional conduct."[7] HCQIA defines *professional review action* as the following:

> [A]n 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 clinical privileges . . . of the physician.[8]

An action does not concern competence or professional conduct if the action primarily concerns the doctor's association with a professional society, fees or advertising, participation in certain types of health plans, association with a private group practice, or "any other matter that does not relate to . . . competence or professional conduct."[9] Additionally, the review action must meet

---

1. 42 U.S.C. §§ 11101–11152 (2006).
2. §§ 11111(a)(1), 11151(9). However, HCQIA does not provide immunity from damages sought for civil rights violations. § 11111(a)(1).
3. § 11101(5).
4. § 11133(a)(1).
5. *See* § 11133(a)(1); HEALTH RES. & SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. HRSA-95-255, NATIONAL PRACTITIONER DATA BANK GUIDEBOOK, at E-21 (2001).
6. § 11101(2).
7. § 11151(9).
8. *Id.*
9. *Id.*

certain procedural requirements.[10] The reviewers must first make "a reasonable effort to obtain the facts of the matter," and they must take the action based on a "reasonable belief that the action [is] in the furtherance of quality health care" and that the fact investigation warrants it.[11] Finally, the reviewers must also afford the physician "adequate notice and hearing procedures."[12]

In March 2009, in *Moore v. Williamsburg Regional Hospital*,[13] a panel of the United States Court of Appeals for the Fourth Circuit held that HCQIA immunizes hospitals from liability for review actions based on a physician's conduct that has a "clear nexus" to his ability to render patient care.[14] In so holding, the court upheld a hospital's decision to terminate the practice privileges of a pediatric surgeon who multiple social services agencies had formally accused of physically and sexually abusing his child.[15] The clear nexus test announced in *Moore* gives a hospital wide latitude to act on a broad range of physician conduct but excludes from the hospital's consideration purely private acts that have no possibility of recurring in the hospital or affecting patient treatment.[16]

Blake Moore was a general surgeon with practice privileges at Williamsburg Regional Hospital (WRH) in Kingstree, South Carolina.[17] While Moore practiced at WRH, the South Carolina Department of Social Services (DSS) took Moore's adopted children into emergency foster care because of allegations that Moore's wife had physically abused them.[18] While in foster care, Moore's adopted daughter stated that Moore and his wife sexually abused her.[19] In 2004, DSS confirmed these allegations and initiated family court proceedings to terminate Moore and his wife's parental rights.[20] Dr. Breton C. Juberg, WRH's chief of staff and chairman of its Medical Executive Committee (MEC), soon learned about the DSS suit and told John C. Hales, WRH's chief executive officer, about it.[21] Hales obtained a copy of the case's court records, which contained details of the alleged sexual abuse.[22]

After reviewing the records, Hales and Juberg concluded that immediately suspending Moore would best serve patient safety.[23] On September 13, 2004,

---

10. Hospital peer review bodies are presumed to have met these requirements, but a physician challenging a hospital's decision may rebut that presumption by a preponderance of the evidence. § 11112(a).
11. § 11112(a)(1)–(2), (a)(4).
12. § 11112(a)(3).
13. 560 F.3d 166 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 201 (2009).
14. *Id.* at 172–73, 175 (citing § 11151(9)).
15. *Id.* at 168.
16. *See id.* at 173 (citing § 11151(9)).
17. *Id.* at 168–69.
18. *Id.* at 169.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

Juberg notified Moore of his immediate summary suspension pending resolution of the DSS case.[24] Pursuant to WRH's bylaws, the MEC held a suspension hearing that evening, at which Moore could be present but could not vote.[25] At the meeting, the MEC discussed the contents of the DSS court records and listened to arguments from Moore, but it continued the suspension.[26]

Two days later, Hales notified Moore of his right under the WRH bylaws to appeal the MEC's decision.[27] Before the appeal hearing, WRH informed the NPDB that it had suspended Moore because of "'serious allegations of sexual misconduct of a minor child.'"[28] Also before the hearing, WRH provided Moore with a list of witnesses expected to testify and a proposed list of hearing panel members.[29] WRH granted Moore's request to exclude from the panel a doctor who had treated Moore's children.[30] Moore and his counsel had an additional opportunity to object to the panel composition and witnesses, but they made no objection.[31] At the hearing, Moore and his wife testified that they did not abuse their children, and they presented forensic evidence indicating that no abuse occurred and a psychological evaluation finding that Moore lacked the character traits of a pedophile; however, even though the panel kept the hearing open for two months, the panel upheld the suspension.[32]

Moore appealed to WRH's board of directors at its meeting on April 11, 2005.[33] He presented additional evidence at the hearing and during the following week, but the board voted unanimously to uphold the suspension.[34]

On July 7, 2005, DSS moved to dismiss the sexual abuse case because Moore had already lost his parental rights in a related proceeding.[35] Moore requested that WRH reinstate his privileges because no sexual abuse had been formally proven against him in court.[36] WRH rejected Moore's request because he refused to provide WRH with the credentialing information required by WRH's bylaws.[37]

Moore sued WRH, Hales, Juberg, and other WRH staff members in the United States District Court for the District of South Carolina, alleging that the suspension of his privileges violated his procedural and substantive due process rights, and he sought monetary damages under 42 U.S.C. § 1983 and under state

---

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 170.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* DSS had sued to terminate Moore's parental rights in a separate case based on Moore's physical abuse of the children. *See id.* at 169.
36. *Id.* at 170.
37. *Id.*

law.[38] After extensive discovery, the district court granted summary judgment to the defendants, holding that they were immune under HCQIA.[39] Moore appealed.[40]

A panel of the Fourth Circuit affirmed.[41] In the opinion, the court first analyzed whether Moore's suspension constituted professional review action under HCQIA.[42] Moore argued that professional review should be limited to decisions requiring medical expertise, placing his alleged sexual misconduct outside the scope of HCQIA.[43] The court rejected this "stark dividing line" as too difficult to draw and unduly involving courts in hospital governance.[44] Moore's view was also too narrow, according to the court, because it would prevent peer review committees from acting on "even the most advanced cases of alcohol addiction, illegal substance abuse, incipient dementia, or . . . sexual misconduct toward children on the part of someone with a pediatric practice."[45]

The court instead held that "[a] physician's competence can be implicated by conduct outside a health care facility if there is a clear nexus between that conduct and the ability to render patient care."[46] Congress' decision to use broad language—"professional conduct" instead of "conduct in the course of medical practice"—gave peer review bodies great latitude to act on physician conduct "that has occurred outside the hospital, but could realistically occur or affect treatment in the hospital."[47] "Clearly[,]" the court reasoned, "the 'competence' of a physician may be affected by arguably non-medical difficulties which are manifested outside the hospital: a hopelessly alcoholic physician or one adjudged to be mentally incompetent could only by happenstance render competent patient care."[48] Moreover, because the definition of *professional conduct* includes conduct that "'*could affect* adversely'" patient health, the court concluded that hospitals may take prophylactic action to prevent anticipated future problems, noting that "nothing the statute requires peer review committees to wait until medical disaster strikes."[49]

---

38. *Id.* at 171, 180. Moore asserted claims under South Carolina law for "intentional infliction of emotional distress, tortious interference with existing and prospective contractual relationships, defamation, breach of contract, promissory estoppel, unfair trade practices, and civil conspiracy." *Id.* at 171.

39. *Id.* at 171. On separate grounds not discussed in this Summary, the district court also held that Moore's § 1983 claims failed because WRH was not a state actor and that Moore's state law claims failed. *Id.*

40. *Id.*

41. *Id.* at 168. Judge Wilkinson wrote the opinion, in which Judges Duncan and Agee joined. *Id.*

42. *Id.* at 171.

43. *Id.* at 171–72.

44. *Id.* at 172–73.

45. *Id.* at 172.

46. *Id.*

47. *Id.* (internal quotation marks omitted).

48. *Id.* at 173.

49. *Id.* at 172 (quoting 42 U.S.C. § 11151(9) (2006)).

Meanwhile, the defendants argued that HCQIA immunizes reviewers for acting on "almost any . . . conduct that might, in the peer review body's opinion, one day affect patient care."[50] Like Moore's view, the court rejected the defendants' position as "too rigid—they treat this as an all-or-nothing matter."[51] The defendants' view posed the "risk that driving infractions, messy divorces or custody battles, tax or financial difficulties only tenuously or speculatively related to medical competence might fall within the purview of peer review."[52] Such an expansive "fishing expedition[]" position would allow undue invasion into physicians' personal lives; the court reasoned that, given that HCQIA deals explicitly with *professional* conduct, adopting defendants' view would be "to arm . . . reviewers with a club that Congress did not provide."[53] The court reiterated that its clear nexus test was more faithful to congressional intent.[54]

Applying the clear nexus test, the court held that WRH's actions concerned Moore's professional conduct and thus fell within the purview of HCQIA immunity.[55] The various bodies that heard Moore's administrative appeals heard ample evidence of Moore's harmful tendencies towards children to conclude that "he might sexually abuse child patients in the course of his practice."[56] Additionally, this reasonable possibility that Moore could molest a child patient meant that WRH had to decide between potential liability for child sex abuse or potential liability for suspending Moore—precisely the kind of "close call[]" that HCQIA presupposes.[57] Because the purpose of statutory immunity "is to afford some discretionary latitude to decisionmakers to make close calls unhaunted by the specter of civil liability," removing WRH's discretionary power in Moore's case "would defeat the purpose of immunity."[58]

Finally, the court concluded that WRH had provided Moore with sufficient notice and procedural opportunities to satisfy HCQIA.[59] At each level of appeal, the reviewing body considered evidence, heard witnesses, and gave Moore an opportunity to cross-examine witnesses.[60] The hearing panel left the record open for two months so Moore could introduce more evidence, and WRH's board held two meetings to allow Moore to present evidence.[61] As for the composition of the tribunals, Moore complained that his first appeal violated HCQIA because the hearing panel contained members of the MEC who had previously voted to

50. *Id.* at 173.
51. *Id.*
52. *Id.*
53. *Id.*
54. *See id.* (citing § 11151(9)).
55. *Id.* at 175.
56. *Id.* at 174.
57. *Id.* at 174–75.
58. *Id.* at 175.
59. *Id.* at 176.
60. *Id.* at 175.
61. *Id.* at 175–76.

suspend him.[62] However, because HCQIA does not prevent members of one administrative body from considering an appeal of that body's decision, the court disregarded Moore's objection as irrelevant to the narrow question of whether WRH complied with HCQIA.[63] Additionally, because Moore knew the hearing panel's composition in advance of the hearing but failed to object to having MEC members sit on it, he waived the right to object to the composition after the fact.[64] Thus, the court concluded that Moore failed to show the defendants violated HCQIA's requirements, and therefore, the defendants were immune from liability on Moore's state law claims.[65]

In announcing the clear nexus test for whether a doctor's actions affect his competence or professional conduct within the meaning of HCQIA, the *Moore* court provided a flexible standard for reviewing hospital peer review actions to determine whether immunity applies under HCQIA. Though the breadth and flexibility of the test make it deferential to hospitals, the test is not a result of a judicial preference. Rather, the court remained faithful to Congress's intent to give hospitals broad discretion in managing their credentialed medical staff.[66] The close nexus test supports that intent by focusing on substance rather than form. With several categorical exceptions,[67] virtually any type of conduct in which a physician engages can serve as the basis for hospital action, provided that the conduct in question possesses the requisite relation to the doctor's medical practice.

Given this breadth, the test may seem hostile to physicians who challenge adverse hospital decisions. The court attempted to limit the test's reach by emphasizing that HCQIA was not intended to cover hospital decisions based on a doctor's private, personal behavior.[68] The court reasoned that "[h]uman beings are not smooth and rounded pebbles, but often contradictory in their habits and traits. A surgeon whose personal life might not bear close scrutiny may nonetheless save lives with his talents in the operating room."[69]

Although the court was certainly correct that Congress did not mean for HCQIA "to encourage fishing expeditions into private behavior,"[70] the court's personal–professional distinction confuses the scope and mechanics of the clear

---

62. *Id.*

63. *Id.* Regarding membership on a hearing panel, HCQIA merely provides that no member can be an economic competitor of the physician. 42 U.S.C. § 11112(b)(3)(A)(iii) (2006). WRH satisfied this requirement. *Moore*, 560 F.3d at 170.

64. *Id.* At his hearing before WRH's board of directors, Moore had objected to the panel's composition; however, the Fourth Circuit considered that objection to be untimely. *See id.*

65. *Id.* The court also rejected Moore's state law claims on the merits. *Id.* at 176–78. It also rejected Moore's § 1983 claim because it found no violation of his due process rights and because WRH was not a state actor. *Id.* at 178–80.

66. *See id.* at 174–75; *see also id.* at 173 (describing HCQIA's protections of peer review as "generous").

67. *See* 42 U.S.C. § 11151(9)(A)–(D).

68. *See Moore*, 560 F.3d at 173.

69. *Id.*

70. *Id.*

nexus test. On one hand, the clear nexus test ignores categorical distinctions in behavior, but on the other hand, the court implies that some activities are so personal that they are beyond the possibility of having a clear nexus to professional conduct. There are two plausible explanations for this result. First, the court may have intended the test to apply only within a certain "twilight zone" of physician conduct that is neither obviously covered by HCQIA nor patently excluded from it. Second, the court may have intended the test to serve generally as *the* test for conduct's inclusion within HCQIA, and the court's discussion of the personal–professional distinction was simply an appeal to hospitals and courts to use their practical sensibilities to find that, as a matter of fact, some conduct simply will never have a clear connection to a doctor's professional life. While either standard seems reasonable in light of the competing interests at play under HCQIA, hospitals, physicians, lawyers, and courts would benefit from some clarification of the mechanics of the clear nexus test—particularly if the court had in mind some types of conduct that it felt warranted per se exclusion from HCQIA.

This is not to say that the clear nexus test, as announced in *Moore*, is fundamentally flawed. Rather, it clearly is a fact-intensive inquiry, and like all judicially created tests, its meaning will become increasingly clear with each new court decision that applies it.

Andrew R. deHoll

*