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FACTS

In 1985, Dr. Tuong B. Van earned his medical degree from the University of Texas School of Medicine at San Antonio, and thereafter completed several residencies in cardiology throughout the country.[1] In 1994, Dr. Van returned to Texas to assume a position on the medical personnel of the Medical City Dallas Hospital (Hospital).[2] As a member of the Hospital's medical staff, Dr. Van retained privileges to perform invasive cardiology procedures, or cardiac catheterizations.[3]

In his complaint, Dr. Van asserted that his first three years at the Hospital went by without incident.[4] In the beginning of 1998, however, Dr. Van began to experience problems with the nursing staff.[5] On January 1, 1998, the nurses filed an occurrence report with the Hospital, alleging that Dr. Van had been confrontational with them regarding the transfer of one of his patients.[6] In response to the nurses' complaint, the Chief of Cardiology, Dr. Anderson, phoned Dr. Van to discuss Dr. Van's professional relationship with the nursing staff.[7] Dr. Van alleged that the tone of this conversation was race-based and threatening.[8] Dr. Anderson denied that he ever made any race-based statements.[9] Dr. Van stated that after his conversation with Dr. Anderson, he thought he had to reduce his "Oriental" patient load or "face peer review."[10] In response to the comments of fellow staff members, Dr. Van said that he "drastically reduc[ed] the number of [his] Asian patient admissions to the hospital."[11] He claimed that between December 1997 and August of 2000, his practice at the Hospital decreased to less than 10% of what it had been.[12]

A second incident arose in early 1998, in which Dr. Van's medical qualifications were questioned.[13] A colleague of Dr. Van informed Dr. Allan Schwade, the Chairman of the Cardiology Performance Improvement Committee (CPIC), that Dr. Van resorted to cardiac catheterizations on an

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[1] Van v. Anderson, 199 F. Supp. 2d 550, 555 (N.D. Tex. 2002).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 555-56.
[11] *Id.* at 556.
[12] *Id.*
[13] *Id.*

alarmingly high number of his patients.[14] Dr. Schwade brought the matter before the CPIC.[15] Consequently, the CPIC initiated a six month targeted review of Dr. Van.[16] In April 1998, almost simultaneous with the initiation of the CPIC review, Dr. Van requested reappointment to the medical staff at the Hospital.[17] In June, the Hospital granted him a two-year renewal, conditioned on the results of his peer review.[18]

In July 1998, the nurses at the Hospital filed a second occurrence report complaining about Dr. Van's angry response to their refusal to move one of his patients.[19] In September of that year, Dr. Van received a letter from Stephen Corbeil, Hospital President and CEO, denying his reappointment to the medical staff.[20] Dr. Van requested a hearing to address this denial.[21] Dr. Van was granted a hearing, which began on April 7, 1999.[22]

At the hearing, Dr. Van identified several mistakes in CPIC's report, which he argued was the basis for the adverse determination.[23] The Hospital later acknowledged the mistakes in the report.[24] The Hearing Committee disbanded without result at 10:30pm and never reconvened.[25] The Executive Committee subsequently withdrew its denial of reappointment.[26] Dr. Van argued that the Executive Committee's ultimate decision to withdraw its denial of staff privileges violated the Hospital's bylaws, because, pursuant to the Executive Committee's withdrawal, Dr. Van's hearing was "unlawfully disbanded."[27] Dr. Van further argued that prior to his hearing, Dr. Anderson reiterated the threat that Dr. Van's failure to heed warnings about his patients would have a "detrimental effect upon [his] career."[28]

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 557.
[21] *Id.*
[22] *Id.* "Before this hearing, however, believing that the Hospital had refused to take any action against Drs. Anderson and Schwade for their race-based threats, and for what Plaintiff believed was the adoption of a bogus peer review against him, Dr. Van filed this suit in federal court on February 12, 1999." *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 558.
[26] *Id.*
[27] *Id.* Dr. Van contended that he was unable to get a "fair trial" because he never got to tell his side of the story. The Executive Committee's withdrawal of its denial mooted the need to continue Dr. Van's hearing.
[28] *Id.*

In a letter dated June 25, 1999, Dr. Wayne Taylor, the current Chief of Staff of the Hospital, informed Dr. Van that Dr. Schwade had revised the report from the cardiology section's Target Review Committee.[29] The purpose of this revision was to correct the inaccurate information that Dr. Van identified at the hearing.[30] The letter additionally stated that the revised CPIC report was sent to an Ad Hoc Departmental Investigation Committee.[31] The Hospital hired an independent "resource physician" to assist the Committee in its assessment of Dr. Van's case.[32] The Committee reviewed Dr. Van's case and files and found that Dr. Van lacked certain organizational, diagnostic, and technical skills necessary for his position at the Hospital.[33] The Committee found that Dr. Van needed a minimum of six to twelve months of intensive training in clinical cardiology before returning to practice medicine at the Hospital.[34]

The Hospital then asked Dr. Van to attend an Executive Committee meeting in March 2000 to confer about the Committee's report.[35] He was unable to attend due to a prior commitment, but asked for an opportunity to appear at a later date.[36] The Committee granted this request.[37] The submission of Dr. Van's application for reappointment was then stayed, pending an opinion from the National Practitioner Data Bank (NPDB) "as to whether a lapse in Dr. Van's medical staff privileges as a result of a decision not to reapply while peer review process was ongoing would have to be reported to the NPDB."[38] The NPDB replied to the parties' inquiry in May 2000 and declared that "if a hospital considers the physician to be 'under investigation,' then his failure to apply for reappointment and allowing his clinical privileges to expire would have to be reported to the NPDB."[39] The stay was lifted and the Hospital asked Dr. Van to appear before the Executive Committee at its June 2000 meeting.[40] The Hospital then granted Dr. Van an extension until June 27, 2000, to present his application for reappointment.[41]

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 558-59.
[34] *Id.* at 559.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 559-60.
[41] *Id.* at 560.

Finally, on August 30, 2000, the Hospital informed Dr. Van of the suspension of his staff privileges because he failed to return his application for reappointment.[42] The Hospital further stated that since the peer review process was not complete prior to Dr. Van's voluntary lapse in his staff privileges, a report would be sent to inform the Texas State Board of Medical Examiners and the NPBD of this lapse.[43] The Hospital thereafter discontinued the peer review process.[44]

HOLDING

On defendants' motion for summary judgment, the district court found that Dr. Van had not demonstrated a prima facie case under Section 1981, as he was unable to show a valid contract between himself and the Hospital, a necessary element of the claim.[45] The court further found that, had Dr. Van proven a prima facie case, the charge of discrimination would have failed because the Hospital had a legitimate non-discriminatory basis for its adverse employment decision.[46]

ANALYSIS

The first issue the court examined was whether the medical staff bylaws and hospital bylaws created the necessary contract for a Section 1981[47] claim to proceed.[48] The court noted that if a contract existed, then the plaintiff must show that the defendants intended to discriminate against him to frustrate the performance of the contract based on the plaintiff's race.[49] The court also addressed a number of ancillary matters, including plaintiff's claims of breach of contract, malice, and defamation, as well as defendant's assertions that the federal Healthcare Quality Improvement Act (HCQIA) provided qualified immunity for statements made by participants in peer review actions.[50]

Section 1981 grants "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 550.
[46] *Id.*
[47] *See* 42 U.S.C. § 1981 (2001).
[48] Van v. Anderson, 199 F. Supp. 2d 550, 560-61 (N.D. Tex. 2002).
[49] *Id.* at 562.
[50] *Id.* at 560-61.

enjoyed by white citizens."[51] The court explained that to establish a violation under this section, the plaintiff has to demonstrate a *prima facie* case of intentional discrimination.[52] The court noted that claims under Section 1981 require the same evidence as Title VII claims.[53] Section 1981 claims require a showing that "(1) the plaintiff is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination implicated the "making and enforcing" of a contract."[54]

The court considered whether defendants discriminated against Dr. Van in his ability to make a contract with the Hospital with regard to his hospital privileges, and whether "the medical staff's bylaws also constitute a contract, one to which the Hospital made itself a party by its adoption of them."[55] The court first acknowledged that Texas law draws a distinction between medical staff bylaws and hospital bylaws.[56] The court noted that physicians design medical staff bylaws to supervise the governance of physicians with hospital privileges.[57] Even though medical staff bylaws outline and administer the procedure for a physician's renewal of privileges, the bylaws ultimately require that any decisions made pursuant to them be approved by the "Hospital's Governing Body."[58] Consequently, the court found that the Hospital's medical staff bylaws established no contract "simply by virtue of the fact that Dr. Van had been granted staff privileges at the hospital."[59] The medical staff bylaws clearly required that reappointment of a staff member be preceded by a targeted performance assessment and approval by the "Chief of his respective Section, Medical Director (as appropriate), the Privileges and Credentials Committee, the Executive Committee and [the] Board of Trustees."[60] Neither the medical staff bylaws nor staff recommendations obligated the Hospital to approve Dr. Van's privileges renewal application.[61]

The court further averred that Dr. Van presented no evidence that his staff privileges were interrupted throughout the review process.[62] In fact, Dr.

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[51] *Id.* at 562. *See* 42 U.S.C. § 1981(a) (2001).
[52] *Van*, 199 F. Supp. 2d at 562.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 563-64.
[59] *Id.* at 564.
[60] *Id.* at 563.
[61] *Id.* at 563-64.
[62] *Id.*

Van voluntarily allowed his privileges to lapse.[63] This voluntary lapse in combination with Dr. Van's failure to show that a valid contract with the Hospital even existed made it impossible for Dr. Van to establish a prima facie case of discrimination under Section 1981.[64] The court also held that Dr. Van's claims against Drs. Schwade and Anderson were deficient for similar reasons to those set forth above.[65]

Next, the court opined that even if it found that the medical staff bylaws established contractual rights for Dr. Van, the "only allegation that can be interpreted as an 'interference' by Defendants with his rights rests on the claim that he was denied a right to a fair hearing when the 1999 Executive Committee withdrew its negative recommendation against him, resulting in the disbandment of the investigative panel."[66] The court stated that the disbandment only could have been helped Dr. Van, since the Governing Body refused to analyze Dr. Van's case under the influence of dubious evidence.[67] The court held that such a refusal did not constitute a breach of contract.[68]

Dr. Van argued that the defendants violated Section 1981 by interfering with his ability to contract with his patients and their insurance carriers for payment of services rendered at the Hospital.[69] The court rejected this claim, noting that Dr. Van continued to see his patients and receive payment for services performed at the Hospital throughout the peer review process.[70] The court also cited Dr. Van's acknowledgment that he voluntarily reduced the number of patients he saw at the Hospital.[71] Finally, the court suggested that Dr. Van's reduction in patients could have occurred because he stopped advertising in Vietnamese newspapers.[72] Whatever the reason for the reduction in patients, the court concluded that Dr. Van never had an exclusive arrangement with any of his patients and therefore such an arrangement could not be considered a contract for Section 1981 purposes.[73] With respect to Dr. Van's relationship with his patients' insurance carriers, the court reiterated that Dr. Van's staff privileges were never interrupted during the review period.[74] Because Dr. Van continued to enjoy full

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[63] *Id.* at 564.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* 564-565.
[68] *Id.* at 565.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

admission and payment privileges until he voluntarily allowed his privileges to lapse, there was absolutely no evidence on which to base a Section 1981 claim.[75]

Despite the court's finding that the medical staff bylaws created no contracts on which to base a Section 1981 claim, it nonetheless analyzed and rejected Dr. Van's racial discrimination arguments as if such contracts had in fact existed.[76] The court noted that claims of racial discrimination brought under Section 1981 are handled similarly to Title VII claims.[77] A Section 1981 plaintiff may establish a prima facie case of intentional discrimination by introducing direct evidence of racial discrimination or by satisfying the test set forth by the Supreme Court in *McDonnell Douglas v. Green*.[78] *McDonnell Douglas* requires that the plaintiff show that "(1) [he] is a member of a protected class; (2) that he was at all times qualified for the position in question; and (3) that the defendant made an adverse employment decision despite the plaintiff's qualifications."[79] A showing by the plaintiff of discrimination under the *McDonnell Douglas* standard creates a rebuttable presumption which the defendant employer can rebut by introducing a legitimate, nondiscriminatory purpose for its decision.[80]

The court noted that in this case, Dr. Van's evidence of direct discrimination centered on the statements made to him by his chief of cardiology, errors in the targeted review reports, and discrimination of other minority doctors at the Hospital.[81] The court considered and rejected Dr. Van's arguments that Dr. Anderson's various remarks regarding Dr. Van's "Oriental" patients were direct evidence of intentional discrimination.[82] The court concluded that Dr. Anderson's remarks, while "general[ly] bias[ed],"[83] were ambiguous.[84] The court stated that these remarks did not prove discrimination against Dr. Van per se.[85]

Having found no direct evidence of intentional discrimination, the court examined Dr. Van's case under the *McDonnell Douglas* standard.[86] The court found that Dr. Van's evidence was insufficient to create a

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[75] *Id.* at 566.
[76] *Id.*
[77] *Id.* at 562.
[78] *Id.* at 566. *See* McDonnell Douglas v. Green, 411 U.S. 792 (1973).
[79] Van v. Anderson, 199 F. Supp. 2d 550, 566 (N.D. Tex. 2002) (citing Sreeram v. La. State Univ. Med. Ctr.-Shreveport, 188 F.3d 314, 318 (5th Cir. 1999)).
[80] *Id.*
[81] *Id.* at 567.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 568.

rebuttable presumption of prima facie discrimination.[87] The court rested this decision primarily on the question of whether Dr. Van was at all times "qualified" for the position he sought to renew.[88] The court found sufficient evidence to suggest that a reasonable person could find that Dr. Van was not qualified for renewal.[89] The court based this finding on the recommendations of the independent review panel, whose determinations called into question Dr. Van's diagnostic and technical skills.[90] Finally, the court held that even if Dr. Van was qualified for renewal, there was no evidence to suggest that the review process caused him to suffer any adverse employment action.[91] Dr. Van's staff privileges at the Hospital were terminated only *after* Dr. Van *voluntarily* allowed his application for reappointment to lapse.[92] Therefore, having failed these prongs of the *McDonnell Douglas* test, and without direct evidence of intentional discrimination, the court rejected all of Dr. Van's Section 1981 claims.[93]

As an alternative to claims brought under Section 1981, Dr. Van also asserted an action for breach of contract.[94] Dr. Van claimed that as a member of the Hospital's medical staff, he was entitled to rights and privileges devoid of discrimination.[95] The court rejected this claim, having found that no contract existed between Dr. Van, the Hospital, and Dr. Van's patients or their insurance carriers.[96]

Dr. Van also sought a declaratory judgment from the court, arguing "that the illegal actions of the defendants were in bad faith, with malice, without due process, and not immune from liability either under the Federal Healthcare Quality Improvement Act or Texas's version of that statute."[97] Alternatively, Dr. Van sought a declaration that Texas's immunity statutes are unconstitutional.[98] The court granted neither of Dr. Van's requests, because Dr. Van failed to demonstrate a prima facie case of discrimination or breach of contract.[99] Consequently, the court did not entertain defendants' claims that they were immune to Dr. Van's claims under the Health Care

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[87] *Id.* at 568-69.
[88] *Id.* at 568.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 568-69.
[92] *Id.* at 569.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*

Quality Improvement Act or the Texas Peer Review Committee statute with regard to Dr. Van's racial discrimination and breach of contract claims.[100]

The court dismissed Dr. Van's defamation claims against defendants Drs. Anderson and Schwade, finding that all statements made by the defendants avoid liability under provisions of HCQIA.[101] Under Texas law, a statement is defamatory if it is one that is "orally communicated or published to a third person without legal excuse."[102] The court reasoned that in order to win a defamation claim, Dr. Van would have to show that the statements made by Drs. Anderson and Schwade were known, or should have been known by them to be false.[103] Claims for defamation may be avoided by proving the statements to be true or that the statements were made under a qualified immunity and were not made with malice.[104] In this case, the court held that the defendants had qualified immunity.[105] The court found that Congress granted such immunity to protect participants in peer review proceedings to encourage honest candor and critique.[106] After examining the legislative history and purpose of HCQIA, the court held that the defendants were immune from liability in this case under Texas's statutory adoption of the federal regulation.[107]

CONCLUSION

The court reached the correct decision in this case, holding that without a valid contract upon which a Section 1981 claim might be brought, the defendants' motion for summary judgment must be granted. To establish a Section 1981 claim, as a threshold matter, a plaintiff must allege facts that show that (1) he is a member of a racial minority; (2) that the defendant had an intent to discriminate on the basis of race; and (3) that the discrimination

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[100] *Id.*
[101] *Id.* at 550.
[102] *Id.* at 570.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.* at 571. *See also* 42 U.S.C. § 11112(a) (2001) (stating that in order for immunity to apply under HCQIA, a professional review action must be taken: "(1) in the reasonable belief that the action was in furtherance of quality health care, (2) after a reasonable effort to obtain the facts of the matter, (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)"). The Act also includes a presumption that a professional review action meets each of the four prongs of Section 11112(a) unless the plaintiff can rebut the presumption by a preponderance of the evidence. *Id.*
[107] Van v. Anderson, 199 F. Supp. 2d 550, 566 (N.D. Tex. 2002).

concerned the making and enforcing of a contract.[108] The court found that the medical and hospital bylaws governing Dr. Van's physician staff privileges did not rise to the level of a "contract" as required by Section 1981. The court had no obligation beyond this determination to consider whether or not Dr. Van would have prevailed if a valid contract had existed.

However, despite the court's finding of no valid contract, it nonetheless proceeded with an inquiry into whether the defendant had a legitimate non-discriminatory basis for its decision not to renew Dr. Van's staff privileges. This searching look into defendants' circumstantial evidence was one-sided and inappropriate at the summary judgment stage. The court afforded Dr. Van no equivalent opportunity to prevent additional evidence of discrimination—including testimony from fellow physicians regarding racist actions and comments allegedly made by Dr. Anderson. The court overlooked Dr. Van's circumstantial evidence because it was the independent review panel, not Dr. Anderson, who made the ultimate adverse determination against Dr. Van. Unfortunately, this ignored Dr. Van's allegation that the sole reason he became the subject of peer review was that he failed to heed Dr. Anderson's warnings regarding problems with Dr. Van's "Oriental" patients.

The court should have afforded Dr. Van an equal opportunity to present all available evidence of discrimination. The court's unequal consideration of the defendant's circumstantial evidence goes against the basic principle that a nonmoving party in a summary judgment proceeding is allowed to present all evidence surrounding genuine issues of material fact. Given that the court analyzed Dr. Van's case as if a valid contract existed, it should have given proper consideration to any evidence Dr. Van could produce that tended to show discriminatory intent as the basis for defendant's adverse decision against him.

A larger question raised by this case is whether a "contract" as defined in Section 1981 should be a required element in allegations of institutional discrimination made by physicians. The requirement places non-employee minority physicians in a uniquely vulnerable position. Since there is no employment relationship, a doctor in Dr. Van's position cannot succeed on a Title VII claim, and the fact that courts are reluctant to find that medical staff or hospital bylaws rise to the level of a contract leaves physicians like Dr. Van with few causes of action through which to attack institutional discrimination.

A second obstacle for physicians who suffer unfair review or disciplinary actions as a result of racial discrimination is the broad immunity

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[108] *Id.* at 562.

provisions of statutes such as Texas's HCQIA. It is virtually impossible for victims of discrimination to gather enough evidence to present a genuine issue of material fact of discrimination when review proceedings are virtually banned from discovery. Whether or not Dr. Van's race played a part in the review panel's adverse decision in this case is much more difficult to determine, so long as such proceedings enjoy broad immunity protection. It is manifestly unfair to require Dr. Van or any other Dr. Van to present material evidence of discriminatory intent by a review panel without some right of discovery. Without access to such information, hospitals are afforded a virtual wall behind which potential discrimination is immune from the reach of the court. The argument that, in order to encourage honesty and candor, participants in a review proceeding must be afforded immunity from defamation and other causes of action is indefensible when what is being covered up is discrimination on the basis of race or ethnic ancestry. Limited discovery of review proceedings, whether by a Dr. Van or by a court, would facilitate fair assessment of minority physicians without exposing them to the dangers that lie behind a wall of immunity.

The precedent that this case creates for physicians who suffer adverse employment conditions as a result of institutional discrimination is unfortunate. The court was all too willing to find legitimate non-discriminatory justifications for Dr. Van's termination, without allowing Dr. Van to rebut with evidence tending to show that he was the victim of a racist supervisor who targeted him for review because he failed to heed warnings about problems with his minority patients. Further, the issue of whether or not a valid claim exists for physicians who are neither employees nor who maintain "valid and enforceable contracts" with the hospitals in which they practice is troubling. Cases like this one highlight the opportunity for unchecked institutional discrimination in the health care field. Exacerbating this problem is the fact that qualified immunity statutes protecting internal hospital review proceedings make evidence of discrimination almost impossible for physician-victims to access—leaving them with few sources from which to draw rebuttal evidence creating a genuine issue of material fact of discrimination necessary to go to trial.

Summary and Analysis Prepared By:
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