

THE STATE OF NEW HAMPSHIRE

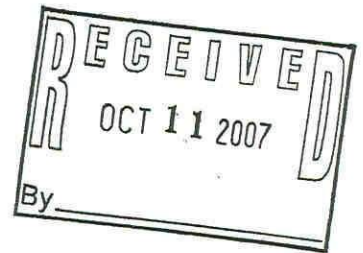
Grafton Superior Court

3785 Dartmouth College Highway

N. Haverhill, NH 03774

603 787-6961

NOTICE OF DECISION



DAVID P SLAWSKY ESQ
NIXON RAICHE VOGELMAN BARRY & SLAWSKY
77 CENTRAL STREET
MANCHESTER NH 03101

05-C-0103 Jill Davidson vs. Littleton Regional Hospital, et al

Enclosed please find a copy of the Court's Order dated 10/09/2007
relative to:

Order on Pending Motions

10/09/2007

Robert B. Muh
Clerk of Court

cc: Andrea K. Johnstone, Esq.

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

No. 05-C-103

Jill Davidson

vs.

Littleton Regional Hospital, et al.

ORDER ON PENDING MOTIONS IN LIMINE

This order addresses the defendants' three pending motions in limine; the first, a motion in limine to exclude evidence and testimony of other alleged retaliation, harassment, and/or termination beyond that alleged by the plaintiff, Jill Davidson; the second, a motion in limine to preclude expert witness testimony of Julie Moore, Esq.; and the third, an objection to the addendum and revised report submitted by Ms. Moore. The Court will address each in turn. The Court ruled from the bench during trial on these motions. This order affirms and supercedes the oral ruling.

Motion in Limine to Exclude Evidence and Testimony of Other Alleged Retaliation, Harassment, and/or Termination

The defendants base their motion to preclude evidence of other nurses' claims of alleged retaliation or harassment on New Hampshire Rules of Evidence 402 and 403, claiming that the evidence, if admitted: 1) will result in jury confusion and is a waste of time; 2) is irrelevant; 3) is unduly prejudicial; and 4) constitutes improper character evidence of other bad acts under 404(b). They protest that evidence of other similar complaints would result in "mini-trials" on those other offenses, resulting in prejudice. The plaintiff responds that, in order to prove her claims of wrongful termination and tortious interference with contractual relations, the plaintiff must prove the element of bad faith. It is therefore necessary to show the history of concerns regarding the Medical-Surgical unit (Med-Surg), the fear and stress prevalent among the nurses working there, and the complaints to Littleton Regional Hospital (LRH) administration about the problems, as well as the reaction of LRH and its administrators.

As long as the evidence of the alleged retaliation, termination, or harassment is offered based on the witness' personal knowledge, rather than being the result of gossip or hearsay, the Court DENIES the motion to preclude its admission. Such evidence's prejudicial value is outweighed by its probative effect of showing bad faith on the part of the defendants. As to Rule 404(b), "Evidence of other acts is admissible for purposes other than to prove character, eg, 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" Madeja v. MPB Corp., 149 N.H. 371, 391-2 (2003). In this case: evidence of ongoing difficulties on Med-Surg falls within the specific exception to 404(b); rather than illustrating defendants' character, it goes to the defendants' intent and knowledge, and the motive and plan which allegedly led to the plaintiff's termination.

Motion in Limine to Preclude Expert Witness Testimony of Julie Moore, Esq.

The defendants object to Ms. Moore's testimony on the grounds of New Hampshire Rule of Evidence 702, discussing the role of experts, and Rule 403, weighing probative value against prejudice. They further argue that Ms. Moore, by applying her analysis of the law to the facts provided by the plaintiff, impermissibly appropriates the function of the jury.

New Hampshire Rule of Evidence 702 permits expert testimony when the issue in a case involves some scientific, technical or other specialized subject matter about which the average juror would not be knowledgeable. The purpose of permitting expert testimony is to assist the trier of fact to understand the evidence. The defendants argue that a jury can determine on its own whether LRH's policies are applicable, whether they were followed, and whether any failure to follow them is evidence of wrongful termination, such as ill will, bad faith, or malice. The plaintiff counters that Ms. Moore's expertise will be helpful to the jury because LRH is a hugely document-heavy employer. Discovery has yielded over 18,380 pages of Bates-stamped pages, and it is unrealistic to believe that the jury would have time to sort through all of this information. Ms. Moore has already sifted through the documents, including the hospital's policies and the information yielded by discovery, and synthesized it. The plaintiff further argues that the defendants'

arguments go to the weight of the evidence, not its admissibility.

The Court finds that an average juror may not know the employment practices appropriate for a large employer, or the appropriate policies and procedures governing termination from such employment. Consequently, an expert's opinion on those limited issues would be beneficial. The Court intends to avoid in the expert's report a "rubber stamping" of the plaintiffs' claims. While educating a jury as to the proper procedures with respect to investigating complaints or leading up to terminations would be helpful, it would be improper for the plaintiff's expert to in effect usurp the function of the jury by trumpeting the reasonableness of all of the plaintiff's actions, and the unreasonableness of the defendant's actions in this case. The jury must decide whether or not the plaintiff was wrongfully terminated; that decision should be the jury's alone.

Ms. Moore shall not testify as to the reasonableness or wrongfulness of the defendants. For example, it would be inappropriate to ask Ms. Moore, "Was the termination unlawful?" However, "Was the termination consistent w/ LRH's internal policy?" would be an acceptable question, as would, "What does the record show that LRH knew about these complaints?" Counsel shall review with the Court, prior to Ms. Moore's testimony, the exact scope of her testimony in light of this Court's ruling.

Given these limitations on Ms. Moore's testimony and the conclusions that she may draw before the Court, the defendants' motion to preclude her testimony is DENIED.

Objection to Addendum to Ms. Moore's Testimony and Report

The same restrictions that govern Ms. Moore's testimony before the Court apply to the information contained in the addendum to her testimony, and to her second report. The Court will not exclude the additional report for lack of timeliness. No rule prohibits an expert from supplementing her findings. Particularly where the letter accompanying Ms. Moore's initial report of September 29, 2006 stated that it was a preliminary report subject to modification, and where the addendum and second report were submitted at the end of May, 2007, and the plaintiff made Ms. Moore available for redeposition by the defendants, the Court finds that there was no prejudice suffered as a result of Ms. Moore's supplementing her report. The motion to exclude Ms. Moore's supplemental report is

DENIED.

SO ORDERED.

Dated: October 9, 2007

A handwritten signature in cursive script, appearing to read "Jean K. Burling", written over a horizontal line.

Jean K. Burling,
Presiding Justice