

FIRST CIRCUIT DEEMS CREDENTIALS COMMITTEE'S DECISION-MAKING AS RETALIATORY AS TO MEDICAL STAFF MEMBER

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This case arose when Dr. Sagun Tuli, a female neurosurgeon, filed a lawsuit against her employer Brigham and Women's Hospital ("the Hospital") and her former co-worker and supervisor Dr. Arthur Day. See *Tuli v. Brigham & Women's Hosp., Inc.*, 566 F. Supp. 2d 32 (D. Mass. 2008). After the jury ruled for Dr. Tuli on several claims and awarded her a \$1.6 million verdict, the parties appealed to the First Circuit Court of Appeals. See *Tuli v. Brigham & Women's Hosp.*, 08-2026, 2011 WL 3795599 (1st Cir. Aug. 29, 2011). In its decision, the Court of Appeals affirmed the verdict award, and in reaching its decision, discussed the role of the Hospital's Credentials Committee in the plaintiff's successful claim of retaliation.

Background

In 2002, the Hospital hired Dr. Sagun Tuli as an associate surgeon in the Department of Neurosurgeon ("Department") and hired Dr. Arthur Day as Residency Director and Vice Chairman of the Department. In 2002 and 2003, Dr. Tuli was appointed as the Department's professionalism officer and representative to the Hospital's Quality Assurance and Risk Management Committee ("QARM"), which required her to investigate and/or report on other doctors' case complications. In her role as QARM representative, Dr. Tuli was assigned to investigate three of Dr. Day's cases, which ultimately were reported to the Massachusetts Board of Registration of Medicine. In 2004, two colleagues in the department left the practice and left Dr. Tuli as the sole spine surgeon. Unlike prior male doctors, she was not promoted to the position of Director of Spine.

Most of Dr. Tuli's claims stem from her interactions with Dr. Day, who ultimately became her supervisor when he was promoted to Chair of the Department in 2007. Dr. Tuli alleged that Dr. Day's behavior toward women (including Dr. Tuli) had been consistently inappropriate and demeaning. According to Dr. Tuli, Dr. Day's inappropriate and/or offensive conduct toward her included: At a graduation dinner and in

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front of a female resident, Dr. Day asks Dr. Tuli, “Can you get up on the table to dance so you could show them how to behave?”; Dr. Day makes comments on different occasions: “You’re just a little girl, you know, can you do that spine surgery?” “Oh, girls can do spine surgery?” “Are you not strong enough to use the hand instruments?”; Dr. Day bars Dr. Tuli from spine oncology research saying that he had “a guy in mind” for the job.

Starting in 2005 and continuing until 2007, Dr. Tuli raised these allegations and concerns about Dr. Day to Dr. Anthony Whittemore, the Chief Medical Officer of the Hospital. Additionally, in 2005, Dr. Tuli accused a fellow resident of mismanaging one of her patients and, in 2006 and 2007, received herself a number of patient complaints, primarily concerning her attitude and communication skills.

In October 2007, Dr. Tuli’s medical staff reappointment and privileges were due for review by the Hospital’s Credentials Committee. As the Chairman of the Department, Dr. Day presented Dr. Tuli’s case to the Committee, stating that she had “mood swings, that twenty to thirty members of the operating room staff did not want to work with her, and that she would benefit from anger management training.” The Committee was not apprised of Dr. Tuli’s complaints regarding Dr. Day’s behavior towards her or that she had been involved in several negative reviews of his care through the QARM. The Committee then conditioned Dr. Tuli’s reappointment on obtaining an evaluation within four months by an outside agency, Physician Health Services (“PHS”), and agreeing to comply with its recommendations.

Shortly thereafter, concerns were raised about the lack of specificity of Dr. Day’s complaint, and the Committee asked Dr. Whittemore to re-present Dr. Tuli’s case in December 2007. Although somewhat more objective, Dr. Whittemore mainly reiterated the issues Dr. Day had discussed during the earlier meeting. Most significantly, Dr. Whittemore did not tell the Committee of Dr. Tuli’s prior complaints against Dr. Day, which she had made directly to Dr. Whittemore. The Committee affirmed its earlier decision.

The Lawsuit

Preliminarily, Dr. Tuli sought relief to prevent loss of her privileges during the pendency of the case. Additionally, under both federal and Massachusetts law, Dr. Tuli charged the Hospital and Dr. Day with various claims including, gender discrimination through both disparate treatment and a hostile work environment, retaliation, violation of Massachusetts’ Health Care Whistleblower Act, equal pay violations, intentional interference with advantageous relations, and slander.

The Federal Court granted relief to Dr. Tuli and held her loss of privileges in abeyance during the case, which the Hospital appealed. Soon thereafter, the trial resulted in a jury decision favorable to Dr. Tuli in most respects. The jury awarded Dr. Tuli over \$1.6 million dollars, \$600,000

of which was against the Hospital in compensatory damages on her retaliation claim.

Applicable Law: Retaliation Claim¹

Under Title VII, 42 U.S.C. § 2000e-3(a), it is:

an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.²

In alleging retaliation against the Hospital, it was Dr. Tuli's position that the Credentials Committee's action against her comprised retaliation because she had previously complained about Dr. Day. The Hospital did not dispute that Dr. Tuli's complaints were protected conduct, but it disputed that the evidence showed either of the two other requisites of a retaliation claim: that Dr. Tuli suffered "an adverse employment action" and that "a causal connection existed between the protected conduct and the adverse action."

The Court ruled that Dr. Tuli provided sufficient evidence from which a jury could conclude that the consequences of the obligatory counseling ordered by the Hospital—invasion of privacy, potential stigma, and possible impact on employment and licensing elsewhere—"might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Obligatory counseling is not a typical adverse action but the impact here could be deemed sufficient by the jury if the action was prompted by a retaliatory motive.

The issue of causal connection was more complicated. The jury had to decide whether the Credentials Committee was misled by Dr. Day in a way that altered the outcome. In general, a hospital has good reason to intervene—both to protect itself and to safeguard its patients—where a doctor is in need of treatment in order to provide competent care, and courts are likely to defer to an impartial assessment. Of note, the Court recognized there was no suggestion that individuals on or involved with the Credentials Committee other than Dr. Day harbored any improper animus or acted with a retaliatory motive in voting to compel Dr. Tuli to seek and follow an evaluation.

Despite the lack of animus from the members of the Credentials Committee, the Court concluded a causal connection existed because Dr.

¹This article only addresses the law applicable to Dr. Tuli's retaliation claim. For a complete analysis of all additional claims, see please the full opinion at *Tuli v. Brigham & Women's Hosp.*, 08-2026, 2011 WL 3795599 (1st Cir. Aug. 29, 2011).

²Massachusetts has a counterpart provision. Mass. Gen. Laws ch. 151B, § 4(4) (2011).

Day represented the Hospital as the head of his Department in presenting the case against Dr. Tuli. The Court noted that Dr. Day presented Dr. Tuli's case even though he had been the subject of adverse critiques by Dr. Tuli of his own performance as part of her official responsibilities and Dr. Day was the subject of her complaints about his own wrongful conduct toward her.

Further, the Court ruled that the causal chain was not broken by the second round of review involving Dr. Whittemore. Dr. Whittemore—who had knowledge of Dr. Day's behavior—re-presented Dr. Tuli's case without presenting this information to the Committee. He relied in part on information from Dr. Day, and he did not tell the Committee of the complaints that Dr. Tuli had made about Dr. Day. Importantly, in the underlying trial, two Committee members testified that knowledge of the complaints against Dr. Day would have been “important information” in making their decision.

Conclusion

In addition to affirming a substantial jury verdict, the Court's decision is significant in underscoring the importance of a Credentials Committee's fair and impartial review of a medical staff member in granting clinical privileges. Committee members who have information regarding potential bias by medical staff leaders and other participants in the decision-making process are strongly encouraged to raise such concerns so they may be properly vetted and addressed. In the end, the Committee and the Hospital will be held accountable for the conduct of one individual whose title and role places them in a position to be acting on behalf of the institution. Direct intent by the Committee is not necessary to conclude retaliation has occurred. Hospitals and Committees involved in this process must be ever-vigilant.

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