IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

MARC E. BROCKMAN,

Plaintiff,

v.

DR. CARMEN PULIAFITO and UNIVERSITY OF MIAMI d/b/a BASCOM PALMER EYE INSTITUTE and d/b/a BASCOM PALMER OF THE PALM BEACHES,

Defendants.
_____/

CASE NO. 2006-CA-002832XXXXMB AF





**DEFENDANT THE UNIVERSITY OF MIAMI'S MOTION FOR SUMMARY JUDGMENT**

Defendant the University of Miami ("the University"), by and through undersigned counsel, and pursuant to Fla. R. Civ. P. 1.510, moves for summary judgment as to Count II (Negligent Hiring), the one claim asserted against it by Plaintiff Marc E. Brockman, on the ground that there are no genuine issues of material fact that would support a jury verdict in favor of the Plaintiff.

**STATEMENT OF MATERIAL FACTS**[1]

**The Parties**

1. Plaintiff Marc E. Brockman was employed by the University as an optometrist, working in the Palm Beach Gardens Clinic of the Bascom Palmer Eye Institute ("the Clinic") from 1996 until his lay off on April 23, 2003. (Brockman Dep. at 272-75, App. Exh. 1; App. Exh. 9)

[1]In support of this motion, the University is submitting an appendix of relevant exhibits. Included in the appendix is a copy of a deposition taken in the matter of *Marc E. Brockman v. University of Miami*, Case No. 05-0928, filed in the State of Florida Division of Administrative Hearings. The Court may take judicial notice of this prior testimony. Fla. Stat. Sec. 90.202.

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2. Dr. Carmen A. Puliafito is the Chair of the University of Miami Medical School's Department of Ophthalmology and the Director of the Bascom Palmer Eye Institute. He was hired by the University in July of 2001. (Clarkson Aff. ¶ 3, App. Exh. 3)

**Hiring Dr. Puliafito**

3. In or about 2000, a search committee was formed to identify and recommend the hire of a new Chair of Ophthalmology. Dr. Laurence Gardner, the-then Chair of the Department of Medicine, was appointed the Chair of the search committee. (Clarkson Aff. ¶ 2, App. Exh. 3; Gardner Aff. ¶ 2, App. Exh. 4)

4. The Search committee considered a number of candidates, including Dr. Carmen Puliafito. The committee unanimously recommended the hire of Dr. Puliafito, which recommendation was forwarded to the-then Dean of the Medical School, Dr. John Clarkson, who approved the recommendation. (Gardner Aff. ¶ 2, App. Exh. 4; Clarkson Aff. ¶ 2, App. Exh. 3)

5. Prior to his employment with the University, Dr. Puliafito was the Chair of the Department of Ophthalmology at Tufts University School of Medicine and was the founding Director of the New England Eye Center. (Gardner Aff. ¶ 2, App. Exh. 4)

6. Prior to his hire, neither Dr. Clarkson nor the Search Committee had any information that Dr. Puliafito had assaulted or committed an act of violence an employee or any other individual at Tufts or at any other previous employer. (Gardner Aff. ¶. 4, App. Exh. 4; Clarkson Aff. ¶ 4, App. Exh. 3)

7. Plaintiff has no personal knowledge about any misconduct by Dr. Puliafito committed at his previous employer. (Brockman Dep. at 169-72, App. Exh. 1)

**The Assault**

8. On April 4, 2002, Plaintiff alleges that Dr. Puliafito grabbed him by the lapels, pulled him up by the collar and yelled obscenities at him. Dr. Brockman sustained no physical injuries and he did not consult a physician. He did not take any time off from work following the incident. (Brockman Dep at 38, 42, 49-50, 61, App. Exh. 1)

9. Plaintiff did not report the incident to Dr. Puliafito's supervisor until several months after it had occurred. (Brockman Dep. at 56, 397-98, 403-04 , App. Exh. 1)

10. One year later, on March 31, 2003, Plaintiff filed a police report about the incident. The State Attorney's office declined to prosecute the matter due to the delay in reporting the incident. Plaintiff testified that he filed the police report in an attempt to save his job. (Brockman Dep. at 68-70, App. Exh.1)

**The Lay Offs**

11. In July of 2002, the Clinic was operating with an approximate $626,000.00 deficit. This deficit continued through fiscal year 2003. (Lee Dep. at 15, App. Exh. 2; Rodgers Aff. ¶ 3, App. Exh. 8)

12. In early 2003, the Department of Ophthalmology was advised that it would not be receiving a tax rebate in the amount of $200,000 to $300,000. (Lee Dep. at 50-51, App. Exh. 2; Rodgers Aff. ¶7, App. Exh. 8)

13. In early 2003, the Department learned, together with the rest of the University's medical school, that malpractice premiums would be significantly increased. (Lee Dep. at 51, App. Exh. 2; Rodgers Aff. ¶ 7, App. Exh. 8)

14. On April 1, 2003, Tom Fitzpatrick, the Chief Financial Officer for the University's School of Medicine, sent an Email message to all School of Medicine departments informing they they needed to make final adjustments to their budgets by April 9, 2003. (Rodgers Aff. ¶8, App. Exh. 8)

15. Based upon these financial concerns, Dr. Yunhee Lee, the Medical Director of the Clinic and Coreen Rodgers, the Assistant Chair of the Department, were directed to cut $200,000 from the Clinic's budget. Dr. Puliafito did not direct how the budget cuts should be made. (Lee Dep. at 25, App. Exh. 2; Rodgers Aff. ¶9, App. Exh. 8)

16. In or about January of 2003, the Department hired Ilene Knopping, of Pointed Communications, who are health care management consultants, to be the interim administrative manager of the Clinic and to assist in the review and evaluation of Clinic operations. As part of her duties, she conducted an analysis of the staffing and operations of the clinic, which notes areas where there was overstaffing and areas where there was a lack of specialized staffing. In her report, Ms. Knopping specifically referenced Dr. Brockman's position and stated that:

> **...a major staffing efficiency is how the practice is using optometrist Marc Brockman as a technician and clinical manager. More than half his time is spent serving as a technician and on issues related to patient care or functions that can be more appropriately done by others at a lower cost to the practice. Currently the optometric patient volume does not require a full time optometrist.**

(Rodgers Aff. ¶4, App. Exh. 8) (emphasis added)

17. Dr. Charles Pappas, the Director of Patient Clinical Services for the Anne Bates Leach Eye Hospital, reached a similar conclusion when he conducted a review of the clinical operations of the Palm Beach Clinic in April of 2003:

**"*Clarify Dr. Brockman's role and value to facility.**

....

**5. Therefore, consider layoff at this time, unless he is generating a substantical financial contribution which is unlikely given his small patient volume."**

(Rodgers Aff. ¶6, App. Exh.8)

18. As part of their analysis of the clinic's operations, the interim administrative manager and Medical Human Resources met with each person working at the clinic to review their job description. (Brockman Dep. at 76, App. Exh. 1; Rodgers Aff. ¶5, App. Exh. 8)

19. On April 23, 2003, Plaintiff, together with four other University employees who worked at the Clinic, were laid off due to budgetary and financial constraints. (Brockman Dep. at 278-79, App. Exh. 1; Lee Dep. at 22-25, App. Exh. 2; Rodgers Aff. ¶11, App. Exh. 8; App. Exh. 9) The lay offs were recommended by the Department of Ophthalmology, and approved, pursuant to University policy, by Medical Human Resources. (Brockman Dep. at 163, App. Exh. 1; Rodgers Aff. ¶11, App. Exh. 8) The net savings to the Clinic of these cost-cutting measures was approximately $200,000.00. (Id.)

20. Pursuant to University policy, Dr. Brockman was given two months' severance and was eligible for rehire. (Brockman Dep. at 270285, App. Exh. 1; App. Exh. 9)

21. Dr. Brockman has not been replaced and his administrative duties were redistributed to existing personnel at the clinic. (Brockman Dep. at 284, 385, App. Exh. 1; Lee Dep. at 25-26, App. Exh. 2; Rodgers Aff. ¶12, App. Exh. 8)

22. None of the other four individuals who were laid off had complained about Dr. Puliafito or were involved in the April 4, 2002 incident. (Brockman Dep. at 281, App. Exh. 1)

23. At the time Dr. Brockman was laid off, he was the highest paid non-physician at the Clinic. He only spent approximately 50% of his working time, or two and a half days per week, treating patients. In 2002 and projected for 2003, Dr. Brockman represented a net loss to the Department. (Brockman Dep. at 14, 307-08, 321, 341, App. Exh. 1; Rodgers Aff. ¶10, App. Exh. 8)



## ARGUMENT

### I. The Summary Judgment Standard

Under Rule 1.510, summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in

evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). *See Page v. Staley,* 226 So.2d 129, 130 (Fla. 4th DCA 1969) ("the function of summary judgment procedure is to determine if there is sufficient evidence to justify trial upon the issues made by the pleadings, to expedite litigation, and to obviate expense."); *CSX Trans., Inc. v. Pasco County,* 660 So.2d 757, 758 (Fla. 2d DCA 1995) ("The purpose of a motion for summary judgment is to determine whether any genuine issues of material fact exist for resolution by the trier of fact.").

Where, as here, a motion for summary judgment is properly supported, the burden then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue of material fact for trial. *See Gay Bros. Constr. Co. v. Fla. Power & Light Co.,* 427 So.2d 318, 319-20 & n.1 (Fla. 5th DCA 1983) ("When the party who seeks the summary judgment has made an initial showing of the absence of any genuine issue of material fact, then the party moved against has the burden of coming forward with evidence sufficient to reveal that such issue exists. It is not sufficient to merely assert that an issue does exist."). The Fourth District Court of Appeal of Florida has emphasized the requirement of "materiality." In *Continental Concrete, Inc. v. Lakes at La Pax III Ltd. P'Ship,* 758 So.2d 1214, 1217 (Fla. 4th DCA 2000), the court stated:

> [T]he "issue" must be one of *material* fact. Issues of nonmaterial facts are irrelevant to the summary judgment determination. *See* Fla. R. Civ. P. 1.510(c). A material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal question raised in the case.

(emphasis original). Standards governing summary judgment "are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." *Firestone v. Time, Inc.,* 231 So.2d 862, 864 (Fla. 4th DCA 1970).

## II. THE UNIVERSITY IS ENTITLED TO SUMMARY JUDGMENT ON THE NEGLIGENT HIRING CLAIM

### A. THE UNIVERSITY HAD NO NOTICE OF PRIOR MISCONDUCT BY CARMEN PULIAFITO

Plaintiff alleges in Count II, entitled "Negligent Hiring" that the University (1) hired Dr. Carmen Puliafito in 2001, (2) prior to his hire, Dr. Puliafito "engaged in conduct quite similar to that alleged in Count I...." and (3) "At the time it hired Dr. Puliafito, the ...University, knew or should have known that Dr. Puliafito's violent temper and history of outrageous behavior against employees and/or others." (Complaint, ¶¶18-20). However, there are no facts that the University was on notice of any complaints of violent behavior toward others prior to its hiring of Dr. Puliafito. (Facts ¶¶ 3-7). Therefore, Plaintiff's negligent hiring claim fails as a matter of law.

A negligent hiring claim permits a plaintiff to recover against an employer for the intentional acts of an employee which are committed outside the course and scope of employment. *Tallahassee Furniture Co., Inc. v. Harrison,* 583 So. 2d 744, 750 (Fla. 1st DCA 1991)("'Most jurisdictions including Florida, recognize that independent of the doctrine of respondeat superior, an employer is liable for the *willful* tort of his employee committed against a third person if he knew or should have known that the employee was a threat to others'"). However, this cause of action is not unlimited: "'[O]therwise, an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against any person under any circumstances. Such [condition] would be an intolerable and unfair burden upon employers.'" *Total Rehab. & Medical Centers, Inc. v. E.B.O.*, 915 So. 2d 694, 697 (Fla. 3d DCA 2005), *quoting Garcia v. Duffy*, 492 So. 2d 435, 439

(Fla. 2d DCA 1986). To bring a prima facie case for negligent hiring, a plaintiff must demonstrate that:

> (1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known.

*Garcia v. Duffy, supra,* 492 So. 2d at 440.

"[T]he inquiry is focused on whether the specific danger that ultimately manifested itself (e.g., sexual assault and battery) reasonably could have been foreseen at the time of hiring." *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002).[2] Absent evidence that an employer had actual or constructive knowledge that an employee had harmful propensities, the claim must be dismissed. *See Total Rehab & Medical Centus, Inc. v. E.B.O.,* 915 So. 2d 694 (defendant entitled to a directed verdict absent evidence that the employer knew, or had reason to know, that the employee would commit battery); *Dep't of Environmental Protection v. Hardy*, 907 So. 2d 655, 661 (Fla. 5th DCA 2005)("[t]here must be a connection and foreseeability between the employee's employment history and the **current tort committed by the employee**;" dismissing negligent supervision claim where there was no evidence that employer had prior notice of the potential for harm) (emphasis added); *Phillips v. Edwin P. Stimpson, Co.,* 588 So. 2d 1071 (Fla. 4th DCA 1991) (employer's knowledge of prior narcotics conviction insufficient notice that he would assault employee). Courts reviewing

[2]The primary distinction between a claim for negligent hiring and a claim for negligent retention concerns the time at which the employer is charged with knowledge of the employee's unfitness. Liability in these cases focuses on the adequacy of the employer's pre-hire investigation. In contrast, liability for negligent retention occurs after employement begins, where the employer knows or should know of an employee's unfitness and fails to take further action, such as investigating, discharge or reassignment. *Malicki v. Doe, supra,* 814 So. 2d at 362 n.15.

negligent retention claims have not hesitated to dismiss those claims as a matter of law where there was no prior notice of misconduct. *See Wal-Mart Store, Inc. v. Caruso,* 884 So.2d 102 (Fla 4th DCA 2004) (reversing entry of judgment on jury verdict against the employer where there was no evidence that employer knew of prior misconduct); *M.V. v. Gulf Ridge Council Boy Scouts of America, Inc.,* 529 So. 2d 1248 (Fla. 2d DCA 1988)(Boy Scout Council entitled to a directed verdict on claim for negligent supervision where defendant had no notice that camp first aid attendant who committed intentional homosexual acts was unfit to work). Neither the Search Committee nor the Dean of the Medical School had information from Tufts –or any other academic institution–that Dr. Puliafito had committed a similar assault and battery against an employer or other third party. (Clarkson Aff. ¶ 4, App. Exh. 3; Gardner Aff. ¶4, App. Exh. 4)

Plaintiff testified that some unidentified faculty member told him he knew of a prior similar incident that had occurred at Tufts. However, he could not identify who provided this information nor whether the information was based upon personal knowledge. (Brockman Dep. at 176-77, App. Exh. 1) The various faculty members who Plaintiff did identify as individuals who had negative information about Dr. Puliafito deny having any knowledge about complaints of physical altercations lodged against Dr. Puliafito at Tufts or anywhere else. (Cousins Aff., App. Exh. 5; Greenfield Aff, App. Exh. 6; Greenberg Aff., App. Exh. 7) Plaintiff cannot refute summary judgment based upon inadmissible hearsay from some unidentified source. *See In re Forfeiture of 1998 Ford Pickups,* 779 So. 2d 450 (Fla. 2d DCA 2000). Plaintiff also testified that some faculty members had expressed concern that Dr. Puliafito had a bad temper and used profanity. (Brockman Dep. at 180, App. Exh. 1) Apart from the fact that this is hearsay, such knowledge would not impose prior notice to the University that Dr. Puliafito might physically assault someone. The case law is clear that there must

be a connection between the prior employment history and the underlying tort. E.g., *Phillips, supra,* 588 So. 2d at 1073-1074; *see Dickinson v. Gonzalez,839* So. 2d 709 (Fla. 3d DCA 2003).

In the absence of any facts that Dr. Puliafito had assaulted an employee at a prior employer **and** that the individuals responsible for his hiring had any knowledge of such information, Plaintiff's negligent hiring claim against the University should be dismissed.

**B. Plaintiff's Negligent Hiring Claim is Barred by the Impact Rule**

Moreover, to the extent that Plaintiff seeks damages for emotional distress allegedly caused by the University's negligent hiring, such damages are barred by the impact rule. Absent any evidence that the alleged emotional distress flowed from physical injuries Plaintiff sustained in an impact, his negligent hiring claim will not support a claim for emotional distress damages. *See Southern Baptist Hosp. of Fla., Inc. v. Welker*, 908 So. 2d 317, 320 (Fla. 2005); *Woodard v. Jupiter Christian School, Inc.,* 913 So. 2d 1188, 1191 (Fla. 4th DCA 2005)(refusing to recognize another exception to the rule, noting that the Supreme Court has consistently adhered to the rule, "carving out limited exceptions in extraordinary circumstances") , *rev. denied,* 924 So. 2d 812 (Fla. 2006). "'[T]he underlying basis for the rule is that allowing recovery for injuries resulting from purely emotional distress would open the floodgates for fictitious or speculative claims.'" *Woodward v. Jupiter Christian School, supra,* 913 So. 2d at 1190 (quoting *Southern Baptist Hosp. of Fla. v. Welker,* 908 So. 2d at 362). Plaintiff has admitted he did not suffer any physical injuries in connection with the alleged battery. (Brockman Dep. at 49, 92, App. Exh. 1) He did not take any time off from work or consult a physician. (Brockman Dep. at 61, 92, App. Exh. 1) Therefore, the impact rule precludes Plaintiff's claim in negligence.

For all of the foregoing reasons, the University is entitled to summary judgment on Count II of the Complaint.

## III. THE UNIVERSITY IS ENTITLED TO DISMISSAL OF PLAINTIFF'S CLAIM FOR ECONOMIC DAMAGES

Even if the Court denies the University's motion, the Court should nonetheless dismiss Plaintiff's claim for economic damages because there is no causal link between the April 4, 2002, incident and the layoffs of five employees at the clinic over one year later on April 23, 2003.

Plaintiff alleges that, as a result of the negligent hiring, Plaintiff suffered a "loss of earnings and loss of ability to earn money" (Complaint ¶23), which apparently is a reference to the lay off that occurred on April 23, 2003. Economic damages flowing from the alleged negligent hiring cannot be recovered because there are no facts to support causation. *See Watson v. Hialeah,* 552 So. 2d 1146, 1149 (Fla. 3d DCA 1989) (proximate cause is an essential element of a negligent hiring claim and therefore Plaintiff's injuries must be shown to have been brought by reason of employment of the incompetent servant); *Trembath v. Beach Club, Inc,* 860 So. 2d 512, 515 (Fla. 4th DCA 2003) (before an occurrence can be a proximate cause of the injury, it must be determined to be the cause in fact of the injury). While the claim against the University is unclear, the allegations against Dr. Puliafito state that Plaintiff lost his job at the University because he complained about the incident set forth in Count I. There are no facts to support this theory.

Over one year after the incident alleged in Count I of the Complaint, Dr. Brockman, together with four other individuals employed at the Palm Beach Gardens clinic, were advised that they had been laid off as a result of financial constraints and budgetary concerns. (Facts ¶¶ 18-19) That decision was made by Medical Human Resources, based upon a recommendation from the

Department of Ophthalmology. The decision was based upon recommendations made by analyses of Clinic operations and finances performed by the interim administrative manager of the Clinic, the chief administrator for the Department, and an optometrist from Bascom Palmer. (Facts ¶¶ 9, 16-19). There is no evidence that Dr. Puliafito "targeted" Dr. Brockman nor directed anyone to terminate his employment. (Rodgers Aff. ¶ 9, App. Exh. 8). In addition, none of the other four individuals who were laid off had had any altercations with Dr. Puliafito or complained of same. (Id. at ¶ 22)

As background, in the summer of 2002, the Palm Beach Gardens clinic was running an approximate $625,000 deficit. This deficit continued to grow during fiscal year 2003. (Facts ¶ 11) In addition to the growing budgetary deficit at the Clinic, in the early part of 2003, the Department of Ophthalmology learned that it was not going to receive a tax rebate in the amount of $200,000 to $300,000. (*Id.* at ¶ 12) In addition, the Department learned that the malpractice insurance rates for physicians was going to be increased dramatically. (*Id.* at ¶ 13). Based upon these facts, Dr. Puliafito instructed Dr. Yunhee Lee, the Medical Director of the Clinic to determine how best to eliminate at least $200,000 from the Clinic's operating budget. (*Id.* ¶ 15) Dr. Puliafito did not dictate how the budgetary cuts should be made. (Rodgers Aff. ¶ 9, App. Exh. 8). To make this determination, Dr. Lee, together with the Assistant Chair of the Department, Coreen Rodgers, analyzed the Clinic costs. In addition, Dr. Charles Pappas, the Director of Patient Clinical Services at the Ann Bates Leach Eye Hospital, was asked to visit the clinic and make some suggestions at to the efficient operation of the optometry practice. Dr. Pappas thereafter submitted a report suggesting that the University reevaluate Dr. Brockman's employment status and consider layoff. (Facts ¶ 17):

In the spring of 2003, Ilene Knopping, who had been appointed the Interim administrative manager of the Clinic, submitted a report to the Department which recommended, based upon poor profitability, that the optometrist position be eliminated. (Facts ¶ 16). Based upon these recommendations, five individuals were laid off -- two of them were the highest paid individuals at the Clinic. (Id. at ¶¶ 19 and 23). Dr. Brockman was not replaced, and the administrative duties he was performing were redistributed amongst existing personnel. (*Id.* at ¶ 21)

In sum, Plaintiff cannot demonstrate an essential element of his negligence claim: proximate causation. Because Plaintiff's layoff was motivated by budgetary concerns unrelated to his complaints about the incident the year before, there is no causal connection and no liability. *See Goldberg v. FPL,* 899 So. 2d 1105 (Fla. 2005).

## IV. CONCLUSION

Based upon the foregoing, the University respectfully requests that the Court grant summary judgment in its favor, and costs and attorneys' fees as the Court deems just and proper.

Respectfully submitted,

Elizabeth P. Johnson
Florida Bar No. 920990
Timothy O. Schranck
Florida Bar No. 0702331

FOWLER WHITE BURNETT P.A.
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, Florida 33131-3302
Telephone: (305) 789-9200
Facsimile: (305) 789-9201

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, this ~~10th~~ 11th day of January, 2007, to: Alan C. Espy, Esq., *Counsel for Plaintiff, Marc E. Brockman,* 3300 PGA Boulevard, Suite 630, Palm Beach Gardens, Florida 33410; and Jane Moscowitz, Esq., Moscowitz, Moscowitz & Magolnick, P.A., *Counsel for Defendant Dr. Carmen Puliafito,* 1111 Brickell Avenue Suite 2050, Miami, Florida 33131.

Elizabeth P. Johnson

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