

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

STEPHEN M. MADIGAN, M.D.,)
)
Plaintiff)

v.)

No. 2:11-cv-94-JAW
(REDACTED 2/28/12)

THE WEBBER HOSPITAL)
ASSOC. d/b/a SOUTHERN)
MAINE MEDICAL CENTER, et al.,)

Defendants

MEMORANDUM DECISION AND ORDER ON MOTION TO AMEND ANSWER¹

Defendant Spectrum Medical Group, P.A. (“Spectrum”) moves pursuant to Federal Rule of Civil Procedure 15(a) for leave to amend its answer to the plaintiff’s complaint. See Defendant Spectrum Medical Group, P.A.’s Motion To Amend Answer and Defenses to Plaintiff’s Amended Complaint (“Motion”) (Docket No. 18). Because Spectrum unduly delayed filing the Motion and the plaintiff would be unduly prejudiced if the Motion were granted, the Motion is denied.

I. Applicable Legal Standards

Pursuant to Federal Rule of Civil Procedure 15(a)(2), “[t]he court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). Leave to amend should be granted in the absence of reasons “such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue

¹ This decision is redacted in accordance with my order granting in part and denying in part the plaintiff’s motion to redact the decision or keep it under seal. See Docket Nos. 45, 46. In redacting this decision, I have deleted section V, which provided the parties an opportunity to seek redactions of portions of the decision, failing which the court would have unsealed it in its entirety.

prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . .” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The First Circuit has explained:

A motion to amend a complaint will be treated differently depending on its timing and the context in which it is filed. . . . As a case progresses, and the issues are joined, the burden on a plaintiff seeking to amend a complaint becomes more exacting. Scheduling orders, for example, typically establish a cut-off date for amendments (as was apparently the case here). Once a scheduling order is in place, the liberal default rule is replaced by the more demanding “good cause” standard of Fed. R. Civ. P. 16(b). This standard focuses on the diligence (or lack thereof) of the moving party more than it does on any prejudice to the party-opponent. Where the motion to amend is filed after the opposing party has timely moved for summary judgment, a plaintiff is required to show “substantial and convincing evidence” to justify a belated attempt to amend a complaint.

Steir v. Girl Scouts of the USA, 383 F.3d 7, 11-12 (1st Cir. 2004) (citations, internal quotation marks, and footnotes omitted).

The instant case was filed on March 17, 2011. *See* Complaint and Demand for Jury Trial (Docket No. 1). The plaintiff, Stephen M. Madigan, M.D., claims that the defendants, Spectrum and The Webber Hospital Assoc. d/b/a Southern Maine Medical Center (“SMMC”), discriminated against him on the basis of his age, in violation of both the federal Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*, and the Maine Human Rights Act (“MHRA”), when they jointly decided on or about March 23, 2010, not to offer him employment with Spectrum to continue serving as a radiologist for SMMC. *See* Amended Complaint and Demand for Jury Trial (“Amended Complaint”) (Docket No. 5) ¶¶ 10-24. He also sues SMMC for tortious interference with a prospective contractual advantage. *See id.* ¶¶ 25-30.

The deadline for amending pleadings was August 8, 2011. *See* Scheduling Order (Docket No. 11) at 2. Following two extensions, *see* Docket Nos. 14, 21, the discovery deadline expired on January 20, 2012, and the deadline for the filing of dispositive motions is February 17, 2012, *see* Docket Nos. 21, 35. Spectrum filed the instant motion on October 28, 2011. *See* Docket No. 18. Because, as of that time, the deadline for amending pleadings had passed, but no party had as yet moved for summary judgment, the “good cause” standard of Federal Rule of Civil Procedure 16(b) applies.

II. Factual Background

On August 12, 2011, Spectrum served Dr. Madigan with a request for production of documents. *See* Exh. 1 (Docket No. 25-1) to Defendant Spectrum Medical Group, P.A.’s Reply in Support of Its Motion To Amend Answer (“Reply”) (Docket No. 25). Among other things, Spectrum sought (i) all agreements relating to SMMC and (ii) all records related to Dr. Madigan’s clinical service at SMMC, including credentialing records, quality assurance records, complaints related to his conduct or clinical service, and investigatory records. *See id.* ¶¶ 6, 19.

On or about September 6, 2011, Dr. Madigan produced to Spectrum, *inter alia*, documents stamped “Confidential – Peer Review Material” consisting of (i) two drafts of a proposed, unsigned Corrective Action Agreement between defendant SMMC and Dr. Madigan, (ii) SMMC Executive Committee minutes of September 3, 2004, bearing on the issues addressed in the agreement, (iii) minutes of a separate meeting on September 3, 2004, between Dr. Madigan, SMMC Chief Medical Officer Terrance Sheehan, M.D., SMMC President and Chief Executive Officer Edward McGeachey, and Robert Fernandez, M.D., a member of the SMMC Executive Committee, and (iv) several 2002 and 2003 SMMC CT and ultrasound protocols and policies. *See* Reply at 2; Exh. 2 (Docket No. 25-2) thereto. As of September 6, 2011, no

depositions had been taken in this case. *See* Plaintiff's Memorandum in Opposition to Defendant Spectrum Medical Group, P.A.'s Motion To Amend Its Answer ("Opposition") (Docket No. 19) at 3.

On or about October 3, 2011, SMMC produced to Spectrum copies of its response to Dr. Madigan's document request, which included a copy of a finalized, signed Corrective Action Agreement. *See* Reply at 2; Exh. 4 (Docket No. 25-4) thereto.²

On October 12, 2011, Dr. Madigan was deposed and answered questions posed by SMMC's counsel, over objection by Dr. Madigan's counsel, regarding the Corrective Action Agreement and the circumstances leading up to it. *See* Exh. 5 (Docket No. 25-5) to Reply. On October 19, 2011, Frank Lavoie, M.D., SMMC's executive vice-president and chief operating officer, was deposed and answered questions posed by Spectrum's counsel, over objection by Dr. Madigan's counsel, regarding the agreement and the circumstances leading up to it. *See* Exh. 6 (Docket No. 25-6) to Reply.

On October 21, 2011, Spectrum determined that, had it known in March 2010, when it was considering Dr. Madigan for employment, about the agreement and the circumstances leading up to it, it would not have hired him based on that information. *See* Reply at 3. The same day, Spectrum's counsel sought Dr. Madigan's counsel's consent to a planned motion to amend its answer to add the defense of the doctrine of after-acquired evidence, set forth in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995). *See id.* at 3; Exh. 7 (Docket No. 25-7) thereto. On October 25, 2011, Dr. Madigan's counsel conveyed to Spectrum's counsel

² SMMC had produced these materials to Dr. Madigan on or about August 19, 2011. *See* Exh. 3 (Docket No. 25-3) to Reply. The cover letter transmitting the materials indicates that Spectrum's counsel, Melinda Caterine, was copied on that letter, although not on its enclosures. *See id.* However, Attorney Caterine explains that this is an error and that she did not receive a copy of that cover letter until December 1, 2011. *See* Docket No. 30. For purposes of the resolution of this Motion, I accept Attorney Caterine's representation.

that he declined to consent. *See* Motion at [2]. On October 28, 2011, the Motion was filed. *See* Docket No. 18. As of that time, discovery was due to close, following an extension, on November 23, 2011. *See* Docket No. 14. On November 25, 2011, I granted SMMC's consent motion to amend the scheduling order, extending the discovery deadline to January 20, 2012. *See* Docket Nos. 20-21.

III. Discussion

Dr. Madigan opposes Spectrum's motion to amend its answer to add the after-acquired evidence defense on grounds that (i) Spectrum did not timely move to file the Motion, (ii) he will be prejudiced if the Motion is granted, and (iii) the amendment would be futile. *See* Opposition at 4-10. Spectrum disputes all of those propositions. *See* Reply at 1-10. The amendment would not be futile. However, I agree with Dr. Madigan that Spectrum unduly delayed filing the Motion and that he would be prejudiced were the Motion granted. Spectrum accordingly fails to show good cause for the allowance of the amendment.

A. Futility

Dr. Madigan contends that the amendment would be futile because the Corrective Action Agreement and related materials on which Spectrum intends to rely are "professional competence review records" pursuant to the Maine Health Security Act ("MHSA") and, hence, "are privileged and confidential and are not subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceedings." Opposition at 8; 24 M.R.S.A. § 2510-A.

As Spectrum observes, however, *see* Reply at 6, "[a]pplication of the Maine peer review privilege in this federal court proceeding is governed by Rule 501 of the Federal Rules of Evidence[.]" *Thayer v. Eastern Me. Med. Ctr.*, No. 1:09-cv-19-B-S, 2009 WL 1686673, at *2 (D.

Me. June 16, 2009). “Where a federal civil action involves combined state and federal law claims, as here, and the asserted privilege is relevant to both claims, federal courts have consistently ruled that privileges are governed by federal law, not state law.” *Green v. Fulton*, 157 F.R.D. 136, 139 (D. Me. 1994). “State privilege law should govern in combined state-federal cases only when the state law issues predominate over the federal issues, a situation that poses a real danger of forum shopping.” *Id.* Here, Dr. Madigan brings claims of age discrimination against both defendants pursuant to the ADEA and the MHRC, as well as a related state law claim against SMMC. *See* Amended Complaint at 2-5. His state law claims do not predominate over his claim of age discrimination in violation of the ADEA. *See, e.g., Green*, 157 F.R.D. at 139 (while two of three counts were state law claims, gravamen of complaint was violation of plaintiff’s federal constitutional right to be free from excessive force).

“[T]he First Circuit has adopted a balancing test, weighing the respective federal and state interests, for determining when the federal common law should recognize state evidentiary privileges as a matter of comity in federal question cases.” *Id.* at 139-40 (citing *In re Hampers*, 651 F.2d 19, 22 (1st Cir. 1981)). Pursuant to the *Hampers* analysis, the federal court must determine, first, whether the state court would recognize an evidentiary privilege and, second, whether that privilege is “intrinsicly meritorious.” *Id.* at 140 (quoting *Hampers*, 651 F.2d at 22).

Spectrum argues that:

1. For two independent reasons, Maine courts would not recognize a peer review privilege with respect to the materials at issue: that (i) the Corrective Action Agreement does not fit the definition of a “professional competence review record” and (ii) in any event, any privilege was waived when the documents were produced to Spectrum. *See* Reply at 8-10.

2. Even assuming *arguendo* that Maine courts would recognize a privilege in these circumstances, it is not “intrinsicly meritorious.” *See id.* at 6-8.

Spectrum’s first point is not well taken. For purposes of the MHSA, “professional competence review records” are defined as “the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings and work product prepared at the request of or generated by a professional competence review committee relating to professional competence review activity.” 24 M.R.S.A. § 2502(8). In turn, “professional competence review activity” is defined as “study, evaluation, investigation, recommendation or action, by or on behalf of a health care entity and carried out by a professional competence committee, necessary to . . . [m]aintain or improve the quality of care rendered in, through or by the health care entity or by physicians; . . . [r]educer morbidity and mortality; or . . . [e]stablish and enforce appropriate standards of professional qualification, competence, conduct or performance.” *Id.* § 2502(4-B). “Records received or considered by a professional competence committee during professional competence review activity are not ‘professional competence review records’ if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence committee.” *Id.* § 2502(8).

Spectrum argues that the Corrective Action Agreement was not created for purposes of “professional competence review activity” but, rather, [REDACTED]. *See Reply* at 9. It further contends that this information is available from a source other than a professional competence committee, namely [REDACTED]. *See id.*

Nonetheless, the Corrective Action Agreement qualifies as an action taken by a professional competence committee for purposes of enforcing standards of professional

qualification, competence, conduct, or performance. *See* 24 M.R.S.A. § 2502(4-B)(C). While [REDACTED], there is no evidence that they are an “independent source” for the materials at issue in the sense that they possess copies of them or, for that matter, ever have been privy to them.

In addition, as Dr. Madigan points out, *see* Plaintiff’s Surreply Memorandum in Opposition to Spectrum Medical Group, P.A.’s Motion To Amend Its Answer (“Surreply”) (Docket No. 29) at [3], Maine courts would not find a waiver of the peer review privilege based on the production of those documents to Spectrum. The MHSA provides that the protection at issue “may be waived only by a written waiver executed by an authorized representative of the professional competence committee.” 24 M.R.S.A. § 2510-A(1).

Nonetheless, Spectrum is correct that the privilege is not “intrinsicly meritorious” in the circumstances presented. This court twice has considered that precise issue in circumstances in which a physician suing a health care entity has sought access to Maine peer review materials. *See Thayer*, 2009 WL 1686673, at *2; *Marshall v. Spectrum Med. Grp.*, 198 F.R.D. 1, 5 (D. Me. 2000). In *Thayer*, the court was “not persuaded by the argument that the truth-seeking process served by civil discovery should give way to a medical peer review privilege, particularly as the Court has the power to restrict further dissemination of materials beyond what is necessary for the presentation of evidence at trial.” *Thayer*, 2009 WL 1686673, at *2. Likewise, in *Marshall*, the court found the application of the peer review privilege not “intrinsicly meritorious” in the circumstances presented, reasoning:

[T]here are two decisive reasons to compel disclosure in this case and not recognize any federal peer review privilege: (1) the nature of the dispute and (2) the fact that Plaintiff’s consulting psychiatrist and perhaps even Plaintiff himself has already learned about some or all of the information contained within the file. This case is not directly about the quality of patient care; it is a suit which alleges abuse of the peer review process. The articulated justification for

confidentiality in medical peer review matters is that patient care will suffer if a physician's candid comments are subsequently used in malpractice or other cases to form a basis of liability. . . .

I also note that, although not the original proponent of the subpoena, Defendants themselves have a compelling argument in favor of disclosure. Apparently, Plaintiff and/or his consulting psychiatrist have been privy to the information in the file. In terms of the "correct disposal" of the pending litigation, Defendants should have access to the same information.

Marshall, 198 F.R.D. at 5 (footnote omitted). In this case, as in *Marshall*, the peer review materials at issue would be used not for purposes of determining the quality of patient care but, rather, in aid of a collateral federal matter (in this case, in defending against Dr. Madigan's charge that Spectrum discriminated against him on the basis of his age, in violation of the ADEA). Further, in this case, as in *Marshall*, if it were otherwise appropriate to permit Spectrum's amendment to its answer, fairness would dictate that all parties, including Spectrum, have equal access to these peer review materials for purposes of litigating that defense. Indeed, all of the documents at issue already have been produced to Spectrum. Any remaining concern about general public access to those documents could be handled through the confidentiality order already entered in this case. *See* Docket No. 17.

For these reasons, Spectrum demonstrates that the grant of the requested amendment would not be futile.

B. Timeliness/Prejudice

As the First Circuit has noted:

[T]he longer a plaintiff delays, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend. Particularly disfavored are motions to amend whose timing prejudices the opposing party by requiring a re-opening of discovery with additional costs, a significant postponement of the trial, and a likely major alteration in trial tactics and strategy.

Steir, 383 F.3d at 12 (citations and internal punctuation omitted). *See also, e.g., Acosta-Mestre v. Hilton Int'l of P.R., Inc.*, 156 F.3d 49, 53 (1st Cir. 1998) (“Rule 15(a)’s liberal amendment policy seeks to serve justice, but does not excuse a lack of diligence that imposes additional and unwarranted burdens on an opponent and the courts.”).

Dr. Madigan argues that Spectrum was in possession of the information that it needed to file its motion to amend its answer as of September 6, 2011, prior to the taking of depositions in this case, and yet waited seven weeks and three days to do so. *See* Opposition at 4-5. He contends that, had Spectrum timely filed its motion to amend and had that motion been granted, he would have dramatically enlarged his examination of two Spectrum and two SMMC witnesses. *See* Opposition at 5-6. He asserts that, were the amendment allowed, he would seek to reopen those depositions and, more generally, would be forced to rethink his trial strategy. *See id.* at 7.

1. Timeliness

On the issue of the timeliness of its filing of the Motion, Spectrum asserts that:

1. It did not know until October 3, 2011, that the Corrective Action Agreement had been executed by Dr. Madigan [REDACTED]. *See* Reply at 3.

2. Dr. Madigan failed to produce a copy of the executed agreement in response to Spectrum’s discovery requests and, therefore, is himself responsible for the delay of which he complains. *See id.* at 3-4.

3. Until October 3, 2011, Spectrum had no basis for believing that the proposed agreement had ever been executed or that corrective action had been taken against Dr. Madigan. *See id.* at 2 n.2. Indeed, it asserts, it was left with the impression that Dr. Madigan had successfully challenged the allegations against him. *See id.*

Dr. Madigan rejoins that he did not produce a copy of the executed agreement to Spectrum for the simple reason that he did not retain one. *See* Surreply at 1. He argues that, while the executed agreement, standing alone, is “innocuous,” pertaining only to future conduct and acknowledging nothing regarding past conduct, the materials that he produced to Spectrum on or about September 6, 2011, do contain his [REDACTED]. *See id.*

It is undisputed that Spectrum did not receive a copy of the executed agreement until October 3, 2011. Nonetheless, the materials that Dr. Madigan produced on September 6, 2011, sufficed to put Spectrum on notice of the assertion of an after-acquired evidence defense. Those materials included (i) minutes of a September 3, 2004, meeting between Dr. Madigan, SMMC’s chief medical officer, SMMC’s president, and a member of its Executive Committee reflecting that [REDACTED], (ii) a proposed Corrective Action Agreement [REDACTED] and that Dr. Madigan and his counsel had met with Dr. Sheehan and others, including SMMC’s counsel, on September 10, 2004, [REDACTED], and (iii) a “redlined” version of the proposed agreement containing certain alterations to the original version. *See* Exh. 2 to Reply.³

In the circumstances, Spectrum could not reasonably have believed that Dr. Madigan had successfully challenged the allegations against him. To the contrary, the documents produced on September 6, 2011, indicated that (i) Dr. Madigan had [REDACTED], (ii) [REDACTED], and (iii) some kind of dialogue between the parties had occurred that resulted in a “redlined” version of the proposed agreement. *See id.* From all that appears, Spectrum made no inquiry into what then might have occurred, waiting to move amend until after (i) SMMC shared with Spectrum its production to Dr. Madigan, which happened to include a copy of the executed Corrective Action

³ As Dr. Madigan observes, *see* Opposition at 1, 5, 10, Spectrum tellingly omitted from its Motion any mention of the September 6, 2011, production, focusing on the October 3, 2011, production of a copy of the signed Corrective Action Agreement, *see* Motion at [1]-[2].

Agreement, on or about October 3, 2011, and (ii) two witnesses, Drs. Madigan and Lavoie, testified about that agreement on October 12 and October 19, 2011, respectively.

In this context, *Steir* is instructive. In response to the plaintiff's argument that she was "frustrated in her efforts to bring a timely Rehabilitation Act claim by the defendants' misleading and incomplete discovery responses and their willful concealment of their financial relationships with the federal government[,]" *Steir*, 383 F.3d at 13, the court clarified:

[T]he inquiry is not limited to a defendant's conduct: what the plaintiff knew or should have known and what she did or should have done are also relevant to the question of whether justice requires leave to amend under the discretionary Rule 15(a) provision. The failure of [the plaintiff's] counsel to inquire into the memoranda of understanding [between the defendant and several federal agencies] that were mentioned in the answer to the interrogatory is inexplicable.

Id. at 14 (citation, footnote, and internal punctuation omitted).

In the circumstances, Spectrum fails to demonstrate good cause for the approximately seven-week delay between its receipt of the initial production from Dr. Madigan and the filing of its motion to amend its answer to include an after-acquired evidence defense.

2. Prejudice to Dr. Madigan

In *McKennon*, the Supreme Court recognized that, in cases in which an employer has violated the ADEA, after-acquired evidence of an employee's wrongdoing is relevant to the issue of the scope of remedy available. *See McKennon*, 513 U.S. at 361-62 ("[H]ere, and as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds[,]" although "the proper measure of backpay presents a more difficult problem.").

The Court observed: "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in

fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” *Id.* at 362-63.

Dr. Madigan states that, had the Motion been filed and granted prior to the commencement of depositions, he would have dramatically enlarged his examination of two Spectrum and two SMMC witnesses. *See* Opposition at 5-6. He argues that, to determine the “severity” of the events underlying the proposed corrective action agreement, which cannot be judged in a vacuum, he would have:

1. Sought to explore with two SMMC witnesses, McGeachey and Dr. Lavoie, SMMC’s confidential peer review inquiries into other physicians affiliated with the hospital and whether any of those ended in the physician’s discharge, the drawing up of a corrective action agreement, or something less. *See id.* at 6.

2. Inquired of one of Spectrum’s witnesses, Dr. Merriam, a radiologist who once worked with Dr. Madigan and now works for Spectrum at SMMC,⁴ whether Dr. Merriam had been subject to any confidential peer review process or corrective agreement, and inquired of another Spectrum witness, Human Resources Director Jeffrey Cutler, whether any former or current Spectrum physician had been subject to a peer review process and, if so, what action Spectrum took in regard to that physician’s employment. *See id.*

He concludes that the grant of the amendment would necessarily require the reopening of the depositions of all four witnesses, would delay trial, and would cause a major alteration in his trial tactics, as the jury’s focus would be not just on why Dr. Madigan was not hired but also on whether he would have been hired a year and a half later. *See id.* at 7.

⁴ Dr. Merriam’s first name is not provided.

Spectrum disputes that any such extensive discovery would be required, reasoning that (i) it is common sense that the conduct [REDACTED], *see* Reply at 4 n.4, (ii) the questions that Dr. Madigan says he would have propounded to SMMC and Spectrum witnesses are irrelevant, in that they bear on whether the Corrective Action Agreement was justified and/or how SMMC dealt with other instances of improper performance, not on whether Spectrum would have hired Dr. Madigan in March 2010 had it been aware of the agreement and the circumstances leading up to it, *see id.* at 4-5, (iii) Cutler, a non-physician who is not responsible for SMMC's or Spectrum's professional competence review activities and did not have authority to hire and fire physicians, is not in a position to answer the questions that Dr. Madigan indicates he would pose to him, *see id.* at 5, and (iv) no alteration in "trial tactics" would be necessary because after-acquired evidence goes to remedies, not liability, *see id.* at 5-6.

In any event, Spectrum argues, Dr. Madigan should have anticipated that, upon learning of the Corrective Action Agreement, Spectrum would raise the doctrine of after-acquired evidence. *See id.* at 4 n.3. Hence, it contends, he cannot claim surprise and undue prejudice. *See id.* Spectrum points out that, on November 1, 2011, after the filing of its motion to amend, Dr. Madigan noticed a Rule 30(b)(6) deposition of Spectrum but failed to include any area of inquiry related to the doctrine of after-acquired evidence. *See id.* at 5.

Dr. Madigan rejoins that (i) the frequency of application of peer review to other physicians at SMMC and Spectrum would indeed become an issue if the amendment were permitted, and (ii) he did not seek to depose Spectrum on the topic of peer review of other Spectrum physicians because leave to amend the answer had not been granted. *See* Surreply at 2.

Spectrum minimizes Dr. Madigan's need for discovery to respond to an after-acquired evidence defense. When an employer raises that defense, "a court must look to the employer's

actual employment practices and not merely the standards articulated in its manuals when evaluating whether the employe[e] in fact would have suffered the adverse employment action.” *Palmquist v. Shinseki*, 729 F. Supp.2d 425, 429 (D. Me. 2010) (citation and internal quotation marks omitted). “[A]n employer must establish by a preponderance of the evidence not only that it *could* have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so.” *Id.* (citation and internal quotation marks omitted) (emphasis in original).

To the extent that Spectrum takes the position that the conduct at issue, [REDACTED] justified not hiring Dr. Madigan, Dr. Madigan would be entitled to test that assertion by exploring, at a minimum, whether Spectrum has in fact fired or declined to hire physicians who have been subject to peer review processes.⁵ Dr. Madigan plausibly describes the addition of the after-acquired evidence defense as necessitating an alteration in his “trial tactics.” If that defense were interposed, and Spectrum were found liable for age discrimination, a jury would have to go on to determine both whether Dr. Madigan engaged in misconduct and whether any such misconduct was so severe that Spectrum would have declined to hire him on that basis. *See, e.g., id.* at 430-31. That inquiry, in turn, would have necessitated a bifurcation of the liability and damages phases of the trial or, minimally, the employment of limiting instructions. *See id.* at 431. In either case, a reworking of trial strategy indeed would have been in order.

That Dr. Madigan has not sought to conduct discovery bearing on the after-acquired evidence defense even after learning of Spectrum’s desire to add it does not undercut his showing of prejudice. Spectrum cites no authority for the proposition that Dr. Madigan was

⁵ Dr. Madigan’s proposed depositions of SMMC witnesses also could have led to the discovery of admissible evidence. To the extent that SMMC employs or credentials physicians who have been subject to peer review proceedings, particularly corrective action agreements similar to that of Dr. Madigan, that would tend to undercut Spectrum’s assertion that the [REDACTED] to justify the non-hire of Dr. Madigan.

obliged to proceed with potentially wasteful discovery on the assumption that the motion would be granted.

IV. Conclusion

In sum, although the assertion of an after-acquired evidence defense would not be futile, Spectrum's undue delay in seeking to amend its answer to add that defense, and the resulting prejudice to Dr. Madigan, counsel against the grant of its motion. The motion accordingly is **DENIED.**

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 15th day of February, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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