IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

MICHAEL A. KAUFMAN, M.D., an individual, Plaintiff, v. CAMBIA HEALTH SOLUTIONS, INC., *et al.*, Defendants.	Case No. 14cv06430 ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the court on defendants' motion for summary judgment on September 2, 2015. Defendants were represented by Jeffrey J. Druckman and Janine C. Blatt. Plaintiff was represented by Craig Crispin.

ORCP 47 C

Pursuant to ORCP 47 C, "the court shall grant the motion [for summary judgment] if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment."

Defendants' reply brief, Section II, "Undisputed Facts," sets out what they characterize as such in subsections 1 through 8. That format serves well to allow comparison of defendants' factual interpretations with those that, in my opinion, could legitimately be drawn by an objectively reasonable juror viewing the record that is before the court in a manner most favorable to the plaintiff ("ORCP 47 C juror").

Defendants' Undisputed Fact No. 1

"Prior to working at Cambia, Kaufman had been employed 'at-will' in several positions and fully understood the meaning of the term .... He concedes early in his [response] brief 'As most executives at his level have experienced, job security is seldom guaranteed.'"

ORCP 47 C juror

Plaintiff was familiar with the term "at-will," and, having previously been so terminated, sought confirmation that Regence offered a "corrective action process... that applied to all employees prior to at-will termination ..." Defendant's Exhibit No. 28. Plaintiff wanted reassurance that what had happened to him before wouldn't happen again.

Defendants' Undisputed Fact No. 2, first clause

"Within hours of Kaufman receiving Prows's September 13 email, which uses qualifying terms such as 'usually,' 'rarely' and 'I think',...."

ORCP 47 C juror

Prows' "qualifying terms" notwithstanding, his email specifically addressed plaintiff's concern about the possibility that at-will terminations would not include an opportunity for corrective action: "[O]n the severance issue, H.R. told me, and I think this is true, that not for cause terminations don't really happen unless positions are

eliminated .... I've actually never seen a case where anyone here was just fired without cause. What I have seen commonly is performance-related corrective actions, and if expectations are not met, then the persons are 'managed out'. This usually takes more than a year, and is rarely if ever a surprise."[1] *Id.*

By virtue of Prows' employer-delegated authority to negotiate the terms of plaintiff's employment contract, Prows was Regence, and through him it reassured plaintiff that he would not be fired without cause unless he was first offered an opportunity for corrective action.

Defendants' Undisputed Fact No. 2, second clause

"[Prows' September 13 email] ... says 'H.R. will not enter into any agreement that looks like a contract, ...'"

ORCP 47 C juror

This clause could confuse an ORCP 47 C juror, and thus work against defendants. Would an agreement between an employer and an employee "look like" anything other than a contract?

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Defendants' Undisputed Fact No. 2, third clause

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[1] A fair reading of the Prows email would be that, according to the Human Resources Department, Regence did not use not-for-cause terminations (unless a position was eliminated), such that all terminations were for-cause, and those were preceded by "performance related corrective actions." This was apparently plaintiff's interpretation when his complaint was drafted, i.e. "... Regence breached the terms of its contract with Dr. Kaufman by terminating him without cause and without having instigated any corrective action plan." Complaint, ¶ 31. In responding to defendants' motion for summary judgment, plaintiff does not contest Regence's right to terminate him at will, but contends that he was first entitled a corrective action plan.

"Within hours of Kaufman receiving Prows's September 13 email, ... Durkee sent Kaufman a separate email explicitly telling Kaufman that Regence is an 'at-will' employer."

ORCP 47 C juror

Dr. Prows was designated and empowered by Regence to negotiate the terms of plaintiff's employment agreement. Prows was Regence. Durkee, an "associate recruiter," was Prows' subordinate, and had no authority to overrule or revise any representations that Prows made to Kaufman. She was careful to confirm that Prows, not she, spoke for Regence, *e.g.*: "On behalf of Dr. Ralph Prows, I am pleased to extend you an offer of employment with Regence." Exhibit No. 26; "On behalf of Dr. Ralph Prows, I am pleased to confirm your offer of employment with Regence." Defendant's Exhibit No. 37.

An ORCP 47 C juror could reasonably conclude that when Durkee used the term "at-will," that term meant what Regence, through Prows, had told plaintiff it meant.

Defendants' Undisputed Fact No. 3

In this section, defendants quote excerpts from Prows' deposition to establish that "Prows also told Kaufman that Cambia is an at will employer."

ORCP 47 C juror

As excerpted in plaintiff's response brief, Prows also testified in his deposition that "at-will" meant what he had told plaintiff it meant in his September 13 email. Plaintiff's Memorandum in Opposition, p. 6.

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Defendant's Undisputed Fact No. 4.

"After receiving Durkee's 'At-Will' email, Kaufman asked Cambia to 'sweeten' the sign-on bonus .... Kaufman knew prior to accepting Cambia's employment offer that, to receive the bonus, he had to sign the Sign-On Bonus Agreement, a copy of which had already been provided to him ...."

ORCP 47 C juror

Alison Durkee's offer letter of September 7th, 2011, includes the statement: "Upon acceptance of this offer, please sign and fax back the enclosed Sign-On Bonus Agreement." Exhibit No. 26, p.2. Plaintiff did not accept that offer. Durkee's offer letter to plaintiff dated September 21st, 2011, stated on that topic: "You will receive a sign-on bonus in the gross amount of $125,000." Exhibit No. 37, p.1. There was no reference to a "Sign-On Bonus Agreement," and no indication plaintiff was required to sign such an agreement to receive the sign-on bonus. Plaintiff accepted the Regence offer as set out in detail by Durkee in that letter, *id.,* p.2, thereby establishing an employment contract that did not require plaintiff to sign a separate agreement to receive the sign-on bonus.

Defendants' Undisputed Fact No. 5, first fact

"Kaufman continued to negotiate to maximize the sign-on bonus .... On September 19, 2011, Cambia offered Kaufman a bonus of $125,000. Kaufman dep. at 170:7-16, Exhibit 33."

ORCP 47 C juror

Exhibit 33 is an email from Prows to plaintiff dated September 19, 2011, that refers to a sign-on bonus. The email does not mention a sign-on bonus agreement.

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Defendants' Undisputed Fact No. 5, second fact

"On September 26, 2011, Kaufman signed a Sign-On Bonus Agreement ...."

ORCP 47 C juror

When plaintiff signed the Sign-On Bonus Agreement on September 26, 2011, he already had an employment contract with Regence, pursuant to which he had no obligation to execute the Sign-On Bonus Agreement. He received no additional consideration for doing so.

Defendants' Undisputed Fact No. 5, third fact

"The Sign-On Bonus Agreement includes an acknowledgment by Kaufman of his at-will employment:

> 'As a condition of accepting the Offer of Employment as Executive Medical Director with The Regence Group ..., I agree to the terms of this Sign-On Bonus Agreement as follows:
> * * *
> - I understand this Agreement is not a contract of employment and it does not modify my at-will employment relationship with Regence.'
>
> Exhibit 39.

Cambia provided Kaufman substantial consideration -- $125,000 -- for his acknowledgement of his at-will employment status."

ORCP 47 C juror

As of September 26, 2011, when plaintiff signed the Sign-On Bonus Agreement, to the best of his knowledge his "at-will employment relationship with Regence"[2] was as had been described to him by Regence, through Prows, *i.e.*: "[F]or cause terminations don't really happen .... I've actually never seen a case where anyone here was just fired without cause. What I have seen commonly is performance-related corrective actions, and if expectations are not met, then the persons are 'managed out'. This usually takes

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[2] Not his "at-will employment status," as here characterized by Regence.

more than a year, and it is rarely if ever a surprise." Exhibit No. 28.

Despite defendant's argument that at-will employment and an offer of corrective action before termination are necessarily mutually exclusive, that is the "at-will relationship" that Regence, through Prows, described to plaintiff.

Defendants' Undisputed Fact No. 6

"Prior to his start date, Durkee gave Kaufman information about forms that Cambia required him to complete on his first day of employment, including an acknowledgment form. Durkee Declaration, Exhibit 113. Durkee also provided Kaufman a link to the company's internal website so that he could review Cambia's Employee Handbook prior to his start date, telling him that it was his responsibility to be familiar with the policies in the Employee Handbook. Exhibit 113."

ORCP 47 C juror

Regence made a detailed offer of employment to plaintiff in Durkee's letter dated September 21, 2011. Kaufman accepted that offer, and an employment contract was thereby formed on September 22, 2011. Exhibit No. 37. Regence documents in existence at the time that contract was formed were not mentioned in that contract.

Defendants' Undisputed Fact No. 7, first fact

"On October 10, 2011, his very first day of work, Kaufman signed and dated a one-page document in which he personally acknowledged the following:

> 1. I have received instruction on how to access the online copy of the Regence Employee Handbook and HR Reference Guide .... I acknowledge I have the ability and responsibility to be familiar with and follow the policies set forth in those Guides. * * * I understand that these Guides are not employment contracts or guarantees of specific treatment in specific situations, nor do they give me any express or implied right of

continued employment ....
***"

ORCP 47 C juror

Plaintiff did not need to be concerned that the handbook and reference guide were not contracts, or that they did not give him a right of continued employment. He already had entered an employment contract, which made no reference to either document. And pursuant to his contract, according to his employer's explanation, not-for-cause terminations did not happen unless preceded by performance-related corrective actions.

Defendants' Undisputed Fact No. 7, second fact

"3. *I understand that unless otherwise stated in a written employment contract, Regence has the right to change (modify, add to, substitute, or eliminate), interpret and apply, in its sole discretion, the policies rules and benefits described in these Guides.* ***"

ORCP 47 C juror

The record before the court does not include reference to any change made by Regence of its policies, rules or benefits. Further, plaintiff already had a written employment contract confirming his "at-will employment relationship" with Regence, as had been explained to him by Regence, through Prows.

Defendants' Undisputed Fact No. 7, third fact

"'4. *I understand that Regence or I may terminate my employment relationship with Regence, for any reason, with or without cause or notice at any time, unless otherwise stated in a written employment contract.*'"

ORCP 47 C juror

A reasonable juror could conclude that this general statement had, in effect, been superseded when Regence reassured plaintiff that, per the Human Resources

Department, Regence did not fire employees without cause without first offering performance-related corrective procedures. That juror could also conclude that plaintiff's "at-will employment relationship," as had been confirmed in the Sign-On Bonus Agreement, satisfied the "otherwise stated in a written employment agreement" requirement.

Defendants' Undisputed Fact No. 7, fourth fact

> "'5. *I understand that Regence CEO is the only person who has the authority to enter into an employment contract, and that all such contracts must be in writing and signed by both parties to be valid.'* Kaufman Dep. at 186:6-20, Exhibit 40 (emphasis added)."

ORCP 47 C juror

This provision is significantly at odds with the facts in this record. Accordingly, the ORCP 47 C juror could question any assertion made by Regence that turns on what Regence means when it refers to a "contract." It is undisputed that Regence did enter into an employment contract with plaintiff, and that it did so through an associate recruiter, hardly the "Regence CEO."

In her letter of September 21, 2011, to plaintiff, Regence Associate Recruiter Alison Durkee, writing "[on] behalf of Dr. Prows," says in her first sentence, "... I am pleased to confirm your offer of employment with Regence." Exhibit No. 37. On page two of the letter, there is a pre-printed sentence that reads "I accept this offer of employment as Executive Medical Director with The Regence Group," below which are two pre-printed lines, below are which are the words "Signature" and "Date."

Between the opening confirmation that the letter is an offer, and the concluding, anticipated acceptance, which was executed by plaintiff, Durkee explains proposed terms of employment regarding compensation, job title, initial date of employment,

location of employment, the requirement of a drug screen and criminal background check, an "Annual Incentive Plan," terms of a sign-on bonus, a comprehensive package of health and welfare benefits, paid time off, health and dental benefits, a "Non-Qualified Voluntary Deferred Compensation program," a "401(k) Savings Plan," and a "Severance Pay Plan for Senior Leaders." Durkee concludes; "We are pleased to be able to extend this offer to you. If you accept our offer, I request that you acknowledge by signing this letter and returning it to me...." Which plaintiff did.

Defendants' Undisputed Fact No. 8, first fact

"Cambia's Employee Handbook, which Kaufman had access to prior to his first day of work, includes the following statements and policies in relevant part:

> At-Will Employment
> You have a mutual relationship with Regence, which is called 'employment at will.' This means that you have come to work for us voluntarily and are free to terminate your employment at any time, with or without cause or reason, with or without advance notice. *Similarly, Regence reserves the right to terminate your employment at any time with or without cause or reason, with or without advance notice. In accepting or continuing employment with us, you agree that our employment relationship is strictly voluntary and 'at will' on both sides.* Stimpson Declaration, Exhibit 41, p. 3 (emphasis added)."

ORCP 47 C juror

Having "access to" doesn't necessarily equate with "agreed to abide by." More to the point, the Regence Employee Handbook was published in 2010. Ex. No. 41, p.1. It was in existence in September, 2011, when Regence, through Dr. Prows, explained to plaintiff how the Human Resources Department actually viewed and implemented the Regence termination policies. Ex. No. 28.

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Defendants' Undisputed Fact No. 8, second fact

"Corrective Action

At its discretion and on a case-by-case basis, Regence believes that constructive, positive corrective action may be of assistance in helping to improve employee performance. * * * *It is not necessary that a verbal warning or any written warning precede termination.*' *Id.*, Exhibit 41, p. 6 (emphasis added).

ORCP 47 C juror

See ORCP 47 C juror discussion, immediately above under "first fact."

Breach of Implied Contract

For the sake of the pending motions, the court accepts defendants' argument that Utah law applies. The court will also accept Regence's explanation of Utah law as it applies to implied contracts, i.e.:

"Utah law presumes 'that all employment relationships entered into for an indefinite period of time are at-will, which means that an employer may terminate the employment for any reason (or for no reason) except where prohibited by law,' and at any time. *Nelson v. Target Corp.*, 2014 UT App. 205 (2014); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). *To overcome the presumption of at-will employment, there must be evidence of a 'manifestation of intent that is communicated to the employee and sufficiently definite to operate as a contract provision [so that] the employee can reasonably believe the employer is making an offer of employment other than employment at will.' Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1002 (Utah 1991). *'[T]he existence of an employment agreement not terminable at will must be established by more than subjective understandings or expectations.' Rose v. Allied Development Co.*, 719 P.2d 83 (Utah 1986). *As stated by the Utah Supreme Court; '[A] cardinal rule in construing … a contract is to give effect to the intentions of the parties …" Buehner Block Co. v. U.W.C. Assocs.*, 752 P.2d 892, 895 (Utah 1988)." (Emphasis added.)

The court accepts the emphasized legal precepts, and an ORCP 47 C juror could conclude that they are apt characterizations of the Prows September 13 email.

Regence contends that even if plaintiff at one point had an implied contract requiring corrective action before termination, that term of employment was unilaterally

changed by Regence, and by continuing to work for Regence, plaintiff accepted that change, citing *Trembly v. Mrs. Fields Cookies,* 884 P.2d 1306 (Utah App. 1994). Defendants' Motion, p. 22.

There is a key factual distinction between *Trembly* and the case at bar. In *Trembly*, the plaintiff was hired in November, 1986. His employer, both before Trembly was hired and afterward, made reassurances, both directly, and by implication, that he would not be fired for other than just cause. *Id.* at 1309. Then, "In November 1989, an employee handbook ... was distributed, which, by its terms, superseded all prior handbooks, manuals, policies and procedures issued by Mrs. Fields. The handbook was distributed after the oral statement [about for-cause terminations] were made to Trembly by [the employer] and after the [employer's] video [discussing termination policy] was distributed." *Id.*

The *Trembly* court held that "[E]ven if [the employer's] oral assertions to Trembly modified his at-will status with Mrs. Fields, the handbook, which Trembly testified he was familiar with, clearly superseded and replaced that agreement." *Id.* at 1313.

Regence attempts to invoke the *Trembly* rationale, relying on Durkee's September 13 email, plaintiff's signature on the Sign-On Bonus Agreement, and plaintiff's signature of the acknowledgement form. As explained in the "Facts" sections above, an ORCP 47 C juror could determine that: (1) the "at-will" reference in Durkee's email was subject to the Prows explanation of how termination worked at Regence; (2) the "employment relationship" referred to in the Sign-On Bonus Agreement was a relationship as had been explained to plaintiff by Prows, (in addition to which plaintiff already had a binding employment agreement when he signed the bonus agreement, for which there was no consideration); and (3) neither the acknowledgment form, nor

the employee handbook to which it refers, were newly promulgated, and thus, unlike *Trembly*, did not supersede Prows' explanation of the Regence termination policy.

In its reply memo, Regence raises the argument that Oregon's parol evidence rule[3] prohibits consideration of the Prows September 13 email in construing the parties' employment agreement. "... Oregon's parol evidence rule provides that a binding, integrated written agreement, such as the Sign-On Bonus Agreement, 'supersedes or discharges all agreements, written or oral, that were made before the integrated agreement, to the extent the prior agreements are inconsistent.' *Wirth v. Sierra Cacace, LLC,* 234 Or. App. 740, 230 P.3d 29 (2010) ..." Defendants' Reply Memo, p. 9.

As the court explained in *Wirth*:

"The parol evidence rule is codified by ORS 41.740 and provides:

> 'When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However, this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties.'

"Oregon Courts have never read that statute in a literal manner, but have instead '"treated the statute as a codification of the common law parol evidence rule."' *Abercrombie v. Hayden Corp.,* 320 Or. 279, 286, 883 P.2d 845 (1994) (quoting *Hatley v. Stafford*, 284 Or. 523, 526 n. 1, 588 P.2d 603 (1978)).

"The parol evidence rule is a substantive, not an evidentiary, rule because '"it declare[s] that certain kinds of fact are legally ineffective in the

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[3] The court assumes that Utah has a parol evidence rule substantially similar to Oregon's, or that Regence is satisfied relying on the Oregon rule.

substantive law.'" *Id.* (quoting 9 Wigmore, Evidence § 2400 (Chadbourn rev. 1981); brackets in Abercrombie). The rule's purpose is to promote commercial certainty between contracting parties. *Id.*

> 'The parol evidence rule, in brief, provides that a binding, completely integrated, written agreement supersedes or discharges all agreements, written or oral, that were made before the completely integrated agreement, to the extent that the prior agreements are within the scope of the completely integrated agreement.
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> 'Restatement (Second) of Contracts § 213(2) (1979). The rule also provides that a binding, partially integrated, written agreement supersedes or discharges all agreements, written or oral, that were made before the partially integrated agreement, to the extent that the prior agreements are inconsistent with the partially integrated agreement. Restatement (Second) of Contracts § 213(1) (1979).'

"*Id.* at 286-87, 883 P.2d 845 (footnote omitted).

> "'An integrated agreement is one that the parties intended to be a final expression of some or all of the terms of the agreement.' *Id.* at 287, 883 P.2d 845 (citations omitted).
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> 'An integrated writing is partially integrated if the writing omits a consistent, additional agreed-upon term, which was (1) agreed to by the parties for separate consideration, or (2) such a term as in the circumstances might naturally be omitted from the writing. Otherwise, the integrated writing is completely integrated.'

"*Id.* at 289, 883 P.2d 845 (citations omitted). 'A prior agreement is "inconsistent" with the terms of an integrated writing if it contradicts or negates an express term in the writing.' *Id.* (citation omitted)."

Wirth, 230 P.3d at 47.

Assuming that the Sign-On Bonus Agreement is properly characterized as completely integrated, the ORCP 47 C juror could find that its reference to plaintiff's "at-will employment relationship with Regence," meant the relationship that Prows had explained to plaintiff. Assuming that the Sign-On Bonus Agreement is partially integrated, that juror could find that the Prows explanation was consistent with the agreement's reference to plaintiff's "at-will employment relationship" with Regence.

Regence further urges that plaintiff's understanding of the Prows email, i.e., that an employee can be employed at-will but not subject to termination without first receiving a corrective action process, is "a legal principle not recognized by Oregon law." Defendants' Reply Memo, p. 10. The court finds that an ORCP 47 C juror could reasonably conclude that plaintiff's understanding of the Prows email does not represent a legal principle so much as an implied term of plaintiff's employment contract.

Breach of Implied Duty of Good Faith and Fair Dealing

As Regence seems to suggest in its reply memo, the court will also deem Utah and Oregon law sufficiently similar to consider the latter with regard to plaintiff's claim for the breach of implied duty of good faith and fair dealing.

Regence's argument that the implied duty of good faith and fair dealing does not apply in this case rests upon its contentions that plaintiff agreed to be employed at-will, that plaintiff admits he was employed at-will, and that Regence maintained the "sole discretion to proceed directly to termination without any verbal or written warning." Defendants' Reply Memo, p. 12. For the reasons discussed at some length above, an ORCP 47 C juror could reasonably conclude otherwise.

Under *Best v. U.S. National Bank*, 303 Or. 557, 739 P.2d 554 (1987) and its progeny, whether the fashion in which Regence terminated plaintiff breached the subject duty is a question for the jury.

Promissory Estoppel

The court in *Skanchy, et al v. Calcados Ortope SA*, 952 P.2d 1071 (Utah 1998) ruled, in part,

"*Tolboe Construction v. Staker Paving & Construction,* 682 P.2d 843, 845-

46 (Utah 1984) adopted the Restatement (Second) of Contracts § 90, which recognizes promissory estoppel as a valid claim for relief under certain circumstances. Section 90 states in pertinent part:

> "A promise made which the promisor should reasonably expect to induce action or forbearance on the part of the promisee … and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

A ORCP 47 C juror could conclude that Regence made a promise that induced action on the plaintiff's part. Whether enforcement of that promise is necessary to avoid injustice, and what "justice would require" as a potential remedy, are by their nature, at least under the circumstances of this case, jury questions.

Intentional Interference with Economic Relations

Defendant Mera contends, and plaintiff does not dispute, that Utah does not recognize a claim for intentional interference with economic relations that rests solely on an allegation of improper motive. Utah law also requires improper means. *See* Defendants' Motion, pp. 27-28. The court need not focus on whether this record would support a finding that Mera had an improper motive, given that it was defendant Regence that executed the means of plaintiff's termination.

In conclusion, defendant Cambia Health Solutions, Inc.'s motions for summary judgment dismissing plaintiff's claims for breach of implied contract, breach of the implied duty of good faith and fair dealing and promissory estoppel are denied. Defendant Mera's motion for summary judgment dismissing plaintiff's claim for intentional interference with economic relations is granted.

IT IS SO ORDERED this 30th day of September, 2015.

Charles E. Corrigan
Circuit Court Judge Pro Tem