

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 12, 2018

SEAN F. MCAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KEVIN OLDEN, M.D.,

Plaintiff,

v.

YAKIMA HMA PHYSICIAN
MANAGEMENT, LLC; YAKIMA,
HMA, LLC,

Defendants.

No. 1:16-CV-3047-LRS

**ORDER RE MOTION
FOR SUMMARY
JUDGMENT**

BEFORE THE COURT is Defendants' Motion For Summary Judgment (ECF No. 63). This motion was heard with oral argument on January 22, 2018. Matthew A. Brinegar, Esq., argued for Plaintiff. Jerome R. Aiken, Esq., argued for Defendants.

I. BACKGROUND

In this diversity case, Plaintiff contends his employment by Defendant Yakima Health Management Associates (HMA) Physician Management, LLC (Physician Management) was wrongfully terminated. His Second Amended Complaint (ECF No. 22) alleges causes of action against Physician Management for wrongful termination in violation of public policy, failure to pay wages in violation of RCW 49.52.050, breach of contract, breach of implied covenant of good faith and fair dealing, and intentional interference with business expectancy. Plaintiff also alleges a cause of action against Defendant Yakima Health

**ORDER RE MOTION
FOR SUMMARY JUDGMENT- 1**

1 Management Associates LLC (Yakima HMA), for intentional interference with
2 contractual relations.

3
4 **II. UNDISPUTED FACTS**

5 Defendants are Washington companies who formerly operated Yakima
6 Regional Medical and Cardiac Center (YRMC).

7 Plaintiff, Kevin Olden, M.D., is a board-certified gastroenterologist and
8 psychiatrist.

9 In late 2013, YRMC was owned and operated by Yakima HMA. YRMC
10 contacted Plaintiff regarding employment in Yakima.

11 Plaintiff and Yakima HMA Physician Management entered into a Physician
12 Employment Agreement dated April 29, 2014.¹ The agreement was signed by
13 Plaintiff on May 6, 2014, and by Veronica Knudson on behalf of Physician
14 Management on May 8, 2014.

15 At the time of entering into the agreement, Plaintiff was not licensed to
16 practice medicine in the State of Washington.

17 During Plaintiff's employment, Jamon Rivera was the director of all of the
18 medical clinics.

19 During Plaintiff's employment, Veronica Knudson was the Chief Executive
20 Officer (CEO) of YRMC and Plaintiff's ultimate supervisor.

21 The Physician Employment Agreement was later amended to indicate
22 Plaintiff's commencement date as September 2, 2014. On that date, Plaintiff had a
23 temporary conditional medical license in the State of Washington, but he did not

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26 ¹ Although Physician Management was the only "Employer," for the sake of
27 convenience, the court refers to "Defendants" throughout this order in addressing
28 Plaintiff's claims.

1 yet have an active license. As of that date, Plaintiff was granted temporary
2 privileges at YRMC.

3 Plaintiff was paid a commencement bonus of \$25,000 on September 19,
4 2014.

5 On October 3, 2014, Plaintiff obtained an unrestricted Washington license
6 to practice medicine.

7 Plaintiff was 66 years old during his employment by Physician
8 Management.

9 Plaintiff did not work on Wednesday, November 26, 2014, nor did he work
10 on Friday, November 28, 2014.

11 On Monday, December 15, 2014, Plaintiff was in Florida attending an
12 Eluxadoline² Advisory Board meeting. He received compensation for attending
13 that meeting.

14 YRMC had a call schedule that was available in the emergency department
15 of the hospital. The schedule contained a list of on-call physicians who could be
16 contacted by emergency room personnel to respond to emergency situations.
17 Plaintiff was on-call December 2, 17, 18 and 31, 2014.

18 Plaintiff declined to attend a meeting scheduled for December 18, 2014 to
19 discuss gastrointestinal service issues.

20 Plaintiff declined to attend a meeting scheduled with Veronica Knudson for
21 December 19, 2014.

22 Jamon Rivera sent an e-mail to Plaintiff on December 23, 2014, discussing
23 dissatisfaction with Plaintiff's employment performance.

24 Plaintiff met with Knudson on December 31, 2014. At Plaintiff's request,
25 fellow physicians, Drs. Cundiff and Good, were in attendance. Plaintiff appeared

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27
28 ² A medication taken for irritable bowel syndrome.

1 briefly at the meeting and then left, stating he would not discuss anything without
2 his lawyers being present.

3 In a letter to Plaintiff dated January 15, 2015, Knudson discussed her
4 dissatisfaction with Plaintiff's conduct, including what she asserted was the
5 Plaintiff taking leave when he was not authorized to do so.

6 On January 16, 2015, Plaintiff's employment was terminated. The reasons
7 for his termination were summarized in a letter to Plaintiff from Knudson, dated
8 January 16, 2015. Plaintiff was terminated for cause. The letter cited Paragraph
9 5.5.8 of the Employment Agreement and alleged conduct by Plaintiff "such as
10 unilaterally scheduling yourself for time off, avoiding in patient duty, walking out
11 of our meeting on the 31st"

12 After his termination, Plaintiff sought employment as a *locum tenens*³
13 physician at Western Arizona Regional Medical Center (WARMC) in Bullhead
14 City, Arizona. Plaintiff's application was not processed on the asserted basis that
15 he did not meet the criteria for employment at WARMC.

17 **III. SUMMARY JUDGMENT STANDARD**

18 The purpose of summary judgment is to avoid unnecessary trials when there
19 is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d
20 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R.
21 Civ. P. 56, a party is entitled to summary judgment where the documentary
22 evidence produced by the parties permits only one conclusion. *Anderson v.*
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v.*
24 *Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if
25 there exists a genuine dispute over a fact that might affect the outcome of the suit
26 under the governing law. *Anderson*, 477 U.S. at 248. A dispute about a material

27
28 ³ A temporary position.

1 fact is “genuine” if the evidence is such that a reasonable fact-finder could find in
2 favor of the non-moving party. *Id.*

3 The moving party has the initial burden to prove that no genuine issue of
4 material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475
5 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its
6 burden under Rule 56, "its opponent must do more than simply show that there is
7 some metaphysical doubt as to the material facts." *Id.* The party opposing
8 summary judgment must go beyond the pleadings to designate specific facts
9 establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325,
10 106 S.Ct. 2548 (1986).

11 When considering a motion for summary judgment, the court does not
12 weigh the evidence or assess credibility; instead “the evidence of the non-movant
13 is to be believed, and all justifiable inferences are to be drawn in [her] favor.”
14 *Anderson*, 477 U.S. at 255. Nonetheless, summary judgment is required against a
15 party who fails to make a showing sufficient to establish an essential element of a
16 claim, even if there are genuine factual disputes regarding other elements of the
17 claim. *Celotex*, 477 U.S. at 322-23.

18
19 **IV. DISCUSSION**

20 The Physician Employment Agreement states Plaintiff could be terminated
21 with or without cause.⁴

22 Paragraph 5.4 provides that “[t]his Agreement may be terminated by either
23 party for no cause upon ninety (90) days written notice to the other party.”

24 Paragraph 5.5 provides that “[t]his Agreement may be terminated
25 immediately by Employer, without penalty or prejudice to Employer, upon

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⁴ The term of the agreement was 36 months.

1 occurrence of any of the following events,” one of which is set forth in Paragraph
2 5.5.8:

3 Employer’s determination, in Employer’s sole discretion,
4 that Physician’s continued employment would pose an
5 unreasonable risk of harm to patients or others or would
6 adversely affect the confidence of the public in the services
7 provided by the Employer or Hospital, or Employer’s
8 determination that Physician has engaged in subordinate
or unprofessional conduct, or Employer’s determination
that Physician has engaged in any conduct that is unethical,
unprofessional, fraudulent, unlawful, or adverse to the
interest, reputation or business of Employer or Hospital[.]

9 **A. Breach of Contract/Implied Covenant of Good Faith and**
10 **Fair Dealing**

11 Defendants contend that because they had “sole discretion” to terminate
12 Plaintiff for cause, Plaintiff’s breach of contract cause of action fails as a matter of
13 law. Defendants acknowledge, however, that their interpretation of what
14 constitutes “unreasonable risk of harm to patients or others or would adversely
15 affect the confidence of the public,” or “subordinate or unprofessional conduct,”
16 or “conduct that is unethical, unprofessional, fraudulent, unlawful, or adverse to
17 the interest, reputation or business of Employer or Hospital,” must be reasonable.
18 Indeed, one of the cases cited by Defendants, *Bearden v. Humana Health Plan,*
19 *Inc.*, 1992 WL 245604 (N.D. Ill. Sept. 23, 1992) at *4, held that while a “sole
20 discretion” clause made it irrelevant whether the employer had cause to fire an
21 employer, it was still necessary that the employer make a for cause determination
22 and that said determination not be in bad faith. Furthermore, Defendants
23 acknowledge that under Washington law, every contract is subject to an implied
24 duty of good faith and fair dealing. *Rekhter v. Dept. of Social. & Health Services,*
25 *180 Wn.2d 102, 112, 323 P.3d 1036 (2014).* One of the causes of action pled by
26 Plaintiff is breach of implied covenant of good faith and fair dealing.

27 Accordingly, what must be determined is whether there was in fact adequate
28 “cause” to terminate the Plaintiff.

1 **1. Vacation**

2 The Cover Sheet of the Physician Employment Agreement contains all of
3 the information specific to Plaintiff. (Ex. 3 to ECF No. 65 at p. 0184). It is
4 followed by the “Standard Terms And Conditions” of the agreement which include
5 Paragraphs 5.4 and 5.5.8, discussed above.

6 With regard to “Vacation Days,” the Cover Sheet states “Four (4) Weeks,”
7 without a reference to “Employer Physician Benefits Summary.”⁵ With regard to
8 “Sick Days” and “Holidays,” the Cover Sheet states “Per Employer’s Physician
9 Benefits Summary.” Defendants maintain that Plaintiff’s four weeks of vacation
10 was also subject to the 2014 Physician Benefits Summary, whereas Plaintiff says it
11 was not and that the same was specifically negotiated out of the Employment
12 Agreement.

13 The “2014 Benefits Summary For Benefit Eligible Employed Physicians of
14 Central Washington Medical Group” (Ex. 19 to ECF No. 65) addresses “Physician
15 Time Off” (PTO) for “Continuing Medical Education (CME),” “Holidays,”
16 “Vacation” and “Sick Leave.” With regard to “Vacation,” it provides that
17 “[u]nless your employer cover sheet provides a different schedule, your vacation
18 hours are earned each pay period based on your length of service” such that up to
19 120 hours (three weeks) can be earned for each year during Years 1-4 and 160
20 hours (four weeks) can be earned for each year during Years 5-9. It further
21 provides that “[v]acation hours may be used after completion of 90 days of
22 continuous employment” and that “vacation time must be scheduled and approved
23 in advance and approval may be withheld if the vacation would interfere with
24 scheduled patient care or would create a financial hardship on the practice.” (*Id.*
25 at p. 0290).

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27 _____
28 ⁵ Four weeks is equivalent to 160 hours.

1 Defendants contend Plaintiff violated the foregoing provisions by taking
2 vacation in September, October and November 2014, prior to working 90
3 continuous days, and by not obtaining approval to take time off from December 21
4 through December 31, 2014. Plaintiff contends that because his vacation time was
5 not subject to the Physician Benefits Summary, he did not have to work 90 days
6 continuously to take vacation and he did not have to accrue vacation time.

7 According to Plaintiff, the first iteration of the employment contract stated
8 he would receive three weeks of paid vacation subject to the Physician Benefits
9 Summary and that he objected and the words "Physician Benefits Summary" were
10 stricken and he received four weeks vacation. Plaintiff cites e-mail
11 correspondence between him and Jamon Rivera and between him and Lori
12 Stephenson who is/was Director of Physician Opportunities for YRMC and
13 Central Washington Medical Group. (Ex. 2 to ECF No. 74). This
14 correspondence, while indicating Plaintiff clearly wanted four weeks of vacation,
15 does not indicate he actually and specifically objected to having the Physician
16 Benefits Summary otherwise apply to his vacation time.

17 In her April 15, 2014 e-mail to Plaintiff, on which Rivera was copied,
18 Stephenson states:

19 In regard to the vacation[,] I doubt we can get 5 weeks at
20 this point. As you can see[,] they require we start new
21 physicians out at 3 weeks. I hope you can work with the
22 4 weeks, plus the 7 holidays. If it's a deal breaker for you[,]
23 I can ask.

24 It appears Stephenson is referring to the Physician Benefits Summary which
25 provides that new physicians get three weeks (120 hours) of vacation.

26 Later on April 15, Plaintiff sent an e-mail to Jamon Rivera, stating as
27 follows:

28 I infer from your email I am being offered 4 weeks (terrific) but
my contract states "vacation per the policy outlined in the benefits
document." So please clarify. I suspect we have agreed on 4 but
this will clearly need to be stated in the contract.

1 On April 17, an e-mail presumably to Plaintiff from Justin Ballinger, a
2 Regional Vice President of The Medicus Firm (a physician recruitment firm),
3 states that “Lori is getting an amendment for the 4 weeks vacation” and “[s]he will
4 send it as soon as it is approved.”

5 This e-mail chain does not conclusively establish that the Physician Benefits
6 Summary (Summary) was negotiated out of the Employment Agreement as the
7 Summary specifically pertained to “Vacation.” Indeed, it reasonably suggests the
8 opposite and that the parties were negotiating vacation with reference to the
9 Summary and within the framework of the Summary.

10 The Defendants note there is deposition testimony from Plaintiff in which
11 he acknowledged the Physician Benefits Summary provided for “Vacation” to be
12 prorated for someone employed for less than a year. Plaintiff further
13 acknowledged he needed to get approval to take vacation time. (ECF No. 91 at p.
14 065 and p. 067). The court cannot conclude, however, that Plaintiff’s testimony
15 amounts to a concession by him that the Summary applied to his vacation time
16 specifically, as opposed to him merely offering his opinion about what he thought
17 the Summary meant in regard to vacation time in general.

18 Defendants also assert that interpreting the Employment Agreement in a
19 fashion that makes the Summary not apply to Plaintiff’s vacation time is
20 unreasonable in that “Plaintiff could have taken four weeks off the first day of
21 work, and he could have taken off at any time despite the needs of his employer.”
22 (ECF No. 96 at p. 11). This is not necessarily so, however, as Plaintiff
23 acknowledges he too was subject to an implied covenant of good faith and fair
24 dealing which prevented him from taking time off whenever he wanted despite the
25 needs of his employer. Defendants contend Plaintiff’s interpretation would mean
26 Plaintiff is not entitled to any of the other benefits addressed in the Summary,
27 including medical, dental and vision insurance coverage, disability coverage, life
28 insurance and Continuing Medical Education. Plaintiff, however, does not argue

1 the Summary has no application to the Employment Agreement; he argues only
2 that it has no application to his vacation time.

3 The “context” rule is the framework for interpreting written contract
4 language which involves determining the intent of the contracting parties by
5 viewing the contract as a whole, including (1) subject matter and objective of the
6 contract, (2) all circumstances surrounding its formation, (3) the subsequent acts
7 and conduct of the parties, (4) the reasonableness of the respective interpretations
8 advocated by the parties, (5) the statements made by the parties in preliminary
9 negotiations, and (6) usage of trade and course of dealings. All contracts are
10 interpreted under the context rule and this is true regardless of whether or not the
11 court determines that the terms of the contract are ambiguous. *Berg v. Hudesman*,
12 115 Wn.2d 667, 668, 801 P.2d 222 (1990). The application of the context rule
13 leads the court to discover the intent of the parties based on their real meeting of
14 the minds, as opposed to insufficient written expression of their intent. Context
15 may not be used to contradict, modify or add to the written terms of the agreement,
16 nor may it be used for importing into the writing an intention not expressed
17 therein. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895-96, 28 P.3d 823
18 (2001).

19 “If only one reasonable meaning can be ascribed to the agreement when
20 viewed in context, that meaning necessarily reflects the parties’ intent; if two or
21 more meanings are reasonable, a question of fact is presented.” *Martinez v. Miller*
22 *Indus., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999). “Interpretation of a
23 contract provision is a question of law only when (1) the interpretation does not
24 depend on the use of extrinsic evidence or (2) only one reasonable inference can
25 be drawn from the extrinsic evidence.” *Scott Galvanizing, Inc. v. Northwest*
26 *EnviroServices, Inc.*, 120 Wn. 2d 573, 582, 844 P.2d 428 (1993).

27 The court concludes a question of fact is presented for resolution by a jury
28 as there are two reasonable meanings to the parties’ agreement about vacation

1 time. A jury could reasonably find that Plaintiff's vacation time was not subject to
2 any conditions of the Summary (e.g., no vacation for 90 days; approval necessary
3 to take vacation thereafter; accrual of vacation time per pay period).⁶ A jury could
4 also reasonably find Plaintiff's four weeks of vacation was subject to the
5 conditions of the Summary based on the aforementioned negotiations about
6 vacation time which suggests the Summary provided the framework for those
7 negotiations, and based on the Plaintiff thereafter seeking approval for all of the
8 leave he did take (subsequent conduct). While it is reasonable to interpret the
9 absence of any reference to the Summary on the Cover Sheet in regard to vacation
10 time as meaning the Summary did not apply, an equally reasonable interpretation
11 is there was no specific reference to the Summary because it would have made no
12 sense to say "Four Weeks (4) weeks" "Per Employer's Physician Benefits
13 Summary" because the Summary specified only three (3) weeks for a beginning
14 physician like Plaintiff. It was reasonable to leave out a specific reference to the
15 Summary while at the same time intending that the conditions of the Summary
16 pertaining to vacation would apply to the four weeks vacation given to Plaintiff.

17 Whether or not the Summary applied to Plaintiff's vacation time, the next
18 question is whether Plaintiff had approval for all of the days he took leave. It
19 appears that what led to Plaintiff's termination in January 2015 was the time he
20

21 ⁶ In addition to there being no specific reference to the Summary regarding
22 vacation time, in two "Employee Time Off Request[s]" from Plaintiff dated
23 January 8, 2015, his PTO (Personal Time Off Balance) is reflected as 160 hours (4
24 weeks) . (Ex. 2 to ECF No. 94, Declaration of Stephanie Baldoz). According to
25 Baldoz, this simply indicated that Plaintiff, per his Employment Agreement, had
26 160 hours of PTO available to him in 2015, but he did not have that much time
27 available to him immediately because he would have to earn vacation time as the
28 year progressed. A jury will consider if this is a reasonable explanation.

1 took off in December 2014, and specifically the time after December 19, 2014.
2 While Defendants assert that Plaintiff worked only five of the 23 working days in
3 December 2014, there is no discussion of Plaintiff being absent on any specific
4 dates prior to December 19, other than him being in Florida on Sunday, December
5 14, and Monday, December 15, for an Eluxadoline Advisory Board Meeting.

6 In an email to Plaintiff dated December 19, Jamon Rivera informed Plaintiff
7 as follows:

8 I was told late yesterday that you are planning on leaving town
9 this afternoon and will be out all next week, which was not
10 approved, because of the amount of time you have been employed
11 by us **and the other vacation requests you made**. Stephanie
[Baldoz] says she communicated this to you on November 24th. I
wanted to touch base with you to follow-up that if indeed you are
planning on leaving[,] it has not been approved.

12 (Ex. 42 to ECF No. 65)(emphasis added). This email indicates Plaintiff made
13 “other vacation requests” prior to December 2014.

14 In a follow-up letter to Plaintiff dated December 23, 2014, Rivera wrote:

15 With the holidays coming and no paid vacation left, you
16 decided on your own to stop seeing patients. After Friday
17 December 19, you scheduled no patients for the rest of the
18 year. You did this **without approval of the practice manager**
and without pay, as you already used up all of your paid
vacation time.

19 (Ex. 43 to ECF No. 65)(emphasis added). This letter suggests Rivera recognized
20 Baldoz, as the “practice manager,” was the one to give approval for leave requests.
21 In deposition testimony, Baldoz acknowledged she was the practice manager to
22 whom Rivera referred in his letter. (ECF No. 74-17 at p. 35).

23 Plaintiff says his clinic was shutdown during the last two weeks of
24 December 2014 (“[n]o one was going to be present to staff the clinic”) and he was
25 forced to take unpaid leave. According to Plaintiff, he requested paid vacation,
26 but Rivera denied it and so he took unpaid leave which he says was approved by
27 Baldoz. Plaintiff says Baldoz approved all of the time he took off while employed

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1 by Defendants and signed his approval slips. (Olden Declaration at Paragraph 11,
2 ECF No. 75; ECF No. 74-5 at p. 93 and p. 100).

3 In her declaration, Baldoz says she did not have authority to grant any
4 physician's request for vacation days, paid time off, or time off without pay, and
5 that only her supervisor, Jamon Rivera, could do that. (ECF No. 94 at Paragraph
6 3). Baldoz also claims the clinic was not closed the last two weeks of December as
7 she was working, and at least one physician assistant was working. (ECF No. 94
8 at Paragraph 4).

9 There are genuine issues of material fact whether Plaintiff was approved to
10 take leave when he did and as such, whether Defendants breached the
11 Employment Agreement.⁷ If Plaintiff did not have approval to take leave for days
12 prior to December 2014, that is a defense which goes to the amount of damages
13 recoverable by Plaintiff if the Employment Agreement was breached. This is
14 because Defendants claim they did not discover those other absences until after
15 Plaintiff's termination.

16 The "after-acquired evidence" doctrine precludes or limits an employee
17 from receiving remedies for wrongful discharge if the employer later "discovers"
18 evidence of wrongdoing that would have led to the employee's termination had the
19 employer known of the misconduct. *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App.
20 30, 60, 366 P.3d 1246 (2015), citing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1070-
21 71 (9th Cir. 2004). An employer can avoid back pay and other remedies by coming
22

23 ⁷ Subsumed within this issue of material fact is whether Defendants
24 unreasonably withheld approval for paid vacation during the last two weeks of
25 December 2014, and whether the clinic was closed during those last two weeks, as
26 asserted by Plaintiff. If the jury finds the Summary did not apply to Plaintiff's
27 vacation time, that may strengthen Plaintiff's argument that he had paid vacation
28 time available to him for the last two weeks of December 2014.

1 forward with after-acquired evidence of an employee’s misconduct, but only if it
2 can prove by a preponderance of the evidence “that the wrongdoing was of such
3 severity that the employee in fact would have been terminated on those grounds
4 alone if the employer had known of it at the time of the discharge.” *Id.*, quoting
5 *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 360-63, 115 S.Ct. 879
6 (1995). If the employer proves the same, back pay is calculated from the date of
7 the wrongful discharge to the date the new information was discovered. *Id.* See
8 Washington Pattern Jury Instructions 330.81.01 and .02. The after-acquired
9 evidence doctrine serves as a limitation on damages, but is not a defense against
10 breach of contract. The after-acquired doctrine presents a question of fact that
11 must be resolved by a jury. *Palmquist v. Shinseki*, 729 F.Supp.2d 425, 432 (D.
12 Me. 2010).

13 14 **2. Outside Employment**

15 Paragraph 3.1 of the Employment Agreement states “[p]hysician shall
16 practice on a full-time basis, exclusively for Employer within the scope of this
17 Agreement, in accordance with all the terms and conditions of this Agreement, and
18 Physician shall not provide the Services on behalf or for the benefit of any other
19 person or entity.”

20 Plaintiff was in Florida on Sunday, December 14, and Monday, December
21 15, for an Eluxadoline Advisory Board Meeting. Plaintiff acknowledges this was
22 not a CME course. He says it was “in part, for educational purposes,” and he was
23 compensated for his attendance by the Advisory Board. Defendants assert
24 Plaintiff did not receive permission to attend this meeting and that it was a
25 violation of Paragraph 3.1 prohibiting outside employment. For his part, Plaintiff
26 says he did not know he was expected to get permission to attend this meeting “as
27 he had been attending these types of meetings for decades without having to get

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1 any permission from his employers.” (Olden Declaration at Paragraph 20, ECF
2 No. 75).

3 Defendants claim that in addition to the foregoing, Plaintiff saw patients
4 who were not patients of the clinic at which he was employed and that he
5 performed professional medical-legal expert work. The Defendants do not,
6 however, cite any evidence, including Plaintiff’s deposition testimony (Ex. 5 to
7 ECF No. 74 at pp. 79-81; 194), which conclusively establishes that Plaintiff was
8 doing these things during the short period of time he was employed by Defendants
9 (see for example Ex. 67 to ECF No. 65).

10 Plaintiff’s alleged engagement in outside employment was not specifically
11 cited by Knudson as a basis for termination of Plaintiff’s employment. Therefore,
12 if anything, outside employment is an “after-acquired” reason justifying
13 termination which serves to limit damages, but is not a defense to breach of
14 contract. Plaintiff’s unapproved December 2014 trip to Florida, however,
15 seemingly would also fall under the umbrella of alleged unauthorized PTO
16 (Personal Time Off). While Knudson did not specifically refer to the Florida trip
17 in her letters to Plaintiff dated January 15 and 16, 2015, she said that Plaintiff was
18 “not at liberty to take time off whenever you choose” and that conduct “such as
19 unilaterally scheduling yourself for time off” was not acceptable and justified his
20 termination. (Exs. 46 and 48 to ECF No. 65).

21 Defendants contend Plaintiff had a scientific manuscript, unrelated to his
22 work for Defendants, transcribed by Defendants at their expense. (Ex. 27 to ECF
23 No. 65). Plaintiff asserts the manuscript “was connected to my work for
24 Defendants because it involved my area of practice and would serve to promote
25 my services.” (ECF No. 75 at Paragraph 20). He adds that he did not know this
26 would be an issue because “[m]ost employers encourage this kind of work because
27 it enhances the prestige of the practice.” (*Id.*).

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1 There is a genuine issue of material fact whether Plaintiff engaged in
2 outside employment in violation of the Employment Agreement. Even if there
3 was a violation, there is an issue of material fact whether Defendants would have
4 terminated his employment had they known of it at the time.

5
6 **3. Accuracy of Application(s)**

7 The Employment Agreement includes an “Applicant Certification,
8 Agreement And Release” which Plaintiff signed. It says:

9 The information in my application, resume, and disclosed
10 in the interview process is true, correct and complete. I
11 understand that any misrepresentation, falsification, omission
 or deception of material facts may cause my application to be
 rejected or any employment terminated.

12 (Ex. 3 to ECF No. 65 at p. 0201).⁸

13 During his April 1, 2017 deposition, Plaintiff acknowledged several errors
14 in his application materials. (ECF No. 63 at pp. 15-17). In Paragraph 18 of his
15 Declaration (ECF No. 75), Plaintiff offers an explanation of what happened:

16 My wife fills out my credentialing documents. She wrote
17 down the wrong dates that I was not working due to cardiac
18 surgery. I signed the application and take responsibility for
19 it, but I never intended to mislead anyone about the dates
20 and would have no reason to do so. My wife also wrote
21 down that I was relocating to Yakima. I had no reason to
22 misrepresent that I was relocating to Yakima as opposed to
23 anywhere else. I disclosed my entire working history in my
24 credentialing documents, including the few “gaps” occasioned
25 by cardiac surgery or a sabbatical. I was not asked to explain
26 the gaps.

27 Defendants suggest in general that Plaintiff’s “self-serving” declaration
28 varies his deposition testimony, but with regard to Paragraph 18 specifically, the
court finds nothing therein that varies from what Plaintiff testified to at his

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⁸ At page 15 of their opening brief (ECF No. 63), Defendants quote different
language, but their citations do not reveal that language.

1 deposition. What is new is that Plaintiff offers an explanation for the inaccuracies
2 which he was not given an opportunity to do during the deposition.

3 The aforementioned inaccuracies are something not discovered by
4 Defendants until Plaintiff's April 1, 2017 deposition, over two years after his
5 termination. Pursuant to the after-acquired evidence doctrine, as discussed *supra*,
6 Defendants have the burden of proving they would have terminated Plaintiff for
7 the inaccuracies. These inaccuracies are not a defense to breach of contract, but
8 are a defense to the amount of damages for which Defendants may be liable.
9 There is a genuine issue of material fact whether these inaccuracies were of such
10 severity that Defendants would have terminated Plaintiff's employment because of
11 them. A jury will decide that question.

12 13 **4. Failure To Take Call**

14 On October 29, 2014, the five physicians of Yakima Gastroenterology
15 Associates (YGA) declared they would cease to take call for GI patients at YRMC
16 and resigned their active hospital privileges there. After a meeting with YRMC
17 administration on November 18, Plaintiff says he agreed to take over YGA's
18 duties and be on-call Monday through Friday, 8 a.m. to 4 p.m., blocking out the
19 morning for consults. (Olden Declaration., ECF No. 75 at Paragraph 4).

20 According to Plaintiff, he agreed to try this schedule out for two weeks, but after
21 those two weeks, realized it was not feasible. Plaintiff says the block time was
22 wasted because random consults would come in, but he would spend a lot of time
23 waiting around. (*Id.* at Paragraph 5). Plaintiff says Rivera and Knudson did not
24 properly notify staff regarding his new call schedule and, as such, he a started to
25 get calls around the clock. He says he was also concerned the administration did
26 not have a backup or call-coverage plan in case he needed to handle another
27 emergency or an elective procedure. (*Id.* at Paragraph 6).

28 ///

1 On December 1, 2014, Plaintiff says he asked the hospital to e-mail him a
2 copy of the Medical Staff Bylaws and the hospital's "On-Call Policy." (*Id.* at
3 Paragraph 7; Ex. 37 to ECF No. 65). After receipt of those materials, Plaintiff
4 says he informed Rivera and Knudson that he did not have to take call because of
5 his age and informed them their call plan was in violation of the law. (*Id.* at
6 Paragraph 8). Although Plaintiff told Rivera and Knudson he would no longer
7 take call from 8 a.m. to 4 p.m. Monday through Friday, he says he still took call
8 four times a month in accordance with his prior arrangements with YGA and
9 YRMC. According to Plaintiff, he was not obligated to do this, but did so to
10 "benefit the community and help grow my practice in Yakima." (*Id.* at Paragraph
11 9). Plaintiff says that until he declined to take "extra call," he had no problem
12 getting his vacation requests approved and it was only after this that his requests
13 were denied. (*Id.* at Paragraph 10). He also contends his job was never threatened
14 until he advised Rivera and Knudson that their call schedule was unworkable and
15 not in compliance with the law. (*Id.* at Paragraph 8).

16 Article 8.1.1 of the Medical Staff Bylaws⁹ sets forth the qualifications of
17 Active Medical Staff. One of those (B.) is as follows:

18 Maintain a call coverage residence within 15 miles of the
19 hospital or close enough to allow the Active Staff member
20 to be physically present within 30 minutes of an emergency
21 request and provide for the continuous care of his/her own
22 patients in the hospital or have other appropriate mutually
23 acceptable arrangements with another Medical Staff Member
24 with admitting privileges. * *Members of the Active Staff who
25 are at least 62 years of age and who have served on the Active
26 Staff for at least the immediate preceding five years may*

24 ⁹ It is apparently undisputed that this was the version of the bylaws in effect
25 during the relevant period of time, September through December 2014. It appears
26 these bylaws were adopted in 2012, whereas the "On Call Policy-ER Call" was
27 created in June 2011 by a "Bylaws Committee." (Ex. No. 37 to ECF No. 65, p.
28 0393; ECF No. 74-4 at p. 0337).

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1 *request removal from emergency call and other rotational*
2 *obligations. The department chair will recommend to the M.E.C.*
3 *[Medical Executive Committee] whether to grant such a*
4 *request based on need and the effect on others who serve*
5 *on the call roster for that specialty. The M.E.C.'s*
6 *recommendation will be subject to final action by the*
7 *Board.*

8 (ECF No. 74-3 at p. 0320)(*Italics* in original; **Bold** added).

9 Article 8.1.3 D. of the Medical Staff Bylaws states:

10 Active Medical Staff Members shall be required to provide
11 emergency room coverage as stated in the On-Call Policy
12 approved by the Medical Executive Committee, and Governing
13 Body. This call policy must remain in compliance with
14 relevant laws and regulations (i.e., EMTALA)

15 (ECF No. 74-3 at p. 0321).

16 The “On-Call Policy-ER Call” provides:

17 Members of the Medical Staff older than 62 years of age
18 will not be required to take call but do have the option of
19 remaining on the call roster. In the event of unusual
20 situations when the on-call physician in that specialty is
21 occupied with a concurrent emergency, then the requesting
22 physician, after talking to the on-call physician, may need
23 to call the Chairperson of the Department or his/her designee
24 or the on-call physician to arrange for coverage. If the
25 Department Chair is unavailable, then the on-call physician
26 may contact the President of the Medical Staff or designee.

27 (ECF No. 74-4 at p. 0337).¹⁰

28 Because Plaintiff acknowledges he opted to remain on the call roster, the
court questions the need to determine if, by virtue of the “On-Call Policy-ER
Call,” he would have been entitled to request removal from the call roster due to
his age, notwithstanding that he had not served on the Active Medical Staff for at
least the immediate preceding five years as specified in the bylaws. The “On-Call
Policy-ER Call” does not say anything about serving five years on the Active

¹⁰ Schedule 1.3 A. 6. to the Employment Agreement obliges a physician to
comply “with the rules, regulations, policies, procedures and bylaws of Employer
and/or Hospital” (Ex. 3 to ECF No. 65 at p. 0196).

1 Medical Staff before having the option to request removal from the call roster.
2 Plaintiff contends the “On-Call Policy” governs over the bylaws and because he
3 was over 62, he was not contractually obligated to take any call at all.

4 If it is necessary to decide whether it is the bylaws or the “On-Call Policy-
5 ER Call” which governs, the court concludes as a matter of law it is the bylaws by
6 virtue of Article 1.4 of the same which states: “In case of conflict between the
7 Policies and procedures of the Medical Staff and the Bylaws, the Bylaws shall
8 prevail.” (ECF No. 74-4 at p. 0312). Furthermore, the bylaws were enacted in
9 2012, after the “On-Call Policy,” which was enacted in 2011. Contrary to
10 Plaintiff’s assertion, the bylaws do not specifically state the “On-Call Policy”
11 “governs” over the bylaws. Article 8.1.3 B. merely states Active Medical Staff
12 Members are required to provide emergency room coverage “as stated in the On-
13 Call Policy.”¹¹

14 The jury will not be allowed to find Plaintiff was not obligated to take call
15 because he was older than 62 years of age and therefore, that Defendants breached
16 the Employment Agreement by requiring him to take call. Defendants were within
17 their contractual rights to ask Plaintiff to take call because he had not been
18 employed five years, notwithstanding his age. And, as noted, Plaintiff willingly
19 agreed to take at least some call. Defendants were not, however, allowed to
20 terminate Plaintiff’s employment for protesting call coverage in violation of the
21 EMTALA, if that is in fact what they did. This issue is discussed *infra* in regard
22 to Plaintiff’s wrongful termination claim.

23
24 ¹¹ When viewed in context, only one reasonable meaning can be ascribed to
25 the bylaws in relation to the on-call policy: that an Active Medical staff member
26 could not opt out of call unless he had been employed the immediate preceding
27 five years- and therefore, no question of fact is presented for resolution by a jury.
28 *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

1 **B. Wrongful Termination In Violation Of Public Policy**

2 Employees may not be discharged for reasons that contravene public policy.
3 *Gardner v. Loomis Armored Inc.*, 128 Wn. 2d 931, 935, 913 P.2d 377 (1996).
4 Washington courts permit public policy tort actions in four circumstances: (1)
5 when the employer fires an employee for refusing to commit an illegal act; (2)
6 when the employer fires an employee for performing a public duty or obligation,
7 such as serving on jury duty; (3) when an employer fires an employee for
8 exercising a legal right or privilege, such as filing a worker’s compensation claim,
9 and (4) when an employer fires an employee in retaliation for reporting employer
10 misconduct. *Id.* at 936. There are four elements to this cause of action: (1) the
11 existence of a clear public policy (clarity element); (2) discouraging the conduct in
12 which the employee engaged would jeopardize the public policy (jeopardy
13 element); (3) the public-policy-linked conduct caused the dismissal (causation
14 element); and (4) the employer must not be able to offer an overriding justification
15 for the dismissal (the absence of justification element). *Id.* at 941.

16 According to Plaintiff, the policy at issue is embodied in the Emergency
17 Medical Treatment and Active Labor Act (“EMTALA”), 42 U.S.C. §§ 1395dd *et*
18 *seq.* Regulations promulgated pursuant to this Act require hospitals to have an on-
19 call list of physicians who are . . . available to provide treatment necessary after
20 the initial examination to stabilize individuals with emergency medical
21 conditions,” 42 C.F.R. § 489.20(r)(2), and have “written policies and procedures
22 in place . . . [t]o respond to situations in which a particular specialty is not
23 available or the on-call physician cannot respond because of circumstances beyond
24 the physician’s control,” 42 C.F.R. § 489.24(j)(1). Plaintiff alleges Defendants did
25 not have a written policy to provide emergency services, nor did they provide him
26 with backup coverage.

27 Citing 42 U.S.C. § 1395dd(i), “Whistleblower protections,” Defendants
28 contend Plaintiff does not qualify as a whistleblower. This provision states:

1 A participating hospital may not penalize or take adverse
2 action against a qualified medical person . . . or a physician
3 because the person or physician refuses to authorize the
4 transfer of an individual with an emergency medical
hospital employee because the employee reports a violation
of a requirement of this section.

5 Defendants contend this is not the situation with Plaintiff as he “only voiced
6 concerns over alleged deficiencies in Defendants’ on-call policies.” This
7 argument fails to realize that Plaintiff is not asserting a claim under the federal
8 EMTALA whistleblower provision that prohibits retaliation against those who
9 refuse to authorize “patient dumping” or report the same. Rather, he is asserting a
10 claim under Washington common law for wrongful termination in violation of a
11 public policy which he says is set forth in EMTALA: that a hospital have
12 sufficient on-call physicians available to handle emergencies.

13 “In determining whether a clear mandate of public policy is violated, courts
14 should inquire whether the employer’s conduct contravenes the letter or purpose
15 of a constitutional, statutory, or regulatory provision or scheme.” *Thompson v. St.*
16 *Regis Paper Co.*, 102 Wn. 2d 219, 232, 685 P.2d 1081 (1984). A federal statute
17 can be a source of public policy. *Id.* at 234. The Washington Supreme Court has
18 “expressed a willingness to hold that a broad public policy articulated in a statute
19 could extend beyond the reach of the statutory remedies created by the Legislature
20 so long as the policy is clear.” *Sedlacek v. Hillis*, 145 Wn. 2d 379, 388, 36 P.3d
21 1014 (2001). Whether or not a clear mandate of public policy exists is a question
22 of law. *Id.* The court agrees with Plaintiff that the clear mandate of public policy
23 in EMTALA is the screening and stabilizing of patients and this policy is
24 jeopardized when hospitals do not have sufficient on-call physicians, including
25 backups, available to handle emergencies.

26 Defendants contend “Plaintiff’s whistleblowing claim fails as he has
27 provided no evidence that he told any person about his concerns during his
28 employment.” Plaintiff is not making a whistleblowing claim under EMTALA,

1 however, and therefore, he is not bound by any particular reporting requirements
2 under EMTALA and/or the cases which have interpreted EMTALA. Furthermore,
3 Plaintiff has offered sufficient evidence to create a genuine issue of material fact
4 that he did communicate his concerns to hospital administration (Rivera and
5 Knudson). (Olden Declaration, ECF No. 75 at Paragraphs 8 and 13). Plaintiff's
6 declaration is sufficient to raise an issue of material fact so long as it does not vary
7 his deposition testimony. His declaration does not clearly vary his deposition
8 testimony. That Plaintiff does not provide a specific date or dates for when he
9 allegedly communicated his concerns to hospital administration, and apparently
10 lacks any documentation concerning those alleged communications, are matters
11 for the jury's consideration in weighing Plaintiff's credibility.

12 Defendants contend their request that Plaintiff see "inpatients during normal
13 business hours" does not implicate EMTALA. In support of this contention, they
14 cite deposition testimony from Dr. Robert A. Bitterman, an expert witness for the
15 Plaintiff. According to Defendants, Bitterman's deposition testimony establishes
16 that for the purpose of EMTALA, "on-call" means to see or consult about a patient
17 in the emergency room during an emergency condition, which is distinct from
18 Plaintiff's obligation under the Employment Agreement to see "inpatients" and his
19 verbal agreement on November 18, 2014, to see inpatients Monday through
20 Friday, 8 a.m. to 4 p.m.. (ECF No. 91 at pp. 31, 41-43). Again citing Dr.
21 Bitterman's deposition testimony, Defendants say the only thing that implicated
22 EMTALA was the "call" which Plaintiff agreed to be on four times a month. (*Id.*
23 at pp. 42-44).

24 In rendering his opinions, Dr. Bitterman was asked to review Knudson's
25 January 15, 2015 letter to Plaintiff in which she stated:

26 Your Employment Agreement with Central Washington
27 Medical Group is to provide care for the patients that we
28 serve both inpatient and outpatient. **Your refusal to provide
care for inpatients, other than the 4 days a month that you
are on call is not in compliance with your Agreement.**

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1 (Ex. 46 to ECF No. 65)(emphasis added).¹² Knudson’s January 16 termination
2 letter to Plaintiff was consistent with this in referring to Plaintiff “avoiding in
3 patient duty” as an indication he did not “wish to abide by [his] full-time
4 commitment under the current agreement.” (Ex. 48 to ECF No. 65). Defendants
5 contend “Plaintiff just did not want to see inpatients, something he agreed to and
6 then later refused to do in violation of his contract.”

7 The court concludes there is a genuine issue of material fact whether the
8 arrangement Plaintiff says he agreed to try out on a temporary basis- being
9 available to see inpatients from 8 a.m. to 4 p.m., Monday through Friday-
10 amounted to him being on-call during that time so as to implicate EMTALA.
11 While Dr. Bitterman appeared to testify that being required to see only inpatients
12 did not implicate EMTALA, he also stated that it was implicated if Plaintiff was
13 on-call during that time. (ECF No. 91 at pp. 41-42). Plaintiff asserts he was on-
14 call and there is evidence which suggests he needed to make himself available for
15 emergencies in the emergency room at the hospital during that time. At her
16 deposition, Knudson maintained that being on-call requires a 30 minute response,
17 but the court is not aware of Dr. Bitterman concurring with that standard and
18 furthermore, Knudson’s deposition testimony arguably suggests Plaintiff’s
19 obligation could have easily morphed into an on-call obligation:

20 Q: And was this additional time when he was supposed to
21 respond to emergencies, was that also considered part of
22 being on call?

23 A: It was not. Being on call requires a 30-minute response.
24 When he was in the clinic if he didn’t have patients
25 scheduled and there was a patient in the emergency
26 department, he could - - we requested that he go over
27 and see that patient.

27 ¹² It is undisputed that Plaintiff was “on-call” December 2, 17, 18 and 31,
28 2014.

1 **It did not require a 30-minute response at that point**
2 **in time.**

3 (Knudson Dep., ECF No. 65-2 at p. 44)(Emphasis added).

4 Knudson further testified that she called the November 18, 2014 meeting
5 with Plaintiff because “we were having issues about emergency patients that came
6 into the ED and not having the GI service available.” (ECF No. 111-4 at p. 33).¹³
7 She acknowledged this meeting happened “in the wake of Yakima GI Associates
8 no longer taking call.” (*Id.*). Knudson testified she approved of the letter to
9 Plaintiff from Jamon Rivera, dated December 23, 2014, in which Rivera took issue
10 with Plaintiff being gone the last two weeks of December, reminding Plaintiff that
11 “GI medical conditions can be quite serious,” that “[i]t is critical to patient care
12 that GI services be available on an immediate basis,” and that “[t]his is why we
13 contracted with you for a full-time commitment to GI patient care.” (ECF No.
14 111-4 at p. 88; Ex. 43 to ECF No. 65). According to Knudson, if patients were
15 emergent and Plaintiff was not available or on-call, the plan was send to those
16 patients to the other hospital, Yakima Valley Memorial Hospital. (ECF No. 111-4
17 at p. 89).¹⁴

18 A jury will decide if Plaintiff was on-call from 8 a.m. to 4 p.m., Monday

19
20 ¹³ In a December 29, 2015 e-mail to Plaintiff, Knudson described the
21 November 18, 2014 meeting as “agree[ing] to a plan whereby your schedule would
22 blocked M-F at 0800 for you to be able to see in house consults and a block in the
23 afternoon for you to do any necessary procedures.” (Ex. 45 to ECF No. 65).

24 ¹⁴ In oral argument, Defendants’ counsel asserted Dr. Bitterman testified at
25 his deposition that diversion to another hospital is an appropriate plan. The court
26 is not aware of Defendants citing to such testimony in their written materials. In
27 any event, if that is what Dr. Bitterman testified to, Defendants can present it to
28 the jury for consideration.

1 through Friday, pursuant to the arrangement he reached with Defendants at the
2 November 18, 2014 meeting, and whether that arrangement constituted a violation
3 of the policy of EMTALA in that Plaintiff did not have a backup physician. This
4 is the jeopardy element of a public policy tort claim. A jury will also decide the
5 causation element of Plaintiff's public policy tort claim- was he terminated
6 because he refused to abide by an arrangement violating the policy embodied in
7 EMTALA?¹⁵ A jury will decide if, as Defendants claim, Plaintiff was merely
8 looking for an excuse to not abide by his contractual obligations. And a jury will
9 also decide if Defendants had an overriding justification for terminating Plaintiff's
10 employment.

11 12 **C. Intentional Interference With Business Expectancy**

13 Intentional interference with business expectancy is a tort. A plaintiff must
14 prove five elements: 1) that a valid contractual relationship or business expectancy
15 existed; 2) that the defendant knew of that relationship or expectancy; 3) that the
16 defendant intentionally interfered by inducing or causing a breach or termination
17 of that relationship or expectancy; 4) that defendant interfered with an improper
18 purpose or by improper means; and 5) that damage to the plaintiff resulted from
19 the interference. *Shooting Park Ass'n v. City of Sequim*, 158 Wn. 2d 342, 351,
20 144 P.3d 276 (2006).

21
22 ¹⁵ With regard to the jeopardy and causation elements, Defendants
23 presumably will present testimony at trial from Knudson that hospital
24 administration believed the hospital's on-call policy was wholly appropriate and
25 not in violation of EMTALA. (Knudson Declaration, ECF No. 92 at Paragraphs 6
26 and 7). Dr. Bitterman's deposition testimony suggests he did not agree with
27 Knudson that the hospital's on-call policy satisfactorily addressed all EMTALA
28 concerns. (ECF No. 121-5 at pp. 80-85).

1 Plaintiff alleges he had a business expectancy for *locums* work at Western
2 Arizona Regional Medical Center (WARMC) in Bullhead City, Arizona, and that
3 Defendants intentionally and in bad faith interfered with this expectancy by falsely
4 claiming Plaintiff was an insubordinate employee. Defendants maintain Plaintiff
5 has produced no evidence that Defendants intentionally and in bad faith interfered
6 with Plaintiff's asserted business expectancy.

7 At her September 12, 2017 deposition, Knudson acknowledged she spoke to
8 the CEO of WARMC about the Plaintiff. The WARMC CEO asked her why
9 Plaintiff had left employment at YRMC and Knudson says she "told him that we
10 had a difference in interpretation of the contract." (ECF No. 74-9 at p. 94). She
11 says she told him there was "a difference of opinion of . . . what the contract
12 obligations were," and that while he may have asked what that meant, she did not
13 "go any further." (*Id.* at pp. 94-95).¹⁶

14 Considering there is a genuine issue of material fact whether Plaintiff was
15 wrongfully terminated by Defendants, a reasonable inference arises that Knudson
16 may have shared more with the WARMC CEO than she testified to (e.g., she
17 expressly stated or impliedly indicated Plaintiff was insubordinate) and this was
18 the reason why Plaintiff was not hired for the job with WARMC. If Plaintiff was
19 not insubordinate, it would have been improper for Knudson to indicate such to
20 the WARMC CEO. A legitimate question is why the WARMC CEO felt the need
21 to communicate with Knudson if, as contended by WARMC, Plaintiff's
22 application was not processed because he could not perform a certain type of
23

24 ¹⁶ Knudson's recollection was that Plaintiff did not put his employment at
25 YRMC on his Curriculum Vitae (CV) which he gave to the *locums* company (ECF
26 No. 74-9 at p. 94), but acknowledged she and the WARMC CEO "work together."
27 (*Id.* at 95). In his deposition testimony, Plaintiff indicated that WARMC and
28 YRMC are owned by the same corporate entity. (ECF No. 74-5 at p. 58).

1 surgical procedure and did not have professional liability insurance. (Ex. 63 to
2 ECF No. 65).

3 At this juncture, there is a genuine issue of material fact whether Defendants
4 intentionally interfered with a business expectancy Plaintiff claims to have had
5 with WARMC.

6
7 **D. Damages**

8 **1. Limitation on Damages**

9 Defendants contend Plaintiff is limited to 90 days of damages in accord with
10 Section 5.4 of the Employment Agreement which allows either party to terminate
11 the agreement without cause upon 90 days notice. Defendants do not cite any
12 Washington law for this proposition and Plaintiff does not cite any Washington
13 law to counter it. Washington law appears, however, to be in accord with what the
14 Defendants contend, at least insofar as concerns recovery of contract damages.
15 According to *Mason v. Mortgage A., Inc.*, 114 Wn. 2d 842, 849, 792 P.2d 142
16 (1990):

17 Contract damages are ordinarily based on the injured
18 party's expectation interest and are intended to give
19 that party the benefit of the bargain by awarding him
20 or her a sum of money that will, to the extent possible,
put the injured party in as good a position as that party
would have been in had the contract been performed.

21 As Plaintiff notes, however, the law cited by Defendants (*Reiver v. Murdoch*
22 & *Walsh, P.A.*, 625 F.Supp. 998, 1010 (D. Del. 1985)) pertains only to contract
23 damages. It does not pertain to consequential damages (whatever those may be in
24 the instant case) and it does not pertain to damages recoverable in tort for
25 wrongful discharge in violation of public policy and intentional interference with a
26 contract or a business expectancy. Consequential and tort damages are not subject
27 to a 90 days limitation.

28 ///

1 Defendants contend that if Plaintiff's damages are not limited to the 90 days
2 period, the court should alternatively hold as a matter of law that Plaintiff is not
3 entitled to any wage-related damages after April 1, 2017. Plaintiff acknowledges
4 the after-acquired evidence doctrine limits his remedies to when his alleged
5 wrongdoing was discovered by Defendants (April 1, 2017) and says he is not
6 seeking any damages beyond that date.

7 8 **2. Mitigation of Damages**

9 Defendants contend Plaintiff admitted he failed to mitigate his damages
10 after his termination by failing to diligently look for permanent employment and
11 therefore, the court should find as a matter of law that he so failed and instruct the
12 jury accordingly. The deposition testimony of Plaintiff cited by Defendants (ECF
13 No. 74-5 at p. 72) is arguably not an admission of failure to mitigate damages.
14 Plaintiff testified that after he was terminated, he sought temporary positions.
15 According to his declaration (ECF No. 75 at Paragraph 16), after he was
16 terminated by Defendants, he returned to Arizona and in February 2015, applied
17 for a *locum tenens* position because he "decided to take a break from taking on a
18 permanent position but . . . believed [he] could up [his] schedule and make
19 approximately the same amount of salary with temporary positions until [he] was
20 ready again to place [his] trust in another employer."

21 Only reasonable efforts at mitigation are required. The duty to mitigate is
22 not absolute. Reasonable minds could differ regarding the reasonableness of
23 Plaintiff's mitigation efforts and therefore, mitigation is a question for the jury.
24 Defendants presumably will present to the jury the evidence (ECF No. 120 at pp.
25 6-8) which they assert shows Plaintiff failed to use reasonable efforts to mitigate
26 his damages.

27 ///

28 ///

1 **3. Liquidated Damages/Recovery of Commencement Bonus**

2 Defendants have been allowed to file an Amended Answer (ECF No. 104)
3 pleading counterclaims for recovery of liquidated damages pursuant to Paragraph
4 12.1 of the Employment Agreement for Plaintiff’s alleged breaches of the same,
5 and for recovery of the Commencement Bonus paid to Plaintiff pursuant to
6 Schedule 1.5 E.

7 Recovery of liquidated damages depends on whether Plaintiff breached his
8 Employment Agreement such that Defendants were justified in terminating his
9 employment. Whether he breached the Employment Agreement is an issue of fact
10 for the jury.

11 Defendants seemingly contend that recovery of the Commencement Bonus
12 does not necessarily depend on whether Plaintiff breached the Employment
13 Agreement and Plaintiff is obligated to return it merely by virtue of his
14 employment being terminated. According to Schedule 1.5 E.:

15 In the event the Agreement is terminated for any reason
16 other than the Physician’s death or total disability, or in
17 the event that Physician fails to discharge any of the duties
18 set forth herein, Physician agrees to and shall, without
19 demand, immediately pay . . . to Employer the un-amortized
20 amount of the total Commencement Bonus Amount paid to
21 Physician pursuant to the Agreement.

22 If the jury determines that Plaintiff failed to discharge any of his duties
23 (breached the Employment Agreement), the Defendants are entitled to
24 reimbursement of the Commencement Bonus. If the jury determines otherwise
25 (that Plaintiff did not breach the Employment Agreement), the court will
26 determine through post-trial motion practice whether Defendants are nevertheless
27 entitled to reimbursement of the Commencement Bonus.
28

29 **4. Moving and Relocation Expenses**

30 The court is not aware of any evidence that Plaintiff was paid any Moving
and Relocation expenses pursuant to Schedule 1.5 B. According to that provision,

1 Physician Management, as the “Employer,” agreed to reimburse Plaintiff “certain
2 reasonable expenses incurred by [him] for the professional move of normal
3 household items . . . in connection with [his] relocation to [Yakima].” Citing
4 deposition testimony from Jamon Rivera, (Ex. 5 to ECF No. 91 at p. 96),
5 Defendants assert Plaintiff never hired a professional mover and instead purchased
6 some used furniture in Zillah which he had a hospital employee move to an
7 apartment the Plaintiff rented in Yakima. Plaintiff “partially” disputes this, citing
8 his deposition testimony in which he stated it was his intention to move to
9 Yakima, to purchase a home or condo, and move his wife and child there from
10 Arizona after his child completed her last year of middle school. (ECF No. 74-5 at
11 pp. 111-12).

12 If Plaintiff is claiming he is entitled to recover moving and relocation
13 expenses as part of his damages, the court fails to see how he is entitled to recover
14 the same considering there is no indication he hired a professional mover.
15 Schedule 1.5 B. clearly contemplates a professional move as indicated by the
16 sentence quoted above and an additional sentence that “[u]pon Physician’s
17 relocation to the Community, Employer shall pay such expenses in an amount up
18 to the Relocation Expense Amount . . . directly to the Physician **or on Physician’s**
19 **behalf to Physician’s professional moving company.**” (Emphasis added).

20 The court finds as a matter of law that Plaintiff is not entitled to Moving and
21 Relocation Expenses as an element of damages.

22

23 **V. CONCLUSION**

24 Defendants’ Motion For Summary Judgment (ECF No. 63) is **GRANTED**
25 in limited part as follows: 1) as a matter of law, Plaintiff was not allowed to opt
26 out of call because of his age; and 2) as a matter of law, Plaintiff is not entitled to
27 the recovery of Moving and Relocation Expenses as an element of damages.

28 ///

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1 Otherwise, the Motion For Summary Judgment is **DENIED** for the reasons set
2 forth herein.¹⁷

3 **IT IS SO ORDERED.** The District Executive is directed to enter this order
4 and forward copies to counsel.

5 **DATED** this 12th of February, 2018.

6
7 *s/Lonny R. Suko*

8

LONNY R. SUKO
9 Senior United States District Judge

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¹⁷ All evidentiary objections asserted by the parties on summary judgment
28 are reserved and may be reasserted as necessary in anticipation of trial.

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