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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF OLMSTED THIRD JUDICIAL DISTRICT

MICHAEL JOYNER, M.D.,

Plaintiff,

vs.

MAYO CLINIC, GIANRICO FARRUGIA, M.D. and CARLOS MANTILLA, M.D., Ph.D.,

Defendants.

Type: Employment
Court File No. 55-CV-23-7708

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

INTRODUCTION

When an institution of higher learning grants a professor "tenure" and guarantees "academic freedom," what does that mean? At minimum, one would think, it means that the school cannot fire or discipline the professor for talking about his or her research results or conclusions—and if it does, the professor will have legal recourse.

The Mayo Clinic evidently disagrees. According to Mayo, its tenure and academic-freedom policies are mere aspirations—meaningless and unenforceable—and Mayo professors can be terminated or disciplined whenever they talk about results from their research that Mayo or its executives dislike. Mayo makes the same arguments about its detailed, written Appeal Policy and Non-Retaliation policy: despite their statements that they offer important protections for employees, they don't really do so, because Mayo can violate them whenever it wants and the employees have no remedy.

The law and facts contradict Mayo's arguments. Minnesota law has long recognized employment policies like Mayo's academic-freedom policy can be enforceable contracts. And on the facts, Dr. Joyner has successfully alleged that he was in a tenured contractual relationship with

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Mayo, and that Mayo breached the contract by taking adverse action against him because of what he said about his research results and conclusions, and because of his related conduct. In moving to dismiss, therefore, Mayo asks the Court to disregard the facts pleaded in the complaint, Minnesota contract law, and indeed the very concepts of tenure and academic freedom.

With respect to Dr. Joyner's claims against Defendants Farrugia and Mantilla, Minnesota law provides that corporate actors and supervisors are liable for tortious interference with contract if they acted with malice. Dr. Joyner has pled facts alleging malice against both Farrugia and Mantilla, as, among other things, both Defendants knowingly made false statements about Dr. Joyner and wrongfully and willfully interfered with Dr. Joyner's employment contract with Mayo, including by their retaliation and discipline of Dr. Joyner, without cause or justification.

FACTS

Plaintiff Dr. Michael Joyner is a Mayo Clinic physician and the Frank R. and Shari Caywood Professor of Anesthesiology at Mayo's College of Medicine and Science. (Amended Complaint ("Compl.") ¶¶1, 39.) Dr. Joyner is an internationally acclaimed researcher and expert on convalescent plasma and the physiology of exercise and elite athletes. (*Id.*) He has been employed at Mayo for 36 years, and is an appointed Consultant and Clinician Investigator, the highest academic rank available at the Mayo Clinic. (*Id.* ¶¶39; 184.) In 2022, Mayo represented in federal court that Dr. Joyner's rank is akin to tenure. (*Id*. ¶184;) *Mayo Clinic v. United States* ("*Mayo v. U.S.*"), 642 F. Supp. 3d 831, 850 ¶174 (D. Minn. 2022). In its Partial Motion to Dismiss, Mayo asks the court to disregard that representation, as well as the facts pled in the Complaint specifically alleging that Dr. Joyner was a professor in a tenured contractual relationship with Mayo. (Compl. ¶¶40-44; 46; 184; 304; Defs. Memo at 1.)

Dr. Joyner, like hundreds of other physicians at Mayo, accepted Mayo's offer of employment in 1992 through Mayo's traditional handshake ritual, with Mayo promising "our

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handshake is better than a written contract" and offering employment until retirement (*Id.* ¶¶40-42.) This promise aligned with Mayo's 1969 Tenure Policy for "all physicians, scientists, and administrators," which promised that "each appointment is made with the expectation that it will continue until the normal retirement date of the individual." (*Id.* ¶43.) In 1996, Mayo formally appointed Dr. Joyner a "Consultant," which is the highest academic rank at the institution and which Mayo represented in federal court as akin to tenure at other institutions. (*Id*. ¶44;) *Mayo v. U.S.*, 642 F. Supp. 3d at 850. In 2002, Mayo's Board again promoted Dr. Joyner and made a written offer to him with the appointment of "Clinician Investigator." (Compl. ¶46.) Dr. Joyner accepted this offer and relied on Mayo's representation that the appointment was until his retirement date. (*Id*.)

The policies and procedures governing Dr. Joyner's appointment as a Clinician Investigator are communicated on Mayo's internal website, called its Policy Library, which serves as Mayo's faculty and staff handbook. (*Id*. ¶48.) One of these policies is Mayo's Freedom of Expression and Academic Freedom Policy ("Academic Freedom Policy"). (*Id.* ¶49.) The Academic Freedom Policy is essential to Dr. Joyner's appointment as a Clinician Investigator. (*Id*.) All Clinician Investigators, including Dr. Joyner, are expected to secure "sustained independent funding" for their programs. (*Id*. ¶¶50; 181.) Guarantees of academic freedom are integral to sustained independent funding, as grant agencies, like the NIH, expect that those receiving academic grants will be able to freely publish their research. (*Id*. ¶181 n 7.)

The Academic Freedom Policy declares that Mayo is "is committed to the free and open discussion of ideas in both medical and non-medical areas." (*Id*. ¶65.) It promises that faculty have the "freedom to explore all avenues of scholarship, research, and creative expression and to reach conclusions according to [their] own scholarly discernment." (*Id*. ¶4.) It also promises to protect

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faculty from "fear of retribution or retaliation if those opinions and conclusions conflict with those of the faculty or institution." (*Id.* ¶4.) The policy makes clear that faculty "are not required to advocate for policies or positions that represent the consensus of Mayo Clinic in their publications or communications," provided faculty make clear the views expressed are the individual's own views, and not the views of Mayo. (*Id*. ¶69.)

Dr. Joyner relied upon the Academic Freedom Policy to conduct and to speak about his research. (*Id*. ¶66.) He also relied on Mayo's numerous other assurances and affirmations of academic freedom, including in emails and other publications. (*Id.* ¶¶155; 157-159.) Academic freedom is essential to an educational institution's mission and to the scientific method itself. (*Id*. ¶9.) Mayo's Academic Freedom Policy was put in place to ensure Mayo's accreditation as an academic institution, and its receipt of lucrative tax breaks. (*Id.* ¶¶80-81.) Dr. Joyner and other faculty rely upon this freedom to fund and publish their research. (*Id.* ¶¶66; 155.) The public—and in the case of a medical institution like Mayo, the public health—relies on institutions following their clear promises of academic freedom for faculty, as this is a key guarantor of scientific integrity. (*Id.* ¶¶10; 81; 167.)

Mayo's Academic Freedom policy expressly protects faculty speech related to research and scholarship, and promises that Mayo will not retaliate if a faculty member's scholarly opinions or conclusions conflict with those of the institution. (*Id.* Ex. A.) Mayo broke this promise to Dr. Joyner. (*Id*. ¶19.) After Dr. Joyner expressed scholarly opinions and conclusions that conflicted with institutional views, Mayo punished him with a suspension, lost pay, and an ongoing gag order. (*Id.* ¶¶19; 137; 142; 144; 154; 189; 299.) Mayo also violated its policy by attempting to prevent Dr. Joyner from speaking about his research at academic conferences, even though giving such presentations is a required part of his academic appointment as a Clinician Investigator. (*Id*. ¶87.)

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Among other breaches of the Academic Freedom Policy, Mayo also imposed a gag order on any discussion of testosterone and human performance—which is a primary focus of Dr. Joyner's research and expertise. (*Id*. ¶¶63-65.)

Mayo also maintains a written Appeals Procedure, which provides instructions for appeals, delineates the role of various parties in the appeal process, and promises not to retaliate against faculty filing an appeal. (Compl. Ex B.) Dr. Joyner followed the Appeal Procedure, including step 12, which allowed him to communicate information to the Appeals Panel during his appeal. (*Id*.) Mayo retaliated against him for these communications, and for filing the appeal. (*Id*. ¶¶280-288.)

Likewise, Mayo's written Anti-Retaliation Policy provides protections for faculty or staff reporting both compliance concerns and other concerns regarding employment. This includes a promise of discipline, including possible termination, for any Mayo employee who engages in retaliatory behavior. (*Id*. Ex. D.) Dr. Joyner relied upon this policy and reported concerns protected by the policy. Among other things, he reported illegal attempts to poach protected patient health information in 2020, he reported Defendant Farrugia for his retaliatory actions, and he reported other employment and compliance concerns. (*Id*. ¶¶7; 238-242; 244; 247-248; 251-53.) In violation of Mayo's Anti-Retaliation Policy, Dr. Joyner faced retaliation for his reports. (*Id*.)

Mayo systemically disregarded its policies and procedures and punished a tenured faculty member without cause or justification. To distract from its policy violations and chill the speech of other faculty considering speaking freely, Mayo fabricated vague, ex-post-facto attacks on Dr. Joyner's stellar professional reputation. (*Id*. ¶¶134-36; 256-265.) In reality, Dr. Joyner's personnel record is filled with outstanding reviews for his teaching, research, and overall job performance. (*Id*. ¶21.) But, when Defendants Farrugia and Mantilla needed to create some sort of pretext for their retaliatory actions toward Dr. Dr. Joyner, they knowingly made false statements about Dr.

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Joyner's professionalism and treatment of coworkers and external partners. (*Id*. ¶¶136; 241-42.) Both defendants intentionally and willfully interfered with Dr. Joyner's contract and employment at Mayo by retaliating against him, and disciplining or arranging for him to be disciplined, without cause or justification (*Id*. ¶360.)

Because of Defendants' actions, Dr. Joyner has suffered a suspension, lost pay, and damage to his professional reputation. In addition, Defendants' actions have restricted Dr. Joyner's ability to advance and discuss subjects of his research, causing him lost wages and pay increases, as well as diminished earning capacity and emotional distress. (*Id*. ¶315.) But perhaps most disturbingly, Mayo's retaliation against and ongoing censorship of Dr. Joyner—an international expert on matters of public health—imperils the public health, contradicting its institutional claims to be an educational institution and breaching the public trust. (*Id*. ¶11.)

ARGUMENT

A. Minn. R. Civ. P. 12.02(e) Standard

A Rule 12.02(e) motion raises the single question of whether the complaint states a claim upon which relief can be granted. *See Royal Realty Co. v. Levin*, 69 N.W. 2d 667, 670 (Minn. 1955). "The showing a plaintiff must make in order to survive a motion to dismiss under Minn. R. Civ. P. 12.02(e) is minimal." *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003). The court accepts facts pleaded in the complaint as true and draws all reasonable inferences in favor of the Plaintiff. *See Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 429 (Minn. 2014). "We have held it is immaterial whether or not the plaintiff can prove the facts alleged," and the court "will not uphold a Rule 12.02(e) dismissal 'if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant relief demanded.'" *Martens v. Minn. Mining & Mfg. Co.,* 616 N.W.2d 732, 739-740 (Minn. 2000) (internal citations and quotations omitted).

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B. Dr. Joyner has alleged a tenured and permanent contractual relationship with Mayo, with terms and conditions communicated orally, by custom, and in Mayo's Policies and Procedures Library.

Tenure is a contractual employment arrangement that may have several distinguishing characteristics, the most obvious of which is that a tenure contract is *not* terminable at the will of the employer. The Minnesota Supreme Court recognizes the importance of tenure, and defines it "in the academic setting, as a faculty appointment for an indefinite period of time. A tenured faculty member enjoys substantial job security because tenured faculty members can only be removed for cause…" *University Education Assn. v. Regents of University of Minnesota,* 353 N.W.2d 534, 540 (Minn. 1984).

While at-will employment is the presumption in Minnesota, it "is inappropriate to dismiss [an] employee's claim for breach of an oral contract for permanent employment where the employee alleges sufficient facts to overcome the presumption that the contract was for at-will employment." *Eklund v. Vincent Brass & Aluminum Co*., 251 N.W.2d 371 (Minn. Ct. App. 1984) (supervisor and plaintiff testified that both parties understood the agreement was for permanent employment provided satisfactory performance.) "[T]he existence of a contract, but also the terms and construction of that contract, are questions of fact to be determined by the factfinder." *Bergstedt, Wahlberg, Berquist Assoc., Inc. v. Rothchild*, 225 N.W.2d 261, 263 (Minn. 1975).

Tenure contracts need not consist entirely of written provisions. As Dr. Joyner has alleged, Mayo's tenure practice includes an explicit oral contract for permanent employment via its famous "handshake agreement." (Compl. ¶¶40-42.) Yet even an oral contract is not necessarily required: the Supreme Courts of both Minnesota and of the United States also recognize "implied" or "de facto" tenure, where a faculty member cannot be discharged without just cause. In *Martin v. Itasca Cty,* 488 N.W. 2d 368, 370 (Minn. 1989), the Minnesota Supreme Court cited *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), in recognizing the existence of "implied tenure." As the Supreme Court

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of the United States explained, when a faculty member "has held his position for a number of years, [he may] be able to show from the circumstances of this service – and from other relevant facts – that he has a legitimate claim of entitlement to job tenure. Just as this court has found there to be a 'common law of a particular industry or of a particular plant' …so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Id. at* 602. The Supreme Court went on to note that "de facto" tenure is "particularly likely in a college or university… that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice," *Id.* (*citing* C. Byse & L. Joughin, *Tenure in American Higher Education* 17-28 (1959)).

Tenure arrangements are a common form of employment contract in American educational institutions. As the American Association of University Professors (AAUP) explains, "The principal purpose of tenure is to safeguard academic freedom, which is necessary for all who teach and conduct research in higher education. When faculty members can lose their positions because of their speech, publications, or research findings, they cannot properly fulfill their core responsibilities to advance and transmit knowledge." American Association of University Professors, *What is academic tenure?,* https://www.aaup.org/issues/tenure.

So it is certain that Minnesota academic institutions can and do offer tenure contracts to their faculties. The question that Minnesota courts have not directly addressed is whether the *terms* of such tenure contracts include the school's policies and procedures that are related to the terms and conditions of tenured employment. Other jurisdictions, however, have addressed this question. A great number of courts across the country have recognized that provisions in faculty handbooks are either part of the tenure contract itself, or else evidence of how the contract's terms are to be performed by the parties. *See McAdams v. Marquette Univ.*, 914 N.W. 2d 708, 712 (Wisc. 2018)

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(faculty contract "incorporates" the "Faculty Handbook [and] University Policies and Procedures" and the University "breached its contract with [Professor] when it suspended him for activity protected by the contract's guarantee of academic freedom" *Id*.); *McConnell v. Howard Univ*., 818 F.2d 58, 67 (D.C. Cir. 1987) ("Since the power to terminate the appointment of a tenured faculty member is subject to procedures set forth in the Faculty Handbook, it follows that this failure, if established at trial, would place Howard University in violation of its contract with McConnell"); *Crenshaw v. Erskine Coll*., 850 S.E.2d 1, 11 (D.C. 2020) ("In the context of this case—analyzing the enforceable rights of tenured professors at private institutions—the promise of tenure leaves us with no doubt that the Faculty Manual is a contract); *Wilson v. Clark Atlanta Univ., Inc*., 339 Ga. App. 814, 828-829 ("We are not holding that the handbook itself constituted a contract; instead, we hold that it defines the scope of protection afforded to the 'tenured' and 'tenure-track' positions provided in the one-page contracts between the parties"); *Vermeer v. Univ. of Del*., Civ. No. 21-1500-RGA, 2022 U.S. Dist. LEXIS 161952, at *20 (D. Del. Sep. 8, 2022) (professor's employment contract incorporated the Faculty Handbook by reference because it stated he would be evaluated according to the handbook and other college procedures).

Here, not only has Dr. Joyner alleged that Mayo has created a tenure system in practice, but Mayo actually has represented to a federal court that its policies are *intended* to function in precisely that fashion. (Compl. ¶184; see also *Mayo v. U.S.*, 642 F. Supp. 3d at 850, ¶174 ("Newly hired physicians at Mayo are placed on a three-year probationary track. After three years, such physicians are evaluated for advancement to consultant status, *which is akin to a tenure process*.") (Emphasis added.) Dr. Joyner has also alleged he was orally promised permanent employment—a tenured position—at Mayo. (Compl. ¶¶42, 44, 46). And this was not a one-off: Dr. Joyner alleges this was Mayo's custom and practice, with dozens of other faculty receiving similar oral or

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"handshake" offers in keeping with Mayo tradition dating back to its founding in 1883. (*Id.* ¶¶41, 42.)

Likewise, as is customary in academic institutions, Mayo promised its faculty academic freedom. (*Id.* ¶¶11; 24; 49; 81; 160-164). Mayo affirmed this promise through emails, publications, and a formal Academic Freedom Policy. (*Id.* ¶¶155-160.) This promise of Academic Freedom is fundamental to Dr. Joyner's ability to perform his job and research at Mayo. (*Id*. ¶187.) Specifically, as a Clinician Investigator, Dr. Joyner is required to obtain "sustained independent funding" through academic grants, or R-series grants—which grants require him to freely conduct and publish his research (*Id*. 50;181Dr. Joyner & n 7, NIH Grants Policy Statement 8.2.) Likewise, Dr. Joyner's position as a Clinician Investigator required him to present his research at academic conferences. (*Id*. ¶87.) He could not do these things without the ability to speak and write about his research results.

Defendants' motion to dismiss Dr. Joyner's contract claim at this stage contradicts established Minnesota law, which generally recognizes that once a contractual relationship is established, if the terms of that contract are ambiguous, even *summary judgment* is inappropriate. *See, e.g*., *Do*nnay *v. Boulware*, 144 N.W. 2d 711, 716 (Minn. 1966). Dr. Joyner has alleged more than sufficient facts to establish he had a tenured and permanent employment contract with Mayo. And as with any other contract, Mayo cannot simply wish it away when it becomes inconvenient: in a civil suit, the terms and construction of that contract are questions of fact for the fact-finder. *Bergstedt,* 302 Minn. at 480.

C. Mayo's policies and procedures at issue create enforceable contractual obligations.

Minnesota law has long recognized that written policies and procedures in employee handbooks, manuals, or bylaws can create contractual obligations for the employer. *See Pine River State Bank v. Mettille* ("*Pine River*"), 333 N.W.2d 622, 626 (Minn. 1983) (holding employee

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discipline procedures in handbook to be a binding offer). That is true even for at-will employees, let alone tenured employees like Dr. Joyner here. *Id.* To form a unilateral contract of this kind, the policy must be an offer that is definite in form and communicated to the employee. *Id.* at 626. This offer must also promise something more than what the employer is already legally required to do, since "[a] promise to do something that one is legally obligated to do…does not constitute consideration and therefore does not give rise to an enforceable contract." *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Marshall*, 857 N.W.2d 695, 701-02 (Minn. 2014) (internal citations and quotations omitted). Whether the policy or handbook language is meant to be an offer for a unilateral contract is determined by the "outward manifestations of the parties, not by their subjective intentions." *Pine River*, 333 N.W.2d at 626 (citing *Cederstrand v. Lutheran Brotherhood*, 117 N.W.2d 213 (Minn. 1962)).

Language in an employer's policies is "sufficiently definite" to form a unilateral contract when it is more than a general statement of policy. *Pine River*, 333 N.W.2d at 626. Minnesota courts have found numerous employment policies to be "sufficiently definite," including policies that provided for rights or benefits, policies that set forth work requirements and duties, and policies that provided for disciplinary actions or procedures. *See, e.g., Pine River*, 333 N.W.2d at 631; *Hall v. City of Plainview*, 954 N.W.2d 254, 268 (Minn. 2021) (employer policy promising to pay accrued paid time off was an enforceable offer despite handbook disclaimer saying otherwise); *Fey v. Minneapolis Police Dep't*, 365 N.W.2d 791, 794 (Minn. Ct. App. 1985) (police manual setting forth officer duties regarding handling of evidence was a binding offer as "[c]ompliance with the Manual's provisions was mandatory and a condition of an officer's continuing employment with the City."); *Med. Staff of Avera Marshall*, 857 N.W.2d at 704 (medical staff bylaws providing for procedures to amend the bylaws was a binding unilateral contract with staff).

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Minnesota courts are especially likely to view an employer policy as contractually enforceable if it promises benefits or compensation to an employee, since the employee has already given consideration for such a promise by performing work. See *Pine River*, 33 N.W.2d at 627 (distinguishing vacation benefits from other policies affecting the employment relationship, as the vacation benefit has already been earned); see also *Hall*, 954 N.W.2d at 266 (Minn. 2021) (Paid-time-off (PTO) policy was an enforceable unilateral contract offer despite employer disclaimer).

Minnesota courts have also applied this analysis in the higher education context. When a professor sued the University of Minnesota's dental school over its failure to make him the department chair, the Minnesota Supreme Court noted that "handbook provisions" can create contractual obligations if they "clearly affected the employee's current employment." *Goodkind v. Univ. of Minn*., 417 N.W.2d 636, 639 (Minn. 1988). The court found the University's particular guidelines in that case were "general statements of policy" that did not entitle the professor to a promotion to chair, and so were "insufficiently related to the terms and conditions of [his] current employment" to form the basis for an offer for a unilateral contract. *Id*. The plain implication, of course, is that when promises in a handbook *do* relate to the terms and conditions of current employment (as opposed to a hoped-for promotion), then they *are* enforceable in contract. And indeed, in another education-related case, the Court of Appeals of Minnesota found that when the University of Minnesota "fail[ed] to make findings of fact" about the awarding of tenure, despite being required to do so by "the University's own regulations," the University "violated its own procedures included within its contract" with the faculty member. *Ganguli v. Univ. of Minn*., 512 N.W.2d 918, 923 (Minn. Ct. App. 1994).

Minnesota law is also clear that, when an employer makes a contractual promise like this, it may not simply disclaim the promise. In *Hall*, the Minnesota Supreme Court held that a single-

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page policy in the employee handbook regarding paid time off (PTO) was binding on the employer despite that handbook's specific, printed disclaimer that "no provision in the Handbook creates any contractual rights for the employees that are binding on the City." 954 N.W.2d at 266. The Court reasoned that, like all contracts, a court's role in construing an employment contract is to determine the intention of the parties. *Id*. In so doing, language is given its plain and ordinary meaning, and terms are read in the context of the entire contract and will not be construed to lead to a harsh or absurd result. *Ins. Co. v. Eagles Lodge*, 165 N.W.2d 554, 556 (Minn. 1969). The *Hall* Court held that the employer's "disclaimer language is general, lacks precision, and *most importantly, the City's reading is internally inconsistent*." *Id*. (emphasis added.) As such, the *Hall* Court held the PTO policy was a binding unilateral contract.

As we will explain next, Mayo's claim that this Court should ignore the plain meaning and context of its own policies is similarly internally inconsistent and should likewise be rejected.

1. *The Academic Freedom Policy*

Mayo's Academic Freedom Policy provides a specific benefit to faculty and is akin to the one-page PTO benefit policy in *Hall v. City of Plainview*, which the Minnesota Supreme Court found to be an enforceable unilateral contract. Academic freedom is a clear employment benefit specific to those who, like Dr. Joyner, are engaged in the academic enterprise of teaching and research. Dr. Joyner had already offered consideration by performing his research with the expectation that Mayo would provide him the consideration it promised – including "the right to discuss and present scholarly opinions and conclusions" without retribution or retaliation. Yet when Dr. Joyner said something Mayo's higher-ups found inconvenient, Mayo not only retaliated with a suspension and lost pay, but limited—and *continues* to limit—Dr. Joyner's ability to discuss his research. (Compl. ¶¶19, 299.)

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Academic freedom is an expected benefit for all faculty, and especially tenured faculty, at educational institutions. (*Id.* ¶¶24; 49-50; 81; 155-164.) Academic freedom is a guarantor of scientific integrity to the public. (*Id*. ¶81.) It is a benefit that Mayo repeatedly promises to its faculty and to the public, including through "outward manifestations" like emails and assurances to faculty and published articles for the public. (*Id.* ¶¶155-164.) *See Pine River*, 333 N.W.2d at 626 ("Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions"). Formally codified as part of Mayo's educational accreditation process, Mayo's Academic Freedom Policy provides a definite offer to its faculty of academic freedom, including the types of expressions or statements that are included in this offer, the scope or context of when the offer applies, and the responsibilities of the faculty member. (*Id*. Ex. A.) This policy is not an "aspirational statement of principles" discussing only the values of academic freedom. (Defs. Memo at 8.) It is a specific promise to faculty to protect their scholarly opinions and conclusions when those opinions or conclusions conflict with the institution. (Compl. Ex. A.) Making and keeping promises of academic freedom is required by Mayo's regional accreditor, the Higher Learning Commission, whose Criterion 2 for Ethical and Responsible Conduct requires that an accredited institution like Mayo be "committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning," and "establish[] and follow[] policies and processes to ensure fair and ethical behavior on the part of its governing board, administration, faculty and staff." Higher Learning Commission, *Policy Book* CRRT.B.10.010, Criterion 2.

The Mayo policy's stated "Purpose" is to offer a "commitment to academic freedom and freedom of expression" so that faculty are free to "explore all avenues of scholarship, research, and creative expression, and to reach conclusions according to [their] own scholarly judgment."

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(Compl. Ex. A.) The Policy promises Dr. Joyner and his peers "freedom of expression, which includes the right to discuss and present scholarly opinions and conclusions without fear of retribution or retaliation if those opinions and conclusions conflict with those of the faculty or institution." (*Id*.) Nevertheless, Mayo punished Dr. Joyner for statements about his research and scholarly opinions because those statements "fail[ed] to communicate in accordance with prescribed messaging," and "reflected poorly on Mayo Clinic's brand and reputation." (*Id.* ¶¶19-20.)

The "Scope" of Mayo's offer of academic freedom specifies that it applies when Mayo faculty are "engaged in educational activities within the Mayo Clinic College of Medicine and Science." (*Id*. Ex. A.) The term "within" is not a location-based restriction (nor could it be, given the nature of scientific inquiry), as Mayo's policies define the scope of Dr. Joyner's educational activities at MCCMS to not only allow but require him to make presentations at outside conferences, but also to obtain R-series grants to fund his research. (*Id.* ¶¶50; 87; 181.) These grants are academic grants which require Dr. Joyner to freely present his research findings. (*Id*. ¶181.) Yet in its attempt to read the academic freedom policy out of existence, Mayo's motion to dismiss simply ignores the fact that speaking at academic conferences and freely publishing and discussing his research are specific requirements of Dr. Joyner's academic appointment at MCCMS. (Defs. Memo at 7-8.)

Mayo's written offer of academic freedom does exclude certain types of faculty expression or speech from protection, including "harassment" or "expression that violates the law." (Compl. Ex. A.) But Mayo has never alleged that Dr. Joyner's statements were harassing or in violation of the law. (*Id.* ¶¶19-20.) Rather, Mayo alleged that his statements ran counter to institutional views and negatively impacted Mayo's "brand and reputation." (*Id*.) Mayo's policy already provides for

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this legitimate institutional concern in a way that does not hamper academic speech: it makes clear that "faculty have the responsibility to make clear the views expressed are the individual's own views, and not the views of MCCM." (Compl. Ex A.) Dr. Joyner has repeatedly and consistently done this (*Id.* ¶¶74; 93; 117; 193; 275; 293; 296), yet Mayo punished him anyway.

Mayo also contends that its Academic Freedom Policy is "aspirational" and that because of a disclaimer allowing Mayo to regulate expression "as allowed by law," the policy is effectively meaningless. (Defs. Memo at 8-9.) This runs counter to basic principles of contract construction, where language is given its ordinary meaning, and terms are read in context of the entire contract and not construed to lead to a harsh or absurd result. *Ins. Co. v. Eagles Lodge*, 165 N.W.2d 554, 556 (Minn. 1969). It also contradicts the Minnesota Supreme Court's reasoning in *Hall*, where the court disregarded a specific disclaimer because it "lacked precision," was "internally inconsistent" with the language of the policy, and went against both "common sense and fairness." *Hall*, at 266. As the Supreme Court of Wisconsin pointed out when analyzing Marquette University's argument that its concrete promises of academic freedom should give way to nebulous "other values" (which that Court even labeled "aspirations"):

> The University posited that educational institutions assume academic freedom is just one value that must be balanced against "other values core to their mission." Some of those values, it says, include the obligation to "take care not to cause harm, directly or indirectly, to members of the university community," "to respect the dignity of others and to acknowledge their right to express differing opinions," […] These are worthy aspirations, and they reflect well on the University. But they contain insufficiently certain standards by which a professor's compliance may be measured. Setting the doctrine of academic freedom adrift amongst these competing values would deprive the doctrine of its instructive power; it would provide faculty members with little to no guidance on what it covers.

McAdams, at 732.

That is true to an even greater degree of Mayo's attempted disclaimer here. Mayo claims that it adopted an elaborate and detailed policy about academic freedom, only to say at the very

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end that the policy actually means nothing at all because it "expressly contemplates the regulation of speech" (Defs Memo at 9) in any manner that is not already *specifically illegal.* That is not how the courts interpret legal documents.

Nor is it really how Mayo wants or needs its Academic Freedom Policy to be interpreted as a practical matter. Mayo adopted the policy in order to obtain accreditation as an educational institution. The policy also is necessary for Mayo researchers to receive NIH grants. It is extremely likely, therefore, that Mayo's "we-had-our-fingers-crossed-behind-our-back" position will last only as long as this litigation does. If taken seriously, that position would also threaten Mayo's accreditation as an academic institution and the ability of its researchers to get NIH grants, which would pose an existential threat to the institution. "Absurd result" does not even begin to describe such an outcome.

Nor is Mayo correct in contending that the Academic Freedom Policy is "analogous" to its EEO Policy at issue in *Kiel v. Mayo Clinic Health System Southeast Minn*., No. 22-cv-1319, 2023 U.S. Dist. LEXIS 135595 (D. Minn. Aug 4, 2023). This disregards that the policy in *Kiel* was a non-discrimination policy that offered no additional consideration to employees, as it simply reiterated Mayo's obligation under Federal and State law not to discriminate. *Id*. at 35. "A promise to do something that one is already legally obligated to do…does not constitute consideration." *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Marshall*, 857 N.W. 2d 695, 701-02 (Minn. 2014); *see also Minn. Dept. of Corr. v. Knutson*, 976 N.W. 2d 711 (Minn. 2022) (handbook promise to allow an employee to appeal to a state arbitration panel not enforceable in contract because the handbook gave no rights beyond the statute, so there was no consideration). Unlike Mayo's EEO policy, which simply restates federal and state non-discrimination laws, Mayo's Academic Freedom policy provides a definite offer of a benefit to Mayo's faculty.

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2. *The Anti-Retaliation Policy*

Like Mayo's Academic Freedom Policy, Mayo's Anti-Retaliation Policy is a part of Mayo's Policies and Procedure Library. (*Id.* ¶¶48; 249.) This Library functions as a faculty handbook, detailing the terms and conditions of Dr. Joyner's employment contract. (*Id*. ¶48.) Like a police manual or medical staff bylaws, which were both found to be enforceable unilateral contracts under Minnesota law, the policies in Mayo's Policy Library are binding on both the employee and the employer. *See Fey v. Minneapolis Police Dep't*, 365 N.W.2d 791, 794 (Minn. Ct. App. 1985) (police manual regarding the handling of evidence was a binding part of officer's contract with the city); *Med. Staff of Avera Marshall Reg'l Med. Ctr.* v. *Marshall*, 857 N.W.2d 695, 704 (Minn. 2014) (holding bylaws a part of medical staff contract as medical staff were required to abide by the bylaws for continued employment).

Mayo's Anti-Retaliation Policy "[a]pplies to all personnel when involved in possible retaliatory situations." (*Id*. Ex. D.) The policy's "Purpose" is broader than what is required by law, and "establish[es] protections for individuals who report, internally or externally, violations or other wrongdoings including, but not limited to, privacy, revenue, finance, research, quality of care, patient safety, and employment related concerns." (*Id*.) The policy encourages employees to report certain suspected violations and offers resources for where they should make the report. It promises employees that "Mayo Clinic does not tolerate retaliatory behavior against any individual who raises a compliance concern" and promises discipline for "any employee, regardless of position or title, that has engaged in retaliation." (*Id*.) The policy further provides for Human Resources to evaluate reports of retaliation and warns that discipline could include termination of employment for those found responsible.

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Despite the fact that the policy's stated purpose is to establish protections for employees who raise compliance concerns, Mayo now asserts that the role of Human Resources in the process makes the entire policy meaningless, claiming that "[t]here can be no violation of policy unless Mayo Human Resources says so…" (Defs. Memo at 8.) Mayo relies on *Oni v. Target Corp*., 27-CV-19-11468, 2020 Minn. Dist. LEXIS 267, *18 (Minn. Dist. Ct. 2020), where the employer policy specifically gave the employer "sole discretion" to refer employees who tested positive for drugs to drug treatment. Yet Mayo's anti-retaliation policy does not provide "sole discretion" to Human Resources, and its argument that violations only occur if Human Resources "says so" is self-evidently false. It simply is not what the words of the policy mean. Nor is it what the reasonably *could* mean—there would be no reason for Mayo to have an anti-retaliation policy at all if the substance of the policy was, "retaliation is prohibited, but only when Human Resources thinks it is worth troubling about."

Unsurprisingly, then, the actual language of the policy is quite different. Mayo has defined "retaliatory behavior" to include the types of behavior reported by Dr. Joyner, and made an offer to employees to protect them from that behavior. Mayo's motion to dismiss asks the court to make the anti-retaliation policy meaningless if "Mayo Human Resources says so." Again, this position is "internally inconsistent" with the language of the policy, which defines retaliatory behavior and promises to protect employees reporting specific types of concerns from such retaliatory behavior. (*Id*. Ex. D.) Mayo's motion to dismiss also runs counter to both "common sense and fairness." *Hall*, 954 N.W.2d at 266 (Minn. 2021).

3. ***Appeals Procedure***

Mayo's Appeals Procedure is also a part of Mayo's Policies and Procedure Library. (*Id*. ¶201.) Mayo's Appeals Procedure is four pages long, applies to "[f]ormal corrective action at the

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final written warning," and allows appeals for "disputed application of Mayo policies and procedures." (Compl. Ex. B.) Dr. Joyner filed a timely appeal, despite his personnel file missing documents that were required under Minnesota law. (*Id.* ¶¶202-206; 211.) He followed the Appeals Procedure, including step 12, which specified that he was to "provide additional information to the Appeals Committee during the course of the appeal process." (Compl. Ex. B.) Yet after doing so, Mayo informed Dr. Joyner that "these communications should be sent to the [Personnel Chair], not panel members," threatened Dr. Joyner by accusing him of "improperly influencing the appeals committee," and asked him to "cease from any further communications with the appeals panel." (*Id*. ¶281.)

Mayo legal then threatened further retaliation against Dr. Joyner for following step 12 of the Appeals Procedure, and alleged that Dr. Joyner's actions "reflect[ed] an attempt by Dr. Joyner to evade normal processes and improperly influence the appeals committee." (*Id*. ¶284.) Mayo legal then retaliated by accusing Dr. Joyner of unprofessional conduct and lying and implied that the appeal panel would retaliate, writing that "one has to wonder how this…will come across to the [appeal] panel." (*Id*. ¶287.) Considering that Mayo Legal's role in the Appeals Procedure was to "review documents…and offer advice on identifying key issues, questions that may need to be answered, and any other information deemed appropriate to the appeal process," their threat to have the panel retaliate was real. (*Id*. Ex. B.) Ultimately, Mayo's Appeal Panel rejected Dr. Joyner's appeal without addressing the policy questions that were the point of the appeal, but also added punishments beyond those initially levied in the Final Warning. (Compl. Ex. B; ¶288.)

The Appeals Procedure is analogous to many other employer disciplinary procedures that courts have held to be binding unilateral contracts. *Pine River*, 333 N.W.2d at 626 (discipline policy); *Lewis & Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986) (discharge

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procedures); *Hunt*, 384 N.W.2d 853 (Minn. 1986) (discharge procedures). The Appeals Procedure is hardly a "general statement of policy" as it provides detailed instructions for filing appeals—including the scope of issues covered by the procedure, a timeline, page length, and description of what information should be included in the appeal. (Compl. Ex. B.) The Appeals Procedure also delineates the role of various parties in the appeal process, and promises not to retaliate against faculty filing an appeal. (*Id*.) Like the disciplinary polices in *Pine River*, *Lewis*, and *Hunt*, Mayo's Appeals Procedure provides a specific offer to employees and Dr. Joyner has more than alleged facts that Mayo breached the Procedure.

D. Dr. Joyner has alleged facts sufficient for a promissory estoppel claim.

Promissory estoppel is an equitable doctrine that implies a contract in law where one or more of the elements of contract formation are missing in fact. It requires proof of: (1) a clear and definite promise, (2) that the promisor intended to induce reliance and did in fact induce reliance to his detriment, and (3) the promise must be enforced to prevent injustice. *Martens v. Minnesota Mining & Mfg. Co.*, 616 N.W. 2d 732 (Minn. 2000). When a conventional contract analysis of an employee's claim deprives the employer/employee relationship of a "needed flexibility ... promissory estoppel allows a court to capture and weigh competing interests." *Housing & Redevelopment Auth. v. Norman*, 696 N.W. 2d 329, 332 (Minn. 2005). Thus, promissory estoppel prevents an injustice when the employer has made an offer to the employee and the employee reasonably relied upon that offer, but the employer disclaimed that this offer was contractual. *See Christensen v. Minneapolis Municipal Employees Retirement Bd.,* 331 N.W.2d 740 (Minn. 1983) (employee who reasonably relied to his detriment on employer's offer could enforce the offer despite employer disclaimer that their policies did not "create or give any contract rights to any person".)

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Here, Dr. Joyner has pleaded each of these elements as alternatives to each of his contract claims. Mayo reasonably expected its Academic Freedom Policy to induce faculty to accept positions and pursue research at Mayo. (*Id.* ¶¶4; 9; 68-69.) Dr. Joyner relied upon this policy to his detriment. (*Id.* ¶¶66; 320.) Likewise, Mayo reasonably expected its anti-retaliation policy to induce employees to come forward with reports and concerns. (*Id.* Ex. D.) Dr. Joyner also relied upon this policy, to his detriment. (*Id*. ¶320.) Finally, Mayo reasonably expected its Appeals Procedure to be relied upon when filing a Complaint. (*Id.* Ex. B.) And Dr. Joyner again relied upon this policy, its procedures, and its promise that he would not face retaliation, to his detriment. (*Id.* ¶320.) Enforcing the promises in these policies is necessary to prevent injustice.

E. Employees have a claim for tortious interference with contract against corporate actors or supervisors if they plead malice.

Finally, the individual defendants' arguments against Dr. Dr. Joyner's tortious-interference claims are unavailing.

The general rule is that a party cannot interfere with its own contract. So, corporate actors or supervisors, acting within the scope of their duties, cannot be liable for tortious interference with contract. *Bouten v. Richard Miller Homes*, *Inc.*, 321 N.W.2d 895, 900-01 (Minn. 1982). Nevertheless, corporate officers or agents may be liable for tortious interference if they act outside the scope of their duties. *Id.* Even at-will employees have claims for tortious interference with contract against their supervisor or another corporate actor, if they allege facts supporting the corporate actor acted with malice. *Nordling v. Northern State Power Co*., 478 N.W.2d 498 (Minn. 1991). "[T]he at-will employment subsists at the will of the employer and employee, not at the will of a third-party meddler who wrongfully interferes with the contractual relations of others." *Id.*at 505, quoting Restatement (Second) of Torts §766 comment g (1979).

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What is necessary, then, is that defendants like those here interfered with an employment contract out of personal ill-will, spite, or hostility, and thus were outside the scope of their employment duties. In *Nordling*, for instance, the plaintiff's job performance was "exemplary" and "he consistently received [an] above average performance rating"—until he reported a company plan he thought to be illegal involving placing employees under surveillance. *Id*. at 499. At that point, the Plaintiff's supervisor wrote a false report about his job performance, monitored his personal phone calls, and weaponized office rumors that he "made disparaging comments" to support terminating him. *Id*. at 500. The court concluded that, even though the employer could terminate the at-will employee, the supervisor acted with "malice" or "bad faith" such that "a tortious interference suit will lie." *Id.* at 505.

In this context, when corporate actors lie or knowingly make false statements, that is evidence of the requisite malice. *See Anick v. Bonsante*, 2022 Minn. App. Unpub. LEXIS 805, *14 (denying summary judgment where "there is a disputed issue of fact about whether [plaintiff's supervisor] knowingly lied about the interaction with [plaintiff]."). "[E]vidence that the utterer knew the falsity of his statements when published" is "relevant evidence of malice."); *Anick*, 2022 Minn. App. Unpub. LEXIS 805 at *12 (quoting *Bahr v. Boise Cascade Corp*., 766 N.W.2d 910, 920 (Minn. 2009)). In *Anick*, the plaintiff's supervisor alleged that the plaintiff had "acted unprofessionally" and "used vulgar language." *Id.* at *2-3. The court held that this statement was "a factual claim about [plaintiff's] behavior, and for purposes of summary judgment, we presume that he knew the falsity of his statement when published," and that this was "relevant evidence of malice." *Id*. at *12-13. Even though the defendant supervisor's statement "took place in the context of an employment investigation," the Court found no qualified privilege attached to the Supervisor's statement. *Id*.

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1. ***Defendant Gianrico Farrugia acted with malice.***

Here, Dr. Joyner has alleged malice on the part of Defendant Farrugia—including that Farrugia retaliated against him, made false statements, and directed or arranged for Dr. Joyner to be disciplined without cause or justification. (Compl. ¶¶241-42; 360.)

In addition to Farrugia's well-documented personal dislike for Dr. Joyner, Farrugia knowingly pursued retaliatory and illegal discipline of Dr. Joyner for Dr. Joyner's reports about an outside partner's attempt to illegally poach protected health information. (*Id.* ¶¶243; 233; 238; 239; 241; 242.) Farrugia knowingly lied when he claimed that "Dr. Joyner had threatened to quit the U.S. [convalescent plasma] program if he was not issued an up-front seven figure payment." (*Id.* ¶241). Farrugia knew this statement was false and that Dr. Joyner had never threatened to quit the U.S. convalescent plasma (CP) program. (*Id*.) In his malicious pursuit of retaliatory discipline, Farrugia also knowingly made the false allegation that Dr. Joyner had behaved "unprofessionally" with external partners and with colleagues. (*Id*. ¶244.) In addition to Farrugia's lies about Dr. Joyner, he also engaged in unprofessional behavior towards Dr. Joyner that put both Mayo and Dr. Joyner at risk. (*Id*. ¶246.) In the summer of 2020, without prior discussion or permission, Farrugia violated both professional standards and the rules governing Mayo's contract with an outside partner and edited Dr. Joyner's slides just prior to a high-profile presentation of the results of CP. (*Id.* ¶244.) Mayo's BARDA contract for CP research required prior approval from BARDA before public disclosure of any results. (*Id*. ¶245.) As the Principal Investigator on the grant, Dr. Joyner was ultimately responsible for the slides and presentation, and he had spent hours obtaining BARDA's approval of the presentation, right down to the font on the slides. (*Id*.) Farrugia's actions not only put Dr. Joyner at personal risk, but risked Mayo's contract with BARDA. (*Id*. ¶¶245-46).

Like the plaintiff in *Nordling*, Dr. Joyner "consistently received [an] above average

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performance rating" until he reported potentially illegal activity. (*Compare* 478 N.W.2d at 499 *with* Compl. ¶264.) Then, as in *Nordling*, Dr. Joyner faced retaliation that included false allegations about his job performance and his interactions with coworkers. (Compl. ¶¶238-42.) Farrugia knowingly made false allegations, including that Dr. Joyner had threatened to quit the CP program and that Dr. Joyner had engaged in "unprofessional" interactions with both external partners and colleagues. (*Id*. ¶241.) These false statements are more numerous and specific than those in *Anick*, which were found to be sufficient evidence of malice for a tortious interference claim. 2022 Minn. App. Unpub. LEXIS 805 at *2-3 (Plaintiff's supervisor lied that she had "acted unprofessionally" and "used vulgar language.")

Dr. Joyner has alleged that Farrugia acted with malice, and therefore, that Farrugia's actions were outside the scope of his employment with Mayo. Thus even if Dr. Joyner's "contract claim based on the employee handbook fails…a tortious interference suit will lie" against Defendant Farrugia. *Nordling*, 478 N.W.2d at 505.

2. *Defendant Carlos Mantilla acted with malice.*

Likewise, Dr. Joyner has also pled tortious interference with contract against Defendant Carlos Mantilla. Like Farrugia, Mantilla acted with malice by knowingly making false statements about Dr. Joyner's behavior. (*Id.* ¶¶136; 360.) Mantilla also willfully ignored his duties as Department Chair, duties which included addressing Dr. Joyner's repeated concerns and complaints about Mayo PA's unprofessional behavior and their refusal to abide by the Academic Freedom Policy. (*Id.* ¶¶121-123; 180.) Mantilla took no action to address these concerns, despite Dr. Joyner's complaints that Mayo PA was interfering with his research and publishing. (*Id*. ¶173.)

Mantilla pursued malicious and retaliatory discipline against Dr. Joyner for Dr. Joyner's statements in a CNN piece on convalescent plasma. This was not an innocent mistake or a good-

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faith difference of opinion. To the contrary, Mantilla initially praised Dr. Joyner for the article, writing "Amazing impact, Mike Thank you!!!" only to suddenly reverse course and punish Dr. Joyner for the very statements he had praised. (*Id.* ¶105.) During the disciplinary process, Mantilla withheld notice to Dr. Joyner that any formal discipline was happening and then, acting with ill-will and spite, discouraged Dr. Joyner from obtaining legal counsel by intimating that it could result in retaliation by Mayo. (*Id.* ¶124.) Mantilla then threatened Dr. Joyner's ability to communicate about his research if he didn't protect Mayo's reputation. (*Id.* ¶125.) Mantilla knew this directly conflicted with Mayo's Academic Freedom Policy. (*Id.* ¶141.) Mantilla initially suggested a simple reprimand. However, even though he was aware of Farrugia's personal animosity towards Dr. Joyner, Mantilla agreed to Farrugia's insistence on a severe sanction, including a suspension, lost pay, and an ongoing gag order. (*Id.* ¶¶132, 133.)

In arranging for Dr. Joyner's discipline, Mantilla knowingly made numerous false statements about Dr. Joyner. In his 2023 performance review, Mantilla gave Dr. Joyner the highest possible grades on categories related to professionalism and collegiality. (*Id.* ¶¶263-64.) He knew that Dr. Joyner had not engaged in an "unprofessional pattern of behavior." (*Id.* ¶¶130;135; 263.) Yet he simultaneously claimed to be disciplining Dr. Joyner for his lack of collegiality and for just such "a pattern of unprofessional behavior exhibited by you for some time." (*Id.* ¶130.) Mantilla wrote that Dr. Joyner "had engaged in 'disrespectful communications with colleagues" and described his tone as "unpleasant and having a bullying quality to it." (*Id*. ¶136.) Again, Mantilla knew these allegations were false. (*Id*.) Indeed, Mantilla's performance reviews of Dr. Joyner were consistently stellar. (*Id.* ¶268.) Mantilla's March 2023 review noted that "Dr. Joyner is an exceptional clinician investigator and leader in the department. He is enormously productive and has supported many of our junior faculty in their budding careers. The potential synergy across

many clinical areas in expanding scholarship and research is tremendous. I thanked Dr. Joyner for all his activities in the service of the department, the institution and the community." (*Id.* ¶263.)

Dr. Joyner has alleged that Mantilla acted with malice, and therefore, he has alleged Mantilla's actions were outside the scope of his employment with Mayo. Therefore, even if Dr. Joyner's "contract claim based on the employee handbook fails…a tortious interference suit will lie" against Defendant Mantilla. *Nordling*, 478 N.W.2d at 505.

CONCLUSION

For all of these reasons, Defendants' Partial Motion to Dismiss should be denied.

Dated: March 25, 2024

CROSSCASTLE PLLC

s/Samuel W. Diehl
Samuel W. Diehl (#388371)
Nicholas J. Nelson (#391984)
Harry N. Niska (#0391325)
333 Washington Avenue N.
Ste 300-9078
Minneapolis, MN 55401
P: (612) 429-8100
F: (612) 234-4766
Email: sam.diehl@crosscastle.com
nicholas.nelson@crosscastle.com
harry.niska@crosscastle.com

ALLEN HARRIS PLLC

s/Samantha K. Harris
Samantha K. Harris[1]
Kellie J. Miller[1]
PO Box 673
Narberth, PA 19072
P. (610) 634-8258
Email: sharris@allenharrislaw.com
kmiller@allenharrislaw.com

ATTORNEYS FOR PLAINTIFF MICHAEL JOYNER, M.D.

4893-3305-8992, v. 3

[1] Admitted *Pro Hac Vice*.