

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

CARLO A. CICCONE	)	CASE NO: CV 08 676818
	)	
Plaintiff	)	JUDGE JOHN P. O'DONNELL
	)	
vs	)	
	)	
MEMBERHEALTH, LLC.	)	<b><u>JOURNAL ENTRY</u></b>
	)	
Defendant	)	

*John P. O'Donnell, J.:*

Plaintiff Carlo Ciccone has filed this lawsuit alleging that defendant Memberhealth, LLC, “willfully and intentionally concealed and suppressed a material fact” during its negotiations to hire him.<sup>1</sup> The plaintiff also alleges that the defendant “negligently misrepresented” the plaintiff’s eligibility, if hired, to participate in a benefits plan and negligently misrepresented the “reporting line” of the position for which he was interviewed.<sup>2</sup>

The defendant has now filed a motion to dismiss pursuant to Ohio Civil Rule 12(b)(6). Having considered the motion, the plaintiff’s brief in opposition, the defendant’s reply brief, and the plaintiff’s sur-reply brief, the court finds as follows:

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<sup>1</sup> See amended complaint at ¶11.

<sup>2</sup> See amended complaint at ¶13. The amended complaint also includes a claim of an ERISA violation. That claim was dismissed after removal of the amended complaint to the U.S. District Court and is not under consideration on remand here.

## **I. FACTUAL ALLEGATIONS**

The plaintiff apparently began interviewing, through a recruiter, for a job with the defendant in late 2005.<sup>3</sup> During the interview, the plaintiff was told that the company had a “benefits plan.”<sup>4</sup> The nature of this benefits plan is not clear from the amended complaint, but it appears as if the plan involved some sort of “reward”<sup>5</sup> in the event that the defendant, which was then privately held, became the subject of an initial public offering of publicly traded stock.<sup>6</sup>

The plaintiff alleges that he was told during the pre-hire interview that only employees hired before the start of 2006 would be eligible for any benefits in the event the company went public.<sup>7</sup> Although the amended complaint does not include the date on which the plaintiff was hired, it is apparently sometime in 2006, thus placing the plaintiff in the class of employees who were supposedly not eligible to participate in the “benefits plan.”

The plaintiff accepted a job with the defendant. Later, the plaintiff learned that three employees hired after him were allowed to participate in the alleged “benefits plan.”<sup>8</sup> The plaintiff complains that the defendant, during his interviews, told him that he would not be eligible for the “benefits plan” but did not advise him that his eligibility could be negotiated.<sup>9</sup> The plaintiff also complains that he was told during negotiations

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<sup>3</sup> See amended complaint at ¶4 and ¶5.

<sup>4</sup> See amended complaint at ¶5.

<sup>5</sup> See amended complaint at ¶7.

<sup>6</sup> See amended complaint at ¶4 and ¶5. Some of the inferences in the court’s paraphrase of the plaintiff’s factual allegations also come from the plaintiff’s brief in opposition to the motion to dismiss and sur-reply in opposition to the motion to dismiss.

<sup>7</sup> See amended complaint at ¶5.

<sup>8</sup> See amended complaint at ¶7.

<sup>9</sup> See amended complaint at ¶6 and ¶7.

that, as the chief auditor, he would report directly to the company's president but that, in fact, after being hired he reported to the chief financial officer.<sup>10</sup>

The amended complaint does not allege any details, including eligibility requirements, of the "benefits plan," nor does the amended complaint allege that the defendant has become a public company.<sup>11</sup> (The fact that the defendant is a limited liability company suggests to the court that it is not a publicly traded company.)

## II. LAW AND CONCLUSION

The defendant has filed the motion to dismiss pursuant to Ohio Civil Rule 12(b)(6). That rule provides as follows:

(B) **How presented.** Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted.

In *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St. 2d 242, the Ohio Supreme Court held that for a trial court to dismiss a complaint for failing to state a claim upon which relief can be granted, it must appear beyond doubt that the allegations in the complaint can prove no set of facts which, when construed most favorably to the plaintiff, would entitle him to relief. The trial court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Maitland v. Ford Motor Co.*, 103 Ohio St. 3d 463, 2004-Ohio-5717, at ¶11.

The plaintiff's complaint describes a job interview where he was told about a benefit plan that was available to some employees of the defendant but that would not be available to him if he were hired. He was ultimately hired as a chief auditor, the compensation for which obviously did not include the benefit plan at issue. After

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<sup>10</sup> See amended complaint at ¶3 and ¶8.

<sup>11</sup> The named defendant, MemberHealth, LLC, is alleged to be the successor corporate entity to MemberHealth, Inc.

agreeing to work for the defendant under terms of compensation that did not include the benefit plan, the plaintiff now complains that the defendant wronged him before being hired by violating an alleged duty to tell him that he could have negotiated participation in the benefit plan.

The two causes of action arguably asserted in the complaint are fraud and negligent misrepresentation. These torts are similar but not exactly the same.

The elements of fraud are (a) a representation, or where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) resulting injury proximately caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St. 3d 69, at syllabus 2.

The plaintiff's amended complaint actually undercuts his argument that a fraud occurred. Paragraph 5 of the amended complaint alleges that, during the interview process, the "defendant described a benefits plan ("plan") that was in place for, as stated by defendant, only those employees of defendant hired prior to 2006." In other words, the plaintiff was told that his compensation, should he be hired, would not include participation in the benefits plan. That representation was apparently true: the plaintiff was hired under terms that did not include his participation in the benefits plan. That he may have later learned that there was nothing in the rules of the benefits plan to prevent him from having negotiated participation in the plan as a benefit of his employment,

despite not being hired before 2006, is not material. What is material is that he was told he could not participate in the plan and he, in fact, did not participate in the plan.

The plaintiff's amended complaint describes nothing more than ordinary pre-employment negotiations and an inference can be made that the plaintiff inquired about participating in the plan as additional consideration for his work and was told that he could not. He then accepted employment that was consistent with that representation. The court, therefore, concludes that the amended complaint fails to state a claim for fraud, because the plaintiff does not describe a false representation.

As to the claim that the plaintiff was told that he would report directly to the company president but actually reported to the chief financial officer, the court finds that the plaintiff has failed to state a claim for fraud because of the absence of the element of an injury proximately caused by reliance upon the alleged false representation.

As for a cause of negligent misrepresentation, the Ohio Supreme Court, citing to 3 Restatement of the Law 2d Torts (1965), Section 552 (1), has noted that "one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Delman v. City of Cleveland Heights* (1989), 41 Ohio St. 3d 1, 4.

The Cuyahoga County Court of Appeals has considered a negligent misrepresentation claim in the context of an employer-employee relationship. In *Nichols v. Ryder Truck Rental, Inc.* (June 23, 1994), Cuyahoga App. No. 65376, the court rejected

the application of the tort of negligent misrepresentation to an employer-employee relationship because an employer is not in the business of supplying information for the guidance of others. The court said:

Such persons who are in the business of supplying information for the guidance of others typically include attorneys, surveyors, abstractors of title and banks dealing with no-depositors checks. The business transactions of the alleged injured party are usually those involving lease or insurance agreements. No court in Ohio, has held the tort of negligent misrepresentation applicable to the employer-employee relationship.

The Cuyahoga County Court of Appeals has affirmed this conclusion as recently as 2006 in the case of *Hamilton v. Sysco Food Services of Cleveland, Inc.*, 170 Ohio App. 3d 203, 2006-Ohio-6419. This court has been unable to uncover any cases finding that the tort can exist in the employer-employee context. Moreover, the fact that the plaintiff accepted employment and began to work without being a participant in the benefits plan would negate the element of justifiable reliance.

For all of these reasons, the defendant's motion to dismiss the amended complaint is granted at the plaintiff's cost.

**IT IS SO ORDERED:**

Date: \_\_\_\_\_

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Judge John P. O'Donnell

**SERVICE**

A copy of this Journal Entry was sent by regular U.S. mail, this \_\_\_\_ day of July, 2009,  
to the following:

Carlo A. Ciccone  
8255 South Avenue, Suite A.  
Boardman, OH 44512  
*Pro Se*

Eric J. Johnson, Esq.  
Christine T. Cossler, Esq.  
Walter & Haverfield LLP  
1301 East 9th Street, Suite 3500  
Cleveland, OH 44114  
*Attorneys for Defendant*

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Judge John P. O'Donnell