STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

ANGELA BAKER, *Plaintiff*,

vs.

INNERCEPT, LLC, *Defendant*.

Case No. **CV 2016 750**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on Defendant Innercept, LLC's Motion for Summary Judgment.

Defendant is an Idaho limited liability company that conducts business as a children's residential care facility in Kootenai County, Idaho. Complaint, p. 2, ¶ 1.2; Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 2. ¶ 2. Its facilities specialize in services for children with behavioral and mental health disorders. Complaint, p. 2, ¶ 2.1; Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 2. ¶ 2. Defendant employs approximately 100 people. Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 2. ¶ 3.

In July of 2013, Plaintiff Angela Baker began her employment with Defendant as a "program manager". Complaint, p. 2, ¶ 2.2; Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 3, ¶ 5. Plaintiff was hired as

an at-will employee. *Id.* The parties dispute the responsibilities and access to confidential information Plaintiff had in her role as a "program manager". *See* Complaint, p. 3, ¶¶ 2.5–2.13; Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 4, ¶ 5.

In July of 2015, Defendant presented to Plaintiff and other employees it believed were "key employees", a document entitled "Covenant Regarding Disclosure of Confidential Information and Covenant Not to Compete" ("Non-competition Agreement"). Complaint, p. 3, ¶ 2.13; Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 5, ¶ 7. "Upon review of the [Non-competition] Agreement, [P]laintiff believed that the Agreement proposed by [D]efendant was in contravention of the law, specifically Idaho Code Title 44, Chapter 27." Complaint, p. 4, ¶ 2.14. Plaintiff raised these concerns with Defendant's Director of Programs, David Melear. Complaint, p. 5, ¶ 2.25. Plaintiff contends Mr. Melear "indicated plainly that the agreement was a 'take it or leave it' proposition, and that [D]efendant was not concerned about the Idaho statutes, specifically Idaho Code Title 44, Chapter 27." *Id.* Plaintiff again raised her concerns about the alleged unlawfulness of the Non-competition Agreement to Mr. Melear in a staff meeting. *Id*., p. 5, ¶ 2.27. Plaintiff refused to sign the Non-competition Agreement. Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, pp. 5–6, ¶ 7.

Plaintiff was terminated in August of 2015. Complaint, p. 6, ¶ 2.29. The parties dispute the basis for her termination. Plaintiff claims she was terminated "because of her request that the [non-competition] agreement conform to Idaho law." Complaint, p. 7, ¶ 3.10. Defendant claims Plaintiff was terminated because her "work performance became troubling and unacceptable . . . [and Defendant] was losing valuable business and was having its reputation damaged due to the performance problems of [Plaintiff]."

Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment, p. 5, ¶ 6.

On January 25, 2016, Plaintiff filed her Complaint initiating the instant action, alleging she was wrongfully terminated in violation of public policy. Complaint, pp. 6–7, ¶¶ 3.1–3.12. Plaintiff claims she was wrongfully terminated because she was "performing an important public obligation by requesting that her employer not force her or its other employees to sign an agreement which was unlawfully restrictive in light of Idaho statutes on point, specifically Idaho Code Title 44, Chapter 27." Complaint, p. 7, ¶ 3.9.

On March 25, 2016, Defendant moved for summary judgment on the grounds that "Plaintiff has failed to state a claim for which relief can be granted." Defendant Innercept, LLC's Motion for Summary Judgment, p. 2. The motion is supported by a "Statement of Undisputed Facts in Support of Defendant Innercept's Motion for Summary Judgment", "Innercept's Memorandum in Support of Motion for Summary Judgment", and the "Affidavit of Jami Sturges-Ullrich in Support of Defendant's Motion for Summary Judgment". On April 26, 2016, Plaintiff filed "Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment". It is supported by the "Affidavit of Angela Baker". On May 2, 2016, Defendant filed "Innercept, LLC's Reply Memorandum in Support of Motion for Summary Judgment".

Oral argument on this motion was held on May 10, 2016. For the reasons set forth below, the Court grants summary judgment in favor of Defendant.

STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA*

No. 8 Ltd. Partnership, 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)).

"Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett*, 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing

Atwood v. Smith, 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)).

Neither party in this case has demanded a jury trial. If an action is being tried without a jury, "[t]he trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007) (citing *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001)). The fact finder is responsible for resolution of conflicts between the possible inferences. *Id.* (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). If the Idaho Supreme Court reviews the decision of a judge serving as fact finder, it "[e]xercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences." *Id.* (citing *Intermountain Forest Management*, 136 Idaho at 236, 31 P.3d at 924).

Moreover, pursuant to Idaho Rule of Civil Procedure 56(f):

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

I.R.C.P. 56(f). "The decision to grant or deny a Rule 56(f) continuance is within the sound discretion of the trial court." *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 103, 294 P.3d 1111, 1115 (2013) (quoting *Taylor v. AIA Services Corp.,* 151 Idaho 552, 572, 261 P.3d 829, 849 (2011) (citing *Carnell v. Barker Mgmt.,* 137 Idaho 322, 329, 48 P.3d 651, 658 (2002)).

II. ANALYSIS.

A. Plaintiff's Termination Was Not Wrongful Because it Was Not in Violation of Idaho Public Policy.

Defendant disputes the basis for Plaintiff's termination, but argues that if Plaintiff was terminated for failure to execute the Non-competition Agreement, her termination was not unlawful in violation of public policy. Defendant Innercept's Motion for Summary Judgment, p. 2; Intercept's Memorandum in Support of Motion for Summary Judgment, p. 9. Defendant maintains there is no liability for an employer if an employee is terminated after the employee questions the enforceability of a non-compete agreement. Innercept's Reply Memorandum in Support of Motion for Summary Judgment, p. 3. According to Defendant, failure to sign an allegedly unenforceable agreement is not a protected activity that falls within the narrow public policy exception to at-will employment. *Id.*, p. 5. Specifically, Defendant claims "[Plaintiff] did not perform an important public duty by raising concerns with a private noncompete agreement and refusing to sign the agreement." *Id.*

Moreover, Defendant contends Idaho Code § 44-2701 *et seq*., the code sections upon which Plaintiff relies in support of her claim, "focuses on the validity and enforceability of contractual agreements and covenants protecting legitimate business interests; it does not establish a public policy exception or cause of action for at-will employees to assert a wrongful termination claim against an employer." Innercept's Reply Memorandum in Support of Motion for Summary Judgment, p. 3. Pursuant to Idaho Code § 47-2703, Defendant argues Plaintiff's remedy is not a cause of action for wrongful termination, but rather a request of the court to redact the unenforceable provisions and only enforce what remains. Defendant claims Idaho Code § 44-2701 *et seq*. is a shield against enforcement of an unenforceable non-compete agreement, not

a sword that provides a separate cause of action for an unenforceable non-compete agreement. *Id.,* pp. 3-5. Relying upon Idaho Rule of Civil Procedure 8(c), Defendant alleges Plaintiff could raise the legality of the Non-competition Agreement as an affirmative defense against Defendant in a different lawsuit if Defendant sought to enforce the signed Non-completion Agreement against Plaintiff after her employment with Defendant ended. *Id.,* p. 5. Therefore, Defendant seeks summary judgment on the grounds that "Plaintiff cannot establish that Defendant Innercept's termination of Plaintiff's employment was an unlawful termination that violated public policy." Defendant Innercept's Motion for Summary Judgment, p. 2.

In response, Plaintiff claims Defendant terminated her "when she tried to engage in meaningful discussions about the Agreement and the provisions which were contrary to the Idaho statutes." Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, p. 5. She maintains she did not oppose signing a Non-competition Agreement, but did not want to sign an agreement that violated Idaho law. Affidavit of Angela Baker, p. 2, ¶ 4; p. 4, ¶12. Plaintiff contends that because at least twenty-four other employees were required to sign the Non-competition Agreement, more than her private interests are implicated. *Id*.; Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, pp. 5, 13. Plaintiff maintains that "[Defendant's] bamboozling of its own employees into negotiating away protections afforded to them by Idaho law is a prime example of the public policy concerns this case addresses." Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, p. 5.

Moreover, Plaintiff argues she was terminated in contravention of public policy for two reasons: 1) because she was engaging in a protected activity by exercising her

legal right or privilege in refusing to sign an illegal agreement; and 2) because she was "performing an important public obligation by requesting that her employer not force her or its other employees to sign an agreement which was unlawfully restrictive in light of Idaho statutes on point, specifically Idaho Code Title 44, Chapter 27." Complaint, p. 7, ¶ 3.9. Plaintiff claims Idaho Code § 44-2701 *et seq*. gives employers and employees the right to only enter into legally enforceable contracts. At oral argument on May 10, 2016, counsel for Plaintiff repeated that argument, that Idaho Code § 44-2701 *et seq*. "…gives employers and employees the right to enter into only legally enforceable contracts under the non-competition agreement statute." To make the point, counsel for Plaintiff argued, "It's the same as them putting in front of her a contract for murder for hire and she says I don't want to enter into that agreement. It's an illegal contract." A murder for hire contract would be an **illegal** contract. A contract that exceeds the bounds of Idaho Code § 44-2701 *et seq*. only creates an **unenforceable** contract.

Relying on *Freiburger v. J-U-B Engineers, Inc.*, 141 Idaho 415, 111 P.3d 100 (2005), Plaintiff contends public policy is implicated when employment is restricted like her employment was when she was required to sign an unenforceable non-compete agreement. Plaintiff misstates the law in *Freiburger.* In that case, a civil engineer formerly employed by J-U-B had signed a covenant not to compete that prohibited him from providing any services to J-U-B's clients without regard to whether he had any contact with these clients during his employment. *Id.* at 418, 111 P.3d at 103. When the engineer resigned from J-U-B, he went to work for a competing firm, which asked him to market to a current J-U-B client he had "nurtured" while employed by J-U-B. *Id.* J-U-B then sought to enforce the covenant not to compete against the engineer. *Id.* The trial court granted summary judgment in favor of the engineer, finding the covenant

not to compete was unenforceable as a matter of law. *Id.* The Idaho Supreme Court affirmed the decision of the trial court, but refused to reform the parties' agreement because reformation would have required more than adding or changing a few words to make it reasonable. *Id.* at 423, 111 P.3d at 108. Therefore, the Idaho Supreme Court found "the only alternative was to declare the entire clause void and unenforceable as a matter of law." *Id*. Moreover, and of importance to the instant case, the Idaho Supreme Court did not find that all covenants not to compete must be consistent with public policy, as Plaintiff argues but rather, "[i]n order *to be enforceable*, a covenant not to compete must be ancillary to a lawful contract supported by adequate consideration, and *consistent with public policy*." *Id.* at 419, 111 P.3d at 104. (emphasis added). The Idaho Supreme Court made it quite clear that *to be enforceable* a covenant not to compete must be consistent with public policy. The Idaho Supreme Court did not state that it is contrary to public policy *to terminate* an employee for not signing an unenforceable agreement. That is a separate question which was not addressed by the Idhao Supreme Court in *Freiburger*.

In addition, following oral argument, Plaintiff filed "Plaintiff's Supplemental Citation of Authorities in Opposition to Summary Judgment". Attached to that document were four authorities Plaintiff submitted in support of her position for the Court's consideration: *AMX International, Inc. v. Battelle Energy Alliance, LLC*, 744 F.Supp 1087 (D. Idaho 2010), *D'sa v. Playhut, Inc.*, 85 Cal. App. 4th 927, 102 Cal Rptr. 2d 495 (2000); *Latona v. Aetna U.S. Healthcare, Inc*., 82 F. Supp. 2d 1089 (C.D. Cal. 1999); and Restatement of Employment Law § 5.02(d), Illustrations 16 and 17. Plaintiff's Supplemental Citation of Authorities in Opposition to Summary Judgment, pp. 1-2. Because the Restatement illustrations deal specifically and solely with *D'sa* and

Latona, the Court will simply discuss those cases and not the Restatement.

In *AMX International, Inc. v. Battelle Energy Alliance, LLC,* an Idaho federal district court case, AMX sued Battelle, its client, for tortious interference with a contract after Battelle hired several AMX employees in spite of the fact that the employees' contracts with AMX included non-compete clauses, precluding them from working for AMX clients. *AMX Int'l,* 744 F.Supp.2d at 1089–90. Battelle argued that it could not have interfered with the contracts between AMX and AMX's employees because those contracts were unenforceable, as the non-compete clauses were contrary to public policy. *Id.* at 1093. The court found "unreasonable noncompete agreements violate public policy and are thus void." *Id.* However, that case had nothing to do with wrongful termination. The court was asked to interpret a non-competition agreement after it had been signed by employees to determine whether the signed agreement could be enforced against the former employees. In making its decision, the federal district court cited the following Idaho law: "Covenants not to compete must be consistent with public policy to be enforceable, and they must be reasonable as applied to the public in addition to the employer and employee." *Id.* (citing *Pinnacle Performance, Inc. v. Hessing,* 135 Idaho 364, 17 P.3d 308, 311 (Ct. App. 2001). That is not to say that a covenant not to compete can be used to support a claim for wrongful termination in violation of public policy. The remedy in *AMX* was to void the agreement and find it unenforceable against the parties. Because *AMX* did not concern a wrongful termination situation, it is of little guidance to this Court on summary judgment.

D'sa v. Playhut, Inc., 85 Cal. App. 4th 927, 102 Cal Rptr. 2d 495 (2000), would certainly support Plaintiff's claim that Idaho Code § 44-2701 *et seq*. creates "…employers and employees the right to only enter into legally enforceable contracts."

Latona v. Aetna U.S. Healthcare, Inc., 82 F. Supp. 2d 1089 (C.D. Cal. 1999) makes it clear that merely requiring an employee to sign an agreement containing a non-competition clause is illegal under California law. *Id.,* at 1092, 1097-98.

However, ***D'sa*** and *Latona* must be read in the context of California law as it has evolved on the subject, and that evolution is in stark contrast to what has evolved in the State of Idaho. The conclusion in *Latona* indicates the difference between the State of California and most other states, including Idaho:

> Aetna took the contract it uses in other states and, without regard to California law, and contrary to the clear prohibition contained in section 16600, compelled its California employees to sign it or be fired. Aetna's claim that it should not be held responsible for wrongful termination unless it "knew" the provision was unenforceable misses the mark. Aetna knew it was operating in California and would be subject to its laws. Section 16600, or a version thereof, has been on the books since 1872. It is not asking too much for Aetna to refrain from requiring its employees to sign presumptively illegal provisions and then firing them when they decline to do so.

82 F. Supp. 2d 1089, 1098.

In ***D'sa,*** the plaintiff, Richard D'sa was terminated after he refused to sign the confidentiality agreement. ***D'sa,*** 85 Cal. App. 4th 927, 930, n. 2, 102 Cal. Rptr. 2d 495, 497, n. 1. The California Court of Appeal reversed summary judgment against the employer, finding, "Clearly, the very broad covenant not to compete that is contained in the subject confidentiality agreement in this case comes, at least in part and perhaps entirely, within the prohibitory provisions of section 16600 and is therefore to that extent void and unenforceable. *Id.,* at 931, 102 Cal. Rptr. 2d at 498. Citing *Baker Pacific Corp. v. Suttles,* 220 Cal. App. 3d 1148, 1154, 269 Cal. Rptr. 709 (Cal. App. 1990), the California Court of Appeal held in ***D'sa***, as it did in *Baker*, "The court held that since the release violated public policy, it necessarily followed that requiring prospective workers to sigh the release as a condition of employment was contrary to law." *Id., a*t 933, 102

Cal. Rptr. 2d at 500. "In the instant case, there exists a clear legislative declaration of public policy against covenants not to compete. '[Section 16600] represents a strong public policy of this state.'" *Id.,* at 933, 102 Cal. Rptr. 2d at 499.

However, California is markedly different than Idaho in this area of employment law. The Supreme Court of California stated:

> Under the common law, as is still true in many states today, contractual restraints on the practice of a profession, business, or trade, were considered valid, as long as they were reasonably imposed. This was true even in California. However, in 1872 California settled public policy in favor of open competition, and rejected the common law "rule of reasonableness," when the Legislature enacted the Civil Code. Today in California, covenants not to compete are void, subject to several exceptions discussed briefly below.
>
> Section 16600 states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Edwards v. Arthur Andersen, LLP, 189 P.3d 285, 288, 44 Cal. 4th 937, 945, 81 Cal. Rptr. 3d 282 (Cal. 2008). (citations omitted). In California, except in very limited circumstances, covenants not to compete are void. In Idaho, if they are reasonable, covenants not to compete are allowed. I.C. § 44-2701. And even if the covenant not to compete is not reasonable, it may be reformed by a court. Idaho Code § 44 2703 reads: "To the extent any such agreement or covenant is found to be unreasonable in any respect, a court shall limit or modify the agreement or covenant as it shall determine necessary to reflect the intent of the parties and render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement or covenant as limited or modified." *Id.* Thus, Plaintiff's reliance on California case law interpreting its significantly different statutes is misplaced. The Court of Appeals of Texas noticed this difference in answering a choice of law question in *Merritt, Hawkins & Associates, LLC, v. Capoicci,* 2016 WL 175251 (Ct. App. Tex., May 2, 2016):

> California courts have consistently affirmed that section 16600 "evinces a settled legislative policy in favor of open competition and employee mobility," "protects Californians," "and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." In contrast, Texas law allows the enforcement of noncompetition clauses to the extent they are reasonable, they are ancillary to an otherwise valid transaction or agreement, their restraints are not greater than necessary to protect a legitimate interest, and "the promise's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the promisor or any injury likely to the public."

2016 WL 175251, 4.

Pursuant to Idaho law, "[u]nless an employee is hired pursuant to a contract which specifies the duration of the employment, or limits the reasons why the employee may be discharged, the employee is 'at will.'" *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 578, 329 P.3d 356, 360 (2014) (citing *Thomas v. Medical Center Physicians, P.A.,* 138 Idaho 200, 206, 61 P.3d 557, 563 (2002) (quoting *Nilsson v. Mapco,* 115 Idaho 18, 22, 764 P.2d 95, 99 (Ct. App. 1988))). In this case, the parties agree that Plaintiff was an at-will employee of Defendant. "The employer of an employee at will may terminate the relationship at any time for any reason without incurring liability, unless the motivation for the termination contravenes public policy." *Hummer v. Evans*, 129 Idaho 274, 279, 923 P.2d 981, 986 (1996) (citing *Ray v. Nampa School Dist. No. 131,* 120 Idaho 117, 120, 814 P.2d 17, 20 (1991); *Jones v. EG & G Idaho, Inc.,* 111 Idaho 591, 593, 726 P.2d 703, 705 (1986); *MacNeil v. Minidoka Memorial Hosp.,* 108 Idaho 588, 589, 701 P.2d 208, 209 (1985)). Termination is in contravention of public policy when the employee is terminated for "(1) refusing to commit an unlawful act, (2) performing an important public obligation, or (3) exercising certain legal rights and privileges." *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 640, 272 P.3d 1263, 1271 (2012) (citing *Van v. Portneuf Med. Center,* 147

Idaho 552, 551, 212 P.3d 982, 991 (2009)).

"Public policy of the state is found in the constitution and statutes." *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 177, 75 P.3d 733, 738 (2003) (*Boise-Payette Lumber Co. v. Challis Independent School Distr. No. 1,* 46 Idaho 403, 268 P. 26 (1928)). The public policy exception was adopted "to balance the competing interests of society, the employer, and the employee in light of modern business experience." *Crea v. FMC Corp.*, 135 Idaho 175, 178, 16 P.3d 272, 275 (2000). "The determination of what constitutes public policy sufficient to protect an at-will employee from termination is a question of law." *Venable*, 156 Idaho at 579, 329 P.3d at 361 (quoting *Van,* 147 Idaho at 561, 212 P.3d at 991). If the Court determines that a public policy exists, whether that public policy was violated is a question for the trier of fact. *See id.*

While it would be impossible for the Court to enumerate all of the public policy interests under Idaho law, termination based upon the following activities or situations have been found in violation of public policy: union membership or activities (*Watson v. Idaho Falls Consol. Hospitals, Inc.*, 111 Idaho 44, 720 P.2d 632 (1986); *Roberts v. Bd. of Trustees, Pocatello School Dist. No. 25*, 134 Idaho 890, 11 P.3d 1108 (2000)); reporting safety violations (*Ray v. Nampa Sch. Dist. No. 131*, 120 Idaho 117, 814 P.2d 17 (1991); complying with a court ordered subpoena (*Hummer v. Evans*, 129 Idaho 274, 923 P.2d 981 (1996). In *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977), the Idaho Supreme Court also noted the activities or situations that are protected by the public policy exception in other jurisdictions, which included protection for employees refusing to give false testimony, reporting injuries to file a workmen's compensation claim, refusing to date a supervisor, and serving on jury duty against the

wishes of the employer. *Id.* at 334, 563 P.2d at 58.

There is no public policy exception for terminating an employee who attempts to negotiate. *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 668, 799 P.2d 70, 74 (1990). In *Sorensen*, an employee was offered a new position with the terms to be negotiated at a later date. *Id.* at 665, 799 P.2d at 71. When the employee attempted to negotiate, the employer fired him. *Id.* The employee argued that the employer violated public policy by terminating him when he attempted to negotiate. *Id.* The Idaho Supreme Court rejected that argument and held "[t]he claim that failure to negotiate is a violation of public policy, in the absence of a statute requiring employers to bargain with employees, is not supported by our prior cases." *Id.* at 688, 799 P.2d at 74. Essentially, Plaintiff negotiated, and lost in that process. Plaintiff had employment with Defendant; Defendant later required her to sign a non-compete agreement, and Plaintiff did not want to sign such. Plaintiff maintains she did not oppose signing a Non-competition Agreement, but did not want to sign an agreement that violated Idaho law. Affidavit of Angela Baker, p. 2, ¶ 4; p. 4, ¶12. All Plaintiff did was attempt to negotiate, and that negotiation did not end well. The fact that Defendant did not negotiate was not a violation of public policy per *Sorensen*.

"In order to properly state a claim under the public policy exception, a plaintiff must specifically identify the public policy in question and then provide evidence to show a violation of the public policy." *Venable*, 156 Idaho at 580, 329 P.3d at 362. Plaintiff has failed to meet that burden. Plaintiff argues she was engaging in a protected activity by exercising her legal right or privilege in refusing to sign an illegal agreement. It is not illegal to sign an unenforceable agreement. If the parties signed the Non-competition Agreement and Defendant sought to enforce it against Plaintiff,

she could raise the issue of enforceability as an affirmative defense in that cause of action. Defendant was not asking Plaintiff to commit an illegal act when it required her to sign the Non-competition Agreement. At best, Defendant asked Plaintiff to sign an agreement that might at some date in the future be determined to be unenforceable. But the only way the question of enforceability would arise would be if: 1) Plaintiff left her employment with Defendant, and then 2) Plaintiff found work which violated the agreement, and then 3) the Defendant then wished to enforce the agreement. Then, and only then, would the Defendant need to file a lawsuit to have a court modify the agreement. And even then, the remedy is not unenforceability of the entire agreement. The remedy at all times is that the Court simply modify the non-competition agreement to make it *reasonable*. This is the sequence set out by the Supreme Court of New Jersey in *Maw v. Advanced Clinical Communications, Inc.,* 846 A.2d 604 609, 179 N.J. 439, 448 (N.J. 2004):

> As previously noted, plaintiff did have options available to her. If she could not negotiate terms that were to her liking, she was free to dispute the reasonableness of those terms if and when her employer attempted to enforce the agreement. The burden then would be on the employer to hire counsel and initiate enforcement litigation…

Id. (citations omitted). Because of that reality, there is no public policy that was violated by Defendant requiring Plaintiff to sign the Non-competition Agreement.

At oral argument, Plaintiff compared signing the Non-competition Agreement to a contract for murder for hire. There is a very important distinction between those two contracts. Murder is actually **illegal**. In California, a non-compete agreement is **void**. In Idaho, the agreement Defendant required Plaintiff sign is not void when entered into. It *might* be **unenforceable, but it is not likely void and it is not illegal.**

In addition, Plaintiff contends that because Defendant required multiple employees to sign the Non-compete Agreement, there is a public policy concern.

Plaintiff's Memorandum in Response to Motion for Summary Judgment, p. 5. Specifically, she claims that by "requesting that her employer not force her or its other employees to sign an agreement" which failed to conform with the requirements of Chapter 27, Title 44, Idaho Code, she was performing an important public obligation. Complaint, p. 7, ¶ 3.9. However, it is not the number of people implicated by potential termination that creates a public policy exception to termination of an at-will employee. Rather, Plaintiff must identify a specific statute or provision of the Idaho Constitution that enumerates a public policy exception for wrongful termination. Chapter 27, Title 44, Idaho Code, upon which Plaintiff relies for her claims, does not contain such a public policy exception, but would allow Plaintiff to pursue a private cause of action against Defendant under contract theories.

Moreover, pursuant to *Sorensen*, as a matter of law, Plaintiff has failed to state a proper claim for wrongful termination under the public policy exception. The court in *Sorensen* did not find a public policy exception for an employer refusing to allow an employee to negotiate his salary. A non-competition agreement as a condition of employment is less of a restraint than the amount an employee is paid because the employee is still employed and receiving a salary. The plaintiff in the second scenario only has damages if he is fired or quits and his former employer attempts to enforce the non-competition agreement against him.

Because Plaintiff has failed to identify an enumerated public policy sufficient to protect an at-will employee from termination under the facts of this case, it is unnecessary for the Court to determine whether Baker was a "key employee" required to sign the Non-compete Agreement or whether the Non-compete Agreement is enforceable as a matter of law.

B. Plaintiff's request for an extension is denied.

Without making a motion under Idaho Rule of Civil Procedure 56(f), Plaintiff makes the following request of the Court: "To the extent the Court is inclined to rule on whether or not [Plaintiff] was factually a key employee of [Defendant], this motion is premature as Plaintiff should be afforded the opportunity to engage in further discovery, including the deposition examination of [Defendant's] management." Plaintiff's Memorandum in Response to Defendant's Motion for Summary Judgment, p. 12. Since Plaintiff has not filed an actual motion, the Court is unable to consider Plaintiff's request for additional time.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court grants summary judgment to Defendant.

IT IS HEREBY ORDERED Defendant Innercept, LLC's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED any motion by Plaintiff pursuant to I.R.C.P. 56(f) is DENIED.

Entered this 19th day of May, 2016.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2016, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Kammi Mencke Smith	509-838-1416	Mark A. Ellingsen	667-8470

_____
Jeanne Clausen, Deputy Clerk