

Pure Past

General Information

BioPharm is a large multi-national pharmaceutical company. Two years ago, BioPharm purchased ImmunoGro, Inc., the developer of ImmunoPure, an extremely pure intravenously administered immuno-globulin, used to boost immune responses in immune deficient patients. Other immuno-globulin products were either expensive and pure, or inexpensive but less pure, causing difficult side effects for some. ImmunoPure was valuable for its marriage of high purity and low cost.

ImmunoGro was started by two immunologists, Drs. Jenkins and Karp, and Chris Tillem, the manager of Jenkins' university laboratory, who left the university to set up ImmunoGro's first lab. Jenkins and Karp put up capital and took debt risk; only they became owners. Tillem was 50 at the time. After the BioPharm purchase, Tillem became a BioPharm lab manager, responsible for ImmunoPure. Karp and Jenkins continued as directors of BioPharm's ImmunoPure work.

Eighteen months ago, Tillem suffered serious health problems, including double vision, severe headaches, and tremors and spasticity in his limbs. His family physician said it may be multiple sclerosis or another neurological illness. Anticipating illness episodes and many tests before a definitive diagnosis, Tillem informed his supervisor, Elliot Lassiter, BioPharm's VP of Lab Operations, and requested FMLA leave. Lassiter sent Tillem to HR, where Tillem asked about the FMLA and obtained FMLA paperwork. The HR Director (and Lassiter) said BioPharm would work with Tillem to accommodate occasional flare ups and tests, and suggested saving FMLA for future lengthier absences.

Six months later (a year ago), BioPharm scientists had fully developed an ImmunoPure patch delivery system. The ImmunoPure patch would be less expensive, easier, and safer for most patients, except a small percentage requiring immediate, extremely concentrated doses. BioPharm asserts that it then moved ImmunoPure responsibility to its patch division to save costs. Tillem and six other BioPharm employees were terminated.

Tillem sued BioPharm, claiming age and disability discrimination and retaliation for exercising FMLA rights. Tillem notes that many of those terminated were over 40, and that some new employees hired into the patch division since then are considerably younger. Though the formal diagnosis of MS wasn't made until some months after the termination, Tillem clearly showed signs of a severe illness. Tillem claims that the BioPharm supervisor expressed discomfort with Tillem's symptoms and shut him out of important meetings before termination.

Suit was filed in federal district court. Discovery is largely complete. BioPharm anticipates moving for summary judgment but has not yet filed. Nine months after termination (three months ago), Tillem was hired as a lab technician at the state forensics laboratory, earning \$24,000 a year less than at BioPharm. Tillem's attorney has emphasized that emotional distress is an enormous factor in this case, far more than in most termination cases.

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Confidential Information for the Plaintiff, Chris Tillem

You are far, far more than angry at BioPharm and at Dr. Jenkins and Dr. Karp. They betrayed you! These people KNEW that you were going through living hell with MS. HOW COULD THEY PERMIT YOUR TERMINATION?! You were (and are) facing a degenerative illness, hopefully long-term, but still degenerative. You have no idea how long you will be able to work. You took great pride in your work at BioPharm and ImmunoGro, and in the decade of experimental work at the University to develop ImmunoPure. The idea of NOT working panics and depresses you. You are single – long ago divorced – without anyone to provide financial support.

When you were terminated, the emotional horror and fear of your illness and diagnosis were *exponentially intensified* by fear that you would not be hired anywhere before MS left you completely unable to work. You were emotionally distraught at having been set up and betrayed by Lassiter and the HR people, who refused to let you take FMLA leave, and then plotted to cut you out of BioPharm because of your medical condition.

Even more hurtful was Karp's and Jenkins' betrayal: they let BioPharm do this to you. They could have intervened – BioPharm still needs them – but didn't bother. Some reward after decades of steadfast loyalty! The ImmunoGro venture to develop ImmunoPure commercially was launched at your kitchen table. You left a secure position of 20+ years at the University to help start ImmunoPure. It was understood that you would be rewarded with bonuses and profits if and when ImmunoGro became highly profitable. Many of your laboratory innovations lead to the patented production techniques that made ImmunoPure so pure and less expensive to produce.

Unfortunately, you hadn't anticipated that ImmunoGro would be purchased just as it becoming profitable. At the time, Karp and Jenkins paid you a bonus that was significant dollars, but stingy in your view, considering what you had done for them. They also promised your new BioPharm job would enhance your responsibility and salary. That was somewhat true, but it didn't protect you from termination.

Your lawyer says you have an excellent chance of succeeding at trial, if you get past summary judgment. It helps that 5 of the 7 people terminated were over 45 and three of those were over 50. You suspect that was because the HR representative who selected people for layoffs was only 35. You know BioPharm will claim they needed people with more experience in patch technology. You could easily have learned whatever was needed! BioPharm has since hired two people into its patch division, one 28 and one 36.

You are convinced the whole "transfer" of ImmunoPure to the patch division was a ruse. The lab set up is similar, with some add-on equipment for testing patches. BioPharm's greedy management changed the lab "reporting lines" just to get rid of you and the inevitable cost of your anticipated absences. You know that under the FMLA, an employer is required to hold your job. You know that is why BioPharm's managers advised against your taking FMLA leave yet. They were planning to get rid of you.

You also sensed that BioPharm's Lassiter and even the HR manager were uncomfortable with your illness. When they saw your hands trembling or your fingers splaying (as does happen), they looked away and pretended to check the clock. A BioPharm co-worker told you that Lassiter had asked whether he noticed how "spastic Tillem is" and asked if your speech was ever slurred, because "people with neurological issues can be hard to understand." Lassiter deliberately called at least two ImmunoPure meetings late in the day, after you had left. You did tend to get tired and leave early, to rest and finish paperwork at home. If you had known of planned meetings, you would have stayed.

During the nine months that you were unemployed, the bank nearly foreclosed on your home. Ironically, a month before the termination you had sold the small house you owned outright, and purchased a house on the more expensive side of town to be closer to BioPharm. When you got your new job, you could pay the mortgage again and the bank was willing to work with you on penalties and fees. Fortunately, the house is a ranch, easily adaptable to accommodate your illness. Unfortunately, you have no money to hire a contractor to make the bathrooms and the front and side brick steps more accessible.

Your new salary of \$40,000 is \$24,000 lower than the BioPharm salary of \$64,000. The new job is less interesting. However, your colleagues are decent people and the benefits are comparable, including a long-term disability benefit at 40% of your salary.

Your attorney recommended that you try to settle your case in mediation and you agreed. However, you very much doubt that BioPharm will pay you what is right.

You remember that, shortly after suit was filed, your lawyer told you the conferencing magistrate asked if any settlement demands or offers had been made. As the answer was no, he suggested that you make a formal demand. You told your lawyer you wanted to demand \$1million, but he convinced you to start with a demand of \$600,000. Now you are sorry you did, because the defendant never made an offer.

Pure Past

Confidential Information for Plaintiff's Attorney

You are the attorney for the plaintiff, Chris Tillem. As summary of what you have learned about Chris's perspective on the case is set forth below.

Chris is far, far more than angry at BioPharm and at Dr. Jenkins and Dr. Karp. They betrayed Chris! These people KNEW that Chris was going through living hell with MS. HOW COULD THEY PERMIT HIS TERMINATION?! Chris was (and is) facing a degenerative illness, hopefully long-term, but still degenerative. Chris has no idea how long he will be able to work. Chris took great pride in his work at BioPharm and ImmunoGro, and in the decade of experimental work at the University to develop ImmunoPure. The idea of NOT working panics and depresses Chris, who is single – long ago divorced – without anyone to provide financial support.

When Chris was terminated, the emotional horror and fear of the illness and diagnosis were *exponentially intensified* by the fear of not being hired anywhere before MS left him completely unable to work. Chris was emotionally distraught at having been set up and betrayed by Lassiter and the HR people, who refused to let him take FMLA leave, and then plotted to cut Chris out of BioPharm because of his medical condition.

Even more hurtful was Karp's and Jenkins' betrayal: they let BioPharm do this to Chris. They could have intervened – BioPharm still needs them – but didn't bother. Some reward after decades of steadfast loyalty! The ImmunoGro venture to develop ImmunoPure commercially was launched at Chris' kitchen table. Chris left a secure position of 20+ years at the University to help start ImmunoPure. It was understood that Chris would be rewarded with bonuses and profits if and when ImmunoGro became highly profitable. Many of Chris' laboratory innovations lead to the patented production techniques that made ImmunoPure so pure and less expensive to produce.

Unfortunately, Chris hadn't anticipated that ImmunoGro would be purchased just as it becoming profitable. At the time, Karp and Jenkins paid Chris a bonus that was significant dollars, but stingy in his view, considering what he had done for them. They also promised the new BioPharm job would enhance Chris's responsibility and salary. That was somewhat true, but it didn't provide protection from termination.

You told Chris there is an excellent chance of succeeding at trial, if the case gets past summary judgment. It helps that 5 of the 7 people terminated were over 45 and three of those were over 50. You and Chris both suspect that was because the HR representative who selected people for layoffs was only 35. Chris has warned you that BioPharm will claim they needed people with more experience in patch technology. Chris could easily have learned whatever was needed! BioPharm has since hired two people into its patch division, one 28 and one 36.

Chris is convinced the whole "transfer" of ImmunoPure to the patch division was a ruse. The lab set up is similar, with some add-on equipment for testing patches. BioPharm's greedy management changed the lab "reporting lines" just to get rid of Chris and the

inevitable cost of his anticipated absences. Chris understands that under the FMLA, an employer is required to hold his job. (You haven’t researched it, but you doubt it would protect against a real, mass layoff.) Chris believes that is why BioPharm’s managers advised against his taking FMLA leave yet. They were planning to get rid of him.

Chris has told you of his sense at the time that BioPharm’s Lassiter and even the HR manager were uncomfortable with his illness. When they saw Chris’ hands trembling or his fingers splaying (as does happen), they looked away and pretended to check the clock. A BioPharm co-worker told Chris that Lassiter had asked whether he noticed how “spastic Tillem is” and asked if Chris’ speech was ever slurred, because “people with neurological issues can be hard to understand.” Lassiter deliberately called at least two ImmunoPure meetings late in the day, after Chris had left. Chris did tend to get tired and leave early, to rest and finish paperwork at home. If Chris had known of planned meetings, he would have stayed.

During the nine months that Chris was unemployed, the bank nearly foreclosed on his home. Ironically, a month before the termination, Chris had sold the small house he owned outright, and purchased a house on the more expensive side of town to be closer to BioPharm. When Chris got his new job, he could pay the mortgage again and the bank was willing to work with him on penalties and fees. Fortunately, the house is a ranch, easily adaptable to accommodate the illness. Unfortunately, Chris has no money to hire a contractor to make the bathrooms and the front and side brick steps more accessible.

Chris’ new salary of \$40,000 is \$24,000 lower than the BioPharm salary of \$64,000. The new job is less interesting. However, Chris has told you his colleagues are decent people and the benefits are comparable, including a long-term disability benefit at 40% of salary.

You have recommended that Chris try to settle his case in mediation. He agreed it would be a good idea, if possible. However, you can tell that he remains VERY angry with BioPharm and Drs. Karp and Jenkins. You suspect this anger may make settlement difficult.

Shortly after suit was filed, a conferencing magistrate asked if any settlement demands or offers had been made. As the answer was no, he suggested that you make a formal demand. After extensive discussion with your client, who wanted to demand \$1million, you obtained his agreement to make a demand of \$600,000. You have never received an offer from the defendant.

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Confidential Information for BioPharm's Representative

[Participants in the simulated mediation exercise will determine whether BioPharm's representative will be its VP of Human Resources, the HR Director, the Plaintiff's Supervisor, or Drs. Karp or Jenkins. The information below summarizes BioPharm's broader perspective. Participants playing any of the representative roles should spend some time imagining how a person in that role would view the plaintiff and the dispute and make settlement decisions.]

You are sorry that Chris Tillem is suffering from multiple sclerosis (MS), but BioPharm is not to blame. Tillem was a reasonably good BioPharm employee. He was terminated because of ImmunoPure move to the PharmPatch Division, enabling reductions in laboratory staff.

To avoid legal action from all staff reductions, the HR Department uses an objective system to rate employees based on company needs. In this instance, HR asked PharmaPatch managers what qualifications and experience were priorities for the expanded division's laboratory. All lab personnel were then rated according to these criteria. Tillem's rating would have been done by his supervisor, Lassiter. A relatively young (35 year old) HR representative did conduct the process of setting up criteria and recording scores for each potentially affected employee, based upon her interviews with management and review of employee's files. Tillem's training and experience did not include a number of laboratory applications for patch technology. She noted that Tillem was recognized as a hard worker, but was not rated well for "flexibility" or "willingness/ability to learn new skills" and was rated low on "demonstrated teamwork or teamwork potential." In BioPharm's ImmunoPure lab, Tillem was perceived as stuck in "the way we did it at ImmunoGro."

While it looks bad that 5 of the 7 employees laid off were over 45 and 3 were over 50, most of these (including Tillem) were over 40 when they were hired. Because ImmunoPure was shifting largely to patch delivery, laboratory personnel from the PharmPatch Division, or with patch experience from previous work, were seen as more valuable. The few employees retained from ImmunoPure's lab for limited intravenous drug production had "cross-over potential" – high ratings in flexibility and willingness to learn new skills. After the terminations, PharmPatch's production needs increased rapidly and a few (admittedly younger) people were hired.

Lassiter and the HR department are adamant that they were trying to be helpful by suggesting that Tillem delay filing for FMLA leave. (Tillem testified on deposition that BioPharm's advice to delay in the FMLA filing was a set up, to leave Tillem unprotected from a planned termination.)

BioPharm may take the position that Tillem's emotional distress was from the illness as much as the termination. BioPharm's Lassiter and the HR manager sensed that Tillem was embarrassed about the physical symptoms of MS. In the middle of a conversation, when Tillem's hands were trembling or fingers splaying, Tillem would interrupt: "What are you staring like that for?" As the symptoms became more severe, they would look away sometimes, pretending to be distracted by something or to check the time, so that Tillem wouldn't be embarrassed.

In fact, BioPharm's management had tried to be sensitive to Tillem's needs as the illness became more manifest. Before the Patch Division announced that ImmunoPure could be delivered

through a patch, BioPharm had been looking into various technologies to accommodate Tillem in the ImmunoPure lab. Not wanting to intrude or embarrass Tillem, they had asked some co-workers about their observations of spasticity in Tillem's hands, thinking that speech recognition software might be helpful. They also inquired as to whether Tillem's speech was ever slurred, because that might not work with the software. Lassiter tried to schedule meetings in which Tillem would have a central role early in the day because Tillem tended to get tired and leave early. Lassiter and BioPharm had no problem with this, as they knew Tillem rested and finished paperwork at home. Less important meetings for Tillem were moved to later in the day, and Lassiter would fill Tillem in on what was missed, if necessary.

BioPharm suspects that Tillem's anger is being fueled by resentment over Dr. Karp's and Dr. Jenkins' hitting the jackpot in the sale of ImmunoGro. Karp and Jenkins would maintain that they gave Tillem a sizeable bonus from the sale even though not legally obligated to do so. Tillem also benefited initially from the BioPharm job. When Karp and Jenkins had struck a deal with BioPharm, they negotiated for BioPharm to hire Tillem for ImmunoPure in a position that would enhance Tillem's salary and responsibility.

Karp and Jenkins recognize that Tillem *thinks* his stellar lab work was the major factor in ImmunoPure's success. They recognize that Tillem was intelligent, committed and had streamlined some of the lab production. However, Tillem is a technician, not a scientist. Tillem did not do the research, conceive of ImmunoPure, design the experiments, or own the patents.

Tillem may have still felt that Karp and Jenkins should have (or could have) just continued to run ImmunoPure like a pet project of two academics, with planning meetings over kitchen tables. Tillem may have expected that Karp and Jenkins would protect him from the big bad BioPharm. However, when they sold the company, Karp and Jenkins agreed to continue scientific work on ImmunoPure, but not to become involved in management decisions. They recognized that Tillem would not be protected forever, but had assumed Tillem would make himself indispensable to BioPharm through hard work. They had not anticipated that ImmunoPure would be moved to the Patch Division, allowing corporate cost savings through reductions in staff.

Your attorney has told you that if the case is not thrown out on summary judgment, there is significant exposure for BioPharm in this case, because of the timing of the lay off, and because a jury might have tremendous sympathy for Tillem. The actual damages are not that high. Tillem was only out of work for nine months. There is a \$24,000 difference between the BioPharm salary of \$64,000 and Tillem's new \$40,000 salary in the state forensics lab. However, you understand that the plaintiff's attorney will be seeking enormously high emotional distress damages.

Your attorney recommended that you try to settle the case in mediation. You thought settlement would be a good idea, if it's possible.

You remember that, shortly after suit was filed, your lawyer told you the magistrate asked if any settlement demands or offers had been made. As the answer was no, he suggested the plaintiff make a formal demand. A week or so later, plaintiff's counsel communicated a \$600,000 demand. Because the number was so high, you and your lawyer decided not to make a counter offer.

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[BioPharm is your client. You must discuss with BioPharm whether its representative will be its VP of Human Resources, the HR Director, the Plaintiff's Supervisor, or Drs. Karp or Jenkins. That representative will then participate in the mediation and make ultimate settlement decisions, hopefully influenced by your advice. The information below summarizes BioPharm's broader perspective, and information that you would have obtained from your client prior to mediation.]

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You recommended that BioPharm that try to settle the case in mediation and the client seemed to agree that would be a good idea, if possible.

You remember that, shortly after suit was filed, the conferencing magistrate asked if any settlement demands or offers had been made. As the answer was no, he suggested the plaintiff make a formal demand. A week or so later, plaintiff's counsel communicated a \$600,000 demand. Because the number was so high, you and your client decided not to make a counter offer.