
PURE PAST MEDIATION

Confidential Information for BioPharm's Attorney

[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 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 negotiating.]

BioPharm is sorry that Chris Tillem is suffering from multiple sclerosis (MS), but BioPharm is not to blame. Tillem was a reasonably good BioPharm employee, who was only 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 PharmPatch managers what qualifications and experience priorities for the expanded division's laboratory were. 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 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.

You have told the client that if the case is not thrown out on summary judgment, BioPharm has significant exposure in this case, because of the timing of the layoff, 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 salary of \$40,000 in the state forensics lab. However, you understand that the plaintiff's attorney will be seeking enormously high emotional distress damages, and you have warned your client of that.

You recommended that BioPharm that try to settle the case in mediation; 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 counteroffer. Now, you and your client will have to consider what they would be willing to settle for in mediation.