

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOAN GALLAGHER,

Plaintiff,

v.

INTERMUNE INC., et al.

Defendants.

Civil Action No. 04-1200

March 31, 2005

MEMORANDUM / ORDER

Currently before the court in this diversity suit is defendants motion to dismiss plaintiff s complaint alleging wrongful termination in violation of public policy. As alleged in her complaint, Joan Gallagher was a sales representative for defendant InterMune who refused to engage in what she believed to be the illegal off-label marketing of Actimmune, a drug produced by InterMune. In response to her refusal, InterMune terminated Ms. Gallagher. In their motion to dismiss, defendants argue that plaintiff has failed as a matter of law to state a claim for wrongful discharge since, according to defendants, the allegations of the complaint, if

credited, do not establish that Ms. Gallagher's termination constituted a violation of a clear Pennsylvania public policy mandate.

[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Pryor v. NCAA, 288 F.3d 548, 559 (3d Cir., 2002). Further, a court must accept all the factual allegations of the complaint as true, and must draw all reasonable inferences to aid the pleader. 288 F.3d at 559 (3d Cir., 2002) (internal citation omitted).

Pennsylvania's general policy of at-will employment, see Henry v. Pittsburgh & Lake Erie Railroad Co., 21 A. 157 (Pa. 1891), admits of a limited number of exceptions, see Geary v. United States Steel Corporation, 319 A.2d 174 (Pa. 1974), among which is the circumstance where a termination of an employee would violate a clear mandate of public policy. McLaughlin v. Gastrointestinal Specialists, 750 A.2d 283 (Pa. 2000) (citing Geary, 319 A.2d at 180).

Two elements must be present to qualify for the public policy exception to Pennsylvania's at-will employment presumption (1) an allegation that the termination violates *Pennsylvania's* public policy; and (2) conduct by the defendant that implicates more than the plaintiff's personal interest. McLaughlin, 750 A.2d at 289.

Pennsylvania's public policy must be gleaned by examining the precedent within Pennsylvania, looking to [Pennsylvania's] Constitution, court decisions and statutes

promulgated by [Pennsylvania s] legislature. McLaughlin, 750 A.2d at 288. Plaintiff has adequately demonstrated that the two Pennsylvania statutes to which she cites the Unfair Trade Practice and Consumer Protection Law (UTPCPL), and Controlled Substance, Drug, Device and Cosmetic Act (CSDDCA) -- reflect a clear public policy prohibiting deceptive, off-label marketing of pharmaceutical products.¹ Further, Ms. Gallagher s unwillingness to lend herself to marketing practices deemed violative of statutory policies stemmed from concerns transcending interests personal to her. Animating plaintiff s refusal to participate in marketing Actimmune for an untested purpose were concerns about possible harm to patients misled into using Actimmune in medically inappropriate ways. Insofar as the interests motivating Ms. Gallagher s refusal were the same as those that Pennsylvania s public policy seeks to protect, her termination implicates interests of the requisite level of generality.

In sum, plaintiff has articulated with sufficient support a clear, Pennsylvania public policy that defendants alleged conduct violated. As such, her claim fits within the

¹The UTPCPL provides the Attorney General with a cause of action against, among others, corporations engaged in unfair or deceptive acts or practices, 73 Pa. Cons. Stat. § 201-1 et seq., which include [r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have ..., 35 Pa. Cons. Stat. § 201-2(1)(v). Assuming plaintiff s allegations to be true, defendants off-label marketing would qualify as an unfair or deceptive practice. Similarly, the CSDDCA also prohibits deceptive marketing practices, 35 Pa. Cons. Stat. § 780-113(a)(3), which it defines to include dissemination or publication of any false or misleading advertisement, id., and an advertisement is any representation disseminated in any manner for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase and/or use of a ... drug, 35 Pa. Cons. Stat. § 780-102. The facts alleged in Ms. Gallagher s complaint would, if proven, establish that IM engaged in the sort of marketing practices that the CSDDCA prohibits.

limited exception permitting a cause of action for wrongful discharge where that discharge violated public policy. She has therefore met her burden for stating a claim for which relief can be granted. Accordingly, it is hereby ORDERED that defendants motion to dismiss is DENIED.

Pollak, J.