

IN THE MATTER OF THE ARBITRATION BETWEEN
ELENA FERRANTE

and

AMGEN, INC.

JAMS Ref. No. 1420018077

OPINION AND ORDER ON MOTION TO DISMISS COUNT II
OF THE THIRD AMENDED NOTICE OF CLAIM

John C. Lifland, Arbitrator

Respondents have moved to dismiss Count II of the Third Amended Notice of Claim. Count II alleges that Claimant was terminated in retaliation for “Claimant’s resistance and/or refusal to endorse, promote and participate in” conduct of Respondents which allegedly violated “ethical and legal standards, as well as clear mandates of public policy.” Paragraphs 50, 52.

Respondents argue that Count II is legally deficient because (1) Claimant fails to allege that she reported any allegedly illegal behavior to a government entity, and (2) because she has failed to identify, with specificity, the public policy on which she relies.

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As to failure to report allegedly illegal behavior to a government entity, Count II does not allege any such reporting or attempted reporting. It is alleged that Claimant repeatedly voiced her objections, but only to Respondents. Respondents argue that reporting to a government entity is an essential element of a claim based on Pierce v. Ortho Pharmaceutical Corporation, 84 N.J. 58 (1980), which appears to be the legal foundation for Count II.

No such reporting requirement appears in the Pierce opinion. The holding of Pierce is that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. However, clear support for the reporting requirement is found in dicta in a subsequent New Jersey Supreme Court decision, Young v. Schering Corp., 141 N.J. 16 (1995) and to a lesser extent in an Appellate Division decision, House v. Carter-Wallace, Inc., 232 N.J. Super. 42 (App. Div. 1989), which pre-dated Young.

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Chronologically, New Jersey law developed as follows. Pierce is of course the seminal case, decided in 1980. Next came Citizens State Bank of New Jersey v. Libertelli, 215 N.J. Super. 190 (App. Div. 1987), which denied a wrongful discharge claim primarily for reasons related to the banking laws of New Jersey, not here relevant. The Court described Pierce as establishing that “an employer’s right to fire an at-will employee carries with it a correlative duty not to fire one who declines to perform an act that would require violation of a clear mandate of public policy.” 215 N.J. Super. at 195.

In 1989, the Appellate Division of the Superior Court of New Jersey decided House v. Carter-Wallace Inc., 232 N.J. Super. 42 (App. Div. 1989), *certif. denied*, 117 N.J. 154 (1989). Mr. House, relying on Pierce, complained that his termination of employment was in retaliation for his opposition to the distribution of a product which he felt was contaminated, and therefore violated a clear mandate of public policy. His opposition was never communicated outside of the corporation. The Court observed:

“...no New Jersey case has recognized a claim for wrongful discharge based solely upon an employee’s internal complaints about a corporate decision, where the employee has failed to bring the alleged violation of public policy to any governmental or other outside authority or to take other effective action in opposition to the policy.”

232 N.J. Super. at 48-49. The Court went on to discuss cases from other jurisdictions which also generally limited an employee’s cause of action for a discharge based on opposition to an employer’s conduct which violates public policy to situations where the employee has complained to an outside party or taken other action reasonably calculated to prevent the objectionable conduct. A cause of action for wrongful discharge was found to exist in several of those cases where there was no reporting to an outside authority but the employee refused to do certain acts which would have violated public policy. See cases at 232 N.J. Super. 50. Because Mr. House neither reported his concerns outside of the corporation nor took any effective action to prevent distribution of the allegedly contaminated product, his claim was dismissed.

An alternate ground for the decision was stated as follows:

“Furthermore, even if a cause of action were maintainable for a retaliatory discharge based solely on an employee’s internal expressions of disagreement with corporate policy, House did not have a reasonable belief that the quarantined Pearl Drops were contaminated.”

232 N.J. Super. at 51.

In 1995, the New Jersey Supreme Court decided Young v. Schering Corporation, 141 N.J. 16 (1995). Young was a CEPA case and the issue was the extent of the CEPA waiver provision. In dicta, the Court compared a CEPA cause of action with a Pierce cause of action, as to their notification requirements:

“The CEPA cause of action benefits the employee because notification or threatened notification to a public body or a supervisor of illegal employer conduct is sufficient. N.J.S.A. 34:19-3, subd. a. Under Pierce, however, there must be actual notification to a governmental body of illegal employer conduct.”

141 N.J. at 27. There is no citation to specific or general language in Pierce supporting the last sentence quoted above. Respondents rely heavily on the quoted language because there is no allegation in Count II of notification to a governmental body.

One year later, the New Jersey Supreme Court decided MacDougall v. Weichert, 144 N.J. 380 (1996). The Court had no need to, and did not, address the notification requirement in any detail, merely noting that:

“In most cases of wrongful discharge, the employee must show retaliation that directly relates to an employee’s resistance to or disclosure of an employer’s illegal conduct.”

144 N.J. at 393. It is difficult to reconcile this statement of Pierce’s holding, by the same court a year after Young, with Young’s dicta.

Thus, the judicial history of the reporting/notification requirement can be summarized as follows: It does not derive from the seminal case (Pierce) which

established a cause of action for wrongful discharge in violation of public policy. It first appeared in an Appellate Division decision (House) as a primary (though alternative) basis for the decision to dismiss the claim, and “effective action in opposition to the policy” of the employer was phrased as being an alternative to reporting/notification. In Young, seemingly unequivocal dicta referred to a requirement of actual notification to a governmental body of illegal employer conduct to support a Pierce claim. In MacDougall, resistance to or disclosure of the employer’s conduct was mentioned as the operative requirement. Libertelli described Pierce’s holding as prohibiting termination for refusal to perform an act which would violate a clear mandate of public policy, with no mention of a reporting/notification requirement.

Thus, it appears that the Appellate Division added an element to a Pierce cause of action and, arguably, the New Jersey Supreme Court clearly endorsed that addition, albeit in dicta. However, in all of the above authorities (except Young), it was explicitly stated that resistance to the employer’s conduct, or effective action in opposition to it, or other action reasonably calculated to prevent the objectionable conduct, would serve to satisfy the requirements of a Pierce claim, even if there were no reporting/notification to an outside authority. Thus, the authorities which preceded and came after Young did not impose an absolute requirement of reporting/notification; a Pierce cause of action could proceed upon allegations of resistance to the employer’s conduct, effective action in opposition to it, or refusal to participate in it.

As to Young’s dicta, the Arbitrator is of the view that it was also not meant to impose that absolute requirement. The issue in Young was CEPA waiver, and the context of the Court’s statement was a comparison only of the CEPA and Pierce reporting/notification requirements, noting that CEPA’s was more generous to the employee in that it only required a threat of notification, not actual notification, and even then only to a supervisor, not a governmental body. In that context, the Court had no occasion to decide whether reporting/notification was the only way a Pierce claim could survive.

Carey v. Foster-Wheeler Corp., 1992 U.S. Dist Lexis 6836 (D.N.J. 1992), involved a concession by the plaintiff that he did not report the allegedly illegal conduct to any outside authorities. The Court noted at page *19:

“Thus, Carey’s Pierce claim must fail unless he took some *effective action* in opposition to the alleged scheme.” (Emphasis in original)

Because Carey took no action in opposition to the alleged scheme and did not report it to any outside authorities, his claim was dismissed. The Court distinguished a situation where an employee declined to participate in an illegal activity, citing Radwan v. Beecham Laboratories, 850 F. 2d 147 (3d Cir. 1988), which held that a Pierce cause of action was available in such circumstances.

In Tartaglia v. UBS PaineWebber Incorporated, 2006 WL 2560687, an unreported Appellate Division decision presently pending before the New Jersey Supreme Court, summary judgment for the employer was affirmed, on the ground that the employee’s complaints were limited to those made to her various supervisors. The opinion did not discuss any facts which could constitute refusal to perform an allegedly illegal act, effective resistance to the employer’s policies, or efforts by the employee to prevent the allegedly illegal conduct. The trial judge had stated, and the Appellate Division agreed, that:

“And, as the Supreme Court has interpreted Pierce, a plaintiff must actually notify an outside agency to prove her discharge was against public policy.”

The Arbitrator believes that it is this statement which is presently under review by the Supreme Court of New Jersey. Tartaglia was argued a year ago, suggesting that the Court does not find the issue an easy one.

The foregoing review of New Jersey law leads the Arbitrator to conclude that reporting alleged illegal activity to an outside authority is not the sine qua non of a Pierce cause of action. As noted above, effective resistance to the employer’s policy, refusal to do an act commanded by the employer, or action reasonably calculated to prevent the objectionable conduct have all been stated by courts to be adequate surrogates for notification to an outside authority. Even House, the undisputed source of the requirement Respondents seek to impose, recognized effective action in opposition to the employer’s policies as an alternative to reporting to an outside authority. 232 N.J. Super at 48-49.

The present motion to dismiss Count II requires an evaluation of the

allegations of the Third Amended Notice of Claim, in light of the Arbitrator's view of New Jersey law, as set forth above. After alleging various aspects of Amgen's marketing strategy and her reactions to it in Paragraphs 7-25, Claimant alleged in Paragraph 51 that she repeatedly voiced her objections to those marketing strategies to Respondents. In Paragraph 52, Claimant refers to her "resistance and/or refusal to endorse, promote and participate in" the marketing strategies she disagreed with, and alleges that in retaliation therefor she was terminated.

As indicated above, an allegation of retaliatory discharge for refusal to participate in the employer's policies, coupled with an allegation that those policies violate clear mandates of public policy, states a claim under Pierce. Those allegations appear in Paragraphs 7-25, 51 and 52. Accordingly, the motion to dismiss based on failure to report to a government entity is denied.

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Respondents also move for dismissal because, in their view, Claimant has failed to identify, with specificity, the public policy on which she relies. Claimant must point to a mandate of public policy which is clearly identified and firmly grounded.

This is not a case implicating only the private interests of the parties, insofar as Count II is concerned. Interests of patients of physicians that Amgen hopes will prescribe its products are directly reflected in the allegations of Paragraphs 17, 18, 19, 20, 24 and 25. Cases like DeVries v. McNeil Consumer Prods Co., 250 N.J. Super. 159 (App. Div. 1991) are therefore not helpful.

The Third Amended Notice of Claim is adequately specific as to the public policy on which Claimant relies. In paragraphs 17, 18, 19 and 20, Claimant refers to the obvious dangers of alleged promoting of mis-prescription and over-prescription of Amgen's drug and it can be easily inferred that federal law and medical professional ethics are implicated. Subsequent Paragraphs are more explicit. In Paragraph 21, it is alleged that Claimant was instructed to commit alleged violations of HIPAA, a federal law. In Paragraph 24, Claimant alleges efforts by Amgen to promote off-label uses of its drug, a clear violation of FDA requirements for which drug companies have been fined hundreds of millions of

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dollars.¹ See U. S. ex rel. Franklin v. Parke-Davis, Div. Of Warner-Lambert Company, 147 F. Supp. 2d 39,44 (D. Mass. 2001):

“Though physicians may prescribe drugs for off-label usage, the FDA prohibits drug manufacturers from marketing or promoting a drug for a use that the FDA has not approved. *See* 21 USC 331(d) (prohibiting distribution of drugs for non-approved uses.”

The Arbitrator is satisfied that the allegations of Count II of the Third Amended Notice of Claim are sufficient to support the requirement of Pierce that there be an identification of the public policy on which Claimant relies.

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For the foregoing reasons, Respondents’ motion to dismiss Count II of the Third Amended Notice of Claim is denied.

/s/ John C. Lifland
Arbitrator

October 8, 2008

¹ See The New York Times, October 8, 2008, page B4, col. 6, describing a substantial payment by a drug company “to settle federal criminal and civil claims” that it had promoted a drug for unapproved uses during the 1990's.