IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
WHITESIDE COUNTY, ILLINOIS

FILED
CIRCUIT COURT WHITESIDE COUNTY
DATE 6/8/05
CLERK
Sheila J. Selgren

MORR-FITZ, INC., an Illinois corporation, D/B/A FITZGERALD PHARMACY, Licensed and Practicing in the State of Illinois as a Pharmacy,

Plaintiff,

v.

ROD R. BLAGOJEVICH, Governor, State of Illinois; FERNANDO E. GRILLO, Secretary, Illinois Department of Financial and Professional Regulation; DANIEL E. BLUTHARDT, Acting Director, Division of Professional Regulation; and the STATE BOARD OF PHARMACY, in their official capacities,

Defendants.

Case No. 05-MR 47

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

NOW COMES Plaintiff, MORR-FITZ, INC., D/B/A FITZGERALD PHARMACY, by and through its attorneys, Mailee R. Smith, Americans United for Life, Chicago, Illinois, and Edward R. Martin, Jr., Americans United for Life, St. Louis, Missouri, and hereby moves this Honorable Court to enter a Preliminary Injunction against Defendants, as authorized by 735 ILCS §§ 11-101 and 11-102, restraining and enjoining Defendants Blagojevich, Grillo, Bluthardt, and the State Board of Pharmacy [hereinafter collectively "Government Defendants"], their officers, agents, employees, successors, attorneys, and all those in active concert or in participation with them, from the specific conduct described herein, pending a hearing and awarding of relief sought via a preliminary injunction as contained in Plaintiff's Verified Complaint in the same action as this motion, and further moves this Court for an order setting a date for such hearing.

In support of this motion, Plaintiff incorporates herein by reference its Verified Complaint for Declaratory and Injunctive Relief. In its Verified Complaint, Plaintiff alleges that the Government Defendants, by filing and enforcing the Emergency Rule codified at 68 Ill. Adm. Code § 1330.91(j), have violated and will in the absence of the requested injunctive relief continue to violate Plaintiff's rights, under federal and state law, not to participate in the destruction of human life in violation of its religious beliefs and moral conscience. Government Defendants have also forced and will force Plaintiff to violate those same rights of its employees.

DISCUSSION

The purpose of both a temporary restraining order and a preliminary injunction is to maintain the status quo pending a hearing on the merits of a case. *People ex rel. Jesse White v. Travnick*, 346 Ill. App. 3d 1053, 1060 (Ill. App. Ct. 2nd Dist. 2004). Temporary restraining orders and preliminary injunctions amount to the same type of relief and require the same elements of proof. *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664 (Ill. App. Ct. 5th Dist. 1993). The decision to grant or deny injunctive relief rests within the sound discretion of the trial court. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W. Ry. Co.*, 195 Ill. 2d 356, 366 (Ill. 2001).

In order to obtain a temporary restraining order and preliminary injunction, Plaintiff must establish 1) that it has an ascertainable right needing protection; 2) that there is no adequate remedy at law; 3) that it will suffer irreparable harm if relief is not granted; and 4) that it has a likelihood of success on the merits. *Wilson*, 349 Ill. App. 3d at 248; *Keefe-Shea Joint Venture, Inc. v. City of Evanston*, 332 Ill. App. 3d 163, 169 (Ill. App. Ct. 1st Dist. 2002). The trial court must also decide whether the balance of hardships to the parties supports granting injunctive relief. *Bollweg v. Marker*, 353 Ill. App. 3d 560, 572 (Ill. App. Ct. 2nd Dist. 2004).

I. PLAINTIFF HAS AN ASCERTAINABLE RIGHT NEEDING PROTECTION

The standard for establishing an ascertainable right that requires protection is "not difficult." *Grandberg v. Didrickson*, 279 Ill. App. 3d 886, 889 (Ill. App. Ct. 1st Dist. 1996) (citing *Continental Cablevision v. Miller*, 238 Ill. App. 3d 774, 787 (Ill. App. Ct. 1st Dist. 1992)). To demonstrate a clear and ascertainable right, the Plaintiff must only raise a fair question that it has a substantive interest recognized by statute or common law. *Limestone Dev. Corp. v. Lemont*, 284 Ill. App. 3d 848, 854 (Ill. App. Ct. 1st Dist. 1996).

Plaintiff has a protectable right not to fill prescriptions for "Plan B," a post-coital contraceptive that operates to destroy a fertilized human ovum, in violation of its conscience and its religious belief that life begins at conception. As set forth in the Complaint, these rights are protected by the Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq*., the Illinois Human Rights Act, 775 ILCS 5/101 *et seq*., and the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 *et seq*. In addition, Plaintiff has protectable rights under the Illinois Administrative Procedure Act, 5 ILCS 100/5-5 *et seq*., the Illinois Pharmacy Practice Act of 1987, 225 ILCS 85/1 *et seq*., and Title VII of the Civil Rights Act, U.S.C. § 2000e(j) (2005). These rights include the assurance that regulations governing its conduct as a pharmacy are valid regulations promulgated pursuant to those Acts.

Furthermore, Illinois courts consistently maintain that a threatened business interest is an identifiable right which may be protected by injunctive relief. *Continental Cablevision*, 238 Ill. App. 3d at 787; *In re Marriage of Joerger*, 221 Ill. App. 3d 400, 405 (Ill. App. Ct. 4th Dist. 1991); *In re Marriage of Weber*, 182 Ill. App. 3d 212, 219 (Ill. App. Ct. 1st Dist. 1989). Due to the Governor's threat that violators of his "Emergency Rule" will face punishment and the loss

of their licenses, this potential loss of license is a real and severe threat to the business of Plaintiff. As such, it is yet another ascertainable right requiring protection.

II. PLAINTIFF HAS NO ADEQUATE REMEDY AT LAW

There is no adequate remedy at law when damages are difficult to quantify, such as where monetary damages cannot adequately compensate the injury and the injury cannot be measured by pecuniary standards. *Bollweg*, 353 Ill. App. 3d at 576; *Franz v. Calaco Dev. Corp.*, 322 Ill. App. 3d 941, 947 (Ill. App. Ct. 2nd Dist. 2001). To preclude injunctive relief, a remedy must be "clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *In re Marriage of Hartney*, 2005 Ill. App. LEXIS 276, *4 (Ill. App. Ct. 2nd Dist. 2005); *C.J. v. Dept. of Human Serv.*, 331 Ill. App. 3d 871, 891 (Ill. App. Ct. 1st Dist. 2002). Where a remedy is not the most practical and efficient, there is no adequate remedy. *Joerger*, 221 Ill. App. 3d at 407.

At stake is Plaintiff's right of religious freedom and its right of conscientious refusal to assist in the destruction of human life. Every day that Plaintiff operates its business, it is subject to the very real risk that it will be forced to fill and counsel for a prescription for "Plan B" in violation of its rights of conscience and free exercise of religion. It also faces the risk that it will be forced to require one of its employees to fill and counsel for a prescription for "Plan B" in violation of that employee's right of conscience and free exercise of religion. Not only are damages difficult to quantify, but no monetary damages will suffice to remedy such an extreme and intrusive violation of Plaintiff's right of conscience.

Additionally, Plaintiff's rights of due process afforded him by the Illinois Administrative Procedure Act and his right to be governed by regulations promulgated pursuant to those set out in the Illinois Pharmacy Practices Act governing its business are continually being denied by the

Government Defendants' enforcement and threatened enforcement of the "Emergency Rule." Such a continuing violation of Plaintiff's due process rights demonstrates that Plaintiff has no adequate remedy at law. *See C.J.*, 331 Ill. App. 3d at 891.

III. PLAINTIFF WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF

To demonstrate irreparable harm, the Plaintiff need not demonstrate an injury that is beyond repair or compensation in damages. *Bollweg*, 353 Ill. App. 3d at 577. Instead, the Plaintiff need only show transgressions of a continuing nature—*i.e.*, that, without relief, plaintiff will continue to suffer the same injury. *Id.*; *Continental Cablevision*, 238 Ill. App. 3d at 788. The continuation of a loss to a legitimate business interest is sufficient to show that the Plaintiff will suffer irreparable harm. *Sheehy v. Sheehy*, 299 Ill. App. 3d 996, 1005-06 (Ill. App. Ct. 1st Dist. 1998). In fact, once a protectable right is established, irreparable injury is presumed if that right is not protected. *Cameron v. Bartels*, 214 Ill. App. 3d 69, 73 (Ill. App. Ct. 4th Dist. 1991); *see also C.J.*, 331 Ill. App. 3d at 891 (stating that a continuing violation of a constitutional right which cannot be adequately compensated constitutes a *per se* irreparable harm).

Because Plaintiff has established a right that is not being protected, irreparable harm is presumed. In addition, because of the Government Defendants' filing and threatened enforcement of the illegal "Emergency Rule," Plaintiff is chilled in the exercise of its rights of conscience and religious freedom under state and federal law. Indeed, Plaintiff's failure to dispense or force its employees to dispense "Plan B" in violation of its conscience and religious beliefs would jeopardize its license and thus the job of every one of its employees. Thus, Plaintiff does not have the luxury of exercising its right of conscience and raising its claims at disciplinary proceedings. Any exercise of its right of conscience subjects Plaintiff to the possibility of losing its business and subjects its employees to the possibility of losing their

employment should the Government Defendants follow through on their threats to enforce the "Emergency Rule." These continuing transgressions and the continual threat of loss to Plaintiff's legitimate business interest demonstrate that Plaintiff will suffer irreparable harm.

IV. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

In order to establish that the Plaintiff is likely to succeed on the merits, it must only raise a fair question as to the existence of the rights claimed. *Keefe-Shea*, 332 Ill. App. 3d at 174. However, an exception to the necessity of establishing a likelihood of success occurs when a plaintiff is seeking to simply maintain the status quo. *Joerger*, 221 Ill. App. 3d at 407-08 (stating that "status quo" is characterized as the last, peaceable uncontested status which preceded litigation) (quotation omitted). In fact, if a plaintiff "seeks only to maintain the status quo until the ultimate issue is decided, the injunction is properly allowed or maintained even where there may be serious doubts as to the ultimate success of the complaint." *Blue Cross Ass'n v. 666 N. Lake Shore Dr. Assoc.*, 100 Ill. App. 3d 647, 651 (Ill. App. Ct. 1st Dist. 1981).

A. Illinois Health Care Right of Conscience Act

The Illinois Health Care Right of Conscience Act, 745 ILCS 70/1 *et seq*., states that it is the public policy of the State of Illinois to "respect and protect the right of conscience of all persons … who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually [or] corporately…." 745 ILCS 70/2. The act prohibits all forms of discrimination or coercion upon such entities that, by reasons of their conscience or conscientious convictions, refuse to obtain or deliver certain health care services and medical care. *Id.* Under the Act, "health care" is defined as *any phase* of patient care, including but not limited to counseling, referrals or advice regarding the use or procurement of contraceptives. 745 ILCS 70/3.

According to the Illinois Pharmacy Practice Act, the definition of the "practice of pharmacy" is as follows:

> [T]he provision of pharmaceutical care to patients as determined by the pharmacist's professional judgment in the following areas, which may include but are not limited to (1) patient counseling, (2) interpretation and assisting in the monitoring of appropriate drug use and prospective drug utilization review, (3) providing information on the therapeutic values, reactions, drug interactions, side effects, uses, selection of medications and medical devices, and outcome of drug therapy, (4) participation in drug selection, drug monitoring, drug utilization review, evaluation, administration, interpretation, application of pharmacokinetic and laboratory data to design safe and effective drug regimens, (5) drug research (clinical and scientific), and (6) compounding and dispensing of drugs and medical devices.

225 ILCS 85/3(d). The Act further defines "pharmacist" as "an individual health care professional and provider currently licensed in this State to engage in the practice of pharmacy." 225 ILCS 85/3(k-5). The Act includes in its definition of "health care worker" those "pharmacists licensed under the Pharmacy Practice Act of 1987." 225 ILCS 47/15(d). Plaintiff is not a mere dispenser of drugs. It employs health care professionals and provides heath care services, including instructing, counseling, referring, advising, and providing contraceptives and medications.

Plaintiff is certainly an entity engaged in the delivery of and arrangement for health care services and as such is protected under the Right of Conscience Act. With this established, it clearly possesses a right not to be forced, in violation of its sincere religious beliefs and moral conscience, to provide patients with and counsel patients on the dosage and usage of "Plan B" that will cause the destruction of a fertilized human ovum.

In addition, Sections 5 and 7 of the Act prohibits an entity from discriminating against its employees or potential employees on the basis of their conscientious refusal to fill contraceptive prescriptions. 745 ILCS 70/5, 70/7. Yet that is exactly what the "Emergency Rule" would force

Plaintiff to do. However, under the Act, Plaintiff cannot be held civilly or criminally liable to any person, estate or public or private entity because of its refusal to provide any type of health care service which violates its conscience as documented in its ethical guidelines. 745 ILCS 70/9. *See* Exhibit _______.

For each of these reasons, the "Emergency Rule" is plainly in violation of the Illinois Rights of Conscience Act.

B. The Illinois Administrative Procedures Act

The Governor has made repeated statements to the media that *he* issued the subject "Emergency Rule." Yet the Illinois Administrative Procedures Act provides for emergency rulemaking authority only where an *agency* finds that an emergency exists. 5 ILCS 100/5-45(a-b). The *agency* may adopt emergency rules. The Act states that the term "agency" does not include the Governor. 5 ILCS 100/1-20. The Governor simply has no authority to issue such an emergency rule, and therefore the "Emergency Rule" he issued is void.

Additionally, because no emergency existed, the promulgation of the "Emergency Rule" without satisfying the requirements of 5 ILCS 100/5-5 *et seq*., including the requirement of a public hearing and an opportunity for public notice and comment, was illegal. Illinois courts have recognized that while determination by an agency that there exists a threat to "the public interest, safety, or welfare" is due some deference, courts are not conclusively bound by an agency's determination that an emergency exists. *Champaign-Urbana Pub. Health Dist. v. Ill. Labor Relations Bd.*, 354 Ill. App. 3d 482, 489 (Ill. App. Ct. 4th Dist. 2004).

Many pharmacists and pharmacies have exercised their right of conscientious refusal for decades by refusing to fill prescriptions for medications, including contraceptives, for reasons of conscience or religious conviction. Indeed, seven years ago the American Pharmacy Association

recognized this historical reality, affirming that pharmacists may refuse to fill certain prescriptions because of their religious beliefs or conscience. This policy is incorporated into the pharmaceutical standard of practice that governs all pharmacies and pharmacists. The Government Defendants have cited no evidence that the instances of pharmacists refusing to fill prescriptions for regular birth control pills have increased to such a level that this historical practice has suddenly become a threat to "the public interest, safety or welfare."

Finally, post-coital contraceptives like "Plan B" have only been approved by the FDA within the past seven years. The Government Defendants have not explained how the existence of the relatively few pharmacies like Plaintiff who conscientiously object to providing and counseling for post-coital contraception that was not even available seven years ago has suddenly become such a threat to the "public interest, safety, or welfare" as to justify dispensing with the normal requirements for rulemaking under the Illinois Administrative Procedures Act.

The "Emergency Rule" itself poses the real threat to the public interest, safety, and welfare by requiring pharmacies to fill all contraceptive prescriptions "without delay," potentially requiring them to fill such prescriptions even when contraindicated. Moreover, the effect of the "Emergency Rule" will not be to increase women's access to contraceptives, including post-coital contraceptives, but to diminish the number of pharmacists and pharmacies in Illinois. The Government Defendants offer a false choice. The "Emergency Rule" is premised on the belief that entities with sincere religious beliefs against ending human life can be coerced into violating those beliefs. Rather, it is more likely that such pharmacists and pharmacies will either close their pharmacies and leave the profession or move to other states that are more tolerant of their religious and moral beliefs. Plaintiff is one such pharmacy that would have to seriously consider doing so if the "Emergency Rule" remains in effect. Pharmacy

students and others considering locating in Illinois will also look for employment in states more hospitable to their religious and moral convictions. Instead of a wider availability of contraceptives, including post-coital contraceptives, the Emergency Rule will decrease the number of pharmacies and pharmacists serving the State. These important issues would have been better addressed through the regular rulemaking process of the Administrative Procedures Act rather than through fiat by the Governor.

C. The Illinois Pharmacy Practice Act of 1987

In setting out the duties of the Department [now Division] of Professional Regulation, the Pharmacy Practice Act of 1987 states in pertinent part:

> [T]he following powers and duties shall be exercised only upon action and report in writing of a majority of the Board of Pharmacy to take such action:
>
> (a) Formulate such rules, not inconsistent with law and subject to the Illinois Administrative Procedures Act, as may be necessary to carry out the purposes and enforce the provisions of this Act.

225 ILCS 85/11. Neither the Governor nor the Division of Professional Regulation obtained the requisite written report of a majority of the State Board of Pharmacy prior to issuing the subject "Emergency Rule." As such, the rule is *ultra vires* and void.

D. The Illinois Human Rights Act

The Illinois Human Rights Act prohibits discrimination against applicants and employees based upon their religious beliefs. 775 ILCS 5/1-101 *et seq*. For the reasons set forth in the Complaint, the "Emergency Rule" is in direct conflict with the Act and the Government Defendants have violated the Act by compelling and coercing Plaintiff to violate the Act in order to comply with the "Emergency Rule."

E. The Illinois Religious Freedom Restoration Act

For the foregoing reasons as well as the reasons cited in the Complaint, the Government Defendants have violated the Illinois Religious Freedom Protection Act because they have substantially burdened Plaintiff's exercise of religion without a compelling interest and without demonstrating that the Emergency Rule was the least restrictive means of satisfying such interest.

F. Civil Rights Act of 1964

The Civil Rights Act of 1964 requires employers to accommodate the religious beliefs of employees, as long as doing so would not impose an undue hardship on the business of the employer. 42 U.S.C. § 2000e(j) (2005). For the reasons cited in the complaint, as well as the reasons stated above, the "Emergency Rule" would require Plaintiff to deny its employees' right to religious accommodation, in contravention of Title VII. *Id.*

When a federal statute is in conflict with a state statute, the state statute is pre-empted. U.S. CONST. VI, §1, l. 2; *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Title VII specifically states that a state statute "which purports to require or permit the doing of any act which would be an unlawful employment practice under this title" is void. 42 U.S.C. § 2000e-7 (2005). Because the "Emergency Rule" requires Plaintiff employer to deny its employees rights granted under Title VII, the "Emergency Rule" is void.

G. Maintaining the Status Quo

Plaintiff is seeking only to maintain the status quo that existed *for decades* before the Government Defendants implemented their "Emergency Rule." As such, the injunction is properly allowed even if the Court doubts the ultimate success of the Complaint.

V. THE BALANCE OF HARDSHIPS WEIGHS HEAVILY IN PLAINTIFF'S FAVOR

As previously mentioned, after the Court considers the previous four factors, the Court must decide if the balance of hardships to the parties supports injunctive relief. *Keefe-Shea*, 332 Ill. App. 3d at 169. However, this doctrine of balancing harms is inapplicable where a defendant's action was done with the full knowledge of a plaintiff's rights and with an understanding of the consequences which might ensue. *Blue Cross Ass'n*, 100 Ill. App. 3d at 651.

The Plaintiff will indeed suffer greater harm without the injunction than the Government Defendants will suffer if it is issued. While a customer seeking a "Plan B" prescription has the option of patronizing a different pharmacy, Plaintiff has no other option than to fill the prescription against its conscience or refuse and potentially lose its license. Thus, the balance of hardships weighs heavily in favor of injunctive relief. Moreover, because the Government Defendants filed the "Emergency Rule" and will enforce it with the full knowledge of Plaintiff's rights under the Illinois Rights of Conscience Act, the Illinois Human Rights Act, the Illinois Administrative Procedures Act, the Illinois Pharmacy Practices Act, and the Illinois Religious Freedom Restoration Act, and Title VII of the Civil Rights Act of 1964. as well as with an understanding of the consequences that will ensure, the balancing of hardships is inapplicable in this situation and a temporary restraining order and preliminary injunction should ensue.

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A) Enjoin the Government Defendants and their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them from enforcing the "Emergency Rule" codified at 68 Ill. Adm. Code § 1330.91(j);

B) Enjoin the Government Defendants and their officers, agents, employees, successors, attorneys, and all those in active concert or participation with them from retaliating in any way against Plaintiff;

C) Set a hearing on Plaintiff's request for a preliminary injunction;

D) Grant such other and further relief as this Court deems appropriate.

Respectfully submitted this 8th day of June, 2005.

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CERTIFICATE OF SERVICE

I, ___________, certify under Code of Civil Procedure sec. 1-109 that I served a copy of this notice and the attachments upon each of the persons on the service list by facsimile on 6/8/2005.

____

SERVICE LIST

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