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MARK BAKER, CEO
OF PROGENICS
PHARMACEUTICALS

COVERSTORY

ILLUSTRATION BY NIGEL BUCHANAN

BY JAN WOLFE

HOW TO HELP A WHISTLEBLOWER

THIS GC-TURNED-CEO MIGHT HAVE BEEN
HIS OWN WORST ENEMY ON THE STAND.

PRO SE LITIGANTS ARE NOTORIOUSLY INEPT.
But not Julio Perez.

Perez's former employer, Progenics Pharmaceuticals, fired him in 2008 after he accused company executives of misleading shareholders. Despite English not being his first language, the chemist represented himself at trial and won a verdict that Progenics retaliated against him in violation of whistleblower protection laws. Thanks to a ruling issued in August, he now stands to walk away with about \$5 million in damages on his retaliation claim.

Perez didn't just win handily. He exacted revenge on the man who fired him, Mark Baker, the current CEO of Progenics and its former general counsel. Baker has an impressive resume: graduate of Columbia Law School and a former partner at an elite Manhattan law firm. But he lost his cool under Perez's cross-examination. So much so that the judge wrote that, while on the witness stand, Baker was "condescending, contemptuous, patronizing and hostile."

Progenics is succeeding in the marketplace and, it bears emphasizing, has never been accused of wrongdoing by shareholders or regulators. But, in the Perez case, it keeps digging itself further into a hole. How did a thriving company—which has seasoned in-house lawyers and outside counsel—get outfoxed by an ex-employee?

Corporate Counsel had practitioners, consultants and academics examine the case and identify what went wrong. (Perez declined to comment. Progenics, its lawyers and Baker didn't return phone calls.) These observers identified three main missteps: firing Perez too hastily, adopting a flawed jury trial strategy and, finally, Baker getting angry on the witness stand.

"This is a true David vs. Goliath story," says Jason Zuckerman, a lawyer for whistleblowers in Washington D.C. "Progenics was well-represented and appeared to spare no expense on its defense. Yet a pro se plaintiff prevailed at trial."



JASON ZUCKERMAN SAYS THAT PROGENICS
ACTED RASHLY IN FIRING JULIO PEREZ.

MISTAKE NO. 1: IMMEDIATELY FIRING A WHISTEBLOWER

When Perez joined Tarrytown, New York-based Progenics in 2004, the company was trying to commercialize Relistor, a treatment for gastrointestinal side effects of opioids like morphine. In 2005, Progenics entered into an agreement with Wyeth Pharmaceuticals (now part of Pfizer) to perform clinical trials on Relistor and hopefully get it approved by the U.S. Food and Drug Administration. Perez was one of the chemists working on Relistor, earning an annual salary of about \$130,000.

Perez's feud with his employer began with a press release issued by Progenics and Wyeth in May 2008. In the release, they said that clinical trials of a tablet formulation of Relistor showed "positive activity" and that management was "pleased by the preliminary findings."

But two months later, Perez got his hands on a confidential PowerPoint presentation prepared by Wyeth that, in his view, painted a less rosy picture of the Relistor tablet's effectiveness and discouraged further clinical trials.

Perez became convinced that Progenics, which is publicly traded, was misleading the investing public. So he fired off a memorandum to the head of his department and Baker, the GC at the time, writing that the company was "committing fraud against shareholders, since representations made to the public were not consistent with the actual results of the clinical trial." (There's no record of Perez going to regulators with his concerns, and Progenics and Wyeth have never been sued for fraud relating to the press release. Pfizer did not return a request for comment.)

After receiving the memo, Baker immediately went to Perez's office to confront him about how he obtained the confidential Wyeth report. Perez wasn't in his office, so Progenics secured his computer and revoked his access to the company's servers.

Later that day, the chief financial officer of Progenics met with Perez and asked him how he got the Wyeth report. Perez said he wanted to speak with his lawyer. The next morning, Perez



DIEGO M. RADZINSCHI

was fired. Perez said in a court filing that he was escorted from the building—a "humiliating" ordeal.

Progenics argues that Perez didn't have authorization to see the Wyeth report and breached company policy by obtaining it. (Perez, for his part, says the report was widely circulated.) The company also insists that the May 2008 press release was truthful and that Perez misunderstood the Wyeth report. "Progenics terminated plaintiff's employment because he had misappropriated confidential information and refused to explain how he obtained such information, not because of unfounded concerns he had raised," the company wrote in a court filing.

Progenics acted far too quickly, says Zuckerman. The purpose of the Sarbanes-Oxley Act, enacted with much fanfare six years earlier, was to protect corporate whistleblowers from retaliation. "Dr. Perez didn't disclose confidential company information to anyone outside the company and



TARA TRASK WONDERS IF PROGENICS MAY NOT HAVE FORESEEN HOW THE JURY WOULD REACT.

instead used the information to raise a concern in good faith to senior management,” Zuckerman says. “The company should have addressed his disclosure head-on.”

Zuckerman says he’s seen similarly swift terminations in other Sarbanes-Oxley cases. “Management just assumes that the whistleblower is raising a concern in bad faith,” he says. “Management investigates the whistleblower rather than investigating the whistleblower’s disclosure.”

Getting fired has taken a toll on Perez. He eventually got another job offer, but it was from a start-up that wanted him to relocate and offered him stock instead of an annual salary. He wrote in a court filing that, unable to find suitable work for someone at his level, he “lives frugally” and “drives a 1993 Toyota Corolla.” He says he hasn’t had medical insurance since 2010, when his COBRA coverage ran out.

MISTAKE NO. 2: ADOPTING A DEFENSE JURORS WON’T LIKE

Progenics has never wavered from its defense that Perez was fired for obtaining the Wyeth report. Experts say that was a mistake. Even if it’s true that Perez didn’t have authorization to see the document, that’s “an incredibly poor position to take before a jury,” says Tara Trask, a jury trial consultant based in San Francisco. Most people will overlook this violation of company policy, she says, and admire Perez for having the guts to blow the whistle.

“Their defense hung by a thin reed,” says Jona Goldschmidt, a professor at Loyola University Chicago that researches self-representation. “We terminated you because you refused to divulge where you got this Wyeth report—that was a weak defense.”

Perez sued Progenics in 2010, alleging violations of the anti-retaliation provision of Sarbanes-Oxley. He didn’t name Baker as a defendant. Perez was originally represented by a small law firm in White Plains, New York, that handled depositions



and discovery. The firm withdrew in 2012, citing an “irreconcilable conflict” with its client. Perez told the court that he simply disagreed with the firm about a contract modification it proposed and that it shouldn’t have been allowed to withdraw.

Pro se litigants almost always lose. So Progenics may have felt good about its odds when the case finally went to a jury trial in 2015. But Perez quickly got the upper hand.

The U.S. district judge assigned to trial, Loretta Preska, made a point of accommodating Perez. Goldschmidt, the professor, has heard of judges requiring pro se litigants to ask themselves questions—essentially serving as both witness and advocate. (Cinephiles will think of the scene in “Bananas” where Woody Allen’s character cross-examines himself, frenetically jumping in and out of the witness box). Preska opted for a more natural approach, allowing Perez to testify in first-person narrative form. Progenics’ defense counsel, Blair Fensterstock of the Manhattan firm Fensterstock & Partners, was free to raise objections as he saw fit.



RICK KOPSTEIN

JUDGE LORETTA PRESKA UPPED THE ANTE BY AWARDING PEREZ FRONT PAY OF \$2.7 MILLION.

Given this chance to shine, Perez quickly showed that he's not the typical pro se litigant. Having been represented by counsel for the first two years of the litigation, when much of the heavy lifting was done, he learned the basics of courtroom rules and etiquette. In a post-trial ruling, Preska wrote that he "presented as a credible witness, trying his best to relate information in a truthful, accurate and straightforward manner."

"This is a highly articulate, educated chemist," Goldschmidt says. "Given his background, it's not surprising he fared pretty well."

MISTAKE NO. 3: GETTING ANGRY ON THE WITNESS STAND

A key moment during trial was Perez's cross-examination of Baker—a face-off between two

men who clearly dislike each other. It got off to a rough start. Perez politely said, "Good afternoon, Mr. Baker." Baker didn't respond. Later on, Baker referred to Perez by his first name. The judge later scolded Baker for not answering questions directly. At one point, Baker responded to a question by saying: "We are English-speaking people. We know how to read."

That was game over for Progenics, says Trask. "I've never seen a witness get angry on the stand who didn't faceplant," she says. "It is absolute death."

Baker also seems to have erred by getting on the judge's bad side, Trask says. Judges are in the courtroom with jurors everyday, praising them for the public service and making sure they're comfortable. "Juries love judges. They form a real bond with the judge," Trask says. "Never get sideways with the judge."

Before going in-house, Baker led the capital markets practice group at Dewey Ballantine (a predecessor to the ill-fated Dewey & LeBoeuf). But Trask isn't all that surprised that he struggled on the witness stand. She says that, while she has great respect for lawyers, they sometimes don't make for good witnesses. They're used to being in control and doing the talking, she says. And they're often focused on the law, rather than what jurors are thinking. "They don't take the counsel of their counsel well," she says.

Baker was a particularly troublesome witness because he was being asked to defend his own legal judgment as general counsel. In that situation, "there is no way of looking at things objectively," Trask says.

Perez's pro se status eventually became something of an asset and not a handicap, says Goldschmidt. "Juries don't like seeing a pro se beat up by a lawyer like that. They put themselves in the position of the pro se," he says.

The trial ended on a Friday. The same day, jurors returned a verdict for Perez and awarded him \$1.6 million in back pay.

IT WASN'T OVER YET

Despite its trouble in the courtroom, Progenics is succeeding in the marketplace. The FDA approved the Relistor tablets in July 2016. Progenics got a \$50 million "milestone" payment from Valeant Pharmaceuticals, which has an exclusive license to sell Relistor. Progenics stands to receive much more from Valeant if the drug hits certain sales milestones. This year, Progenics moved its headquarters from Tarrytown to the state-of-the-art 1 World Trade Center tower in Lower Manhattan.

But the Perez case keeps getting worse for Progenics. In August 2016, Preska awarded Perez another \$2.7 million in front pay to cover him through retirement. Once interest has been calculated, Perez will walk away with around \$5 million.

Progenics has tried and failed to chip away at the size of the verdict. At one point, Progenics argued that after Perez got fired, he failed to "mitigate damages" by making a reasonable effort to find a new job. Perez "was much more inclined to pursue damages in the instant lawsuit than to undergo a reasonable job search," Progenics alleges.

BLAIR FENSTERSTOCK STRUCK OUT DEFENDING PROGENICS.

Perez has called that argument nonsensical. "The chances of success for a pro se litigant in federal court are slim to none," he wrote in a December 2015 court filing. Given those long odds, Perez says, he had every incentive to find a job. "It would make no sense for a Ph.D. chemist who had been continuously employed from 1993 to 2008 to abandon his job search and decide to live frugally," he wrote.

Observers say that this case was crying out for a settlement, presuming that Perez was open to a deal. Perez's claim of retaliation was strengthened by the fact that he was terminated a day after he sent his memo. A defendant "is not going to get out on a motion to dismiss when there is termination so close in time to protected activity," says Kevin O'Connor, a litigator at the New Jersey firm Peckar & Abramson.

And once the case headed to trial, Progenics was on shaky footing. To prevail on his retaliation claim, Perez just had to show that he had a reasonable belief that his employer was misleading shareholders. Progenics could make a strong argument that its press release was accurate and still lose the case. "A lot of people don't realize this," says O'Connor. "They think: 'We're right and he's wrong. So we should win.'"

Trask, the jury consultant, wonders if Baker's personal resentments toward Perez clouded his judgment and prevented him from seeing these weaknesses in its case. "Sometimes people can't back away from their emotions and look at things clearly," she says.

"This was a remarkable victory," says Zuckerman. "Maybe the lesson here for corporate counsel is to never underestimate your opponent." ■



RICK KOPSTEIN