

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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MAY 26 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

MYLA NAUMAN,
JANE ROLLER, AND
MICHAEL LOUGHERY,

Plaintiffs,

v.

ABBOTT LABORATORIES
AND HOSPIRA, INC.,

Defendants.

Civ. 04C-7199
Judge Gettleman

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR RECONSIDERATION**

INTRODUCTION

By motion for reconsideration, defendant Abbott Laboratories, joined by defendant Hospira, Inc., invites the Court to second-guess the denial of its motion to dismiss. Abbott asserts that the applicable law was beyond the Court's comprehension and attempts to reanimate its dead ERISA "conspiracy theory." Abbott first presented this straw man in its reply brief supporting dismissal. But that argument is, as it was when originally made, dead on arrival. Plaintiffs never advanced a "conspiracy" claim; therefore, this Court did not rely on it in sustaining the three counts of the Complaint.

Other than its imagined "conspiracy theory," Abbott offers the Court nothing to reconsider in the way of significant changes in law or facts that would justify re-writing the Court's recent opinion. Consequently, Abbott asks in the alternative to take an

immediate appeal on its “conspiracy theory.” Certifying that issue, however, would be pointless since it has no bearing on the ultimate disposition of this case.

FACTS

On January 18, 2005, Abbott and Hospira filed motions to dismiss with supporting memoranda. A month later, plaintiffs filed a consolidated opposition to those motions. The dismissal motions ripened for decision on March 2, 2005, when the defendants filed replies to plaintiffs’ opposition.

After reviewing the fully briefed motions and allowing for a period of reflection, the Court entered an opinion and order on April 27, 2005 (“Order”), denying defendants’ motions to dismiss. The reasons for the Court’s decision were multiple and independent:

Count I

- Relying on Judge Marovich’s review of Abbott’s benefits plan, the Court found that plaintiffs adequately alleged that exhausting their administrative remedies would be futile (Order at 5);
- Relying on *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995), the Court found that plaintiffs adequately alleged that Abbott’s spin-off of plaintiffs and other similarly situated employees was an “indirect method of discharging” them in violation of § 510 of ERISA (Order at 7);
- Citing *Lessard v. Applied Risk Management*, 307 F.3d 1020, 1024-35 (9th Cir. 2002), the Court found that defendants jointly could not terminate hospital products division employees to prevent their accrual of benefits (Order at 8-9); and

Counts II & III

- Citing *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2002), the Court found that plaintiffs adequately alleged that the “no-hire policies were an integral part of the overall scheme to eliminate plaintiffs’ benefits” in violation of § 510 of ERISA (Order at 11).

Due to the Order, Abbott filed its Motion for Reconsideration Or, Alternatively, An Interlocutory Appeal on May 16, 2005 (“Motion”), which Hospira joined.

ARGUMENT

Abbott’s grounds for the Motion do not meet the Seventh Circuit’s standards for reconsideration or for certification of an interlocutory appeal. In support of its extraordinary request, Abbott resurrects an argument that the Court already laid to rest, which moots reconsideration, on a nondispositive issue of law, which dooms appellate certification. Accordingly, the joint motion should be denied in its entirety.

I. NO REASON EXISTS TO RECONSIDER THE ORDER.

Reconsideration is an exceptional, seldom-used corrective device that a court resorts to only when:

(1) the court has patently misunderstood a party; (2) the court has made a decision outside the adversarial issues presented ... by the parties; (3) the court has made an error not of reasoning but of apprehension; (4) there has been a controlling or significant change in the law ... or (5) there has been a controlling or significant change in the facts.

Ramada Franchise Systems, Inc. v. Royal Vale Hospitality of Cincinnati, Inc., 2004 U.S. Dist. LEXIS 24036, Civ. No. 02-1941, at *12 (N.D. Ill. Nov. 23, 2004) (citing *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990)). Abbott has moved only on the third reason for reconsideration, conceding that the other four reasons do not apply. (Motion at 3-4.)

In the Motion, Abbott argues that the Court failed to grasp “a basic proposition of ERISA law” and committed “manifest error” in denying the dismissal motions. (*Id.* at 2-3.) Abbott says that the Court made a “fundamental mistake” when it “accepted Plaintiffs’ ‘conspiracy’ theory” (*Id.* at 1 & 2.) This argument fails for three reasons.

A. Plaintiffs Have Not Alleged Any “Conspiracy.”

Contrary to Abbott’s often-repeated misstatement, plaintiffs have never alleged that defendants “‘conspired’ to eliminate employee benefits through a post-spin amendment to Hospira’s plan.” (*Id.* at 1.) Abbott erected this straw man so that it could easily defeat it. But that is neither plaintiffs’ allegation nor the grounds on which the Order rests. Nowhere in any of their pleadings have plaintiffs used the word “conspiracy” or suggested that a plan amendment, by itself, violated ERISA.

Rather, plaintiffs have long contended that Abbott violated § 510 of ERISA when, with intent to interfere with their attainment of benefits, it discharged the hospital products division employees under the guise of a corporate spin-off. (Complaint at ¶¶ 63-66; Consolidated Opposition to Motion to Dismiss at 8.) The actionable conduct was the discharge, not Hospira’s subsequent adoption of plan amendments. The Court found that plaintiffs’ allegation of wrongful discharge in Count I stated a claim under § 510. (Order at 7.) Thus, the Court’s denial of the motion to dismiss had nothing to do with any “conspiracy,” despite Abbott’s efforts to inject it into this case.

B. Abbott’s “Conspiracy” Was Not Central To the Order’s Holding.

Abbott previously argued its “conspiracy theory” in reply to plaintiffs’ opposition to the motions to dismiss, and the Court rejected it. (Motion to Dismiss at 7-9.) The Order did not to rely on the cases cited by Abbott confirming an employer’s power to prospectively amend plan benefits. Instead, it relied on *Lessard v. Applied Risk Management*, 307 F.3d 1020 (9th Cir. 2002), concluding that Abbott individually could not discharge HPD employees to deprive them of benefits; therefore, defendants jointly could not do so. (Order at 8-9.) Abbott agrees with this principle: “§ 510 precludes a

company from targeting its ‘high rate’ benefits users for termination.” (Motion at 4.) Thus, the Court did not err in sustaining plaintiffs’ allegation that defendants’ joint targeting of high-rate employees violates § 510.

C. Abbott’s “Conspiracy” Cases Are Irrelevant or Misconstrued.

Because the Court rejected its previous authorities, Abbott cites additional cases concerning an employer’s right to amend a plan. Those cases are not germane to plaintiffs’ allegation, or the Court’s ruling, that § 510 precludes Abbott from discharging employees to deprive them of benefits. The majority of Abbott’s citations do not involve an allegation of discharge.¹ In the two cases that do, the Supreme Court and the Seventh Circuit both found violations of § 510.²

In fact, Abbott cites *Inter-Modal Rail Employees Association v. Atchison, Topeka, and Santa Fe Railway*, 520 U.S. 510, 516 (1997), for the proposition that it has an “‘unfettered right’ to amend benefits plans in any way it wishes.” But it should have turned the page. The Supreme Court went on to say that “[t]he power to amend or abolish a welfare benefit plan does not include the power to ‘discharge, fine, suspend, expel, discipline, or discriminate against’ the plan’s participants ... ‘for the purpose of interfering with [their] attainment of ... rights ... under the plan.’” *Id.* at 517.

Finally, because Abbott’s “conspiracy” argument is weightless, its attack on the Court’s no-hire policy ruling has no traction. The “scheme” the Court referred to in the

¹ See *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Commer v. Bethesda Hospital, Inc.*, 370 F.3d 499 (6th Cir. 2004); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3d Cir. 1994); *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir. 1993); *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991); *Aronson v. Servus Rubber, Division of Chromalloy*, 730 F.2d 12 (1st Cir. 1984).

² See *Inter-Modal Rail Employees Association v. Atchison, Topeka, and Santa Fe Railway*, 520 U.S. 510 (1997); *Deeming v. American Standard, Inc.*, 905 F.2d 1124 (7th Cir. 1990).

Order was the reorganization plan that Abbott executed to create Hospira. That plan included, among other things, discharging the hospital products division employees, implementing reciprocal no-hire policies, and terminating employee benefits enjoyed at Abbott. The Court did not rule that a “conspiratorial scheme” existed.

In sum, the only reason Abbott offers as grounds for reconsideration – namely, that the Order relies on a “conspiracy theory” – was not an argument ever raised by plaintiffs. The Court, nonetheless, properly rejected it when Abbott first argued it. Moreover, in knocking down its straw man “conspiracy,” Abbott either miscites the holding of the authority or cites authorities that are not relevant to the Order’s central holding. Reconsideration is neither necessary nor appropriate under these circumstances.

II. NO REASON EXISTS TO CERTIFY AN INTERLOCUTORY APPEAL.

The standard for immediate appeal of a trial court’s order is higher than for reconsideration. Recognizing that, the Court preliminarily indicated at the hearing on the Motion that it would not grant an interlocutory appeal. Under 28 U.S.C. § 1292(b), a court may not certify an appeal of one of its orders unless it “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Plaintiffs separately address each requirement of § 1292(b).

A. Abbott’s Appeal Issue Mixes Law and Fact.

Abbott’s proposed appeal does not present a pure question of law. The issue it seeks to have certified – whether two employers can “conspire” to amend a benefits plan in a way that reduces benefits – is a mixed question of law and fact. Plaintiffs would need

discovery to ascertain the nature and extent of the so-called “conspiracy” and the type, purpose, and value of the benefit-reducing plan amendments.

B. Abbott’s Appeal Issue Is Not Controlling.

As discussed above in Section I.A., the Court ruled that plaintiffs stated a claim under § 510 for wrongful discharge. Whether Abbott and Hospira “conspired” to amend Hospira’s benefits plan will not resolve plaintiffs’ discharge claim. It also will not resolve the claims that plaintiffs assert regarding defendants’ no-hire policies. Because of this, Abbott’s proposed appeal issue cannot be controlling in this case.

C. Plaintiffs Do Not Contest Abbott’s Appeal Issue.

Substantial grounds for a difference of opinion do not exist because the parties agree that an employer may amend its benefits plan in a manner that reduces benefits prospectively. They also agree that an employer may not discharge a plan participant with the intent to deprive that employee of benefits. Therefore, contrary to Abbott’s assertion (Motion at 10), its appeal issue is not “contestable.”

D. Resolving Abbott’s Appeal Issue Would Not Expedite the Litigation.

The reasons that prevent Abbott’s proposed appellate issue from being a pure and controlling legal issue also prevent it from expediting an end to this litigation. A delay for an appeal could have disastrous effects on plaintiffs and other former Abbott employees who worked in the hospital products division. Discovery needs to move forward particularly because the two-year hiring ban prevents plaintiffs from acquiring valuable employment opportunities and from being reinstated into Abbott’s retirement plan.

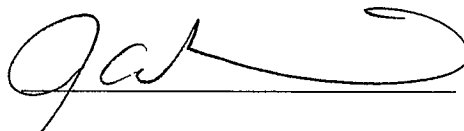
Accordingly, the Court’s initial pronouncement on this matter was correct – Abbott’s request falls outside the criteria for granting an interlocutory appeal.

CONCLUSION

The time for Abbott to delay this litigation must now come to an end. Despite Abbott's efforts to depict this case as an uncontrollable monster, it is similar in size and complexity to others on the Court's docket. The parties have worked diligently to develop an efficient discovery process and anticipate that defendants will produce significant amounts of data and documents. Plaintiffs need to begin the task of reviewing that information, especially since the expiration of the no-hire policies is imminent.

For these reasons, the Court should decline second-guessing itself and deny Abbott's Motion for Reconsideration, including its request for an immediate appeal.

Respectfully submitted,

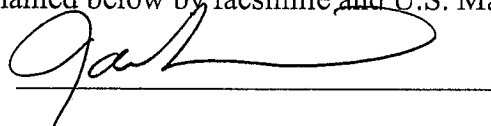


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CERTIFICATE OF SERVICE

The undersigned certifies that on May 26, 2005, a copy of the foregoing document, Plaintiffs' Memorandum in Opposition to Defendants' Motion for Reconsideration, was served upon counsel named below by facsimile and U.S. Mail.



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