

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

EASTERN DIVISION

MYLA NAUMAN,)	
JANE ROLLER, AND)	
MICHAEL LOUGHERY,)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 04C-7199 (Gettleman)
)	
ABBOTT LABORATORIES AND)	CLASS ACTION
HOSPIRA, INC.,)	
)	ORAL ARGUMENT
Defendants.)	REQUESTED

**PLAINTIFFS' CONSOLIDATED REPLY TO DEFENDANTS'
OPPOSITION TO THE MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

Abbott Laboratories ("Abbott") concedes that Count I of plaintiffs' complaint satisfies Federal Rule of Civil Procedure ("Rule") 23(a) and should be certified, at minimum, under Rule 23(b)(2). (Abbott Opp. at 1, 2.) But it objects to the proposed class definition on four grounds, which actually underscore, rather than undercut, the appropriateness of the definition and the need for certification.

Both defendants oppose class certification of the no-hire policy counts (Counts II and III), but for different reasons. Their arguments, nonetheless, share the same flaws: they argue the merits of the case and they assume plaintiffs' injury and, any resulting remedy, are determinative of the class-certification issue. Seventh Circuit precedent

requires that the Court avoid evaluating the merits when deciding class certification and, instead, focus its analysis on defendants' conduct, not plaintiffs' injuries. Defendants ignore these principles and, as a consequence, their arguments must be rejected in favor of certifying a class as to Counts II and III.

ARGUMENT

I. THE SCOPE OF THE PROPOSED CLASS DEFINITION IS APPROPRIATE.

In order to encompass all former Abbott employees affected by the mass termination and spin-off of its Hospital Products Division ("HPD") into Hospira, Inc. ("Hospira"), plaintiffs proposed the following class definition:

All employees of Abbott who were participants in the Abbott Benefit Plans whose employment with Abbott was terminated between August 22, 2003, and April 30, 2004, as a result of the spin-off of the HPD/creation of Hospira announced by Abbott on August 22, 2003.

With respect to Count I, Abbott seeks to narrow this definition on four separate grounds.¹ None are sound.

A. **The Court Has Found that Plaintiffs State a Termination Claim Under § 510 of ERISA and a Class May Be Defined Based on that Finding.**

First, Abbott disregards two separate rulings of this Court, arguing that the former HPD employees neither were "terminated" nor "discharged" in violation of § 510 of ERISA. (*See* Order of Apr. 27, 2005, at 7; Order of June 30, 2005, at 2.) Abbott reiterates this twice-rejected argument, apparently contending that a class defined in part by a "disputed issue" is somehow improper. (Abbott Opp. 5-6.) It cites no authority for this illogical contention (since most class definitions rely in some way on one or more

¹ Abbott's argument relies on procedurally improper statistical information. On pages 3-4 and in its Exhibit A, Abbott relies on a chart that it did not produce to plaintiffs, that does not reveal the nature or source of the underlying data, and that appears to include statistically manipulated data. The chart lacks foundation as a business record under Fed. R. Evid. 803(6) or as an expert opinion under Fed. R. Evid. 701-03.

disputed issues) and suggests no modification to the proposed class definition based on this “impropriety.” In addition, Abbott claims that with additional evidence it will prove the Court erred (*see* Abbott Opp. at 6), which is premature. But black letter law precludes a merits analysis at the class-certification stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Wagner v. NutraSweet*, 95 F.3d 527, 534 (7th Cir. 1996); *Roe v. Publisher’s Clearing House, Inc.*, 1999 U.S. Dist. LEXIS 16420, Civ. No. 98-3330, at *2 (N.D. Ill. Sept. 30, 1999) (Gettleman, J.) (“When evaluating a motion for class certification, the court ... does not examine the merits of the case.”).

B. The Class Should Not Be Defined by the Type of Injury Proposed Class Members Suffered.

Abbott’s second argument is not only premature, but it fails to comprehend the nature of plaintiffs’ claims. Abbott argues that plaintiffs’ use of the defined phrase “Abbott Benefit Plans” is overbroad because it includes twelve separate Abbott benefits plans (*see* Complaint, ¶ 18) and “the dispute does not extend to all twelve plans.” (Abbott Opp. at 7.) *See Gavalik v. Continental Can. Co.*, 812 F.2d 834 (3d Cir. 1987) (holding that in a class action context the “‘scheme’ or policy is exactly what is at issue” and that § 510 “is designated to prevent injury to employees’ protected rights, not simply to redress the injury after the goals of a discriminatory play have been effectuated.”) This argument assumes facts not in evidence (or that certain facts will not come into evidence as discovery unfolds).

Moreover, discovery is far from complete and may well show that Abbott schemed to interfere with all of plaintiffs’ plan benefits. It is clear that as a result of the mass termination, former HPD employees lost the opportunity to earn benefits in any of the Abbott Benefits Plans. Abbott complains that plaintiffs have focused at this early

stage on the benefits they lost under the “pension benefits, retiree medical benefits, and [] cash profit sharing plan[s].” (*Id.*) Yet, it ignores one other harm that every member of the putative class suffered as a result of Abbott’s scheme: regardless of which plan putative class members participated in, Abbott terminated their employment. The class, thus, should not be determined on the kind of losses they suffered as a result of the termination. And it would be premature to conclude that plaintiffs have not suffered losses under all twelve Abbott benefit plans. Therefore, the defined term “Abbott Benefits Plans” is not overbroad.

C. Former HPD Employees Unaffected by Hospira’s Plan Amendments Are Properly Part of the Class Since They Were Terminated Under the Mass Termination Program.

Abbott’s third argument also fails because it attempts to redefine the class based on plaintiffs’ injury (or the lack of injury), which is clearly improper. *Armstrong v. Chicago Park Dist.*, 117 F.R.D. 623, 627 (N.D. Ill. 1987) (limiting class definition in Title VII action to those employees who potentially had a discrimination claim was impermissible when it would prefigure the merits of the class claim in violation of *Eisen*). Abbott speculates that “hundreds of employees, if not more, left [Hospira] between April 30, 2004 (the spin-off) and December 31, 2004 (effective date of Hospira’s plan amendments).” Consequently, Abbott argues, those former employees were not affected by Hospira’s freeze and elimination of employee benefits and, therefore, cannot fall within the class definition. (Abbott Opp. at 8.) This argument mirrors the one it made on reconsideration of the Court’s motion to dismiss ruling, contending that plaintiffs’ complaint concerned only Hospira’s plan amendments and not Abbott’s mass termination. But the Court recognized Abbott’s distortion: “The court fully understands

that plaintiffs' complaint is not based solely on an amendment to the plan." (Order of June 30, 2005, at 2.)

Here, too, the former Hospira employees that Abbott speculates were terminated before the freeze and elimination of benefits were subjected to the same mass termination as the other proposed class members for the purpose of depriving them of benefits and, therefore, may state a claim under § 510 of ERISA.

D. Plaintiffs' Claims Accrued When Abbott Announced the Spin-Off, and Former HPD Employees Terminated Between that Date and the Actual Spin-Off Are Properly Part of the Class.

Abbott's final argument criticizes the class definition for being overbroad because it includes former HPD employees who were terminated on or after August 22, 2003 (the date of the spin-off announcement), but before April 30, 2004 (the date of the spin-off). Abbott incorrectly assumes that plaintiffs' claim for termination accrued on the date of the spin-off. Under Seventh Circuit precedent, however, an actionable termination claim under § 510 of ERISA accrues when an employer gives clear notice of the termination to the employee—in this case, the date Abbott announced the spin-off. *See Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1141 (7th Cir. 1992) (§ 510 claim accrued when termination decision communicated to employee). Therefore, any employee terminated between August 22, 2003, and April 30, 2004, by Abbott as a result of the spin-off properly falls within the proposed class definition.²

² Contrary to Abbott's assertions on page 6 of its Opposition, it is defendant's burden, not plaintiffs', to show that any former Abbott employee terminated on or after August 22, 2003, but before April 30, 2004, was not terminated as a result of the mass termination pattern and practice that plaintiffs have alleged. *Salus v. GTE Directories Service Corp.*, 104 F.3d 131, 135 (7th Cir. 1997) (after employee makes a *prima facie* showing of a § 510 ERISA violation, burden shifts to employer to offer a legitimate, non-discriminatory reason for the violative action).

Because none of Abbott's objections to the proposed class definition are well-founded, the Court should certify a class as to Count I under Rule 23 as proposed by plaintiffs.

II. THE NO-HIRE POLICY COUNTS SATISFY RULE 23 AND SHOULD BE CERTIFIED.

The weight of Seventh Circuit authority dictates that the Court focus its class certification analysis on defendants' conduct toward plaintiffs. *Wagner v. NutraSweet*, 95 F.3d 527, 534 (7th Cir. 1996) ("Typicality ... should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members."); *Daniels v. Federal Reserve Bank of Chicago*, 194 F.R.D. 609, 613 (N.D. Ill. 2000) (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (company-wide policy applying uniformly to all employees or to a group of employees raises common questions by virtue of the employer's standardized conduct); *see also Feret v. Corestates*, 1998 U.S. Dist. LEXIS 12734, at *25 (E.D. Pa. Aug. 18, 1998 (§ 510 ERISA class certified due to employer's mass termination of employees); *Vaszlavik v. Storage Technology*, 183 F.R.D. 264, 270 (D. Colo. 1998) (same). In alleging in Counts II and III that defendants implemented the no-hire policy in order to interfere with their benefits, plaintiffs properly calibrated their certification analysis to focus on defendants' actions. It is the same analysis the Court used in denying defendants' motions to dismiss. (Order of April 27, 2005 ("The policy preventing rehire, and thus preventing bridging, affects every employee subject to the spin-off."))

Plaintiffs have alleged that defendants implemented the no-hire policy to apply to plaintiffs and proposed class members alike. The policy harms plaintiffs and proposed class members by preventing their return to Abbott employment *solely* because Abbott

terminated them. And, even if they later were able to return to Abbott employment after the two-year hiring ban expired, those employees would return as new hires with no accrued benefits, unlike other returning former employees, and would have no right to have their vesting, benefit, and seniority service reinstated under the Abbott plan. That policy is the subject of Counts II and III, and plaintiffs seek an injunction to strike it down and other equitable relief to remedy its past effects. Such an order would provide relief to the entire class and makes these counts particularly appropriate for class treatment. Inexplicably, Abbott fails to acknowledge the class-wide impact of its policy.

Based on these allegations, plaintiffs argued that at least two common questions arise from the no-hire policy. Defendants fail to address these common issues in their opposition to certification of Counts II and III. Rather, they erroneously leap to consideration of whether, and the extent to which, plaintiffs were harmed by defendants' violation of § 510 of ERISA. They never even consider defendants' causative actions.

A. Defendants' Opposition to Class Certification of the No-Hire Policy Counts Rely on Speculation.

Defendants' arguments against certifying Counts II and III improperly invite the Court to engage in merits considerations at the class certification stage by speculating— with no factual support whatsoever—about the harms suffered or not suffered by plaintiffs. Such arguments are procedurally improper. *Eisen*, 417 U.S. at 177-78; *Roe*, 1999 U.S. Dist. LEXIS, at *2 (Gettleman, J.) Abbott hypothesizes about the number of former HPD employees actually affected by the no-hire policy, the likelihood that Abbott could not reabsorb those employees, and the supposed non-impact of Abbott's inability to reabsorb those employees on their bridging rights. (Abbott Opp. at 11, 12.) For its part, Hospira speculates that reciprocal implementation of the no-hire policy has had no affect

on plaintiffs' or the proposed class members' benefits and that its level of liability will differ significantly from Abbott's. (Hospira Opp. at 11, 12.) These contentions lack any basis in the record and, even if they had a basis, defendants' guesswork, especially as to plaintiffs' injuries, is inappropriate at the class-certification stage.

The *only* injury that the Court need consider for class certification is that the reciprocal no-hire policy prevents the former Abbott employees from earning or receiving benefits under the Abbott Benefit Plans. That harm is not speculative; it is significant and quantifiable.

B. Count II Should Be Certified Because It Satisfies the Requirements of Rule 23 and Abbott's Arguments to the Contrary Are Unavailing.

Plaintiffs seek to enjoin the no-hire policy since they and all proposed class members are subject to it. They also seek reinstatement to the Abbott plans. These class-wide remedies are appropriate given the unitary and standardized implementation of the defendants' no-hire policy. Abbott ignores (as does Hospira) plaintiffs' requested relief in order to manufacture arguments against class certification of the no-hire policy counts.

Abbott relies on Title VII deterred-applicant cases to contend that the proposed class is too "speculative" to be certified because there is no certainty that each plaintiff and proposed class member who would want to return to Abbott during the pendency of the no-hire policy could in fact be absorbed by the company. (Abbott Opp. at 11.) The Seventh Circuit has soundly rejected this "shortfall" argument (*i.e.*, the dilemma posed by limited job availability versus a large employee class) and concluded that in such cases a class remedy is both appropriate and necessary.

In *Biondo v. City of Chicago, Illinois*, 382 F.3d 680, 688 (7th Cir. 2004), the Court of Appeals considered the proper approach to fashioning a remedy for a class of firefighters who, but for their employer's discriminatory practices, would have qualified for promotion, yet could not all have been promoted since enough positions did not, and had never, existed to absorb them all. The Court of Appeals concluded that the firefighters' recovery was limited, in part, to their likelihood of promotion, which for one group of promotees was approximately a one-in-four chance. Consequently, those firefighters were entitled to only twenty-six percent of the benefits available for that promotion band. Likewise, in this case, the only appropriate remedy, given Abbott's shortfall argument, is a class-wide remedy that takes into account the likely occurrence of certain events. *Id.* (“[L]oss of chance’ method is the best way to handle probabilistic injuries”) (citing *Bishop v. Gainer*, 272 F.3d 1009, 1015-16 (7th Cir. 2001)).

Abbott bolsters its shortfall argument with the specious claim that “highly individualized fact determinations” would be required to resolve the class claims regarding Count II. However, “the possibility of individualized damage inquiries does not defeat class certification even if individual hearings ultimately may be required.” *Portis v. City of Chicago*, 2003 U.S. Dist. LEXIS 15712, Civ. No. 02-3139, at *12 (N.D. Ill. Sept. 5, 2003) (Gettleman, J.) (quoting *Williams v. Rizza Chevrolet-Geo, Inc.*, 2000 U.S. Dist. LEXIS 2695 (N.D. Ill. Mar. 6, 2000)). As mentioned earlier, Abbott's argument seems to assume plaintiffs are not seeking an injunction on Counts II and III.

Abbott also argues that making the individualized determinations “would require tremendous resources.” But this Court has ruled previously that “[t]he possible expense defendant may incur is not one of the factors the court considers in determining whether a

class action is the superior method of adjudication.” *Roe v. Publisher’s Clearing House, Inc.*, 1999 U.S. Dist. LEXIS 16420, Civ. No. 98-3330, at *2 (N.D. Ill. Sept. 30, 1999) (Gettleman, J.).

Lastly, Abbott contends that the former HPD employees are not entitled to bridging rights because of the shortfall in available positions. (Abbott Opp. at 12.) It cannot be that entitlement to bridging rights is defined, not by the terms of Abbott’s benefits plans, but by the number of positions available at any given time. Accordingly, Abbott’s shortfall argument must fail.

C. Count III Should Be Certified Because It Satisfies the Requirements of Rule 23 and Hospira’s Arguments to the Contrary Are Unavailing.

Hospira’s three objections to class certification of Count III rely on three false premises. Plaintiffs consider the premises first and, then, turn to the objections.

At the outset, Hospira falsely splits the no-hire policy in two, claiming that its policy is separate in form and effect from Abbott’s. (Hospira Opp. at 1-2.) In fact, the evidence shows the no-hire policy is a single, reciprocal policy jointly implemented and enforced by defendants that originated in a single paragraph of the Employee Benefits Agreement executed by defendants. (See A000839, attached as Ex. A). By the terms of that paragraph, Abbott cannot hire back any of its former employees from Hospira for a two-year period “without express written consent of Hospira.” Hospira, thus, has an active and ongoing role under the no-hire policy in determining whether one of its employees may return to Abbott’s employ. Clearly, the no-hire policy is a unitary one, enforced for the mutual benefit of defendants.

Next, Hospira claims that it “could not have been involved in the decision to spin-off HPD because it did not exist at that time.” (Hospira Opp. at 2.) At best, this claim is disingenuous. The Separation and Distribution Agreement that defendants executed lays out the formation of Hospira, which has been in existence since September 16, 2003 (less than a month after the announcement of the spin-off and more than seven months before the actual spin-off), when it was incorporated in Delaware under the name ABC 2003 Newco, Inc. Then, Newco, Inc., was renamed on December 12, 2003, as Hospira. Abbott was the sole shareholder in Newco, Inc., prior to the spin-off on April 30, 2004. In any event, the extent of Hospira’s involvement in the spin-off goes to the merits of the case and, thus, is irrelevant at this point.

In a final act of artifice, Hospira misconstrues the breadth of plaintiffs’ complaint by pretending it is limited to former HPD employees who were retirement-eligible on the spin-off date. (Hospira Opp. at 2.) Hospira cites ¶ 86 of the complaint for this proposition. However, Count III incorporates several paragraphs by reference that clearly indicate plaintiffs intended to state a claim for a broader group of plaintiffs than only those who were retirement-eligible on the spin-off date.³ (*See, e.g.*, ¶¶ 8 & 70, which refer to “HPD Employees” without limitation; ¶ 71, which defines the class broadly; and the prayer for relief for Count III on behalf of all plaintiffs.) (*See also* Fed. R. Civ. P. 8(f) (“All pleadings shall be construed as to do substantial justice.”).)

On these false premises Hospira based three arguments in opposition to class certification of the no-hire policy count. They are not persuasive.

³ Plaintiff has not waived or forfeited any group of plaintiffs as a result of the reference to retirement-eligible employees in ¶ 86 of the complaint.

