

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

MYLA NAUMAN,)
JANE ROLLER, AND)
MICHAEL LOUGHERY,)
)
Plaintiffs,)
)
vs.)
)
ABBOTT LABORATORIES, AND)
HOSPIRA, INC.,)
)
Defendants.)

Case No.: 04C 7199

Honorable Robert W. Gettleman

Magistrate Geraldine S. Brown

**HOSPIRA’S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT ON COUNT III**

[REDACTED VERSION]

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INTRODUCTION

Under the *McDonnell Douglas* burden-shifting analysis, plaintiffs' Count III is dead on arrival. As Hospira demonstrated in its opening brief, the evidence shows unequivocally that, as in most other transactions of this nature, the reciprocal no-hire policy was implemented for the legitimate, non-discriminatory reasons of ensuring that Abbott and Hospira would maintain stable and talented workforces upon the spin-off's completion. Because plaintiffs have failed to come forward with specific facts showing that these reasons are a pretext and that the motivating factor behind the hiring restriction was the specific intent to interfere with plaintiffs' ERISA rights, they have failed to satisfy their pretext burden and summary judgment on Count III is warranted.

Recognizing this, plaintiffs instead seek to avoid the *McDonnell Douglas* framework altogether. Plaintiffs argue that Hospira's motion should be denied because the no-hire policy in and of itself is direct evidence of discrimination, thereby rendering the *McDonnell Douglas* burden-shifting analysis inapplicable. According to plaintiffs, the no-hire policy is discriminatory *per se* because it impacts the retirement-eligible employees differently than those non-retirement-eligible employees. Showing that an employment decision impacts differently situated employees differently, however, is not evidence of discrimination, direct or otherwise.

Not only is there no evidence to support plaintiffs' discrimination claim, but plaintiffs' entire case against Hospira lacks sense given plaintiffs' admissions that (1) Hospira had no involvement in developing or drafting the no-hire policy (*see* Pltfs. Resp. to Hsp. SMF ¶ 35; SAMF ¶ 1); (2) Abbott was the "final decision maker" on whether HPD retirees would be permitted to work for Hospira; and (3) Abbott was "in control of all decisions regarding the spin of HPD prior [to] the spin." (Pltfs. Br. at 9; SAMF ¶¶ 1, 38.) Put a different way, according to

the plaintiffs, in a transaction it had no control over, Hospira violated ERISA by adhering to a no-hire policy that it did not conceive of or author, and that it had no ability to reject.

Plaintiffs' opposition brief is filled with other anomalies as well. They claim – without citation – that Abbott's CEO's (Miles White) "job [was] to convince [Christopher] Begley [Hospira's future CEO] that Hospira should adopt a policy of refusing to hire HPD employees who retired on or before the spin-off date," even though there was no such policy and even though Abbott was calling all the shots prior to the spin-off's completion. (Pltfs. Br. at 9, 10, 28.) They claim that the testimony of the policy's architects – Abbott and Hewitt – is irrelevant, even though up until now they have maintained that the no-hire policy was "reciprocal" and was "jointly implemented." (*Id.* at 31-32.) They claim that the proffered reasons for the policy are "mere conjecture or bias," even though they fail to point to any evidence that even implies, let alone establishes, that these reasons are a lie, contrived to mask Hospira's "unlawful discrimination" and even though it is the perception of the decision-maker, not the plaintiffs, that controls the pretext analysis. (*Id.* at 32-33.) Finally, they claim that the Court should disregard Hewitt's advice regarding the preclusive effect a transfer of the HPD portion of the pension plan would have on employees' ability to retire, even though that evidence is yet further proof that the reasons behind the no-hire policy were not to interfere with plaintiffs' ERISA rights. (*Id.* at 34-36.)

ARGUMENT

I. THE NO-HIRE POLICY IS NOT DIRECT EVIDENCE OF DISCRIMINATION.

Plaintiffs' claim that Hospira is not entitled to summary judgment on Count III because the no-hire policy is discriminatory on its face. (Pltfs. Br. at 29-30.) In particular, plaintiffs claim that the evidence of discrimination could not be "clearer" because the "HPD employees who retired would be treated differently from other HPD employees." (*Id.* at 29.)

According to plaintiffs, then, this is one of the rare cases where there is “direct evidence” of discrimination. That is fiction.¹

The *McDonnell Douglas* burden shifting analysis developed because an employer’s discriminatory intent “is seldom the subject of direct proof.” *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). To present direct evidence of discrimination in a § 510 claim, a plaintiff must show more than simply that the employment decision impacted dissimilarly-situated employees differently. Rather, a plaintiff must present essentially “an admission by an employer or some sort of ‘smoking gun’ that points to discrimination.” *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 794 (7th Cir. 2005) (to proceed under direct method plaintiff must present evidence which “point[s] directly to a discriminatory reason for the employer’s action.”); *see also Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003) (plaintiff could not proceed under direct method because evidence of decision-maker’s bias was not linked to plaintiff’s termination). Using this standard, the Third Circuit recently affirmed summary judgment in a § 510 case, holding that plaintiff’s “generalized evidence” failed to amount to a smoking gun that revealed the specific intent necessary to establish a violation of § 510 under the direct method. *Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 786 (3d Cir. 2007); *see also Lindemann v. Mobil Oil Corp.*, 940 F. Supp. 189, 193 (N.D. Ill. 1996), *aff’d*, 141 F.3d 290 (7th Cir. 1998).

Here, plaintiffs’ “smoking gun” is the policy itself (Abt. Ex. 40) and Abbott’s pre-spin employee communications via an internal newsletter and a PowerPoint presentation (Pltfs. Exs. 55-58). (Pltfs. Br. 29-30.) Abbott’s efforts to inform its employees about the HPD spin-off

¹ In light of their claim that it is “undisputed” that the no-hire policy is discriminatory (Pltfs. Br. at 28), plaintiffs’ failure to move for summary judgment on Count III suggests that even they do not believe this case involves direct evidence of discrimination.

and how the spin-off may affect them individually can hardly be characterized as direct evidence of discrimination. Plaintiffs' attempt to use these Abbott communications to implicate Hospira is even more dubious. Indeed, not only does plaintiffs' "evidence" fail to identify a "discriminatory reason" for Hospira's actions, but all of the evidence is to the contrary. The no-hire policy was conceived of and implemented to ensure that both companies would maintain stable and talented workforces after the spin-off was completed and benefits did not factor into the decision to have that restriction. (*E.g.*, Ex. 5, Fussell Dep. Tr. at 118, 194, 197-98; Ex. 2, White Dep. Tr. at 59-60; Ex. 3, Freyman Dep. Tr. at 212; Ex. 4, Begley Dep. Tr. at 102; Ex. 16, Moreland Dep. Ex. 31 at A004762; Ex. 8, Kompere Dep. Tr. at 62, 130-32; Ex. 17, Arbaugh Dep. Ex. 11; Ex. 18, Arbaugh Dep. Ex. 16 at X003620.)

Moreover, and perhaps more importantly, the no-hire policy is not *per se* discriminatory. It does not single out retirement-eligible employees for disparate treatment. To the contrary, it treats all Abbott and Hospira employees equally. Whether an employee quit, was discharged or retired from either company, that employee is subject to the reciprocal no-hire provisions until May 1, 2006. (Ex. 24, Employee Benefits Agreement ("EBA") at H07751; *see also* Pltfs. Ex. 57 at MN00031 ("policy applies to both active and retired employees").) That the no-hire policy impacted retirement-eligible employees differently than those employees who were not retirement eligible – plaintiffs' real point – is of no significance. *Lindale v. Tokheim Corp.*, 145 F.3d 953, 957 (7th Cir. 1998) (claim based on different treatment of differently-situated males dismissed); *Adkins v. U.S. West Commc'ns*, 181 F. Supp. 2d 1189, 1198 (D. Colo. 2001) (§ 510 claim based on different treatment of differently-situated employees dismissed); Hosp. Br. at 13. Of course it did. But, across the board, the application of the no-hire policy to HPD employees – and all other Abbott and Hospira employees for that matter – was the same.

Plaintiffs' attempt to analogize the facts of this case to those in *Lessard v. Applied Risk Management*, 307 F.3d 1020, 1025-26 (9th Cir. 2002), the only case plaintiffs cite to argue that the no-hire policy is direct evidence of discrimination (Pltfs. Br. at 29, 30), is off the mark. Other than involving a § 510 claim, *Lessard* is nothing like this case. The purchase agreement in that case, unlike here, specifically singled out those employees who were on medical, disability or other extended leave at the time of the sale and prohibited them (and no one else) from transferring to the new employer. 307 F.3d at 1025-26. Moreover, unlike here, where the Count III plaintiffs are gainfully employed and will receive their pension benefits upon their retirement from Hospira, all of the singled-out employees in *Lessard* lost their jobs and their benefits. *Id.* Based on those facts, none of which exist here, the Ninth Circuit held that the agreement in and of itself constituted direct evidence of discrimination. *Id.*

Plaintiffs' focus on the no-hire policy's impact on retirement-eligible employees is nothing more than a thinly-veiled attempt to obfuscate the fact that the policy applied equally to every employee, active or retired. To repeat, if an employee left for any reason after August 22, 2003, he/she could not be rehired by either company until after May 1, 2006. Plaintiffs' claim that the no-hire policy is direct evidence of discrimination is without merit and should be rejected.

II. THE COURT SHOULD GRANT HOSPIRA'S MOTION FOR SUMMARY JUDGMENT ON COUNT III.

As set forth in Hospira's opening brief, because there is no direct evidence of discrimination, the Court must determine whether the plaintiffs can satisfy their burden of proof under the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). (Hosp. Br. at 10.) Where a defendant has advanced a legitimate, non-discriminatory reason for its action, as Hospira has here, the plaintiff must prove that the

proffered reasons are a pretext and that the motivating factor was instead the specific intent to interfere with plaintiff's ERISA rights. (Hosp. Br. at 10, 12 (citing cases).) Establishing a mere loss of benefits or that the loss of benefits "was simply the consequence of a decision that had the incidental effect of affecting an employee's benefits" is not sufficient. *Isbell*, 418 F.3d at 796; *see also* 4/27/05 Order at 5; Hospira Br. at 12 (citing cases). Rather, the plaintiff must squarely rebut the specific reason for the challenged action and set forth evidence showing a specific intent of preventing or retaliating for the use of benefits. *Isbell*, 418 F.3d at 796; Hospira Br. at 12 (citing cases). Summary judgment is proper where the plaintiff fails to meet the pretext burden. *E.g.*, *Deich-Keibler v. Bank One*, 2007 WL 1827260, at *5 (7th Cir. June 26, 2007); *Lindemann*, 141 F.3d at 296.

Plaintiffs fall woefully short of showing that the stated reasons for the no-hire policy are a pretext. Their affirmative evidence is nonexistent. It is the same amalgamation of documents and testimony informing HPD employees how the spin-off, including the no-hire policy, might affect them. (Pltfs. Br. at 29-33.) Worse, plaintiffs make up facts, suggesting, for example, that Mr. White successfully convinced Mr. Begley at a September 2003 meeting not to hire employees who retired prior to the spin date.² (Pltfs. Br. at 10, 13, 28; SAMF ¶ 35.) As testimony from attendees at that meeting shows, Messrs. Begley and White never had any such discussion. (Ex. 42, Weishaar Dep. Tr. at 39-40; Ex. 43, White Dep. Tr. at 74, 77-78.) Rather, that meeting's purpose was to discuss the issues related to whether the HPD portion of the pension plan should be transferred to NewCo. (*Id.*; *see also* Ex. 4, Begley Dep. Tr. at 121-22;

² Another example of plaintiffs' factual liberties is their claim that Mr. Begley did not need to worry about losing benefits in the spin because "Abbott asked Hospira [sic] to calculate the value of lost benefits for select Hospira executives" and arranged to compensate them for those losses. (Pltfs. Br. at 10 n.3; *see also id.* at 20.) Mr. Begley never received any special treatment regarding his benefits, and plaintiffs' citations (SAMF ¶¶ 75-78) do not suggest otherwise.

Ex. 44, Freyman Dep. Tr. at 188-89; Ex. 45, Kearney Dep. Tr. at 183-85.) At bottom, plaintiffs' evidence is no evidence at all.

As for Hospira's mountain of evidence regarding the genesis of the no-hire policy and the reasons for it, plaintiffs make no attempt to address it head on or explain why that evidence does not entitle Hospira to summary judgment on Count III. Instead, plaintiffs provide a host of reasons why the Court should ignore that evidence and they quibble with whether the no-hire policy could have really achieved the desired end of workforce stability for both companies. All unavailing, Hospira nevertheless addresses plaintiffs' primary arguments below.

- *The testimony Hospira relies on should be ignored because it only explains Abbott's two-year restriction, not Hospira's restriction. (Pltfs. Br. at 31.)*

Plaintiffs argue that the testimony Hospira cites in its opening brief should be ignored because it reveals nothing about why Hospira adopted the no-hire policy; rather, it "only purports to explain the two-year hiring restriction adopted by Abbott." (Pltfs. Br. at 31.) Plaintiffs' attempt to distinguish between Abbott's reasons and Hospira's reasons for the no-hire policy directly contradicts their previous representations to this Court that the policy was "reciprocal" and "jointly implemented" by both companies. (*E.g.*, 4/27/05 Order at 10 ("Plaintiffs' allegations, however, are that the no-rehire policies were not separately adopted . . ."); 02/16/05 Pltfs. Br. in Opposition to Hospira's Motion to Dismiss at 18 (defendants "jointly implemented the no-hire policy for their mutual benefit."); Ex. 46, 09/23/05 Nauman Dep. Tr. at 123 ("To my belief, it is one and the same policy.")) To take the position now, at the summary judgment stage, that the business reasons behind the "reciprocal no-hire policies" pertain only to Abbott and not Hospira is disingenuous at best and plaintiffs cannot use it as a means to avoid the mountain of evidence surrounding the legitimate, non-discriminatory business reasons for the no-hire policy.

More to the point, plaintiffs' position ignores the evidence. When the two-year no-hire policy was created, Hospira did not exist. The no-hire policy – standard fare in Abbott transactions – originated with Steve Fussell, Abbott's then Vice President of compensation and development, and Hewitt (David Kompare), Abbott's actuary and benefits consultant. Both Fussell and Kompare testified at length about the policy and its reciprocal nature. (*E.g.*, Ex. 5, Fussell Dep. Tr. at 118 (“we [had] an obligation to shareholders and others to deliver two companies with the talent they need[ed] to operate independently on the day of the spin.”); Ex. 8, Kompare Dep. Tr. at 103-04, 128-29, 140-44 (no-hire policies are a typical way companies maintain the integrity of the parent and spun-off companies' workforces).)

Moreover, the testimony was not limited to the movement of employees back to Abbott post spin-off. (*See* Pltfs. Br. at 31.) Indeed, the evidence regarding the reasons for the no-hire policy does not distinguish at all between which direction employees moved (i.e., from Abbott to Hospira or from Hospira back to Abbott). Rather, the rationale for the policy applied to all employee movement in either direction. (Ex. 5, Fussell Dep. Tr. at 118, 194; *see also* Ex. 5, Fussell Dep. Tr. at 197-98; Ex. 4, Begley Dep. Tr. at 102 (very important to make sure Hospira and Abbott had stable workforces); Hosp. Br. at 7.) Accordingly, the no-hire policy covered all manners of separation (quit, discharge, retirement) and precluded all employee movement between the two companies for a two-year period. (Ex. 24, EBA at ¶ 2.4.)

Plaintiffs cannot turn a blind eye to this testimony – which is unrefuted – and claim that the evidence regarding the reasons for the restriction is limited to employees moving from Hospira back to Abbott; the Abbott half of the no-hire policy. Rather, plaintiffs' burden is to squarely rebut these specific reasons and set forth evidence showing that Hospira (for Count

III) had a “specific intent of preventing or retaliating for the use of benefits.” *Isbell*, 418 F.3d at 796. Having failed to do so, summary judgment on Count III is proper.

- *Hospira’s policy could not have been expected to maintain the stability of either Abbott’s or Hospira’s workforce. (Pltfs. Br. at 31.)*

Plaintiffs argue that Hospira’s policy could not have been expected to maintain the integrity of either Abbott’s or Hospira’s workforce. According to plaintiffs, “since all employees of Abbott’s ‘core hospital products business’ were expected to ‘become part of the new company’ from the outset, Hospira’s policy restricting the transfer of HPD employees wishing to retire first from Abbott could only reduce the number of HPD employees who would come to the new company.” (Pltfs. Br. at 31.)

First, Hospira did not have a particular policy restricting the transfer of HPD employees wishing first to retire from Abbott. Rather, there was only one policy – the employment restriction in the EBA – and it applied to all employees, not just the ones who wanted to retire from Abbott.

Second, Plaintiffs’ surmise about what might have happened is irrelevant; so are their quibbles about whether the restriction was in fact justified. As Hospira pointed out in its opening brief, plaintiffs’ views of the incident are of no relevance; it is “the perception of the decision-maker that controls the pretext analysis.” (Hosp. Br. at 12-13 (citing cases); *see also Kariotis v. Navistar Intern’l Transp. Corp.*, 131 F.3d 672, 679 (7th Cir. 1997) (“employer’s honest belief is critical”). Nor does the pretext analysis address the correctness or desirability of the reasons for the decision. *Wells v. Unisource Worldwide, Inc.*, 289 F.3d 1001, 1007 (7th Cir. 2002). Rather, all that matters is whether the companies honestly believed the non-discriminatory reasons they offer for the decision. *Lynch v. Alpharma Inc.*, 2006 WL 1120510, at *6 (N.D. Ill. Apr. 27, 2006). By their silence on this issue, plaintiffs concede the point.

Third, the evidence directly contradicts plaintiffs' position. Plaintiffs tried to make this very point – that this particular aspect of the restriction would reduce the number of employees coming from Abbott to Hospira – with Mr. Kompare, Hewitt's Corporate Restructuring expert, but he was having nothing of it. According to Kompare, plaintiffs' theory did not make sense:

- Q. Now, if there is a restriction on their [HPD employees] being hired by the new company [Hospira], merely because they retire from the old company [Abbott], that restriction necessarily causes a gap; doesn't it?
- A. In my view, that policy encourages employees to transition without retiring. I don't think it encourages a gap.

(Ex. 47, Kompare Dep. Tr. at 169.)

Quite frankly, there were simply no guarantees that all of the HPD employees would (a) go to the new company post-spin; and (b) stay there for some period of time. Nor was there a guarantee that Hospira would not want to hire Abbott employees at some point after the spin or that Abbott employees would not want to work at Hospira. Consequently, as the witnesses testified, and as is common in transactions of this nature, the EBA's employment restriction was designed to (1) encourage HPD employees to go to Hospira; (2) encourage them to stay at Hospira once they got there; (3) discourage Hospira from hiring employees away from Abbott; and (4) discourage Abbott employees from seeking jobs at Hospira. (E.g., Ex. 4, Begley Dep. Tr. at 102; Exs. 8, 47, Kompare Dep. Tr. at 122-24, 169; Ex. 3, Freyman Dep. Tr. at 212; Ex. 5, Fussell Dep. Tr. at 118, 194; *see also* Hosp. Br. at 4 n.3 & 11 n.7.) Right or wrong, the companies honestly believed, and Hewitt agreed, that if employees could retire first or have a direct route back to Abbott or from Abbott to Hospira, the objective of stability (for both companies) would have been compromised. Other than their own conjecture, plaintiffs offer no evidence to suggest otherwise. Accordingly, Count III should be summarily dismissed.

- *Hewitt's advice is irrelevant because it only involves employee movement post-spin. (Pltfs. Br. at 32.)*

Plaintiffs argue that Hewitt's advice and opinion regarding the need for a no-hire policy is irrelevant because it only explains the purpose of the restriction post-spin. (Pltfs. Br. at 32.) Plaintiffs say that the Hewitt advice "makes no mention of any restraint on transfers of HPD employees who retired on the spin date" and Kompare "could not recall any discussion involving employees retiring prior to the spin and working for the new company." (*Id.* & n.10.)

Of course, plaintiffs must distance themselves from Hewitt's advice regarding the need for a restriction, which Hewitt labeled a "Best Practice." (Ex. 14, Kompare Dep. Ex. 6 at A003316, A003321; Ex. 8, Kompare Dep. Tr. at 142-49.) As an independent consultant, with vast experience in corporate transactions like the one here, Hewitt's clear and consistent advice delivers a knock-out punch to any claim by the plaintiffs that the reasons for the restriction are pretextual, lacking any legitimate, non-discriminatory purpose. But, plaintiffs' labeling of that evidence as limited and irrelevant does not provide them the distance they need.

Hewitt's advice was not limited to the movement of employees post-spin. Rather, from the very beginning, Hewitt advised that "[REDACTED] [REDACTED]." (Ex. 7, Fussell Dep. Ex. 11 at A003261.) Hewitt never wavered from this advice, explicitly advising Abbott throughout the transaction [REDACTED] [REDACTED] [REDACTED]. (E.g., Ex. 16, Moreland Dep. Ex. 31; Ex. 17, Arbaugh Dep. Ex. 11; Ex. 18, Arbaugh Dep. Ex. 16; Ex. 14, Kompare Ex. 6 at A003314.) As Mr. Arbaugh aptly put it in September 2003 (some seven months before the spin), permitting employees to retire "[REDACTED]"

their new jobs at Hospira. (Pltfs. Br. at 33.) Instead, plaintiffs claim that Hospira's justification for the restriction is "pretextual artifice," which "merely describes why Hospira believed HPD retirement-eligible employees . . . should be treated differently."³ (*Id.* at 32, 33.) Again, plaintiffs misconstrue the evidence and misapprehend the law.

On this particular aspect of the restriction, there is ample testimony and documentary evidence showing that there was a concern that retirees may be less focused, less dedicated and more interested in other employment opportunities, thereby threatening the legitimate, non-discriminatory objective of starting Hospira off with a stable and talented workforce. Abbott held this view. (*E.g.*, Ex. 5, Fussell Dep. Tr. at 197-98.) Hospira held this view.⁴ (*E.g.*, Ex. 4, Begley Dep. Tr. at 102.) Hewitt held this view. (*E.g.*, Ex. 17, Arbaugh Dep. Ex. 11.) Whether plaintiffs deem these reasons valid (or "mere conjecture of bias") is of no relevance. Rather, as discussed above, it is the "perception of the decision-maker" that controls the pretext analysis. *Lynch*, 2006 WL 1120510, at *6; *see also Kariotis*, 131 F.3d at 679.

Nor can plaintiffs argue that the objective of a stable workforce is somehow not legitimate. Indeed, in *McNab v. General Motors*, 987 F. Supp 1115 (S.D. Ind. 1997), *aff'd* 162 F.3d 959 (7th Cir. 1998), the court granted summary judgment on a § 510 claim, holding that GM's adoption of a no transfer policy as part of a sale of its AGT division in an effort to retain a viable workforce for the purchaser was a legitimate, nondiscriminatory reason.

³ Plaintiffs' argument begs the question: "Differently than whom?" Plaintiffs never explain how retirement-eligible employees or retirees were treated differently under the no-hire policy than other employees. *See Isbell*, 418 F.3d at 795 n.4 (rejecting age discrimination claim because every employee regardless of age was treated the same).

⁴ Plaintiffs claim that Mr. Begley's initial desire to retire from Abbott "conflicts" with the stated reasons for the restriction. (Pltfs. Br. at 33.) But, his personal desire to retire changed as he got "a better understanding of the benefits of not retiring . . . so we could age into our benefits both in 2004 and then continue to have the age benefit moving afterwards." (Ex. 4, Begley Dep. Tr. at 102-03.) Plaintiffs ignore this evidence also.

Accordingly, defendants stated purpose for restricting transfer, to wit, that it wanted to be able to sell AGT as an ongoing concern and provide AEC with a viable work force, suffices to defeat plaintiffs' claim.

Id. at 1125; *see also Flickinger v. E.I. DuPont de Nemours and Co.*, 466 F. Supp. 2d 701, 710 (W.D.Va. 2006) (summary judgment on § 510 claim granted because desire to retain employees' knowledge and expertise in sale of division was a legitimate, non-discriminatory reason).

Plaintiffs cannot satisfy their pretext burden by second-guessing Abbott's and Hospira's business judgment. The evidence demonstrates unequivocally that the companies, among other things, had an honest concern about the impact of retirements on the stability of Hospira's workforce. Consequently, having failed to show that these concerns are pretextual, the Court should grant Hospira's motion for summary judgment on Count III.

III. THE EFFECT OF THE PENSION PLAN TRANSFER IS FURTHER EVIDENCE THAT THE NO-HIRE POLICY WAS NOT INTENDED TO DISCRIMINATE.

As Hospira established in its opening brief, the consensus at the time was that the transfer of the HPD portion of the pension plan to NewCo prohibited the transferred employees from collecting pension benefits from Abbott and then working for Hospira. (Hosp. Br. at 14-15.) Plaintiffs argue that this is an untimely affirmative defense and contend that nothing prevented them from collecting benefits before the spin and then working for Hospira. (Pltfs. Br. at 34-36.) Plaintiffs misapprehend and misconstrue the point.

Hospira has not asserted a new affirmative defense. Plaintiffs' claim under § 510 requires that they prove that Hospira had "the specific intent to deprive [plaintiffs] of [their] plan rights." *Isbell*, 418 F.3d at 796; *see Lindemann*, 141 F.3d at 295. It is unlikely, to say the least, that the no-hire policy was intended to interfere with plaintiffs' ERISA rights when, according to *Hewitt*, the rules governing plan transfers and pension benefits access alone prevented plaintiffs from retiring from Abbott, drawing their Abbott pension benefit and immediately working for

Hospira. In other words, Hospira did not need to implement a no-hire policy to stop plaintiffs from retiring from Abbott when Hewitt's advice was that the plan transfer in and of itself would accomplish this same purported objective.

Whether plaintiffs agree with this advice is beside the point. The critical inquiry is not whether this advice was legally correct; rather, it is whether the decision-makers honestly believed the advice at the time it was being given. *E.g.*, *Lynch*, 2006 WL 1120510, at *6 n.5; *see also Kariotis*, 131 F.3d at 679. Plaintiffs offer no evidence that suggests that either Abbott or Hospira did not believe Hewitt's advice regarding the preclusive effect a plan transfer would have on an employee's ability to retire. Nor have plaintiffs offered any evidence to suggest that Hewitt's advice was contrived, designed to mask an intent to interfere with the retirement-eligible plaintiffs' ERISA rights. For this reason also, summary judgment on Count III is proper.

CONCLUSION

For these reasons, and the reasons set forth in Hospira's opening brief, the Court should grant Hospira's motion for summary judgment on Count III.

Dated: July 23, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher D. Liguori, an attorney for Defendant Hospira, Inc., hereby certify that on July 23, 2007, service of Hospira's Reply In Support of Its Motion for Summary Judgment on Count III was accomplished pursuant to ECF (pursuant to the General Order on Electronic Case Filing) and via United States mail as follows:

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