UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY J. DIGLIO, Plaintiff vs. AIR PRODUCTS AND CHEMICALS, INC., Defendant	)	CIVIL ACTION NO. 95-7818

TROUTMAN, S.J.

M E M O R A N D U M

In the above-captioned age discrimination action, plaintiff contends, generally, that defendant Air Products used a company-wide reduction in force, known as the Profit Improvement Program (PIP), to eliminate older workers from the company in order to create positions for younger employees. More specifically, plaintiff alleges that defendant violated the Age Discrimination in Employment Act (ADEA) by selecting him for termination, contending that his particular position was eliminated because of his age, while his actual job functions were distributed to positions with different titles occupied by younger employees.

Presently before the Court are plaintiff's motions to compel discovery and to preclude defendant from introducing at trial, and/or relying upon for any purpose, evidence of sexual

harassment allegations against plaintiff during his employment at Air Products. Because resolution of plaintiff's motion in limine could impact the disposition of some of the issues raised in his motion to compel, the motion in limine will be discussed prior to consideration of the interrogatory and document production requests and responses still in dispute.

I. Motion in Limine

It appears from the record submitted in support of and in opposition to plaintiff's motion in limine that two female secretaries assigned to work for plaintiff in 1988 and in 1990 had complained that his conduct, on occasion, was inappropriately personal and/or had sexual overtones which had made them uncomfortable. As a result of these complaints, plaintiff was counseled and warned to avoid comments or behavior that could subject the company and himself to accusations of sexual harassment, whether plaintiff had purposely or inadvertently behaved inappropriately with respect to the two complaining secretaries.

Plaintiff seeks to preclude any reference to such complaints, as well as introduction of any evidence relating thereto, at trial of this matter. Plaintiff argues that Fed. R. Evid. 608(b) precludes attacking a witness's credibility by means of extrinsic evidence of specific instances of conduct unless such conduct is directly probative of truthfulness or untruthfulness. In the alternative, plaintiff contends that even if probative of an issue in the case, such evidence should be

ruled inadmissible pursuant to Fed. R. Evid. 403 as unfairly prejudicial and likely to mislead or confuse the jury in light of its limited relevance.

Defendant, however, argues that the motion to preclude such evidence is premature, if not completely unnecessary, and is impossible to decide other than in the context of the actual trial of this matter. Defendant asserts that it has no intention of attempting to defend against plaintiff's age discrimination claim by suggesting that the prior sexual harassment complaints against plaintiff played any part in the decision to eliminate his position and terminate his employment at Air Products.

Indeed, defendant is willing to stipulate that the evidence that plaintiff here seeks to preclude is inadmissible at trial unless plaintiff attempts to support his claim by touting his record as a "model" employee during his tenure at Air Products. Defendant contends that such evidence on plaintiff's part would be irrelevant, since defendant is not relying upon any performance or disciplinary problems as a reason for plaintiff's termination. Nevertheless, defendant argues that if plaintiff injects such extraneous issue into the trial record, it must have the opportunity to rebut testimony by plaintiff of an exemplary employment history by reference to the secretaries' accusations, which resulted in counseling and a warning placed in plaintiff's personnel file.

In other words, defendant contends that it does not plan to launch a general attack on plaintiff's credibility with

respect to all issues in the case by revealing at trial or threatening to reveal the harassment complaints, as plaintiff seems to suggest in his motion in limine. Moreover, defendant is not asserting that evidence concerning the sexual harassment complaints is absolutely admissible even if plaintiff opens the door to an inquiry into his employment history by asserting that his tenure at Air Products was free of any disciplinary problems or adverse actions. Rather, defendant has committed to making an offer of proof, in the form of its own motion in limine, before attempting to put evidence of the sexual harassment complaints before the jury. Defendant argues that such procedure is preferable to seeking a ruling on this matter out of the context of the evidentiary record as it will stand when and if defendant attempts to place the disputed evidence into the trial record.

Defendant's argument on this issue is persuasive. Long experience with trials has made this Court reluctant to absolutely preclude evidence based only, in essence, upon plaintiff's counsel's certainty that nothing in the trial testimony will render the evidence in dispute relevant and material to the issues in the case. Refusing to rule in advance of trial that the evidence is inadmissible does not, of course, suggest the converse, i.e., that evidence of the sexual harassment allegations is likely to be admissible for some purpose. Our present decision reflects only the desire to eliminate potential delay during the trial in the event that the trial record takes an unexpected turn that would permit evidence

of plaintiff's disciplinary history at Air Products to be admitted, notwithstanding both Rule 608(b) and Rule 403. If plaintiff's motion were granted, yet circumstances at trial, not presently contemplated by the parties, called such ruling into question, it is likely that argument would ensue over the procedural propriety of reconsidering the in limine ruling, as well as over the substantive legal issues relating to admissibility of the evidence. We conclude, therefore, that the more prudent course is to deny plaintiff's motion in limine.

II. Motion to Compel

Although the parties have narrowed their discovery disputes since the motion to compel was filed, there remains a substantial number of issues as to which the parties could reach no agreement. In addition, in some instances, defendant contends that all responsive material sought in plaintiff's interrogatories and document requests have been produced but plaintiff disagrees. Since there is some overlap among the various items in issue, and, in some respects, questions concerning the scope of the discovery request in issue, as well as whether defendant's supplemental discovery responses fully resolved the dispute, it appears that the best way to proceed is to categorize, as much as possible, the contested interrogatories and document production requests, setting forth for each category of dispute the nature thereof and the parties' respective positions.

A. Information Relating to Defendants' Handling of Sexual Harassment Complaints ((Plaintiff's First Set of Interrogatories, Interrogatory ##24 & 25; Plaintiff's First Request for Production of Documents, Request ##28 & 29)

Although Plaintiff's Motion in Limine will be denied, it does not follow, as plaintiff seems to suggest, that he is automatically entitled to pursue a detailed inquiry into all manner of sexual harassment complaints against Air Products employees. Plaintiff's broad discovery requests, seeking the identities of all employees against whom sexual harassment allegations were made, all employees terminated as a result thereof, all documents prepared or maintained by Air Products relating to any accused employee, including records of formal or informal discussions, investigations, and adverse action, are disproportionate to the role such issue could possibly play in the trial. Even if information relating to the sexual harassment accusations against plaintiff is admitted at trial, such evidence would be limited in scope and purpose to impeaching specific testimony by plaintiff of a completely trouble free tenure at Air Products. There is no justification for permitting broad discovery into the history of sexual harassment complaints at Air Products, especially in light of defendant's representations and willingness to stipulate that the sexual harassment complaints against plaintiff did not motivate the decision to eliminate his position, the decision to terminate his employment or the decision not to rehire him for another position at Air Products. Thus, information obtained through the discovery sought by

plaintiff will neither be admissible at trial nor likely to lead to discovery of admissible evidence. Plaintiff's motion to compel defendant to respond to Interrogatory ##24 & 25 of Plaintiff's first Set of Interrogatories and to Request ##28 & 29 of Plaintiff's first Request for Production of Documents is, therefore, denied.

B. Information Relating to Air Products Employee Terminations Resulting from the PIP and to New Hires While the PIP Was Ongoing (Plaintiff's First Set of Interrogatories, Interrogatory #12; Plaintiff's Second Set of Interrogatories, Interrogatory ##16, 22, 26--28; Plaintiff's First Request for Production of Documents, Request #10)

1. Interrogatory #12, First Set

By its terms, this interrogatory seeks information concerning Air Products employees in the Allentown geographical area in October, 1993, including those terminated in the PIP, as well as information concerning new hires for the Allentown geographical area between October 31, 1993 and October 31, 1995. Defendant agreed to provide additional information, supplemented its answer to Interrogatory #12, and identified employees in the Allentown geographical area terminated during all three phases of the PIP.

Plaintiff still contends, however, that defendant's answer is incomplete because it did not contain information concerning employees laid off by Air Products throughout the country. It is unclear when plaintiff changed the scope of Interrogatory #12, and there is nothing in the record which suggests that by agreeing to supplement its response to

Interrogatory #12, defendant likewise agreed to the expansion thereof set forth in plaintiff's counsel's October 22, 1997, letter. Contrary to plaintiff's suggestion in the reply brief to his Motion to Compel, plaintiff's counsel's letter to defendant's counsel dated October 22, 1997, (Exh. G to Plaintiff's Motion to Compel, Doc. #18), does not establish that there was agreement between the parties to expand the scope of the information covered by Interrogatory #12 from employees in the Allentown geographical area to all domestic employees.

Moreover, although defendant did not specifically note the PIP phase in which the Allentown area employees were terminated, Interrogatory #12, as propounded, does not request a breakdown of responsive information by phase of the PIP. In addition, a quick perusal of the supplemental information responsive to Interrogatory #12 (Exh. L to Plaintiff's Reply, Doc. #21), reveals that a significant number of terminations occurred between January 31 and September 30, 1994. Indeed, the majority appear to have occurred on January 31, 1994. Assuming that the dates of the various phases of the PIP are known, it should be a simple matter to determine the phase in which the employees listed on Exh. L were terminated. It appears, therefore, that plaintiff has received all of the information requested in the interrogatory as served upon defendant. There is an insufficient basis for concluding that defendant agreed to do more than originally required by Interrogatory #12, since the only evidence of plaintiff's contention is his counsel's

unanswered characterization of the agreement, and even that letter does not support plaintiff's contention concerning the parameters of the parties' agreement. Consequently, insofar as plaintiff seeks additional supplementation of Interrogatory #12 in his First Set of Interrogatories, Plaintiff's Motion to Compel is denied.

2. Interrogatory #22, Second Set

This interrogatory requests information relating to the number of new hires at Air Products from November 1, 1995 to date, including name, age, birth date, position, department, pay grade and job location. Defendant contends that its response to Interrogatory #12 in Plaintiff's First Set of Interrogatories is likewise a sufficient response to Interrogatory #22, Second Set. It appears, however, that just as plaintiff sought to broaden Interrogatory #12 beyond its stated terms, defendant is similarly attempting to narrow Interrogatory #22. Indeed, both parties seem to consider the two interrogatories co-extensive, despite the obvious geographic location limitation on Interrogatory #12 that is not present in Interrogatory #22.

With respect to the information sought in Interrogatory #22, plaintiff is entitled to some additional discovery concerning new hires at Air Products during and after the PIP, but with limitations. In the first instance, since plaintiff has repeatedly emphasized that he is not seeking world-wide information, defendant will be required to produce the information for new hires within the United States only. Second,

it appears that providing names, birth dates and positions, as well as the number of new hires by age, is overly burdensome. Defendant, therefore, is required to produce, for each domestic Air Products facility, only the type of breakdown, that it produced in response to Interrogatory #12(d), i.e., Age at Date of Hire and Number of Employees. Finally, since discovery needs to come to a definitive end at some point, since plaintiff recognizes that the PIP layoffs and terminations ended sometime in 1997, at the latest, and since the Motion to Compel was filed in October, 1997, defendant is directed to provide such information from November 1, 1995 through October 31, 1997, only.[1] Consequently, this portion of plaintiff's motion to compel is granted, as here limited.

3. Interrogatory ## 26, 27, 28, Second Set

In these interrogatories, plaintiff asks for the percentage of employees laid off by Air Products in each year from 1993 to 1996, as a percentage of total Air Products employment, (#26); the percentage of employee compensation eliminated each year from 1993 to 1996, as a percentage of total employee compensation, (#27); and the percentage of employee compensation for new hires in each year from 1993 through 1996, as a percentage of total employee compensation, (#28).

---

1. Since Interrogatory #12(d) requested new hire information until October 31, 1995, defendant will have to include the Air Products Allentown facility in its supplemental response to Interrogatory #22 if defendant has not yet provided new hire information for the Allentown geographic area between November 1, 1995 and October 31, 1997.

Defendant provided information in response to these interrogatories for the "Lovett Organization" only, and for the period November 1, 1993 to March 31, 1994. Defendant has not, however, explained the justification for so limiting its responses, or for selecting the "Lovett Organization" as the basis for its responses. In the absence of argument or anything else demonstrating that defendant's objections on the grounds of burden and lack of relevance of the information are truly substantive, reflecting something more than simple reluctance to compile and produce such information, Air Products is required to supplement its responses to these interrogatories. It does not, however, appear to be necessary for the information to be broken down by year. It will be sufficient to provide, for the combined domestic Air Product facilities, the same type of information already produced in response to these interrogatories for the beginning of 1993, prior to implementation of the PIP, and for the end of 1996, the last year for which plaintiff requests such information. To that extent, plaintiff's motion to compel additional discovery in response to Interrogatory ##26, 27, and 28 of Plaintiff's Second Set of Interrogatories is granted.

4. Request #10, First Document Production Requests

Although the document production request, as stated, broadly seeks any document which refers to the PIP and was not produced in response to two other document production requests, plaintiff ultimately narrowed the dispute over this request to four categories of documents. Thus, in response to Request #10,

plaintiff still seeks: (1) a complete (and more legible) copy of the so-called "Gadomski list", previously produced to plaintiff's counsel in connection with prior litigation, which is a handwritten list containing approximately 100 job functions, and the employees filling them, that were originally considered for elimination in the PIP; (2) documents relating to each domestic employee terminated in each of the three PIP phases, which plaintiff considers co-extensive with information sought by Interrogatory #12; (3) studies or reports demonstrating an adverse impact on older workers by the PIP; (4) "Action Plans", i.e., documents maintained by the Air Products Human Resources Department relating to employees either actually laid off or considered for lay off during the PIP. (See, Plaintiff's Reply Brief in Further Support of his Motion to Compel, (Doc. #21), at 12, 13).

Both the "Gadomski list" and older worker adverse impact documents are more appropriately discussed in connection with other categories of discovery still in dispute and, therefore, will be considered in detail, infra.

As noted in connection with the discussion of Interrogatory #12, plaintiff did not there request information on all domestic employees affected by the PIP. Thus, if he considers this portion of Request #10 co-extensive with Interrogatory #12, he is entitled only to documents relating to employees in the Allentown geographic area. Although not entirely free from doubt, it appears that plaintiff is satisfied

with the documents produced by defendant with respect to employees in the Allentown geographic area, and is, therefore, seeking the same type of information for all domestic employees. Since he did not request such information in Interrogatory #12, it follows that Request #10 likewise does not reach documents supporting the defendant's answer to Interrogatory #12 for each Air Products domestic employee affected by the PIP. Thus, to the extent that plaintiff is seeking such additional documents in response to Request #10, plaintiff's motion to compel is denied.

We are not persuaded, however, that the "Action Plans" plaintiff seeks are not discoverable. As plaintiff points out, the entire matrix of such documents could demonstrate a pattern of conduct that is not readily apparent from the limited sample of "Action Plans" already produced by defendants. Moreover, it is not beyond the realm of possibility that such documents, if they suggest that the age of incumbents was a consideration in selecting the positions to be eliminated in the PIP, might be admissible at trial as circumstantial evidence that one of the unstated goals of the PIP was to remove older workers in higher management ranks to make way for promotions of younger people. See, Ryder v. Westinghouse Electric Corp., 128 F.3d 128 (3rd Cir. 1997), in which the trial court's admission of a transcript of a discussion among company decision makers was upheld as evidence of a "corporate culture" which condoned, if not encouraged, discrimination. Thus, insofar as Plaintiff's Motion to Compel is directed toward obtaining Action Plans withheld by defendant

in connection with its response to Request #10, the motion is granted.

5. Interrogatory #16, Second Set

To complete its discovery into PIP related information and supporting documents, plaintiff asks Air Products to state whether any documents referring to the PIP have been lost, destroyed or misplaced. Plaintiff contends that defendant's response that it has no knowledge of any such documents is both inadequate and inaccurate, since an Air Products witness testified at deposition that drafts of proposals were destroyed in the ordinary course of business, and requests that defendant be required to identify all lost, misplaced or destroyed documents. It appears, however, that it would be virtually impossible to comply with or enforce such an order, or that attempting to do so would provide plaintiff with any additional information. If documents are destroyed in the normal course of business, it is usually because they are replaced by more current information and/or are not important enough to maintain. It is difficult to imagine, therefore, that defendant would make and keep records sufficient to identify such documents more precisely than they have already been identified as, e.g., interim lists of positions considered for elimination.

Similarly, when documents are lost, misplaced or inadvertently destroyed, they are most often no longer available because mistakes were made in handling them. If the employees responsible for such documents were organized enough to maintain

records to identify them with any particularity, it is doubtful that such documents would have been lost, misplaced or accidentally destroyed in the first instance. In any event, just as it is difficult to prove a negative, it appears to be an exercise in futility to order defendant to identify documents that it can no longer find. We conclude that plaintiff will have to accept defendant's answer to Interrogatory #16, since it is unlikely that defendant is capable of a better response. Moreover, the effort required to satisfy plaintiff with any additional answer, even if that is possible, would be disproportionate to the potential value to plaintiff of an order requiring defendant to attempt to compile additional information responsive to Interrogatory #16. Consequently this portion of Plaintiff's Motion to Compel is denied.

C. Information Relating to Selection of Positions/Employees for Elimination Via the PIP Program (Plaintiff's First Request for Production of Documents, Request ##50 & 64; Plaintiff's Second Set of Interrogatories, Interrogatory ##1, 18, 19, 25)

The remaining disputes over all of this information can be divided into three categories: (1) plaintiff's desire for additional assurances that documents produced by defendant in response to document production requests and interrogatories constitute the only responsive information; (2) plaintiff's desire for a full explanation of the absence of a videotape that defendant represents cannot be located; (3) plaintiff's desire for a full recapitulation of every management decision relating

to every step of the process of selecting positions ultimately eliminated in the PIP.

Plaintiff's positions with respect to these interrogatories and document production requests are simply unreasonable. In the first instance, plaintiff has not demonstrated any objective basis for his insistence that defendant ought to be required to provide assurances, beyond the usual signing and verification of its discovery responses, that it has satisfied its obligation to provide, to the best of its ability, full and complete responses to the discovery requests enumerated above. Second, as previously noted, it is virtually impossible to reconstruct how a mistake, even an egregious mistake, was made. If the videotape plaintiff seeks was lost, destroyed or misplaced by defendant, it obviously cannot be produced, and whatever information it might contain cannot be recovered for use in proving plaintiff's claim. It is difficult to imagine that any additional explanation of its absence that defendant might provide is likely to lead to more damaging evidence against Air Products than the simple fact that the videotape cannot be located. Finally, although plaintiff might want to probe in detail every management process and thought which resulted in the final list of employee terminations that ultimately constituted the PIP, such information, if it could be reconstructed at all, is quintessentially the kind of discovery described as unduly burdensome. Consequently, defendant is not required to further respond to such inquiries.

Plaintiff's Motion to Compel is, therefore, denied with respect to his request for additional responses to Request ##50 and 64 of Plaintiff's First Request for Production of Documents, and with respect to Interrogatory ##1, 18, 19 and 25 of Plaintiff's Second Set of Interrogatories.

D. Information Relating to the Impact of PIP and to Claims of Age Discrimination (Plaintiff's First Set of Interrogatories, Interrogatory ##49, 50; Plaintiff's First Request for Production of Documents, Request ## 10(C), 30)

1. Interrogatory #49; Document Production Request #30

In Interrogatory #49, plaintiff asked whether, before implementing the PIP, Air Products undertook an assessment of whether it was likely to adversely impact older workers. More broadly, one of the four categories of documents that plaintiff contends is still in dispute with respect to Document Production Request #10 are studies or reports which demonstrate an adverse impact of the PIP on older Air Products employees.

Defendant first answered Interrogatory #49 in the negative, noting that until positions were selected for elimination in the PIP, it would have been impossible to assess its impact on any class of workers. Later, however, defendant supplemented its response by identifying employees who undertook analyses of the effect of the PIP on the workforce after positions had been selected for elimination, and noted that documents responsive to Interrogatory #49 had been produced in response to Document Production Requests ##49(d) and 67.

Plaintiff now contends that Interrogatory #49 broadly seeks information regarding any adverse impact analyses conducted at any time during the PIP, and requires defendant to provide him with all of the documents that it had furnished to an expert who was retained by Air Products for other litigation, but who ultimately did not testify in the prior case.

Since Interrogatory #49 is clearly limited in scope to adverse impact information compiled and considered by defendant before implementing the PIP, and defendant has responded thereto by identifying analyses that were apparently conducted subsequent to the selection of positions for elimination but prior to actually terminating the employees who occupied those positions, we conclude that defendant has adequately answered Interrogatory #49. Moreover, since defendant has likewise provided supporting documentation in response to document production requests that are not at issue in the instant motion, and since it is not at all clear how Request #10, as stated, can be reasonably construed to cover documents relating to adverse impact studies which may have been conducted by defendant during or after the PIP, we further conclude that despite plaintiff's characterization of documents remaining in dispute with respect to Request #10, it does not cover such impact studies, investigations or analyses. Finally, plaintiff has not identified any other interrogatory or document production request to which information provided to defendant's expert in the prior Schaller litigation would be responsive. Such request, therefore, appears to be based only on

plaintiff's interpretation of an agreement between counsel to provide him with such information. Defendant, however, both disputes plaintiff's characterization of the purported agreement and contends that such information is privileged. Since plaintiff has not identified the discovery request which might require production of such information, we conclude that it is not necessary to require further briefing on defendant's claim of privilege. Rather, plaintiff's Motion to Compel in this regard can be denied as exceeding the scope of Interrogatory #49 and Document Production Request #10 and as not responsive to any other identified discovery request.

For the foregoing reasons, we conclude that there are no real issues in dispute with respect to Interrogatory #49 and Request #10, since defendant has adequately responded to the specific terms of such requests. Thus, Plaintiff's Motion to Compel is denied with respect to Interrogatory #49, and with respect to the adverse impact category of documents that plaintiff contends is still in dispute in connection with Document Production Request #10.

2. Interrogatory #50

In 1995, defendant's company newsletter reported on employee reaction to the PIP as tested by Employee Pulse Surveys. Via Interrogatory #50, plaintiff seeks the identity of persons who participated therein, as well as in any other employee survey conducted during or after the PIP, as well as any documents analyzing, discussing, relating or referring to any

survey. As defendant point out, however, such information is likely to be subjective, non-specific and of marginal relevance. Since plaintiff has not explained how such information is likely to be relevant to his claims or is likely to lead to the discovery of relevant evidence, we conclude that the burden on defendant and potential delay which might result from pursuing such questionable information is not justified. Plaintiff's Motion to Compel defendant to answer Interrogatory #50 is, therefore, denied.

3. Document Production Request #30

Plaintiff has narrowed the scope of the dispute over Request #30 to documents pertaining to allegations of age discrimination by any present or former Air Products employee against Martin Ferris. For reasons not disclosed in his motion, plaintiff apparently does not accept defendant's response that it has been unable to locate any record of such allegations. Plaintiff, however, does not actually appear to be seeking an order compelling defendant to nevertheless produce some responsive information. Rather, plaintiff seeks a ruling from the Court that if any such information is later uncovered by defendant, its use at trial will be precluded. Since plaintiff has not made the Court aware of any basis for granting such an extraordinary potential and prospective remedy in the context of a motion to compel discovery, plaintiff's motion is denied with respect to Request #30.

E. Information Relating to Positions and Employees in the Areas of Environmental Functions, Engineering, Corporate Safety (Plaintiff's First Set of Interrogatories, Interrogatory ##14, 17, 27, 28; Plaintiff's First Request for Production of Documents, Request ##32, 33, 36, 37, 38, 40, 41, 61)

1. Interrogatory ##14, 27, 28; Document Request #32

Plaintiff seeks information about all Air Products employees working in the "environmental function" on October 31, 1993, including names, annual salaries, persons hired, promoted, transferred or terminated from the environmental function after January 1, 1991, and persons still so employed on February 2, 1994. Plaintiff also requests identification of electronic data bases from which such information was compiled, and all documents describing the organizational structure of the environmental function and changes thereto between January 1, 1991 and the present.

Plaintiff contends that he was responsible for all employees in the environmental function, corporate wide, and refers to a directory that he compiled which lists such employees, their locations and job titles. (See, Exhibit N to Plaintiff's Reply Brief in Further Support of His Motion to Compel, Doc. #21). Based upon his contentions regarding the scope of his duties and the directory he compiled, plaintiff appears to argue, in essence, that defendant should be required to compile a similar employee directory and provide for those listed therein the information sought in Interrogatories 14, 27 and 28.

Defendant, however, compiled and provided the information sought in these interrogatories for persons employed in the Corporate Environmental Audit and Responsible Care units for 1993, 1994 and 1995, and contends that identification of employees in other departments who might be responsible for some "environmental function" is not possible, presumably because defendant does not categorize employees, on a corporate wide basis, as working in environmental functions.

It appears to the Court that there is some justification for both arguments. Just because plaintiff, when he was employed by Air Products, found it expedient or believed that it was part of his job to identify co-employees in various departments and locations who performed environmental functions does not mean that defendant generally categorizes its employees in that manner and prepared or maintained directories similar to that which plaintiff compiled. Thus, the Court cannot categorically reject, as plaintiff does, defendant's representation that it has no mechanism for producing the information plaintiff seeks in Interrogatories 14, 27, and 28 on a corporate wide basis.

On the other hand, defendant has not disputed plaintiff's representation that the persons listed on his Exhibit N can be classified as employees working in the environmental function. Moreover, as plaintiff notes, defendant was able to provide a summary document entitled "Environmental Professional Staffing" which lists various departments, followed by numbers

under the headings "Full Time" and "Equivalent", presumably representing the number of employees who perform environmental functions in those departments. (Id., Exhibit O). It appears, therefore, that defendant should be able to supplement its responses to interrogatories 14, 27 and 28 by providing the information sought therein for all employees listed on plaintiff's Exhibit N, as well as for the employees behind the numbers which appear on Exhibit O, since Air Products must have examined the functions of actual employees in order to arrive at those numbers. Defendant will be required, therefore, to provide the information sought in Interrogatory ##14, 27, 28 with respect to those two categories of employees. It may be, of course, that there is considerable overlap between plaintiff's directory and the identities of the employees underlying the numbers which appear on its summary document, and defendant should so indicate that when it occurs.

With respect to information concerning the organizational structure of the "environmental function" at Air Products, defendant represents that it has produced all responsive documents and identifies them by Bates-stamp numbers. In his reply brief to the motion, plaintiff argues that there must still be missing organizational charts because he has not been provided the identities of all Air Products employees performing environmental functions. To the extent that defendant has not already done so, and to the extent that the specific employees are identifiable on the organizational charts, Air

Products will be required to produce organizational charts which include the positions of all of the employees with respect to whom defendant is required to supplement its responses to interrogatories 14, 27 and 28.

In accordance with the foregoing instructions and limitations, Plaintiff's Motion to Compel is granted with respect to Interrogatory ##14, 27, 28 and Document Production Request #32.

2. Interrogatory #17; Document Request ##33, 61

These discovery requests seek information specifically relating to the Air Products Engineering Department. As modified by plaintiff, this information relates only to the times that the department was headed by Dr. Brian and Dr. Lovett, and includes a description of positions and functions created, changed or eliminated during those times, as well as all documents concerning proposals for increasing or decreasing positions in the department related to environmental, health or safety functions and documents concerning in any way hirings, terminations, promotions or transfers of employees into or out of Engineering.

It does not appear that defendant has any objections to producing such information. Rather, the dispute with respect to these matters centers on whether defendant has fully complied with plaintiff's discovery requests, as it represents. Plaintiff has identified in its reply brief several categories of information that he claims has not been provided in response to

Interrogatory #17 and Document Request ##33 and 61. Since the Court has no method of discerning the accuracy of either party's contentions in this regard, defendant will be required to respond specifically to plaintiff's contentions with respect to the information identified as still not produced, which is found in Plaintiff's Reply Brief at 7. Defendant shall either produce such information or specifically identify the documents, by Bates-stamp number, where such information is found. To this extent, Plaintiff's Motion to Compel is granted with respect to Interrogatory #17 and Document Production Request ##33 and 61.

3. Document Request ##36--38, 40, 41

The remaining disputes with respect to documents relating to the organization/reorganization of the Engineering Department and relating to positions within the department once again fall into the category of plaintiff's claims that documents are missing and defendant's claims that all responsive documents in its possession have been produced. As with all such disputes, there is no satisfactory resolution except to direct defendant to respond specifically to plaintiff's assertions with respect to any documents that plaintiff has specifically identified as responsive to his requests but not produced. The only documents that fall into that category with respect to the Document Production Requests here at issue are those purportedly responsive to Request #40, found in Plaintiff's Brief in Support of His Motion to Compel, (Doc. #18) at 12, also found in Exhibit G thereto at 5. Accordingly, as set forth above, defendant shall

either produce such documents or specifically identify the documents which satisfy those classes of information. To that extent, Plaintiff's Motion to Compel with respect to Document Production Request #40 is granted, and in all other respects, the motion to compel with respect to Document Production Request ##36, 37, 38 and 41 is denied.

F. Information Referring to Plaintiff and/or to the Elimination of Plaintiff's Position at Air Products (Plaintiff's First Set of Interrogatories, Interrogatory ##7--15; Plaintiff's First Request for Production of Documents, Request ##5, 10(A), 42, 44)

The dispute over these categories of information appears to have been reduced by plaintiff to (1) a request for production of a complete and legible copy of the "Gadomski List" of potential positions to be eliminated, which was prepared in 1993 and produced in prior litigation; (2) a request that defendant be directed to furnish proof satisfactory to plaintiff's counsel that all files have been searched which might contain information responsive to above-enumerated discovery requests, and that all employees who might harbor such information have been questioned concerning the existence of responsive material.

With respect to the "Gadomski List", the Court is unconvinced by defendant's assertion that the incomplete copy furnished in response to plaintiff's discovery requests contains all information potentially relevant to this action. Plaintiff clearly sought production of the entire list, and defendant has

provided no justification for withholding part of the list. Plaintiff's Motion to compel is, therefore, granted insofar as plaintiff seeks a complete, unredacted, and more legible copy of the "Gadomski List", as previously furnished to plaintiff's counsel in connection with the prior Schaller litigation.

On the other hand, plaintiff has provided no real basis or justification for an order requiring defendant to again search for additional documents responsive to the foregoing discovery requests and to provide some type of certification that no stone has been unturned in its effort to comply with plaintiff's discovery requests. Consequently, plaintiff's motion is denied with respect to his request for additional assurances that all information responsive to the above-enumerated discovery requests has been supplied, and/or with respect to his request that defendant be required to furnish some sort of description of the efforts undertaken to comply with those discovery requests.

G. Information Relating to Employee Evaluation, Succession Planning, Characterization of Employees (Plaintiff's First Request for Production of Documents, Request ##11--27); (Plaintiff's Second Set of Interrogatories, Interrogatory #24)

1. The document production requests at issue involve the personnel and employment records of 16 named employees, (Document Request ##11--26), plus the personnel and employment records of all employees in the "peer group" against whom plaintiff was compared when his skills were presumably evaluated by defendant in connection with the PIP, (Document Request #27).

Defendant argues that the specific personnel records

are entirely irrelevant to plaintiff's claim because the decision to eliminate his position was not based upon his performance in relation to the performance of other employees. Defendant appears to argue that it was an assessment of the relative value to the company of plaintiff's position, not an assessment of plaintiff's value as an employee, that led to the decision to terminate plaintiff's employment. In addition, defendant asserts that the assumptions underlying Request #27, i.e., that plaintiff's performance was compared to that of some "peer group", and that such comparison contributed to the decision to eliminate his position, are false. Consequently, defendant contends that it is impossible to produce documents responsive to Request #27.

As plaintiff notes, however, his age discrimination claim is based upon defendant's failure to hire him for another position, as well as its decision to eliminate his former position. If plaintiff applied for a different position and was not hired, defendant ultimately did evaluate and reject him, not only his former position. Consequently, it is impossible to determine conclusively that discovery into the employment records of comparable professional employees will not uncover relevant and admissible evidence or lead to the discovery of relevant and admissible evidence. Since defendant does not contend that the employees whose records are sought in Document Request ##11--26 are not professionals with comparable credentials, skills and

experience, plaintiff's motion to compel is granted with respect to Document Production Request ##11--26.

Plaintiff's motion is denied, however, with respect to Document Production Request #27. This request is specifically directed to defendant's decisions with respect to the elimination of plaintiff's position in the PIP. Defendant maintains that it did not make the type of employee-to-employee comparison that plaintiff assumes must have been made during the PIP decision-making process. We cannot order the defendant, in essence, to add new criteria to its now completed process of determining how to eliminate positions in order to create a class of documents responsive to Request #27 by identifying a peer group with whom plaintiff would have been compared if such comparisons had entered into its consideration of how to eliminate the positions and the employees who were terminated in the PIP.

2. In Interrogatory #24, plaintiff seeks information concerning use of the term "Blocker" in defendant's succession planning process. Although defendant does not deny that the term was ever used by any of its officers or employees, it responded to the specific question by denying that such term was used in the context of succession planning. Plaintiff, therefore, simply changed and expanded Interrogatory #24 for purposes of the instant motion, and now contends that Interrogatory #24 was intended is a general inquiry into use of the term "blocker" by defendant. Because there is no interrogatory directed toward eliciting such general information, however, it is impossible for

both the Court and the defendant to determine the type of response that plaintiff would consider adequate. Moreover, it appears that defendant has provided some general information concerning use of the term "blocker" by stating, in response to plaintiff's motion, that the term is not used for management employees and is used for individual career development rather than in succession planning. Consequently, plaintiff's motion to compel will be denied with respect to Interrogatory #24, Second Set.

H. Information Relating to Early Retirement, Employee Downgrades, Management Development Meetings (Plaintiff's Second Set of Interrogatories, Interrogatory ## 5 & 6; Plaintiff's Second Request for Production of Documents, Request #4)

1. Early Retirement--Interrogatory #5, Second Set

Plaintiff asked defendant to identify documents describing or relating to the practice of encouraging early retirement and to state which of a number of listed employees were asked or encouraged to take early retirement. In response, defendant referred plaintiff to a number of documents and noted that of the specifically listed employees, all but two had elected early retirement. Since defendant denied that any employees were either asked or encouraged to elect early retirement, defendant did not, however, state reasons for encouraging any such employees to retire early.

Plaintiff's dissatisfaction with defendant's responses to Interrogatory #5 and its various subparts is based upon statements by H.A. Wagner, CEO of Air Products, excerpted from an

article in Chemical Week magazine and from a talk to employees, which purportedly allude to such a policy. Consequently, plaintiff asks the Court to compel both a different answer to Interrogatory #5 and the identity of the managers responsible for preparing the response to that interrogatory.

In the first instance, the identity of managers contacted to respond to Interrogatory #5 is beyond the scope of the information originally sought in the interrogatory. Plaintiff is, in effect, requesting that the Court sanction its addition of a new subpart to Interrogatory #5 and then compel defendant to answer it. This we decline to do, for substantive as well as procedural reasons.

Plaintiff is, in substance, requesting that the Court direct defendant to answer Interrogatory #5 differently based upon the tenuous conclusion that two isolated statements of defendant's CEO incontrovertibly demonstrate that the answers already provided to certain subparts of Interrogatory #5 must be false. Since the Court has not been provided with copies of the documents identified by defendant in its response to Interrogatory #5, it is impossible to determine whether Wagner's statements and defendant's answer to the interrogatory are, indeed, contradictory. Moreover, the Court will not direct defendant to change its answers to the interrogatory even if plaintiff is entirely accurate in its claim that defendant's response conflicts with a policy stated by its CEO. Plaintiff has far better means at his disposal for highlighting such

purported conflict. If he has not already done so, plaintiff can, e.g., depose some of the employees identified as early retirees and determine from them whether they were asked or encouraged to elect early retirement. At the appropriate time, before the Court and/or before the jury, plaintiff can also seek to identify and emphasize discrepancies in information provided by defendant in its interrogatory answers and information derived from other sources. In short, even assuming that there is reason to believe that defendant has been less than forthcoming in response to Interrogatory #5, an order to compel a different response does not appear to the Court to be an appropriate remedy. Plaintiff's motion with respect to Interrogatory #5, Second Set is, therefore, denied.

2. Downgraded Employees, Interrogatory #6, Second Set

Defendant initially refused to respond to plaintiff's inquiry into whether any Air Products employees were requested or encouraged to accept a downgrade in position in order to avoid lay off in the PIP. Later, however, defendant supplemented its response to Interrogatory #6, Second Set by identifying two such employees, both of whose names were likewise on a list of employees as to whom plaintiff specifically inquired whether they were requested or encouraged to accept a downgrade. Defendant also identified the employees involved in the decision to downgrade one of the two listed employees, but stated it did not know who was involved in the decision with respect to the other employee.

Nevertheless, plaintiff remains dissatisfied with defendant's response to Interrogatory #6, stating that it failed to disclose other downgraded employees and failed to respond specifically to the other names on the list plaintiff had provided. This is clearly not the case. Since defendant identified two downgraded employees, it has obviously stated by implication that no other employees were asked, encouraged, or offered the opportunity to accept a downgrade in lieu of a layoff, whether on plaintiff's list or not. Plaintiff has provided no basis for his apparent assumption that defendant's response is incomplete. Moreover, Interrogatory #6 does not request information concerning any investigation defendant may have conducted prior to responding to the interrogatory. There is, therefore, no justification for plaintiff's request to compel a different answer to Interrogatory #6 and/or an inquiry into defendant's investigation, a request that is beyond the scope of the interrogatory. Consequently, plaintiff's motion to compel is, to that extent, denied with respect to Interrogatory #6.

On the other hand, to the extent that plaintiff still seeks information concerning the Air Products employees involved in downgrading William Krill, defendant is directed to further investigate and to supplement its answer with respect to subpart (b) of Interrogatory #6. This is information that is obviously within defendant's control and defendant's statement that it is unaware of who might have encouraged or requested that Krill accept a downgrade is an incomplete and unacceptable response to

subpart (b) of Interrogatory #6, Second Set. Plaintiff's motion to compel a more complete response to that aspect of the interrogatory is, therefore, granted.

3. Documents Relating to Management Organization Development Committee (MODC) Meetings, Request #4, Plaintiff's Second Request for Production of Documents

It appears that defendant produced documents relating to one MODC meeting in the Corporate Engineering Department, in which plaintiff was employed. Defendant contends, therefore, that it has adequately responded to Request #4, since it has determined that MODC meeting minutes from any other Air Products department would be irrelevant to plaintiff's claim and that his request for such additional documents represents nothing more than a "fishing expedition."

Plaintiff, however, argues that if age notations were regularly made in connection with MODC meetings, as they were on the minutes he has examined, such information may be relevant to demonstrating a "corporate culture" of age bias, leading to the inference that age was a determining factor in selecting positions and employees to be eliminated in the company-wide PIP.

It certainly appears possible that plaintiff's contention that production of all such records is, at least, likely to lead to the discovery of relevant evidence is correct. Indeed, if such documents customarily include age notations, a selection of minutes from various Air Products departments may constitute relevant and admissible evidence themselves. In any

event, defendant is certainly not free to determine which properly requested discovery materials do not need to be produced on relevance grounds, and it has not persuasively supported its contention that additional MODC meeting minutes from other departments are not discoverable in response to Production Request #4. Thus, plaintiff's motion to compel production of all documents responsive to Request #4, Plaintiff's Second Request for Production of Documents is granted.

I. Financial Information (Plaintiff's Second Set of Interrogatories, Interrogatory ## 30 & 31; Plaintiff's First Request for Production of Documents, Request #39)

The basis for plaintiff's requests for the financial information sought in Interrogatories 30 and 31 are obscure at best. Plaintiff appears to be seeking evidence of some financial motivation for the PIP in which his job was eliminated. Plaintiff has not, however, suggested that whatever financial considerations may have prompted or contributed to defendant's decision to reduce its workforce were in any way age related. Absent such a connection, discovery into these matters cannot be justified as likely to either produce admissible evidence or lead to the discovery of admissible evidence. Indeed, plaintiff relies only upon a general invocation of the breadth of permissible discovery in support of production of information responsive to these interrogatories. Although the Court has often disagreed with defendant's characterization of plaintiff's discovery requests as a "fishing expedition", this is one category of information that truly does deserve that description.

Plaintiff's motion to compel answers to Interrogatory ##30 and 31, Second Set is, therefore, denied.

Similarly, plaintiff has provided no good reason to compel defendant to produce salary information concerning specific individuals in response to Document Production Request #39. The general information regarding compensation guidelines for all employees provided to plaintiff is a sufficient response to this document request. Consequently, plaintiff's motion to compel will likewise be denied with respect to Request #39 of Plaintiff's First Request for Production of documents.

J. Miscellaneous Information (Plaintiff's First Request for Production of Documents, Request ## 7, 69; Plaintiff's Second Request for Production of Documents, Request #1)

The dispute between the parties with respect to Document Production Request #7, First Request, seems to have been transformed by plaintiff into a request for documents related to a particular document, the Belaus report, purportedly produced by defendant after the close of discovery. Since defendant will be required to produce additional documents as a result of the instant rulings on plaintiff's motion to compel, production of the documents sought in plaintiff's October 29, 1997 letter (Doc. #21, Exh. T), will not additionally and unduly prolong discovery in this matter. Consequently, this portion of plaintiff's motion to compel is granted, although it appears to be somewhat removed from the original basis for plaintiff's motion to compel in this regard.

Since plaintiff made no additional argument concerning defendant's purported failure to enumerate the documents upon which it will rely for its defense of this action, plaintiff has presumably accepted defendant's argument that the documents it proposes to introduce at trial will be identified in its pretrial memorandum, and that defendant, at present, is not obligated to determine which documents it will ultimately select for use at trial.

With respect to Document Production Request, #1, Second Request, plaintiff sought all documents upon which defendant relied in responding to plaintiff's Second Set of Interrogatories. The dispute over these documents centers on whether defendant has properly classified and identified the responsive documents. Plaintiff argues that defendant's general statement that all such documents have been produced is inadequate in the absence of enumerating, by Bates-stamp number, the documents relied upon for answering each interrogatory. Although defendant maintains that it has already done so, except when plaintiff's overbroad interrogatories warranted only general reference to its prior submissions, review of defendant's responses to plaintiff's second set of interrogatories reveals that both plaintiff's and defendant's positions are justified in some respects and not in others. We will, therefore, both grant and deny plaintiff's motion to compel with respect to Plaintiff's Second Request for Production of Documents, Request #1. Accordingly, defendant is directed to identify by Bates-stamp

number the documents upon which it relied in responding to Interrogatory #1 (the summary documents reviewed by Mr. Wagner); #4, #5(d)(documents relating to the listed individuals who elected early retirement); ##6--14; ##18--19; #23; ##26--28. In all other respects, plaintiff's motion to compel additional information in response to Document Production Request #1, Second Request, is denied.

The final document in dispute appears to be defendant's written policy pertaining to Important Document Files. Since defendant has made no specific objection to producing such document, and it appears that production thereof will resolve plaintiff's motion to compel with respect to Document Production Request #69, First Request, plaintiff's motion to compel is granted with respect to that document.

III. Conclusion

Upon exhaustive review of the discovery materials produced in this case and the respective arguments concerning the various categories of information included in plaintiff's motion to compel, the Court has determined that, as is usual with discovery disputes, neither party is entirely right or wrong. Accordingly, plaintiff's motion to compel will be granted in part and denied in part, as specifically described in this memorandum and the accompanying order.

In addition, for the reasons set forth herein, plaintiff's motion in limine will be denied without prejudice to

revisiting the issues involved therein, if necessary, during the trial of this matter.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY J. DIGLIO, Plaintiff vs. AIR PRODUCTS AND CHEMICALS, INC., Defendant	)	CIVIL ACTION NO. 95-7818

TROUTMAN, S.J.

O R D E R

AND NOW, this day of February, 1998, upon consideration of Plaintiff's Motion In Limine, (Doc. #20) and defendant's response thereto, **IT IS HEREBY ORDERED** that the motion is **DENIED** for the reasons explained in the accompanying memorandum.

IT IS FURTHER ORDERED that, upon consideration of Plaintiff's Motion to Compel, (Doc. #18), and defendant's response thereto, **IT IS HEREBY ORDERED** that, for the reasons set forth and fully explained in the accompanying Memorandum, the motion is **DENIED** with respect to: (1) Plaintiff's First Set of Interrogatories, Interrogatory ##7--15, 24, 25, 49, 50; (2) Plaintiff's First Request for Production of Documents, Request ##5, 27, 28, 29, 30, 36--38, 39, 41, 42, 44, 50, 64, (3)

Plaintiff's Second Set of Interrogatories, Interrogatory ##1, 5, 6 (in part), 16, 18, 19, 24, 25, 30, 31.

IT IS FURTHER ORDERED that the motion is **GRANTED** with respect to: (1) Plaintiff's First Set of Interrogatories, Interrogatory ##14, 17, 27, 28, (as limited and explained in the accompanying Memorandum); (2) Plaintiff's Second Set of Interrogatories, Interrogatory #6(b)(with respect to William Krill, only); ##22, 26--28 (as limited in the accompanying Memorandum); (3) Plaintiff's First Request for Production of Documents, Request #7, (as limited in the accompanying Memorandum); ##11--26, 32, 33, 40, 61, (as limited in the accompanying Memorandum), #69 (with respect to defendant's Important Document Files Policy, only), (4) Plaintiff's Second Request for Production of Documents, Request #4.

IT IS FURTHER ORDERED that the motion is **GRANTED** and **DENIED** with respect to: (1) Request #10, Plaintiff's First Request for Production of Documents, (insofar as plaintiff requests Action Plans withheld by defendant in connection with its prior response to Request #10 and a complete and legible copy of the "Gadomski List", and as more fully described and explained in the accompanying Memorandum); (2) Plaintiff's Second Request for Production of Documents, Request #1, (as fully explained and described in the accompanying Memorandum).

IT IS FURTHER ORDERED that, within **thirty (30) days** of the entry of this order upon the record, defendant shall provide plaintiff with its supplemental discovery responses as ordered herein, and as more fully described and explained in the accompanying Memorandum.

S.J.