

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**MOORE** :  
 : **CIVIL ACTION**  
 **v.** :  
 : **97-2150**  
 **ACME CORRUGATED BOX, et al.** :

**MEMORANDUM**

**Broderick, J.**

**May 18, 1998**

Plaintiff James Moore (“Plaintiff”) has brought this civil action against his former employer, Acme Corrugated Box Corporation, Inc. (“Acme”), as well as Robert Cohen (“Cohen”), Acme’s President and sole shareholder, and Lawrence Heck (“Heck”), Acme’s General Manager (collectively “Defendants”). The action arises from Plaintiff’s termination of employment and his failure to receive benefits under a deferred compensation plan established by Acme.

Presently before the Court is Defendants’ motion for summary judgment, and Plaintiff’s cross-motion for summary judgment as to one count of Plaintiff’s amended complaint. For the reasons which follow, the Court will grant Defendants’ motion in part and deny the motion in part. Additionally, the Court will deny Plaintiff’s cross-motion for summary judgment.

In his initial complaint filed with the Court, Plaintiff alleged a claim of age discrimination, under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621-34, and the Pennsylvania Human Relations Act (“PHRA”), 43 Pa.Stat. §§ 951-63, as well as several claims under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1461, and several claims under common law. Defendants filed a motion to dismiss

Plaintiff's complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. The Court granted Defendants' motion in part and denied the motion in part. The Court dismissed Plaintiff's common law claims on the ground that said claims were pre-empted by ERISA § 514, 29 U.S.C. § 1144. However, the Court allowed Plaintiff to proceed with his claim of age discrimination and allowed Plaintiff to proceed with several of his claims under ERISA.

Trial in the instant case had been scheduled for March 24, 1998, and the Court had set a discovery deadline of February 3, 1998. On February 23, 1998, Plaintiff filed a motion for leave to amend his complaint. In his motion, Plaintiff claimed that discovery had revealed that Defendants had wrongly converted Plaintiff's life insurance policy without Plaintiff's knowledge or consent. Plaintiff sought to amend his complaint to include additional claims under ERISA, and a common law claim of conversion, as well as common law claims of respondeat superior and intentional infliction of emotional distress (which claims the Court had previously dismissed). Plaintiff also sought to add as additional defendants two individuals who Plaintiff claimed were responsible for the wrongful conversion of his policy.

The Court denied Plaintiff leave to amend his complaint to add additional defendants. However, the Court granted Plaintiff leave to amend his complaint to include additional claims under ERISA, and to include his common law claims of conversion, intentional infliction of emotional distress and respondeat superior. The Court specifically granted said leave without prejudice to Defendants raising the issue of ERISA pre-emption.

On April 7, 1998, Plaintiff filed the amended complaint which is presently before the Court. Plaintiff's amended complaint consists of nine counts: count one alleges a claim of age

discrimination; count two alleges a claim for breach of fiduciary duty in violation ERISA, 29 U.S.C. §§ 1101-1114; count three alleges a common law claim of theft and conversion on behalf of Plaintiff and his wife, Linda Moore; count four alleges a claim of respondeat superior; count five alleges a common law claim for intentional infliction of emotional distress; count six alleges that Defendants have failed to provide Plaintiff with a complete report of his rights regarding the deferred compensation plan in violation ERISA, 29 U.S.C. § 1132(a)(1)(A); count seven alleges that Defendants have failed to provide him with benefits to which he is entitled under the plan, in violation of ERISA § 502, 29 U.S.C. § 1132(a)(1)(B); count eight alleges that Defendants have interfered with Plaintiff's right to receive benefits under the plan, in violation of ERISA § 510, 29 U.S.C. § 1140; count nine alleges that Defendants have failed to provide Plaintiff with information regarding his 401(k) plan, in violation of ERISA, 29 U.S.C. § 1132(a)(1)(A).

Defendants subsequently filed the instant motion for summary judgment, claiming that they are entitled to judgment as a matter of law as to all counts of Plaintiff's amended complaint. Plaintiff has filed a response in opposition to Defendants' motion, and has filed a cross-motion for summary judgment as to Plaintiff's claim that Defendants have failed to provide him with information regarding his 401(k) plan. Although Plaintiff's cross-motion for summary judgment requests judgment as to "count eleven" of his complaint, Plaintiff appears to be referring to his claim which is set forth in count nine of his amended complaint. As there is no count eleven in Plaintiff's amended complaint, the Court will construe Plaintiff's cross-motion for summary judgment as a motion made in connection with count nine of Plaintiff's amended complaint.

The facts as to which there are no disputed issues, as disclosed by the exhibits submitted

in connection with these motions for summary judgment, are summarized as follows:

In 1983, Plaintiff James Moore was hired as a plant manager at Defendant Acme Corrugated Box Corp., Inc, a company which manufactures and distributes corrugated boxes. As plant manager, Plaintiff was responsible for “running the plant,” and therefore had numerous responsibilities. In addition to overseeing production of the boxes, Plaintiff was responsible for maintaining cleanliness of the plant, and ensuring that the plant ran efficiently. Plaintiff was responsible for keeping the plant properly staffed and ensuring that the employees had proper training. Plaintiff oversaw lower level supervisors and employees. Plaintiff also provided plant tours to potential clients or others who wanted to visit Acme’s production plant.

Defendant Lawrence Heck was hired at Acme in 1985. At the time of Plaintiff’s termination, Defendant Heck was Acme’s general manager, and directly supervised Plaintiff. Defendant Burton Cohen, whose father founded Acme, is Acme’s President and sole shareholder.

From the time he began his employment at Acme in 1983 until 1995, the year before his employment was terminated, Plaintiff had worked well as Acme’s plant manager. Plaintiff was a loyal and hard-working employee. Under Plaintiff’s supervision, Acme’s plant became more productive, cleaner and more efficient.

Plaintiff’s good performance was noted in his performance reviews. These reviews were conducted by Defendant Heck. In a 1993 evaluation of Plaintiff’s work performance, Defendant Heck stated that Plaintiff did “a truly outstanding job of running the plant,” and stated that, under Plaintiff’s leadership, “the plant has become our major sales tool.”

Although Plaintiff’s evaluations before 1995 were full of praise, they were not without criticism. In a 1988 review of Plaintiff’s work performance, Defendant Heck stated that “[t]he

major area of needed improvement is to communicate more effectively what is expected of all employees, especially supervisors.” Similarly, in Plaintiff’s 1992 performance review, Defendant Heck stated that Plaintiff had “not improved management communication,” and stated his belief that “[no] steps were made to do so.” Although Defendant Heck noted improvement in Plaintiff’s 1993 review, he stated that Plaintiff should continue to work on “management communication in ‘troublesome’ issues.”

During Plaintiff’s tenure as plant manager, Acme became increasingly successful. As a result of its success, Acme set new goals for itself. Acme sought to expand production and improve the quality of its services. These new goals required that Plaintiff improve his managerial skills in areas other than production. In his 1992 review of Plaintiff’s work performance, Defendant Heck stated as follows:

You have made this plant the productive success that it has become over your 8 ½ years with Acme. These achievements are historical and undeniable. We now have a company goal of 12 million dollars in these years with 100% on time delivery. That goal is made possible by past achievement.

In the same light, your past achievements require different skills to take us to that 12 million dollar, 100% on time delivery goal. Namely, your organizational and communication skills need to be greatly improved.

In 1995, Defendant Heck took over Acme’s sales operations and began to reformulate the sales department. According to his deposition testimony, Defendant Heck sought to increase the number of sales brought in, and sought to change the kind of customer who purchased boxes from Acme. Acme planned to bring in new machinery to help effectuate these changes.

According to the testimony of Defendants Heck and Cohen, these changes required that

Plaintiff switch his focus solely from production and output, and focus on improving other areas of management where Plaintiff's skill was lacking. These areas included communication, scheduling and staffing. In his deposition, Defendant Heck testified as follows:

We began to choose and profile customers... We had to meet certain volume and style criteria and we set about to go solicit them... the emphasis [at Acme] switched and it switched from simply output to output that complements the kinds of customers that we need to get. It required improving the communication skills... It required scheduling. It required expediting. It required anticipating problems before they are crises and these things Jim [Plaintiff] had a harder time with. He could certainly push performance and did push performance to a level, but couldn't or didn't for whatever reason-- didn't want to or whatever-- just couldn't get those other skills.

Plaintiff continued to give tours of the production plant. On June 28, 1995, an individual who had toured Acme's plant with a group of persons wrote a letter to Acme which stated that all who had taken the tour had "commented that Acme was the most productive and well-managed box plant they've ever toured." The letter further stated that "Jim Moore and his entire staff did a super job."

On August 17, 1995, Defendant Heck wrote a memo to Plaintiff stating that "[i]t has become apparent as the organization continues to refine and improve that different skills are necessary and appropriate. Mainly, they center around communication, organization and consistency." Defendant Heck then outlined the areas in which Plaintiff needed improvement and stated that "[w]hat runs thru all of this is a failure to consistently and productively communicate and manage the managers and staff of the plant through active leadership in areas that we need to improve." Defendant Heck further stated that "[t]his observation is early, but I believe that if we do not address the changing responsibility of your job, ultimately you will feel and actually be left out. I find that unacceptable and unfortunate as you brought us to this point

of performance.”

On October 19, 1995, Defendant Heck wrote a memorandum to Plaintiff’s personnel file stating that he and Plaintiff “have had no fewer than four formal discussions and easily twice as many informal discussions about the breakdown of the plant’s morale and our inability to schedule manning and projects.” Defendant Heck further stated in his memorandum:

While Jim does not lack the effort to try to solve these issues, he nonetheless has made little progress... Simply put, this is becoming an exercise in frustration for all involved. For Acme, these fundamental management issues are not being addressed to the detriment of our customers and the workforce. For Jim, he does not possess the education, communication, or management perspective to recognize the weaknesses, value them and correct them. For me, watching a long term employee help the company reach the level where he no longer can make a contribution is difficult.

In a November 30, 1995 memorandum to Plaintiff’s personnel file, Defendant Heck stated that “[a]fter reviewing the progress made toward scheduling and the training program and the overtime and finding all to be somewhat unsatisfactory, Jim and I had a frank conversation.” According to Defendant Heck’s memorandum, Heck had “put the question to Jim..... Can you be the plant manager?” Heck stated that Plaintiff had “expressed his decision to get the house in order.” Defendant Heck further stated that he had told Plaintiff that Acme “must move FORWARD and correct the items listed above and overall lack of planning.”

Defendant Heck subsequently wrote a memorandum to Defendant Cohen explaining his dissatisfaction with Plaintiff’s work performance. In this memorandum, Defendant Heck stated that the situation involving the production management team was “critically and dramatically grave.” According to Defendant Heck, “[t]he change in sales was necessary for Acme to grow. Now, a change is necessary in production so that Acme can grow.” Defendant Heck noted

problems in morale, declining efficiency and quality in the plant, and a decline in the plant's cleanliness. Defendant Heck further stated:

What is to be done? Whether the rest of the managers can possibly grow, that is impossible under Jim [Moore]. Jim is the least capable to be in the position he is in... Jim has to be relieved of his responsibilities. The fraud of his leadership has been perpetuated far too long... I see no fall off in performance if he were not in the chain. Actually, I believe he muffs communication by his participation and we would have addition by subtraction.

In a memorandum dated December 13, 1995, Defendant Cohen stated that he had, on that day, held an in-person meeting with Plaintiff concerning his role as plant manager. Cohen stated in his memorandum that he had "made it very clear to Jim that to propel the company forward, he would clearly have to adopt a higher skill level of management to reach our goal of unparalleled performance." According to the memo, Cohen discussed with Plaintiff his lack of leadership and lack of communication skills, as well as his lack of consistency in his treatment of employees and the resulting lack of morale in the workforce. Cohen stated that Plaintiff had not yet "grasped the style of management necessary to move our production facility successfully into the future," and stated that Plaintiff "spends far too much time reacting and far too little time anticipating."

Cohen further stated:

Flex hours, changes in machinery operators, overtime, quality training, etc. are all issues that should be dealt with by the Plant Manager. Those issues have not been dealt with except at the direction of Larry Heck, our General Manager. I told Jim that this was unacceptable.

Defendant Cohen stated that he had told Plaintiff that "he needed the TQM [Total Quality Management] training more than any other supervisor" and that he hoped Plaintiff was taking advantage of the training.

Plaintiff enrolled in TQM training which began in June 1995. Of the nine TQM training

sessions which were held before Plaintiff's employment was terminated, Plaintiff attended five sessions. According to Defendants Cohen and Heck's testimony, Plaintiff had been given several opportunities to enroll in other management and training classes, and had not enrolled in any such classes.

In a memo to Plaintiff's personnel file dated January 10, 1996, Defendant Heck stated that he had been running the plant himself for the last week, and that "Jim Moore remains the plant manager in name only."

According to the undisputed testimony of Defendants Cohen and Heck, the Plaintiff's problems came to a head at two of Acme's quarterly employee meetings which were held in late January 1996. At these meetings, the employees were informed that they would not be receiving efficiency bonuses for that quarter. Several employees then expressed dissatisfaction with their jobs and complained specifically about Plaintiff, even at the meeting which Plaintiff himself attended. These employees complained about Plaintiff's favoritism toward certain employees, his inconsistent messages and his arbitrary scolding of certain employees. In a memorandum to Plaintiff's file dated February 2, 1996, Heck wrote about these meetings and stated:

The seeds of Jim's poor communication, unclear leadership and confrontation style have taken root. He has stayed fixed in time with no improvements in management style while the rest of the company has grown beyond that.

On February 16, 1996, Defendants Cohen and Heck met with Plaintiff and told him his employment with Acme was terminated. At that time, Plaintiff received a written notice of termination. At the time of his termination from Acme, Plaintiff was fifty-one years old.

Following Plaintiff's termination, Acme hired Harvey Stein for the position of plant manager. Harvey Stein was approximately forty years old at the time he was hired. After

receiving a memorandum from Defendant Cohen in which Cohen criticized Stein's performance, Harvey Stein resigned from Acme. He had worked at Acme as plant manager for approximately three months. Since the departure of Harvey Stein, Acme has not had a plant manager. The duties which had belonged to the plant manager have been divided among Mr. Heck and lower level supervisory employees.

In 1993, Acme terminated the employment of one Karl Dorfman. Mr. Dorfman had been in charge of Acme's sales operations. At the time of his termination, Mr. Dorfman was over forty years old. There is no evidence that Mr. Dorfman was discriminated against on the basis of his age, and Mr. Dorfman has made no such allegations. Mr. Dorfman has, however, filed suit in the Court of Common Pleas, Bucks County, claiming that he is entitled to an ownership interest in Acme. Also in 1993, Acme terminated the employment of one Ruth Melman, who had held the position of Secretary/Treasurer and Personnel Manager. At the time of her termination, Ruth Melman was over forty years old. There is no evidence that Ms. Melman was discriminated against on the basis of her age or that she has alleged such discrimination. According to Defendant Cohen, Acme did make an agreement with Ms. Melman at the time of her termination, the terms of conditions of which were sealed by agreement of the parties.

On August 20, 1986, Plaintiff was issued a life insurance policy (Policy # 92088216) by Transamerica Occidental Life Insurance Company ("Transamerica"). The face amount of the Transamerica policy was \$250,000.00. Plaintiff was listed as "Insured" and "Owner" of the Transamerica policy. Plaintiff's wife, Linda Moore, was listed as the beneficiary of the policy. Acme paid the premiums on this policy.

On September 1, 1986, Plaintiff signed a document styled an “Assignment of Policy as Collateral Security.” The document refers to Plaintiff’s Transamerica policy (Policy # 92088216), and provides that “[f]or value received, all right, title and interest of the undersigned in this policy is hereby assigned to Acme Corrugated Box Co., Inc.”

On May 10, 1988, Plaintiff signed a document styled a “Deferred Compensation Agreement.” The Agreement was also signed by Defendant Heck and by Acme’s then personnel manager Ruth Melman. Under a section styled “Deferred Benefits,” the Agreement provided that “[i]n the event the Employee shall continue in the employ of Acme Corrugated until said Employee’s retirement date [the day Employee turns 65 years of age]... Acme Corrugated Box Co., Inc. shall pay the Employee the deferred benefits ...of \$50,000.00 per annum for a period of ten (10) years...” The Agreement additionally provided that said benefits “shall not be paid unless the Employee remains in the continuous employ of Acme Corrugated Box Co., Inc. until Employee’s retirement date, or his date of death if earlier...” Additionally, the Agreement provided that it “may be amended solely by an agreement in writing executed by Acme Corrugated Box Co., Inc. and the Employee.”

On October 18, 1990, Defendant Heck wrote a memorandum to the Plaintiff in which he stated:

Kindly allow this letter to serve as confirmation that you have certain benefits under the Acme Corrugated Box Co., Inc. non-qualified deferred compensation program. Namely, this is a \$250,000 life insurance policy where the death benefit is paid to your beneficiary. Further, if actively employed at Acme Corrugated Box Co., Inc. at the age of 65, you will have a retirement benefit of \$50,000 a year for ten years. If there are any questions, lets discuss.

In early 1994, Plaintiff’s Transamerica policy was surrendered and a variable life

insurance policy was issued on behalf of Plaintiff by Phoenix Home Life Insurance (“Phoenix”). A document reflecting this change, dated January 24, 1994, bears Plaintiff’s signature. Additionally, a document styled a “Request for Full Surrender of Policy,” dated February 22, 1994, bears Plaintiff’s signature. On March 22, 1994, a check in the amount of \$34,327.85. was issued by Transamerica to “James Moore, Owner and Acme Corrugated Box Co., Assignee.” Although the Phoenix policy was not submitted in connection with these motions for summary judgment, evidence in the record reflects that the Phoenix life insurance policy listed Plaintiff as insured, and listed Acme as owner and beneficiary.

According to Plaintiff’s deposition testimony, Plaintiff asked Defendant Heck in November 1995, about his retirement plan, and expressed his concern that he would not receive the deferred compensation benefits if he were let go before his retirement date. Plaintiff testified that he spoke to Defendant Heck about having the “fund” turned over to Plaintiff’s name so he could have the money regardless of whether he stopped working at Acme before his retirement date. According to Plaintiff’s testimony, Defendant Heck later told Plaintiff that he had spoken to Defendant Cohen, and that Defendant Cohen had agreed to turn the plan money directly over to Plaintiff. Defendant Heck then told Plaintiff that papers were on Defendant Cohen’s desk to effectuate this change, and that it was a “done deal.” At that point, according to Plaintiff’s testimony, Plaintiff believed the money had been turned over to him.

#### SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The law is clear that when a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is properly made, the non-moving party cannot rest on the mere allegations of the pleadings. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Rather, in order to defeat the motion for summary judgment, the non-moving party, by its own affidavits, or by depositions, answers to interrogatories or admissions on file, as stated in Fed.R.Civ.P. 56(e), "must set forth specific facts showing that there is a genuine issue for trial." The Court, in determining whether there is a genuine issue of material fact, draws all inferences in favor of the non-moving party. Country Floors v. Partnership of Gepner and Ford, 930 F.2d 1056, 1061 (3d Cir. 1991). However, "[t]he mere existence of a scintilla of evidence" in support of the non-movant's position will not be sufficient to defeat a motion for summary judgment. Anderson, 477 U.S. at 252.

#### PLAINTIFF'S AGE DISCRIMINATION CLAIM

In cases where the plaintiff has produced no direct evidence of discrimination, the Court considers the plaintiff's claim under the shifting burdens analysis set forth by the Supreme Court in McDonnell Douglas and its progeny. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). The Third Circuit has applied this framework to cases involving claims under the ADEA. See, e.g., Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995).

A plaintiff seeking to prove a claim of age discrimination under the shifting burdens analysis must first establish a prima facie case of age discrimination by showing: (1) that he is a member of the protected class in that he is at least 40 years of age; (2) that he is qualified for the position from which he was terminated; (3) that he suffered an adverse employment decision; and (4) that he was replaced by a person sufficiently younger to create an inference of age discrimination. McDonnell Douglas, 411 U.S. at 802; see 29 U.S.C. § 631(a).

After the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the employment decision. McDonnell Douglas, 411 U.S. at 802. The employer satisfies this burden if it introduces evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994).

When the employer has put forth a legitimate, non-discriminatory reasons for its action, the plaintiff bears the burden to persuade the factfinder that this reason was in fact a pretext for discrimination. St. Mary's Honor Ctr, 509 U.S. at 514-515. However, a plaintiff is not required to satisfy this ultimate burden of persuasion in order to defeat a motion for summary judgment. Fuentes, 32 F.3d at 764. In order to survive a motion for summary judgment, a plaintiff need only "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Id.

In order to defeat a motion for summary judgment, the plaintiff must identify

“weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons such that a reasonable factfinder could rationally find those reasons unworthy of credence and hence infer that the proffered nondiscriminatory reason did not actually motivate the employer’s action.” Simpson v. Kay Jewelers, -- F.3d--, 1998 WL 196062, 3 (3d Cir. (Pa.) April 24, 1998). The plaintiff is not required to produce evidence in addition to that which he has put forth in his prima facie case, nor is he required to come forward with evidence which would necessarily compel a finding of pretext. Id. However, a plaintiff must identify evidence which has “sufficient probative force [such] that a fact finder could conclude by a preponderance of the evidence that age was a motivating or determinative factor in the employment decision.” Id.

The plaintiff may point to evidence that the employer has previously discriminated against this plaintiff or against other employees, or evidence that the employer has given more favorable treatment to persons who are similarly situated to the Plaintiff, but are not within the protected class. Id. Additionally, the Third Circuit has noted that “factors such as the defendant's credibility, the timing of an employee's dismissal, and the employer's treatment of the employee could raise an inference of pretext which would make summary judgment for the employer inappropriate.” Josey v. Hollingsworth Corp., 996 F.2d 632, 638-39 (3d Cir. 1993).

In determining whether a plaintiff has discredited the employer’s proffered non-discriminatory reason, the Court must be mindful that the issue is “not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination.” Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997) (citations omitted). A plaintiff can not survive summary judgment simply by showing that the employer’s decision was

wrong or mistaken. Keller, 130 F.3d at 1108. Similarly, a plaintiff can not discredit the employer's reason by identifying evidence that "could convince a reasonable factfinder that he did as well as he could [in his job] under the circumstances." Id. at 1109.

When an employer has cited particular criteria or categories of work performance which led to the plaintiff's discharge, the plaintiff can not discredit the employer's stated reason by pointing to strong performance in other categories. Simpson, 1998 WL 196062 at 5. "Rather, the plaintiff must point to evidence from which a factfinder could reasonably infer that the plaintiff satisfied the criterion identified by the employer or that the employer did not actually rely upon the stated criterion." Id.

In the instant case, Plaintiff has established a prima facie case of age discrimination. Plaintiff was within the protected age group and was objectively qualified for the position of plant manager. His employment was terminated, and Defendants subsequently hired Harvey Stein, a man who was in his early forties. Although it is not clear precisely how old Mr. Stein was at the time he was hired, the Court will assume that Mr. Stein was sufficiently young enough to create an inference of age discrimination.

Defendants have articulated a legitimate nondiscriminatory reason for its decision to terminate Plaintiff's employment. As evidenced in the record, Defendants Cohen and Heck no longer thought Plaintiff was an effective plant manager. According to their testimony and other evidence in the record, Defendants held Plaintiff responsible for several perceived problems with the plant, including the employees' problems with communication and low morale, an inability to schedule production and a failure to create staffing solutions to answer the changing demands for

production.

Plaintiff has failed to identify any “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions” in Defendants’ proffered reason for his discharge. The fact that Plaintiff disagrees with Defendants’ assessment of his work performance does not suffice to discredit Defendants’ explanation for Plaintiff’s discharge. Plaintiff argues that the plant had continued to increase production while he was manager, but Defendants have never cited a failure in production as a basis for Plaintiff’s discharge. Indeed, Defendants stated that Plaintiff was a weak manager because he focused only on production and output, and ignored other aspects of managing the plant.

The fact that Plaintiff received generally positive reviews before 1995 does not give reason to disbelieve the Defendants stated reason for Plaintiff’s termination. Defendants have at all times stated that Plaintiff was at one time an effective plant manager who became increasingly ineffective over time. Similarly, the fact that Plaintiff had been complimented in a letter written in June 1995 by a person who had toured the plant does not contradict the statements by Defendants Heck and Cohen that they felt Acme was not progressing toward its new goals, and believed Plaintiff was responsible for this lack of progress. Although Plaintiff has identified two other persons who held management positions and were discharged when they were over forty years of age, he has provided no evidence that these persons were discriminated against-- or even that these persons made allegations of discrimination.

In sum, Plaintiff has identified no evidence which could cause a reasonable factfinder to disbelieve the employer’s articulated legitimate reason behind Plaintiff’s termination, nor has he pointed to evidence from which a factfinder could reasonably conclude that discrimination was

more likely than not a motivating cause of Plaintiff's termination. For this reason, summary judgment will be granted in favor of Defendants and against Plaintiff with respect to count one of Plaintiff's amended complaint, which alleges a claim of age discrimination under the ADEA and the PHRA.

#### PLAINTIFF'S REMAINING CLAIMS

Counts two through eight of Plaintiff's amended complaint relate to the deferred compensation plan which Acme established for Plaintiff. Count nine of Plaintiff's amended complaint relates to Plaintiff's 401(k) plan established at Acme. As previously noted, counts two, six, seven, eight and nine allege claims under ERISA. Counts three, four and five of Plaintiff's amended complaint allege common law claims for conversion, respondeat superior and intentional infliction of emotional distress.

ERISA covers "any employee benefit plan" established or maintained by an employer engaged in commerce or any industry or activity affecting commerce. 29 U.S.C. § 1003(a)(1). ERISA broadly defines a covered "employee pension benefit plan" to include any plan, fund or program established or maintained by an employer that:

by its express terms or as a result of surrounding circumstances (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.  
29 U.S.C. § 1002(2)(A)(ii).

In the instant case, Defendants have claimed that the deferred compensation plan at issue is a "top hat" plan. A "top hat" plan is a pension plan which is unfunded and maintained by an

employer primarily to provide deferred compensation for a select group of management or highly trained employees. In re New Valley Debtor, 89 F.3d 143, 148 (3d Cir. 1996). “Top hat” plans are “employee benefit plans” which are covered by ERISA generally, but are exempted from many of ERISA’s requirements. 29 U.S.C. §§ 1001-1145. Specifically, “top hat” plans are exempted from the vesting requirements set forth in 29 U.S.C. §§ 1051-1061, the participation requirements set forth in 29 U.S.C. §§ 1080-1081, and the fiduciary requirements set forth in 29 U.S.C. §§ 1101-1114. See, 29 U.S.C. §§ 1051, 1081, 1101; see also, In re New Valley Debtor, 89 F.3d at 148-149. Additionally, ERISA exempts “top hat” plans from its reporting and disclosure requirements upon promulgation of the proper administrative regulations. 29 U.S.C. § 1051(2). Such regulations are set forth in 29 C.F.R. § 2520.104-23. Section 2520.104-23 establishes minimal alternative reporting requirements for “top hat” plans and exempts “top hat” plans from most of ERISA’s reporting provisions. See In re New Valley Corp., 89 F.3d at 149.

The Third Circuit has explained the reasoning behind the exemptions accorded to “top hat” plans:

Congress imposed strict regulations over plans whose participants and beneficiaries it most desired to protect-- employer- funded plans designed to secure employees' financial security upon retirement. ERISA imposes upon the trustees and sponsors of such plans strict fiduciary duties and standards of care and further provides for detailed disclosure and vesting requirements. Top hat plans, however, which benefit only highly compensated executives, and largely exist as devices to defer taxes, do not require such scrutiny and are exempted from much of ERISA's regulatory scheme.  
Kemmerer, 70 F.3d at 286.

The Third Circuit has emphasized, however, that ERISA’s administration and enforcement provisions, 29 U.S.C. §§ 1114-1147, do apply to “top hat” plans. Kemmerer, 70 F.3d at 287. Accordingly, a participant in a “top hat” plan has the right to bring an action under

ERISA's civil enforcement provision to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); Kemmerer, 70 F.3d at 287-288. Moreover, a "top hat" plan remains subject to ERISA's pre-emption provision set forth in ERISA § 514, 29 U.S.C. § 1144. See, e.g., Bruno v. Hershey Food Corp., 964 F.Supp. 159, 163 (D. N.J. 1997).

Section 514 of ERISA provides generally that ERISA's provisions supersede any and all state laws insofar as they "relate to" any employment benefit plan. 29 U.S.C. § 1144(a). The Supreme Court has stated that, for purposes of ERISA § 514, a state law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). ERISA pre-emption is not limited to state laws which are specifically designed to affect employee benefit plans. Shiffler v. Equitable Life Assurance Society of the United States, 838 F.2d 78 (3d Cir.1988).

In the instant case, the Court will deny summary judgment as to counts two, six, seven and eight of Plaintiff's amended complaint, which counts allege claims relating to the deferred compensation plan at issue in the instant case. The Court will deny summary judgment as to these counts because there remain genuine issues of material fact concerning the structure of Acme's deferred compensation plan.

Additionally, the Court will deny the parties' cross-motions for summary judgment as to count nine of Plaintiff's amended complaint which alleges that Defendants failed to provide Plaintiff with information regarding his 401(k) plan in violation of ERISA, 29 U.S.C. § 1132(c)(1). After closely examining the evidence the record, the Court has determined that there

are genuine issues of material fact concerning this claim. Accordingly, the Court will deny the parties' cross-motions for summary judgment as to count nine of Plaintiff's amended complaint.

However, the Court will grant Defendants' motion for summary judgment as to Plaintiff's state common law claims, and will dismiss counts three, four and five of Plaintiff's amended complaint on the ground that said claims are pre-empted by ERISA § 514, 29 U.S.C. § 1144. Plaintiff's common law claims of conversion, respondeat superior and intentional infliction of emotional distress all arise from his allegations that Defendants wrongfully converted and/or denied Plaintiff the benefits he was due under his ERISA governed employee benefit plan. These claims therefore "relate to" the employee benefit plan and are pre-empted by ERISA § 514.

In an attempt to avoid the effect of ERISA pre-emption, Plaintiff has argued that the deferred compensation plan in the instant case is an "excess benefit plan." ERISA provides that its regulations shall not apply to an employee benefit plan if it is an "excess benefit plan," as defined in section 29 U.S.C. § 1002(36), and is unfunded. 29 U.S.C. § 1003(b)(5). Section 1002(36) of ERISA defines an "excess benefit plan" as:

a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies without regard to whether the plan is funded.  
29 U.S.C. § 1002(36)

Plaintiff's argument that the deferred compensation plan at issue is an unfunded "excess benefit plan" not covered by ERISA directly contradicts Plaintiff's claim that he is entitled to relief under several provisions of ERISA. Nevertheless, the Court has considered Plaintiff's argument and has determined that the deferred compensation plan at issue is not an "excess

benefit plan.” As the District Court noted in Northwestern Mutual Life Ins. Co. v. Resolution Trust, “because the limitations set forth in IRC [Internal Revenue Code] Section 415 are not fixed, an employee benefit plan can not serve the purpose of providing benefits in excess of these limitations without expressly referring to IRC 415 or its substantive provisions.” 848 F.Supp. 1515, 1519 (N.D. Al. 1994). Accordingly, an employee benefit plan is not an “excess benefit plan” as defined by ERISA, 29 U.S.C. § 1002(36), unless it refers to Internal Revenue Code Section 415, 26 U.S.C. § 415, or Section 415’s substantive provisions. Id. In the instant case, the deferred compensation plan at issue makes no such reference and is therefore not an “excess benefit plan” as defined by ERISA, 29 U.S.C. § 1002(36).

#### CONCLUSION

For the above-stated reasons, the Court will grant Defendants’ motion for summary judgment in part and deny the motion in part. The Court will grant Defendants’ motion in connection with count one of Plaintiff’s amended complaint which alleges a claim of age discrimination. Additionally, the Court will grant Defendants’ motion in connection with counts three, four and five of Plaintiff’s amended complaint and will dismiss Plaintiff’s common law claims on the ground that said claims are pre-empted by ERISA, 29 U.S.C. § 1144. The Court will deny Defendants’ motion for summary judgment in connection with counts two, six, seven, eight and nine of Plaintiff’s amended complaint, and will deny Plaintiff’s cross-motion for summary judgment as to count nine of his amended complaint.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>MOORE</b>	:	
	:	<b>CIVIL ACTION</b>
<b>v.</b>	:	
	:	<b>97-2150</b>
<b>ACME CORRUGATED BOX, et al.</b>	:	

**ORDER**

**AND NOW**, this 18th day of May, 1998; the Court having considered Defendants' motion for summary judgment and Plaintiff's cross-motion for summary judgment as to one count of his amended complaint; and for the reasons stated in the Court's accompanying memorandum;

**IT IS ORDERED:** Defendants' motion for summary judgment with respect to Plaintiff's claim of age discrimination is **GRANTED** and count one of Plaintiff's amended complaint is hereby **DISMISSED**;

**IT IS FURTHER ORDERED:** Defendants' motion for summary judgment with respect to Plaintiff's common law claims of conversion, respondeat superior and intentional infliction of emotional distress is **GRANTED**, and counts three, four and five of Plaintiff's amended complaint are hereby **DISMISSED**;

**IT IS FURTHER ORDERED:** Defendants motion for summary judgment with respect to counts two, six, seven, eight and nine of Plaintiff's amended complaint is **DENIED**; and

**IT IS FURTHER ORDERED:** Plaintiff's cross-motion for summary judgment with respect to his claim for information regarding his 401(k) plan, which claim is set forth in count nine of Plaintiff's amended complaint, is **DENIED**.

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**RAYMOND J. BRODERICK, J.**