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

JAMES MOORE,	:	
Plaintiff	:	**CIVIL ACTION**
	:	
v.	:	
	:	**97-2150**
ACME CORRUGATED BOX CO.,	:	
LAWRENCE HECK, &	:	
BURTON COHEN,	:	
Defendants	:	

M E M O R A N D U M

Broderick, J. **July 6, 1998**

The Court held a bench trial in the above captioned case. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court's findings of fact and conclusions of law are set forth below. In accordance with those findings and conclusions, the Court will grant judgment in favor of Defendants Acme Corrugated Box Co., Lawrence Heck and Burton Cohen ("Defendants") and against Plaintiff James Moore ("Plaintiff").

Background

The instant action arises out of the termination of Plaintiff Moore's employment at Acme Corrugated Box Co. Moore claims that he was wrongfully terminated, and claims that Acme failed to provide him with benefits to which he is entitled under Acme's deferred compensation plan. Moore further claims that Defendants failed to provide him with information regarding his deferred compensation plan, and his 401(k) plan.

Moore's amended complaint alleged a claim of age discrimination, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S. § 951 et seq., as well as several claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and several claims under state law.

Defendants filed a motion for summary judgment as to all counts in the amended complaint. The Court granted the motion in part and denied the motion in part. The Court granted summary judgment with respect to Moore's claims of age discrimination, and dismissed his state law claims on the basis of ERISA pre-emption. However, the Court denied Defendants' motion for summary judgment with respect to Plaintiff Moore's claims under ERISA.

Accordingly, the Court conducted a non-jury trial as to the following five claims: first, a claim for breach of fiduciary duty in violation of ERISA; second, a claim that Defendants failed to provide Moore with a complete report of his rights regarding Acme's deferred compensation plan in violation of ERISA, 29 U.S.C. § 1132(c); third, a claim for benefits under ERISA § 502; fourth, a claim of interference with Moore's right to receive benefits in violation of ERISA § 510; and fifth, a claim that Defendants failed to provide Moore with information regarding his 401(k) plan at Acme, in violation of ERISA, 29 U.S.C. § 1132(c).

Findings of Fact

Based on the credible evidence presented by the parties at trial, the Court makes the following findings of fact:

In 1983, Plaintiff James Moore began working at Acme Corrugated Box Co., Inc., a company which manufactures and distributes corrugated boxes, as Acme's plant manager. Moore was terminated from this position at Acme on February 16, 1996.

Mr. Moore was hired as Acme's plant manager by Defendant Burton Cohen. At the time he hired Moore as Acme's plant manager, Mr. Cohen was the President and sole shareholder of Acme Corporation. He remains Acme's President and sole shareholder as of this date.

As Plant Manager, Mr. Moore's duties were varied. He was responsible for managing lower level supervisors and other plant employees, and had responsibility for addressing employee concerns and employee discipline issues. Additionally, Moore was responsible for plant cleanliness and safety, and controlling the amount of waste generated by the plant. Moore also bore responsibility for staffing of the plant-- determining how many workers were needed and scheduling their shifts. Many of these duties could be delegated to lower level supervisors.

Before coming to work at Acme, Moore had worked in the corrugated box industry for several years, and he proved himself an effective plant manager at Acme. Under Moore’s direction, production at the Acme plant increased significantly. Moore oversaw an upgrade of plant machinery, and improved cleanliness in the plant.

In 1985, Defendant Lawrence Heck began working at Acme in the position of comptroller. Unlike Plaintiff Moore, Heck had no previous experience in the box manufacturing industry and he relied on Moore for information regarding box manufacturing and production. Heck, too, was an effective worker, and his job responsibilities at Acme steadily increased. By 1988, Burton Cohen had promoted Heck to the position of general manager of the company. As general manager, Heck assumed responsibility for the administration of Acme’s employee benefits, and became the Plan Administrator for Acme’s 401(k) plan. Additionally, Heck had direct supervision over Plaintiff Moore. As Moore’s immediate supervisor, Heck conducted annual evaluations of Moore’s work performance. Heck would write up a written evaluation each year which he would then review with Moore. Burton Cohen reviewed these evaluations as well.

From 1988, the year in which Heck began conducting formal reviews of Moore’s work performance, through 1993, the last year when Heck conducted such a review, Heck’s evaluations of Moore’s work performance were on the whole extremely positive. These evaluations often noted Moore’s loyalty and dedication to Acme, and acknowledged Moore’s responsibility in improving productivity and cleanliness at the plant. In the 1988 evaluation, for example, Heck noted that “the square footage and sales with which the plant runs is 40% more than it was when you started,” and noted that “appearance and throughput of the plant and quality of the workforce is vastly improved.” In the 1993 evaluation of Moore’s work performance-- the last formal evaluation conducted, Heck stated that Plaintiff Moore did “a truly outstanding job of running the plant,” and noted that, under Moore’s leadership, “the plant has become our major sales tool.”

Although Heck’s evaluations of Moore’s work were full of praise, they were not without criticism. In almost all of his reviews of Moore’s work, Heck noted that Moore needed to improve his communications skills, and needed to work more effectively with the supervisors who worked under him. For example, Heck concluded Moore’s 1992 work evaluation with the following statement:

> 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.

Whatever problems were cited in Moore’s evaluations up through 1993, however, those criticisms were far outweighed by praise. Although Moore was aware of the criticisms contained in his work evaluations, he had always believed that both Heck and Cohen were wholly satisfied with his performance as plant manager. Heck had always told Moore that the evaluations contained some criticism because even the best employees had some room for improvement.

Over the course of 1995, Heck became increasingly unhappy with Moore’s performance as plant manager. Heck expressed his dissatisfaction with Moore to Burton Cohen, who also became unhappy with Moore’s work. From Heck and Cohen’s perspective, Acme was changing rapidly, trying to increase its steady pace of improvement and growth, and Moore-- despite the fact that he continued to work hard-- could not adapt to Acme’s changing environment. Heck and Cohen perceived several factors which were contributing to Moore’s declining ability to effectively manage the plant. Heck had taken over the sales department in 1994, and had, according to Heck, significantly increased Acme’s sales by shifting Acme’s base of customers to companies which demanded a larger amount of boxes. Additionally, Acme had begun to acquire and install several new machines, in an attempt to keep pace with the technological advances in the field of corrugated box production. Heck and Cohen believed that the position of plant manager now required a level of initiative and foresight which Moore simply did not have. Moore’s weaknesses in communication with lower level supervisors, his inconsistent treatment of employees, his failure to create a schedule of production projects, and his failure to create a second staff or provide other staffing solutions became increasingly problematic. Both Heck and Cohen encouraged Moore to enroll in a “Total Quality Management” (“TQM”) seminar. Although Moore enrolled in the seminar, he did not attend all of the sessions, and he had one of the other Acme employees who was enrolled in the seminar do his homework.

Heck and Cohen had several meetings with Moore in which they discussed their concerns with various problems in the plant. At trial, Heck and Cohen testified that they had told Moore that they held him responsible for these problems, and had spoken frankly with Moore about the seriousness of his deficient work performance. Heck and Cohen further testified that they had shown great patience in allowing Moore opportunities to improve his work performance, and had allowed him more room to improve than they would have with another employee. It is clear, however, that Heck and Moore did not effectively convey their concerns to Moore. Moore did not perceive that he was being held responsible for the perceived problems in the plant, and did not believe that his job was in any jeopardy. Although Heck and Cohen put memos in Moore’s personnel file which memorialized their conversations with Moore, and detailed their dissatisfaction with Moore’s performance, they did not show these memos to Moore himself. Furthermore, it is clear that Heck and Cohen did not demonstrate any great patience in dealing with Mr. Moore’s work problems. Although Moore had been employed at Acme since 1983, and had at one time contributed greatly to the success of the company, his employment was terminated only a few months after Heck and Cohen perceived serious problems in Moore’s performance.

On February 16, 1996, Moore was called into a meeting with Mr. Cohen and Mr. Heck, and was informed by Cohen that his employment was terminated.

<u>Deferred Compensation Plan</u>

In 1986, Acme established a deferred compensation plan for a select number of Acme employees, including Plaintiff Moore. The plan was established by Defendant Cohen and Nathan Kolbes, a former Acme employee who was then employed as Acme’s benefits coordinator. Cohen and Kolbes decided to implement the deferred compensation plan in order to provide an incentive for certain valued employees to remain in Acme’s employ. Although the deferred compensation plan was initially offered to the few persons in Acme's sales department in addition to Acme's high level employees, the plan was soon discontinued for the sales staff and was available only for Plaintiff Moore, Defendants Heck and Cohen, and Karl Dorfman, then head of Acme's sales department. Karl Dorfman's employment with Acme was terminated in 1993, and only Moore, Heck and Cohen remained participants in the deferred compensation plan.

From its inception, the deferred compensation plan had two components. First, the plan provided a death benefit of $250,000.00 to the employee's designated beneficiary if the employee died while in the employ of Acme. Second, the plan provided that if the employee retired from Acme at the retirement date set by Acme (which, in Moore's case, was the date of his sixty-fifth birthday), the employee would receive a retirement benefit. The retirement benefit established for Moore was $50,000.00 per year for ten years.

The terms of the deferred compensation plan were not written down when the plan was established in 1986. Moore understood that he would receive the death benefit of $250,000.00 only if he was employed at Acme upon his death, and understood that he would receive the retirement benefit of $50,000.00 per year for ten years only if he remained at Acme until his retirement date.

In July 1986, Moore, with the help of Nathan Kolbes, submitted an application for a life insurance policy with

Transamerica Occidental Life Insurance Company ("Transamerica"). Moore designated his wife, Linda Moore, as the beneficiary of the policy. On August 20, 1986, Transamerica issued to Moore a life insurance policy (Policy # 92088216) with a face amount of $250,000.00. The Transamerica policy was a whole life policy, providing that "[u]pon written request, the Owner may surrender a portion of this policy for its value." Moore was designated as both the "Insured" and the "Owner" of the policy.

Moore never actually saw a copy of the Transamerica policy, and approximately ten days after the policy was issued, on September 1, 1986, Moore assigned all right, title and interest in the policy to Acme. Moore's wife, Linda Moore, remained the beneficiary under the policy.

On January 1, 1987, Nathan Kolbes filed with the Department of Labor a declaration which stated that Acme had established an unfunded or insured pension plan for a select group of management employees.

Acme paid all of the premiums on the Transamerica policy issued on Moore's behalf. The premiums which Acme paid on Moore's policy were never listed as wages in Moore's pay stubs, and were never taxed as income to Mr. Moore. As the cash value of the policy accumulated, Acme listed that cash value as a general company asset.

On May 10, 1988, Moore entered into a written "Deferred

Compensation Agreement" with Lawrence Heck who executed the document on behalf of Acme. The Deferred Compensation Agreement (the "Agreement") was intended to memorialize the terms of the deferred compensation plan which had been in place since 1986. The Agreement was the first and only executed document which set forth the terms of Acme's deferred compensation plan.

The Agreement is set forth in relevant part below:

> Whereas Acme Corrugated Box Co., Inc. desires to secure the Employee's services by participating in a deferred compensation program for his benefit;
>
> Now therefore in consideration of the promises and of the benefits to be derived from the mutual observance of the covenants contained herein, the Employer and the Employee agree as follows:
>
> SECTION I
> Deferred Benefits
>
> In the event the Employee shall continue in the employ of Acme Corrugated until said Employee's retirement date (selected in schedule A), Acme Corrugated Box Co., Inc. shall pay the Employee the deferred benefits selected in Schedule A, commencing as of the first day of the calendar month immediately following said retirement date.
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> SECTION II
> Death Benefits
>
> (a) In the event the Employee shall die prior to his retirement date, Acme Corrugated Box Co., Inc. shall pay the death benefit indicated in schedule A, payable in one hundred twenty (120) equally monthly installments
> ...
> (c) Said death benefit as is provided under this section shall be payable to such beneficiaries are designated by Employee.
> In the event the Employee does not designate a beneficiary, or in the event no designated beneficiary survives the Employee, said death benefit shall be paid to the Employee's estate
> ...
>
> SECTION III
> Nonalienation of Benefits
>
> The benefits provided under this agreement shall not be subject to assignment, alienation, anticipation, debts, or any other claims of whatever nature, not to any judicial process for levy or collection, prior to payment under the provisions of this Agreement.

SECTION IV
Conditions

The benefits provided under this Agreement 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;
...

SECTION VI
Miscellaneous

(a) This Agreement may be amended solely by an agreement in writing executed by Acme Corrugated Box Co., Inc. and the Employee
...

SCHEDULE A
1. The effective date of this agreement shall be April 28, 1988.
2. The retirement date of the Employee, for purposes of this Agreement, shall be the date upon which the Employee shall attain age 65.
3. The deferred benefit which shall be accrued and which shall be paid to the Employee under the provisions of Section I of this Agreement shall be as follows:
(a) If the Employee’s employment hereunder is terminated on or after the Employee shall have reached his retirement date, Acme Corrugated Box Co., Inc. shall pay him a benefit of $50,000.00 per annum for a period of ten (10) years, payable in equal monthly installments, less any Employee indebtedness to Acme Corrugated Box Co., Inc.
4. Subject to the provisions of Section II of this Agreement, the death benefit shall be $250,000.00 or the amount of deferred benefits accrued on behalf of the Employee for service to the date of death if greater.

The Agreement makes no mention of the Transamerica policy, or any other life insurance policy which would be used to fund the deferred compensation plan’s death benefit. Although the Agreement requires that Moore remain in the employ of Acme until his death to receive the $250,000.00 death benefit or until his retirement to receive the $50,000.00 per year for ten years retirement benefit, the Agreement makes no mention of what benefits, if any, Moore would receive in the event his employment was terminated before his death or retirement date.

Moore believed that if his employment was terminated before the date of his death or retirement date, he would be entitled to receive the cash value of his life insurance policy which had accumulated at the time of his termination. According to Moore, this belief was founded on the fact that, as owner of the Transamerica policy, Moore would receive occasional statements from Transamerica which listed the accumulating value of his life insurance policy.

Moore received a memorandum from Lawrence Heck in August 1989 which listed Moore’s salary and benefits, and noted that Moore’s “deferred compensation” which consisted of the $250,000.00 life insurance policy, provided an annual benefit of $2500.00. How Heck arrived at the $2500.00 figure is unclear, as Acme paid premiums in an amount over $4700.00 per year on Moore’s policy.

In the fall of 1990, Moore requested a summary description of the deferred compensation plan from Lawrence Heck. On October 18, 1990, Lawrence Heck sent Moore the following memorandum to Moore:

> 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.[00]. 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, let’s discuss.

At some point in 1992, Acme contracted with Charles Creighton and Alan Fishman, employees of the Shevlin Financial Group, to provide consulting services in connection with Acme's employee benefits, including its deferred compensation plan. By this time, Nathan Kolbes (who had created the deferred compensation plan and drafted the 1988 Deferred Compensation Agreement) had left Acme's employ. Although Messrs. Creighton and Fishman knew that Acme held Transamerica life insurance policies for its key employees Cohen, Heck and Moore, Creighton and Fishman did not know that Acme had also agreed to provide retirement benefits under a Deferred Compensation Agreement.

Fishman and Creighton recommended that Acme cash out the life insurance policies issued by Transamerica and purchase life insurance policies from Phoenix Home Life Insurance Company in order to achieve a better return on its investments in the policies. Additionally, Fishman and Creighton recommended that Acme increase the face value of the life insurance policies so Acme could accumulate a higher cash value on the policies by virtue of paying higher premiums.

On January 24, 1994, Moore signed an application for a life insurance policy to Phoenix Home Life Insurance Company. Although it provided that Moore would be the insured, the Phoenix policy application designated Acme as the owner and beneficiary of the policy. The application further provided that the face amount of Moore’s policy would be $344,000.00. This amount was later increased to $500,000.00 pursuant to an application to Phoenix for “layer insurance” which was also signed by Moore. The application for “layer insurance” also identified Acme as the owner and beneficiary of the Phoenix policy. Although Messrs. Fishman and Creighton reviewed both documents with Moore before he signed them, Moore did not understand that the Phoenix policy differed from the Transamerica policy in that Acme, not Linda Moore, was designated as the beneficiary under the policy.

In February 1994, Acme submitted to Transamerica a “Request for Full Surrender of Policy” which was signed by Moore. The following month, Transamerica issued a check in the amount of $34,327.85-- the cash value of the policy. The check listed as payees both “James Moore, Owner” and “Acme Corrugated Box Co., Assignee.” Acme received and endorsed the check without showing it to Moore.

In May 1994, Phoenix issued a life insurance policy on behalf of Plaintiff Moore. On May 5, 1994, Acme wrote a check to Phoenix in the amount of $34,327.85, an amount equal to that which Acme received from Transamerica when it cashed out Moore’s policy.

In addition to helping Acme cash out its Transamerica policies and purchase the Phoenix policies, Messrs. Fishman and Creighton worked with Acme in developing a deferred compensation agreement. As previously noted, Messrs. Fishman and Creighton did not know that Acme had a deferred compensation plan in place. Neither Defendant Heck nor Defendant Cohen ever informed Fishman or Creighton that Acme had, in fact, established a deferred compensation plan in 1986, which plan provided both a death benefit and a retirement benefit, and that Acme had memorialized the terms of this plan in 1988 in a Deferred Compensation Agreement. Although Mr. Fishman and Lawrence Heck exchanged drafts of various deferred compensation agreements throughout 1995, Acme had not executed any new deferred compensation plan documents at the time of Mr. Moore’s termination.

In late 1995, a few months before his employment was terminated, Plaintiff Moore spoke to Lawrence Heck about his benefits under the deferred compensation plan. Moore was apparently concerned about the prospect of losing his job if Acme was purchased. Moore told Heck that he was concerned about the fact that he would not receive his retirement benefit unless he stayed in Acme’s employ until he turned sixty-five. Heck told Moore that he would speak to Cohen about amending the deferred compensation plan to allow for the full receipt of the retirement benefit provided in the plan, regardless of whether the employee remained at Acme until his retirement date. A short time later, Heck told Moore that he had spoken to Cohen and that Cohen had agreed to amend the deferred compensation plan accordingly. Heck further told Moore that the necessary paperwork was on Cohen's desk, and that the amendment was a "done deal."

Indeed, the necessary paperwork was on Cohen's desk. In December 1995, pursuant to Heck's request, Alan Fishman sent Heck a draft of a deferred compensation plan agreement which provided that if employment was terminated for a reason other than death or normal retirement, the employee would receive "the Employee retirement benefits in the same manner as if the employee had terminated on his retirement date." Cohen had this drafted agreement on his desk, but never took steps to finalize or execute the agreement. Moore's employment was terminated approximately two months after Fishman sent Heck the draft of this agreement.

At the time of Moore's termination, Acme offered Moore a severance payment of $50,000.00, payable at a rate of $10,000.00 a month for five months. The payment was conditional upon Moore signing a release of claims and a confidentiality agreement. The February 16, 1996 notice of termination letter issued to Plaintiff by Acme provided that the $50,000.00 payment included "the cash surrender value of a Phoenix Whole Life Policy which Acme holds as sole discretionary compensation as well as some discretionary monies."

<u>401(k) Plan</u>

As an employee at Acme, Moore was eligible to participate in

Acme’s 401(k) program. Plaintiff enrolled in the program in 1986, and received a summary plan description of the 401(k) program at that time. In 1994, Acme replaced its then-existing 401(k) plan with a 401(k) plan sponsored by the Putnam Group. Shortly thereafter, Alan Fishman conducted meetings for Acme employees in which he explained the provisions of the Putnam Group’s 401(k) plan for Acme employees, and answered employees’ questions. Moore did not attend any of these meetings. However, in a November 1995 survey distributed by Acme, Moore rated his knowledge of the Putnam 401(k) plan benefits and investments as “good.”

The February 16, 1996 notice of termination letter issued to Moore by Acme informed him of his option to roll over his 401(k) vested benefits into another plan or to receive the money in a lump sum. On March 4, 1996, approximately two weeks after his employment was terminated, Moore sent a written letter to Heck, the 401(k) plan administrator, requesting the latest copy of the Putnam Group’s summary plan description for Acme’s 401(k). Acme did not mail Moore a copy of the summary plan description until April 17, 1997-- over one year after Moore had requested the information. Acme had not received a copy of the summary plan description from the Putnam Group until late March or early April 1997 because Acme had requested a custom-made summary plan description which would set forth the various vesting schedules for different Acme employees. No one at Acme ever contacted Moore to explain the reasons for Acme's failure to provide him with the summary plan description. Since he received the summary description in April 1997, Moore has not made any investment changes with respect to his 401(k) plan.

Conclusions of Law

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 which "provides retirement income to employees," or which "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A)(ii).

A "top hat" plan, although covered by ERISA generally, is exempt from many of ERISA's stringent requirements. Kemmerer v. ICI Americas, Inc., 70 F.3d 281, 186 (3d Cir. 1995). A top hat plan is defined as a plan which is unfunded and "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly trained employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).

A pension plan must meet two requisites in order to qualify as a top hat plan. First, the plan "must be unfunded and exhibit the required purpose" of providing deferred compensation. In re New Valley Corp., 89 F.3d at 148. Second, the plan must cover "only a few high level employees." Id., 89 F.3d at 148.

It is clear that the deferred compensation plan at issue covered only a few high level employees. Although the plan was initially offered to the few members of the sales department, as well as to Acme's managers, the plan was shortly thereafter made available only to the four highest ranking employees at Acme--Defendants Cohen and Heck, Plaintiff Moore and Sales Department head Karl Dorfman who stopped participating in the plan when he was terminated in 1993.

It is not as clear, however, that Acme's deferred compensation plan was unfunded. A plan is unfunded if the benefits under the plan are to be paid from the employer's general assets, and there is no "res" or property which has been set aside from the corporation's ordinary assets in order to fund the plan. See, Gallione v. Flaharty, 70 F.3d 724 (2d Cir. 1995); see also, Dependahl v. Falstaff Brewing Co., 653 F.2d 1208, 1214 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981). In other words, a deferred compensation plan is deemed funded if the plan beneficiary can establish a legal right greater than that of an unsecured creditor to a specific set of funds reserved to pay the deferred compensation. Miller v. Heller, 915 F.Supp. 651, 660 (S.D.N.Y. 1996).

The Court must determine whether Acme's deferred compensation plan remained unfunded despite the fact that Acme purchased a life insurance policy on behalf of Mr. Moore. Several courts addressing the same issue have found that a deferred compensation plan remained unfunded despite the employer's purchase of a life insurance policy on behalf of an employee plan participant. See e.g., Belsky v. First National Life Insurance Co., 818 F.2d 661 (8th Cir. 1987); Northwestern Mut. Life Ins. Co. v. Resolution Trust Corp., 848 F.Supp. 1515 (N.D. Ala. 1994). In such cases, the courts determined that the life insurance policy at issue remained part of the employer's general assets and did not give the employee any present interest or security.

A determination of whether a deferred compensation plan remains unfunded, despite the purchase of a life insurance policy purchased on behalf of the employee, requires an examination of the particular facts and circumstances in each case. Miller, 915 F.Supp. at 659. The Court should consider whether the insurance policy is specifically mentioned in the deferred compensation plan documents as a source of funding or security. Belsky, 818 F.2d at 663; Northwestern Mut. Life Ins., 848 F.Supp. at 1517. Additionally, the Court should consider whether there is any language in the plan documents which indicates that the insurance policy remains a general corporate asset, subject to the claims of the employer’s general creditors. Id. The Court should also consider whether the employer who purchased the policy remained the owner and beneficiary of the policy. Miller, 915 F.Supp. at 659. Moreover, the Court should consider whether the employee incurred any income tax liability during the year in which the employer paid premiums on the policy. Id.

Although it is clear that Acme intended to establish an unfunded deferred compensation plan, it is less clear that Acme actually established such a plan. There is some question whether Moore had a present interest in the Transamerica policy in light of his designation as owner of the policy and Linda Moore as the beneficiary. Moreover, Acme never clearly communicated to Moore that the value of the policy was, during Moore’s employment, a corporate asset subject to the claims of general creditors.

Nevertheless, the Court has determined that both the life insurance policy purchased from Transamerica and the policy purchased from Phoenix remained part of Acme’s general corporate assets, and did not provide Moore with any immediate interest in the value of the policy. With respect to the Transamerica policy, Moore assigned to Acme all right, title and interest in said policy almost immediately after it was issued. Linda Moore, though the designated beneficiary of the Transamerica policy, had no legal right to any benefits under the policy prior to the death of James Moore. With respect to the Phoenix policy, Acme was designated both the owner and beneficiary. For both the Transamerica and Phoenix policies, Acme paid all premiums, and listed their cash value as a general company asset. Neither policies' cash value was ever recorded in Moore's wage stubs as income, and Moore never paid income tax on any of the payment contributions made to either policy. Moreover, the 1988 Deferred Compensation Agreement, which makes no mention of any life insurance policy, obligated Acme to pay the benefits due under the Agreement regardless of whether it maintained a life insurance policy on Moore's behalf. Thus, the Transamerica policy and the Phoenix policy issued on Moore's behalf both remained part of Acme's general assets, and the deferred compensation plan remained unfunded.

Accordingly, Acme's deferred compensation plan was an unfunded plan which existed primarily to provide deferred compensation for a select group of high level employees, and was therefore a top hat plan.

The Court's determination that the plan at issue was a top hat plan has a significant effect on the adjudication of Moore's ERISA claims. As the Third Circuit has noted, "[t]he dominant characteristic of the special top hat regime is the near-complete exemption of top hat plans from ERISA's substantive requirements." <u>In re New Valley Corp.</u>, 89 F.3d at 148. Top hat plans are exempted from ERISA's vesting, participation, and other content requirements. 29 U.S.C.§ 1051(2). Additionally, top hat plans are subject to less stringent reporting and disclosure requirements than those set forth in ERISA. 29 C.F.R. § 2520.104-23. Moreover, top hat plans are exempted from ERISA's fiduciary requirements. 29 U.S.C. § 1081.

The reasoning which underlies the less stringent requirements for top hat plans is that such plans are presumed to "benefit only highly compensated executives, and largely exist as devices to defer taxes." Kemmerer v. ICI Americas, Inc., 70 F.3d at 286. Participants in a top hat plan are assumed to be financially sophisticated employees who possess significant bargaining power and do not need many of ERISA's protections. With respect to James Moore, the assumption underlying top hat plan exemption appears incorrect. Moore's own testimony reveals that he did not have a complete understanding of his rights and benefits under the deferred compensation plan, and did not exercise a high degree of bargaining power in negotiating the terms of the plan. Moore could have benefitted from many of ERISA's safeguards which do not apply to top hat plans. However, in light of its finding that the deferred compensation plan was unfunded and maintained for a select group of high ranking executives, the Court has no choice but to apply the less stringent ERISA standards which are applicable to top hat plans.

Claim for Breach of Fiduciary Duty under ERISA

Moore claims that Acme, through its agents Lawrence Heck and Burton Cohen, breached its fiduciary duty to him by failing to provide him with full information regarding his deferred compensation plan.

ERISA §§ 1101-1114 sets forth certain duties and requirements for fiduciaries of an ERISA governed plan. However, Section 1101(a) of ERISA provides that its fiduciary requirements shall not apply to "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."

In light of the Court's determination that Acme's deferred compensation plan was a top hat plan, Moore's claim for breach of fiduciary duty must fail.

Claims for Penalties under ERISA, 29 U.S.C. § 1132(c)

Moore claims that he is entitled to penalties because Acme violated ERISA's notice and disclosure requirements, both in connection with Acme's deferred compensation plan, as well as Acme's 401(k) plan.

ERISA sets forth certain notice and disclosure requirements for plan administrators. 29 U.S.C. §§1021-1031. ERISA's civil enforcement provision provides for liability for a plan administrator who fails to meet these requirements, or "who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary." 29 U.S.C. § 1132(c)(1)(B). The statute provides that the administrator "may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal." Id.

It is within a court's sound discretion whether to award a plan participant money damages under 29 U.S.C. § 1132(c). Gillis v. Hoescht Celanese Corp., 4 F.3d 1137 (3d Cir. 1993), cert. denied, 511 U.S. 1004 (1994). In determining whether to impose said damages, the court may consider whether the plaintiff suffered harm by the delay or failure to receive the requested materials. Id; Schlomchik v. Retirement Plan of Amal. Ins. Fund, 502 F.Supp. 240 (E.D. Pa.), aff'd, 671 F.2d 496 (3d Cir. 1980). Additionally, the court may consider whether a penalty against the plan administrator would result in an "unjustifiable windfall" to the plaintiff. Hennessy v. FDIC, 58 F.3d 908, 924 (3d Cir. 1995). The Court may also consider the number of requests which the plaintiff made, as well as the number of documents requested and withheld. Ziaee v. Vest, 916 F.2d 1204 (7th Cir. 1990). Additionally, the Court may consider whether the plan administrator acted with bad faith in withholding the information. Krawczyk v. Harnischfeger, 869 F.Supp. 613 (E.D. Wis. 1993).

ERISA authorizes the Secretary of Labor to promulgate alternative methods for satisfying ERISA's reporting and disclosure requirements. 29 U.S.C. § 1031. With respect to top hat plans, an alternative method for compliance with ERISA's reporting and disclosure requirements is set forth in Section 2520.104-23 of Title 29 of the Code of Federal Regulations. 29 C.F.R. § 2520.104-23. Section 2520.104-23 provides that a top hat plan will not be subject to ERISA's reporting and disclosure requirements if the employer who establishes the plan files a declaration with the Secretary of Labor, notifying the Secretary of the existence of the plan and identifying the number of employees in the plan. 29 C.F.R. § 2520.104-23(b)(1)-(2). The employer must file this declaration within 120 days of the date on which the plan became subject to ERISA. 29 C.F.R. § 2520.104-23(b)(2).

Plaintiff Moore has argued that Acme's deferred compensation plan was not subject to this alternative method of compliance because Acme did not file its declaration with the Secretary of Labor within the 120 day time limitation. The evidence at trial established that Acme filed the declaration regarding its deferred compensation plan on January 1, 1987.

Because Acme's deferred compensation plan was not initially reduced to written terms, it is impossible to ascertain exactly when the plan was established and became subject to ERISA.

However, it appears that Acme did file the requisite declaration with the Secretary of Labor within the 120 day period prescribed under 29 C.F.R. § 2520.104-23. As far as the Court can discern, Acme's top hat plan became subject to ERISA on September 1, 1986-- the date on which Moore assigned to Acme all right, title and interest in the Transamerica policy issued on Moore's behalf. Acme's filing date of January 1, 1987 is within the required 120 day limitation period. Acme thus complied with the alternative method of reporting set forth in 29 C.F.R. § 2520.104-23, and was therefore not subject to ERISA's reporting and disclosure requirements with respect to its deferred compensation plan. Accordingly, Moore's claim for penalties under ERISA, 29 U.S.C. § 1132(c), in connection with the deferred compensation plan must fail.

As noted above, Plaintiff Moore also seeks penalties under 29 U.S.C. § 1132(c) in connection with Acme's failure to provide him with requested information regarding his 401(k) plan. Although Lawrence Heck, the 401(k) plan administrator, could be held personally liable for failing to provide Moore with a copy of the 401(k) summary plan description until April 1997, the Court, in its discretion, declines to award penalties. There is no evidence of bad faith on behalf of Acme or Mr. Heck. On the contrary, Defendant Heck testified that Acme did not receive copies of the summary plan descriptions from the plan sponsor, the Putnam Group, until March or April of 1997. Admittedly, someone at Acme should have contacted Moore and explained to him the reason for the delay, but this failure is not enough to merit an award of penalties. There is no evidence that Moore made additional requests for the information following submission of the March 1996 letter, and there is no evidence that Moore suffered any injury or prejudice as a result of the delay. Even before receiving the summary plan description, Moore had a general understanding of his rights under the plan, and he made no investment changes once he received the summary plan description. Moore's testimony that he might have made different investment decisions if he had the 401(k) plan information sooner does not establish an injury on his part which would merit an award of penalties. Accordingly, the Court will decline to award penalties in connection with Moore's claim that he failed to receive requested information regarding his 401(k) plan.

Claim of Unlawful Termination under ERISA § 510

Plaintiff Moore has alleged that Defendants terminated his employment in order to interfere with the vesting of his deferred compensation plan benefits, in violation of ERISA § 510. Section 510 of ERISA provides that it is unlawful for any person to discharge a plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140.

Plaintiff’s claim under Section 510 is unaffected by the Court’s determination that Acme’s deferred compensation plan was a top hat plan. Top hat plans are not exempt from ERISA’s administration and enforcement provisions, 29 U.S.C. §§ 1114-1147. As with any other ERISA governed plan, a participant in a top hat plan may 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 286-7.

To establish a prima facie case under Section 510 of ERISA, a plaintiff must demonstrate some prohibited employer conduct which was taken for the purpose of interfering with the attainment of a right to which the employee may become entitled. Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.), cert. denied, 484 U.S. 979 (1987). A plaintiff is not required to prove that the sole reason for his termination was to interfere with his pension rights. Id. at 851. However, a plaintiff must prove that the defendant had the “specific intent” to interfere with the plaintiff’s pension rights, in violation of ERISA. Id. In other words, “the employee must show that the employer made a conscious decision to interfere with the employee’s attainment of pension eligibility or additional benefits.” Dewitt v. Penn-Del Directory Corp., 106 F.3d 514, 523

(3d Cir. 1997). The employee may make this showing by introducing circumstantial evidence. Id.

In the instant case, Mr. Moore has not produced sufficient circumstantial evidence which could show that Defendants terminated his employment with the specific intent to interfere with the attainment of his deferred compensation benefits. Moore was terminated more than thirteen years before his retirement benefits would have vested. Other than the fact that Mr. Moore did not expect to be terminated, there is no circumstantial evidence which would tend to show that Defendants terminated Moore's employment for a reason other than their dissatisfaction with his work performance. Although it is clear that Defendants Cohen and Heck did not effectively communicate with Mr. Moore about his problems at work, and did not put much effort into helping Mr. Moore improve his work performance, it is also clear that Defendants Cohen and Heck were genuinely dissatisfied with Moore's work performance and that their dissatisfaction formed the basis for their decision to terminate his employment.

Moore has pointed to the fact that, shortly before he was terminated, Heck and Cohen discussed amending the deferred compensation plan to provide retirement benefits at the employee's termination, regardless of the employee's retirement date. Although this fact may show that Defendants chose to terminate Moore's employment before increasing an employee's right to benefits under the plan, it does not go to whether Defendants specifically intended to terminate Moore's employment in order to interfere with his then existing rights under the plan. Accordingly, Moore has not produced sufficient circumstantial evidence which could support a finding that his employment was terminated in order to interfere with the vesting of his deferred compensation benefits.

Claim for Benefits under ERISA § 502

Plaintiff claims that he is entitled to the benefits under the deferred compensation plan pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a). When dealing with a top hat plan, the Court must consider the employee's claim for benefits as a claim that the employer did not abide by the terms of the benefit plan and thus committed a breach of the contract. Kemmerer v. ICI Americas Inc., 70 F.3d at 287. The benefit plan is viewed as a "unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in the employment for the requisite number of years." Id. Accordingly, "the plan constitutes an offer that the employee, by participating in the plan, electing a distributive scheme, and serving the employer for the requisite number of years accepts by performance." Id.

Applying the above-stated principles of contract, the Court must conclude that Moore is not entitled to the retirement benefit of $50,000.00 per year for ten years provided in Acme's deferred compensation plan. At the time Acme established the deferred compensation plan, and at the time Moore's employment was terminated, the terms of the plan were clear that Moore would not get the retirement benefit of $50,000.00 per year for ten years unless Moore remained at Acme until he reached his retirement date. Moore did not remain employed at Acme for the requisite number of years and therefore did not accept Acme's offer of a unilateral contract. The fact that Moore wanted to accept the offer by remaining employed at Acme until his retirement date, and was prevented from doing so by Acme, does not, unfortunately, change the fact that Moore did not accept the offer of benefits under the deferred compensation plan.

Moore has pointed to the fact that Lawrence Heck orally told Moore that Cohen had agreed to amend the deferred compensation plan to provide for the full retirement benefit regardless of the employee's retirement date. This oral representation, however, can not serve to change the unambiguous terms of the Deferred Compensation Agreement. Although Moore could introduce extrinsic evidence to establish that a provision in the Agreement was ambiguous, Moore has not done so. Instead, Moore has asked the Court to adopt Defendant Heck's oral representations regarding the deferred compensation benefits under the plan, in contravention to the plain language of the Deferred Compensation

Agreement. The Court can not do so.

Moore has claimed in the alternative that he is entitled to the cash value which had accumulated in the life insurance policy issued on his behalf. Although Moore testified to his belief that he was entitled to the cash value of the policy at the time of his termination, regardless of whether he had reached his retirement date, there is simply no evidence to support this belief.

There is no evidence that anyone at Acme ever stated or even intimated that Moore would be entitled to the value of the policy if he was terminated prior to his retirement date. The Deferred Compensation Agreement makes no reference to any life insurance policy, and does not address the issue of what, if any, benefits Moore would receive if his employment was terminated prior to his retirement date.

Accordingly, the Court can not award Moore the accumulated cash value of the life insurance policy issued on his behalf.

Conclusion

As evidenced by his own testimony at trial, Plaintiff James Moore received a significant shock when, on the morning of February 16, 1996, he was called into Burton Cohen's office, informed of his termination and offered $50,000.00 if he would sign a confidentiality statement, a waiver and general release of all claims. Indeed, it is apparent that Mr. Moore has not yet recovered from the trauma of his termination from Acme. It is unfortunate that Mr. Moore, who had devoted thirteen years to Acme, and who, according to his performance evaluations, had "made this plant the productive success that it has become," was terminated without receiving any retirement benefits (even the traditional gold watch) because he did not waive all claims against his employer. It seems that when Congress carved out ERISA's exemptions for top hat plans, Congress assumed that top hat plan participants would be financially sophisticated enough to negotiate their own "golden parachutes" in the event of early termination. Mr. Moore, perhaps blinded by his loyalty to Acme, had no legal entitlement to any monies upon his early termination.

As explained above, the Court has discerned no basis on which Mr. Moore could prevail against Acme in this case, and will enter judgment in favor of Defendants and against Plaintiff Moore.

An appropriate Order follows.

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

JAMES F. MOORE,	:	
Plaintiff	:	**CIVIL ACTION**
v.	:	
	:	**97-2150**
ACME CORRUGATED BOX CO., INC.,	:	
BURTON COHEN, and	:	
LAWRENCE HECK,	:	
Defendants	:	

ORDER AND CIVIL JUDGMENT

AND NOW, this 6th day of July, 1998; the Court having held a non-jury trial in the above-captioned case; and for the reasons set forth in the Court's accompanying Memorandum;

IT IS ORDERED:

Judgment is hereby **ENTERED** in favor of defendants Acme Corrugated Box Co., Inc., Burton Cohen and Lawrence Heck and against Plaintiff James Moore as to Counts Two, Six, Seven, Eight and Nine of Plaintiff's amended Complaint.

____

RAYMOND J. BRODERICK, J.