

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

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|------------------------------|---|--------------------|
| EUGENE PANECCASIO, | : | |
| Plaintiff | : | |
| | : | |
| v. | : | Civil Action No. |
| | : | 3:01 CV 2065 (CFD) |
| UNISOURCE WORLDWIDE, INC., : | : | |
| ET AL., | : | |
| Defendants. | : | |

RULING ON MOTIONS TO DISMISS

The plaintiff, Eugene Paneccasio, brings this action against the defendants, Unisource Worldwide, Inc., Georgia-Pacific Corporation, Alco Standard Corporation, IKON Office Solutions, Inc., the Board of Directors of IKON Office Solutions, Inc., (individually and as fiduciaries), and W.J. Hope Jr., (individually and as administrator and fiduciary of the 1991 IKON Office Solutions Inc. Deferred Compensation Plan), alleging violations of the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 621 et seq., the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001 et seq., and state statutory and common law. The plaintiff seeks compensatory, liquidated and punitive damages, and attorney’s fees and costs. Pending are motions to dismiss by defendants Unisource Worldwide, Inc. and Georgia-Pacific Corporation [Doc. #11] and defendants IKON Office Solutions, Inc., Alco Standard Corporation, the Board of Directors of IKON Office Solutions, Inc., and W.J. Hope Jr. [Doc. #15].

I. Facts¹

The plaintiff, Eugene Paneccasio (“Paneccasio”), was employed by defendant Unisource Worldwide, Inc. (“Unisource”) as Vice-President of Sales and National Accounts in Unisource’s offices in Hartford, Connecticut. Unisource is a subsidiary of defendant IKON Office Solutions, Inc. (“IKON Office Solutions”), formerly known as Alco Standard Corporation (“Alco Standard”), and was acquired by defendant Georgia-Pacific Corporation (“Georgia-Pacific”) in July 1999.

On March 31, 1994, the plaintiff retired from his employment at Unisource, based upon representations made by Unisource orally and in a written agreement regarding the “Unisource Early Retirement Package.”² Unisource represented that Paneccasio would receive, *inter alia*, certain benefits under the “1991 ALCO Standard Corporation Deferred Compensation Plan,” later known as the “1991 IKON Office Solutions Deferred Compensation Plan” (hereinafter “the IKON Plan”) and that his benefits under the plan would be sixty-five percent vested at the time of his early retirement. The benefits included a monthly benefit payment for ten years upon reaching sixty-five years of age, and a life insurance policy.

On December 31, 2000, the Board of Directors of IKON terminated the IKON Plan. On January 2, 2001, the IKON Plan sent Paneccasio a termination benefit of \$75,419.22 and ended his participation in the plan.

¹The facts are taken from the plaintiff’s complaint and any documents incorporated by reference, and are accepted as true for purposes of the motion to dismiss. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47- 48 (2d Cir. 1991).

²Paneccasio was fifty-seven years old at the time.

On November 5, 2001, Paneccasio filed the instant complaint.³ Count One alleges age discrimination in violation of the ADEA by defendants Unisource, Georgia Pacific, IKON Office Solutions, and Alco Standard in connection with the termination of the IKON Plan. Counts Two through Seven raise Connecticut state law claims and only concern the termination of the IKON Plan. Counts Two through Six are directed against Unisource and Georgia Pacific and allege breach of contract (Count Two), breach of the implied duty of good faith and fair dealing (Count Three), violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110 et seq. (“CUTPA”) (Count Four), reckless misrepresentation (Count Five), and negligent misrepresentation (Count Six). Count Seven alleges tortious interference with a contractual relationship and financial expectancy against IKON Office Solutions and Alco Standard. Finally, Count Eight alleges ERISA violations against all of the defendants.

Defendants Unisource and Georgia-Pacific have filed a motion to dismiss [Doc. #11] on the following grounds: (1) Paneccasio fails to state a claim for breach of contract; (2) Paneccasio’s state law claims are preempted by ERISA; (3) Paneccasio fails to state a claim under ERISA for breach of fiduciary and non-fiduciary duties; (4) Paneccasio’s ADEA claim fails because he did not file a timely charge with the Equal Employment Opportunity Commission (“EEOC”); (5) Paneccasio’s ADEA claim against Georgia-Pacific fails because the company was not his employer; and (6) Paneccasio’s breach of good faith and fair dealing claim is barred as a matter of public policy. IKON Office Solutions, Alco Standard, the Board of Directors of IKON Office Solutions, and W.J. Hope Jr. (“the IKON

³On August 9, 2001, Paneccasio received a right to sue letter from the EEOC. The administrative proceedings are discussed infra.

defendants”) have moved to dismiss Counts One, Seven and Eight on the bases that: (1) Paneccasio’s ADEA claim against IKON Office Solutions and Alco Standard in Count One fails because they were not his employer; (2) Paneccasio’s state law claim against IKON Office Solutions and Alco Standard in Count Seven is preempted by ERISA; and (3) Paneccasio’s claim under ERISA against all of the IKON defendants in Count Eight fails to state a claim for breach of fiduciary and non-fiduciary duties.

II. Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with his allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). “The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims.” United States v. Yale-New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, a court may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by

reference in the pleadings and matters of which judicial notice may be taken.” Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

III. Discussion

A. ADEA Discrimination Claim (Count One)

As to Paneccasio’s age discrimination claim, Unisource, Georgia-Pacific, IKON Office Solutions, and Alco Standard claim that Paneccasio failed to file a timely charge with the Equal Employment Opportunity Commission (“EEOC”). Georgia-Pacific, IKON Office Solutions, and Alco Standard also claim that they were not Paneccasio’s “employer” for purposes of the ADEA. Each argument will be addressed below.

1. Timeliness

The ADEA provides that, before an aggrieved person may initiate a private action, he or she must file with the EEOC a charge alleging unlawful age discrimination within 180 days of the allegedly unlawful employment practice. See 29 U.S.C. § 626(d)(1). However, when alleged discrimination occurs in a state or locality that has its own anti-discrimination laws and an enforcement agency, the time period for filing claims with the EEOC is extended to 300 days of the occurrence of the allegedly unlawful employment practice. 29 U.S.C. §§ 633(b), 626(d)(2); Ford v. Bernard Fineson Dev. Ctr., 81 F.3d 304, 307 (2d Cir. 1996); Tewksbury v. Ottaway Newspapers, 192 F.3d 322, 325-28 (2d Cir. 1999) (“Section 626(d)(2) allows such claimants 300 days to file an ADEA charge with the EEOC, whether or not the charge is initially filed with the deferral-state agency.”); Reinhard v. Fairfield Maxwell, Ltd., 707 F.2d 697, 700 (2d Cir. 1983) (holding that deferral-state claimant has 300 days to file ADEA charge with the EEOC, regardless of when charge filed with state agency). Accordingly, the

300 day limit applies to Paneccasio's ADEA claim.

Paneccasio filed a charge of age discrimination with the EEOC in Boston, Massachusetts on July 18, 2001. Three hundred days prior to that date is September 22, 2000. The defendants argue that the adverse employment action occurred on March 31, 1994, the date Paneccasio alleges that Unisource induced him to take early retirement. Paneccasio contends that the period from March 31, 1994 until December 31, 2000, the date that the IKON plan was terminated, should be tolled and the defendants should be estopped from invoking an earlier date, in light of their "fraudulent concealment" of his cause of action during that period. Pl.'s Mem. Supp. Obj'n. Mtn. to Dismiss at 9-12.

"The essence of the [equitable tolling] doctrine 'is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action.' " Dillman v. Combustion Eng'g. Inc., 784 F.2d 57, 60 (2d Cir. 1986) (quoting Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir.1985)). The doctrine of equitable tolling "will be applied, for example, when an employer's misleading conduct is responsible for the employee's unawareness of his cause of action." Id. "[E]quitable tolling will defer the start of the EEOC filing period from the time of the discriminatory action to the time the employee should have discovered the action's discriminatory nature." Id. Paneccasio's allegation that the defendants fraudulently concealed the facts that formed the basis of his age discrimination claim, which must be accepted as true for purposes of the motion to dismiss, states an adequate ground for equitable tolling. Accordingly, the Court declines to find that Paneccasio's ADEA claim is time-barred at this time.⁴

⁴This is without prejudice to the defendants filing a motion for summary judgment on this issue.

2. “Employer” Under the ADEA

Georgia-Pacific, IKON Office Solutions, and Alco Standard also argue that they were not Paneccasio’s employer for purposes of his ADEA claim. These defendants argue that Paneccasio’s complaint does not allege any facts from which it could be inferred that they were his employer.

In the employment context, liability may attach to an affiliated corporation if the plaintiff can demonstrate that there are “sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer.” Herman v. Blockbuster Entertainment Group, 18 F. Supp. 2d 304, 308 (S.D.N.Y. 1998) (Lowe, J.) (internal quotation marks omitted), aff’d 182 F.3d 899 (2d Cir. 1999), cert. denied, 528 U.S. 1020 (1999); Gagliardi v. Universal Outdoor Holdings, Inc., 137 F. Supp. 2d 374, 378 (S.D.N.Y. 2001).

The Second Circuit has established a four-part test indicating what a plaintiff must demonstrate in order to establish that corporations are related in such a manner: “(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.” Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995) (quoting Garcia v. Elf Atochem North America, 28 F.3d 446, 450 (5th Cir. 1994)). A court should focus its inquiry on the “second factor: centralized control of labor relations.” Id. (quoting Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983)).

In paragraph 6 of Paneccasio’s complaint, he alleges that Georgia-Pacific merged with Unisource in July 1999 and “did adopt and ratify each and every act of discrimination and unlawful conduct committed by” Unisource and, since July 1999, acted “in concert with” Unisource in the

discriminatory conduct committed by Unisource, Alco Standard, and IKON Office Solutions. Compl. ¶ 6. In paragraph 8, Paneccasio alleges that Alco Standard changed its name to IKON Office Solutions and “did adopt and ratify every action and contract” of Alco Standard with respect to the IKON Plan. Compl. ¶ 8. In paragraphs 14, 15, and 16, Paneccasio alleges that Unisource terminated him on the basis of his age by making certain representations to him in its early retirement package. In paragraph 17, Paneccasio alleges that Unisource, Georgia-Pacific, Alco Standard, and IKON Office Solutions deprived him of the benefits promised him in the early retirement package. In paragraph 21, he alleges that Alco Standard, its successor IKON Office Solutions, and Georgia-Pacific are interrelated entities. In his opposition to the motions to dismiss, Paneccasio argues that he can establish, through discovery, the interrelation of operations, common management, common ownership or financial control and centralized control of labor unions of Unisource, Georgia-Pacific, Alco Standard, and IKON Office Solutions. Paneccasio also argues that Alco Standard’s control of eighty percent of the stock of Unisource creates a basis for attributing Unisource’s employment actions to Alco Standard.

In light of these allegations, the Court declines to dismiss at this time Paneccasio’s ADEA claim against Georgia-Pacific, Alco Standard, and IKON Office Solutions on the basis that they were not his employer.⁵

B. ERISA Preemption of State Law Claims (Counts Two through Seven)

The defendants argue that Paneccasio’s state law claims for breach of contract, breach of the

⁵ This ruling is also without prejudice to the defendants moving for summary judgment on this issue.

covenant of good faith and fair dealing, CUTPA violations, reckless misrepresentation, negligent misrepresentation, and tortious interference concerning the termination of the IKON Plan are preempted by ERISA because they concern the alleged denial of benefits provided under an ERISA plan to a participant or beneficiary. They further argue that allowing Paneccasio to go forward with those state law claims would provide him with an alternative enforcement mechanism specifically preempted by ERISA.

According to ERISA's preemption clause, ERISA supersedes "any and all State laws insofar as they relate to any employee benefit plan." 29 U.S.C. § 1144(a). In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), the Supreme Court stated: "the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" Id. at 45-46 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). Courts once interpreted this preemption clause by focusing on the question of whether a particular state law related to ERISA. See, e.g., Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983). However, this approach "proved to be a verbal coat of too many colors," and the Supreme Court more recently indicated that a more focused analysis should apply. Plumbing Industry Board, Plumbing Local Union No. 1. V. E.W. Howell Co., 126 F.3d 61, 66 (2d Cir. 1997) (describing the change in approach). Analysis of the preemption clause should begin with the "starting presumption that Congress does not intent to supplant state law." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). To overcome this presumption, a party must convince the court that there is something in the practical operation of the challenged state law to indicate that it is the type of law that Congress specifically aimed to have ERISA supersede. See De Buono v. NYSA-ILA

Med. And Clinical Servs. Fund, 117 S. Ct. 1747, 1751-52 (1997).

The Supreme Court has identified several ways in which the anti-preemption presumption can be overcome. First, preemption will apply where a state law clearly refers to ERISA plans in the sense that the measure acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation. Second, a state law is preempted even though it does not refer to ERISA or ERISA plans if it has a clear connection with a plan in the sense that it mandates employee benefit structures or their administration or provides alternate enforcement mechanisms.

Plumbing Industry, 126 F.3d at 67 (citations and quotations omitted). In Aetna Life Ins. Co. v. Borges, 869 F.2d 142 (2d Cir. 1989), the Second Circuit held that:

laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application--often traditional exercises of state power or regulatory authority--whose effect on ERISA plans is incidental.

Id. at 146. Accordingly, "[w]hat triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." Id. at 146-147.

The parties do not appear to dispute that the IKON Plan is an employee welfare benefit plan to which ERISA applies. See 29 U.S.C. § 1002(1) (defining "employee welfare benefit plan"). As mentioned, Paneccasio's complaint sets forth causes of action for breach of contract, breach of the covenant of good faith and fair dealing, CUTPA violations, reckless misrepresentation, negligent misrepresentation, and tortious interference with contract. The alleged conduct underlying each of these causes of action concerns the termination of the IKON Plan and Paneccasio's resulting failure to

receive a deferred monthly retirement benefit payment and lump sum death benefit. More specifically, in Count Two, Paneccasio alleges that Unisource and Georgia-Pacific breached their agreement that memorialized Unisource's "Early Retirement Package." Paneccasio alleges that such agreement promised that he would become 65 percent vested in the IKON Plan if he retired from his employment and would receive a deferred monthly retirement benefit and lump sum death benefit and that terminating the IKON Plan before he received those benefits breached the agreement. In Count Three, Paneccasio alleges that Unisource and Georgia-Pacific breach the implied covenant of good faith and fair dealing through this same conduct, and in Count Four, Paneccasio alleges that it was an unfair or deceptive act in violation of CUTPA. In Counts Five and Six, Paneccasio alleges that he was induced to retire based on Unisource and Georgia-Pacific's reckless and negligent misrepresentations regarding the deferred compensation arrangement. Finally, in Count Seven, Paneccasio alleges that IKON Office Solutions and Alco Standard tortiously interfered with the contractual relationship between Unisource and Paneccasio embodied in the retirement package agreement and tortiously interfered with the financial expectancy of Paneccasio to receive certain benefits under that agreement.

These causes of action are precisely the type that Congress sought to preempt through ERISA. In Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir.1992), the plaintiff set forth causes of action for breach of contract and negligent misrepresentation, claiming that his employer, Dunham-Bush, had made an oral promise to pay certain pension-related benefits in order to induce him to relocate to Connecticut. According to Smith's complaint, when he "expressed concerns about the inferiority of the United States affiliate's pension plan, Elliot assured him that Dunham-Bush would provide him with a benefits package comparable to what he would have received upon his retirement in the United

Kingdom." Id. at 7. In upholding the district court's finding that the state law claims were preempted, the Second Circuit found that Smith "makes explicit reference to the pension plan in his complaint.... the oral representation underlying this suit deals expressly and exclusively with the appellant's benefits." Id. at 10. Additionally, "the calculation of the promised supplemental benefits" would implicate the ERISA plan. Id. As Smith's claims represented "an attempt to supplement the plan's express provisions and secure an additional benefit," the Second Circuit found they were preempted by ERISA. Id.

District courts have found breach of contract and negligent misrepresentation claims preempted by ERISA in similar contexts. In Hamburger v. Southern New England Telephone Co., 1998 WL 241214 (D.Conn. May 6, 1998), the plaintiff elected to participate in an "Early Out Offer" based on his employer's representation as to the benefits he would receive. Subsequently, Hamburger was informed that the sum he was to receive was significantly less than what had been earlier represented. Dismissing the plaintiff's state law claim of negligent misrepresentation, the district court held that the claim "necessarily relies on the existence of an ERISA plan [I]t only arises *because of* the existence of an ERISA Plan." Hamburger, 1998 WL 241214 at *3. As the court explained:

In order to succeed on this negligent misrepresentation claim, Hamburger would have to show that (1) an ERISA plan existed; (2) Hamburger was entitled to the payment of a certain amount of funds under this plan; and (3) the defendants negligently misrepresented the amount that Hamburger would be entitled to receive. Thus, because the negligent misrepresentation claim is intrinsically related to the underlying employee [benefit] plan, it is preempted by ERISA.

Id. at *3 (internal quotation marks omitted). Accordingly, the court held, Hamburger's negligent misrepresentation claim is "intrinsically related to the underlying employee benefit plan [and] is preempted by ERISA." Id. (internal quotation marks and citation omitted).

Similarly, in Bedger v. Allied Signal Inc., No. 97-6786, 1998 WL 54411, *4 (E.D.Pa. Jan. 23,

1998), the plaintiff claimed her employer breached its severance agreement when it denied her certain pension benefits under that agreement. She argued that this state law claim did not relate to an employee benefits plan because she was not contesting any element of the plan directly, but rather the defendant's alleged breach of the severance agreement. See Bedger, 1998 WL 54411 at *4. The court held that the breach of severance agreement claim related to the benefits plan because "[i]f the benefits plan did not exist, the Plaintiff would have no breach of contract claim. This claim only exists because it incorporates the terms of the ERISA plan." Id. Accordingly, the court held that the breach of contract claim was preempted by ERISA. Several other courts have found that breach of contract and negligent misrepresentation claims arising out of early retirement agreements in similar circumstances are preempted by ERISA. See, e.g., Zito v. SBC Pension Benefit Plan, No. 3:02CV277(JBA), 2002 WL 31060363, at *3 (D. Conn. July 18, 2002); Carlo v. Reed Rolled Thread Die Co., 49 F.3d 790, 793-95 (1st Cir. 1995); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994).

As in Smith, Hamburger, and Bedger, Paneccasio sets forth breach of contract and misrepresentation claims in connection with his employer's promises regarding benefits he was to receive in exchange for certain employment consequences. With regard to each of these causes of action, Paneccasio makes "explicit reference to the pension plan in his complaint," and each of these causes of action concern his receipt of benefits under the plan. Smith, 959 F.2d at 11. As noted above, in Count Two, Paneccasio's breach of contract claim, Paneccasio alleges that terminating the IKON Plan before he received the deferred monthly retirement benefit and lump sum death benefit breached the early retirement agreement. In Counts Five and Six, the misrepresentation claims,

Paneccasio alleges that he was induced to retire based on Unisource and Georgia-Pacific's misrepresentations regarding the deferred compensation arrangement. As in Smith, these representations deal "expressly and exclusively" with the benefits under the ERISA plan. Id. at 10.

Furthermore, the calculation of the defendants' promised benefits will implicate the ERISA plan. See id. at 12. The Court will be required to refer to the IKON Plan in order to determine whether Paneccasio received the benefits which were promised to him. Finally, as in Bedger, though Paneccasio argues that his state law claims do not relate to an employee benefits plan because he is not contesting any element of the plan directly, but rather the defendants' alleged breach of the early retirement agreement, the foregoing analysis indicates that the state law claims do relate to an ERISA Plan. See Bedger, 1998 WL 54411 at *4. Accordingly, Paneccasio's breach of contract, reckless misrepresentation, and negligent misrepresentation claims are pre-empted by ERISA. See id.; Hamburger, 1998 WL 241214 at *3; Bedger, 1998 WL 54411 at *4; see also Pilot Life, 481 U.S. at 47 (holding that employee's common law causes of action of breach of contract, and fraud in the inducement were preempted by ERISA). Paneccasio's other causes of action—breach of the duty of good faith and fair dealing, CUTPA violations, and tortious interference—are likewise preempted, as they also make explicit reference to the IKON plan, concern his receipt of benefits under the plan, and require reference to the plan to calculate the promised benefits. See Smith, 959 F.2d at 11-12; DeGroot v. General Dynamics Corp., 837 F. Supp. 485 (D. Conn. 1993) (CUTPA claim preempted); Murphy v. Metropolitan Life Ins. Co., 152 F.Supp.2d 755, 757 (E.D. Pa. 2001) ("[P]laintiff's statutory law bad faith and consumer protection claims 'relate to' an employee benefit plan and are expressly preempted"). Therefore, Counts Two through Seven of Paneccasio's complaint are

preempted by ERISA.⁶

C. ERISA Claim (Count Eight)

Each of the defendants argues that Paneccasio's complaint fails to state a claim under ERISA. Georgia-Pacific and Unisource argue that (1) they were not responsible for administering the IKON Plan at the time the plan was terminated, nor were they Paneccasio's employer at that time; (2) the act of terminating a plan is a settlor function, rather than a fiduciary action; and (3) the IKON Plan is a "top hat" plan and is thus excluded from ERISA's statutory fiduciary requirements. The IKON defendants join in the latter two arguments.

As to these issues, the Court concludes that the allegations of the complaint are sufficient to withstand a motion to dismiss. Accordingly, the Court declines to dismiss Paneccasio's ERISA claim.⁷

IV. Conclusion

For the preceding reasons, the motion to dismiss by defendants Unisource Worldwide, Inc. and Georgia-Pacific Corporation [Doc. #11] is GRANTED IN PART, DENIED IN PART, and the motion to dismiss by defendants IKON Office Solutions, Alco Standard, the Board of Directors of IKON Office Solutions, and W.J. Hope Jr. [Doc. #15] is GRANTED IN PART, DENIED IN PART. Only Count One, Paneccasio's ADEA claim, and Count Eight, Paneccasio's ERISA claim, remain in the case.

SO ORDERED this ____ day of March 2003, at Hartford, Connecticut.

⁶Accordingly, the Court need not reach Unisource and Georgia-Pacific's alternative arguments.

⁷This ruling is also without prejudice to the defendants filing a motion for summary judgment.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE