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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	Case No. 05 cv 0208
v.	)	Judge James Zagel
SIDLEY AUSTIN LLP,	)	
Defendant.	)	

PLAINTIFF EEOC's MOTION FOR PROTECTIVE ORDER

Plaintiff United States Equal Employment Opportunity Commission ("EEOC") respectfully moves this Court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, for a protective order directing that: (i) discovery (written and oral) not be had concerning certain matters related to the subsequent employment of the six former partners of Sidley Austin, LLP ("Sidley") who are identified in Exhibit 1 ("Former Partners");[1] (ii) Sidley not issue any subpoena or request for information to the law firms identified in Exhibit 1 ("Subsequent Firms") in connection with this action without leave of court and ten days' notice to the EEOC; (iii) no party inquire at the deposition of <REDACTED> ("Former Partner A") about Former Partner A's present or former state of mental health, except to the extent necessary to establish that Former Partner A is presently capable of giving accurate, complete, and truthful testimony.

In support of this motion, the EEOC states as follows:

Subsequent Employment Documents

1. Sidley has issued subpoenas to the Former Partners requesting documents ("Requested Subsequent Employment Documents") reflecting or relating to, inter alia:

i) Any equity or ownership interests that the Former Partners hold or have held in their respective Subsequent Firms;

ii) Hours the Former Partners have billed and/or charged to clients while employed by or a partner of the Subsequent Firms;

iii) Revenues generated from billings to clients the Former Partners originated, are responsible for, or for which the Former Partners are credited for purposes of determining the Former Partners' compensation;

iv) Business the Former Partners have generated and clients the Former Partners have retained since leaving Sidley; and

v) Business development efforts the Former Partners have engaged in since leaving Sidley.[2]

2) During an October 6, 2006 hearing, the Court stated that it would require the Former Partners to respond to the above-noted document requests only upon an individualized consideration of the performance issues that Sidley alleges to be the reasons that motivated each Former Partner's removal from partnership status at Sidley. See Transcript of Proceedings, attached as Exhibit 2, at 20, 23.

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[1] Exhibit 1 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

[2] Sidley's subpoenas to the Former Partners also requested documents reflecting the terms, conditions, duties, and/or responsibilities of any non-Sidley employment or self-employment held by the Former Partners after October 1999. Subject to the entry of a new protective order governing the use and confidentiality of such documents, the Former Partners will produce such documents to the extent that they have authority to do so.

3) The Court explained that the purpose of such discovery concerning subsequent employment would be to provide Sidley an opportunity to obtain evidence that might establish or confirm the existence of the identified performance issues. See id. at 15-18.

4) Sidley has alleged that various combinations of the following performance issues motivated Sidley's decisions to change the Former Partners' status at Sidley: (i) hours; (ii) billings; (iii) volume of business development; (iv) amount of time devoted to a client who paid Sidley by retainer; (v) "responsiveness"; (vi) lack of interest in taking on new areas of practice; (vii) failure to inspire confidence in colleagues, clients, and "others"; (viii) financial management skills; (ix) writing and advocacy skills; and (x) difficulty integrating one of the Former Partners into his practice group at Sidley due the Former Partner's preference to live in a city other than the one in which his practice group was located. See Supplemental Amended Exhibit D to Defendant's Response to EEOC's First Set of Interrogatories ("Statement of Reasons"), attached as Exhibit 3, pp. 1, 19, 24-26, 36-39.[3]

5) A plaintiff may establish that the reasons proffered by an employer for an adverse employment action are pretextual by presenting evidence "tending to prove that the employer's proffered reasons are [i] factually baseless, [ii] were not the actual motivation for the [adverse employment action] in question, or [iii] were insufficient to motivate the [adverse employment action]." Testerman v. EDS Tech. Prods. Corp., 98 F.3d 297, 303 (7th Cir. 1996).

6) The Requested Subsequent Employment Documents and their subject matters are entirely unrelated to performance factors (v)-(x), listed in paragraph 4, supra.[4]

[3] Exhibit 3 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

[4] Indeed, it is not even clear from Sidley's statement of proffered reasons what "responsiveness" means, let alone how it might be reflected in Subsequent Firms' billing records, etc.

7) The EEOC has offered to stipulate to the accuracy of the Former Partners' hours, billings, volume of business development, and time devoted to specific clients, as reflected in Sidley's business records — i.e., the factual bases for performance factors (i)-(iv), listed in paragraph 4, supra. In order to prove that Sidley's reliance on these reasons is pretextual, the EEOC would thereby limit itself to showing that the reasons were not the actual motivation or were insufficient motivation for the Former Partner's removal from partnership status at Sidley. For example, the EEOC could prove pretext — without challenging the factual bases of the reasons — by demonstrating that similarly-situated, younger partners were treated more favorably.[5]

8) Evidence concerning the Former Partners' hours, billings, business development, and time devoted to specific clients at the Subsequent Firms would not have any tendency to prove or disprove whether such factors actually motivated Sidley's decisions to change the Former Partners' status in 1999. For example, if a Former Partner's hours and billings at his Subsequent Firm were the same or even lower than at Sidley, such evidence would have no relevance to the question of whether the Former Partner's hours and billings were the actual motivation for Sidley's decision. (By the same token, if a Former Partner's hours and billings were higher at his Subsequent Firm, that fact also would not support an argument by the EEOC that Sidley's reasons are disingenuous.)

9) Under the circumstances set forth herein, the Requested Subsequent Employment Documents and their subject matters are not relevant to any disputed fact and are not reasonably calculated to lead to the discovery of information relevant to any disputed fact. Sidley therefore should not be permitted to have discovery of these matters.

[5] Additionally, the EEOC may well establish its case through the direct method of proof, using direct and circumstancial evidence, rather than through the McDonnel-Douglas burden-shifting method of proof.

Third-Party Subpoenas

10) The majority of the Former Partners are not authorized to produce the Requested Subsequent Employment Documents, as they are the property of the Subsequent Firms. The EEOC understands that Sidley may therefore attempt to obtain the Requested Subsequent Employment Documents directly from the Subsequent Firms.

11) The Subsequent Firms of several of the Former Partners are not aware of the circumstances under which these Former Partners' employment at Sidley ended. Disclosure of those circumstances would cause great embarrassment to these Former Partners and would likely cause substantial damage to these Former Partners' careers and professional reputations.

12) Even if the Requested Subsequent Employment Documents had any probative value — which they do not, for the reasons set forth in paragraphs 3-8, supra — that probative value would be substantially outweighed by the harm that would be caused to the Former Partners by permitting discovery of such documents from the Subsequent Firms.

14) Accordingly, to ensure that the EEOC and the Former Partners have a fair opportunity to oppose any subpoena or other request for information directed to the Subsequent Firms in connection with this action, Sidley should be required to provide the EEOC ten days' notice and obtain leave of court before issuing any such subpoenas or requests.

Limitation on Oral Discovery Related to Former Partner A's Mental Health

15) The EEOC has reason to believe that at the upcoming deposition of Former Partner A Sidley will inquire into Former Partner A's mental health and mental health treatment

history. Such an inquiry should not be permitted, as it is irrelevant and unnecessary, and would serve only to harass Former Partner A about a highly sensitive and private matter.

16) Sidley partner and Management Committee member Virginia Aronson has stated, both to Former Partner A in 1999 and under oath during her February 23, 2006 deposition in this case, that Former Partner A's change in partner status in 1999 had nothing to do with his prior mental health problems or treatment for those problems. See Transcript of Deposition of Virginia L. Aronson, attached as Exhibit 4, pp. 47-51.[6] Specifically, the following exhange occurred during Aronson's deposition:

<REDACTED>

Id. at 50.

17) Aronson's contemporaneous notes of her 1999 conversation informing Former Partner A's of his change in status also make clear that Former Partner A's mental health had nothing to do with his change of status. See Memo to File by Virginia L. Aronson, Bates

[6] Exhibit 4 will be filed only under seal, as it contains Confidential Information governed by the Amended Protective Order entered on June 20, 2006.

numbered SA009584, attached as Exhibit 5 (“

<REDACTED>

”).[7]

18) Nevertheless, in its Response to the EEOC’s interrogatory concerning the reasons for Former Partner A’s change of status, Sidley notes that “

<REDACTED>

” See Exhibit 3, pp. 37 (emphasis added).

19) Aronson’s 1999 statement to Former Partner A, her contemporaneous notes, and her 2006 deposition testimony make plain that Former Partner A’s mental health and treatment history in 1993 had nothing to do with the partnership expulsions six years later that are the subject of this action. See id. (“ <REDACTED>

”).

20) The EEOC has requested that Sidley drop its assertion that Former Partner A’s mental health problems in 1993 motivated its decision in 1999, but Sidley has refused to do so. The EEOC is concerned that Sidley’s assertion that Former Partner A’s mental health is related to his change of status is not genuine. In light of Aronson’s testimony and notes, it is doubtful that at trial Sidley would present Former Partner A’s mental health as a motivation for his change in status, and the EEOC is therefore concerned that this assertion is being maintained solely to justify questioning Former Partner A’s about his mental health at his deposition.

21) Other than simple harassment, no purpose would be served by an inquiry into Former Partner A’s present or former state of mental health or treatment history. Therefore, no

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such inquiry should be permitted, except to the extent necessary to establish that Former Partner A is presently capable of giving accurate, complete, and truthful testimony.

22) Wherefore, the EEOC respectfully requests that the Court direct that:

(i) discovery (written and oral) not be had concerning the subject matters of the Requested Subsequent Employment Documents identified in paragraph 1, supra;

(ii) Sidley not issue any subpoena or request for information to the Subsequent Firms in connection with this action without leave of court and ten days' notice to the EEOC of a request for such leave; and

(iii) no party inquire about the present or former state of mental health or treatment history of <REDACTED>, except to the extent noted in paragraph 19, supra.

November 17, 2006

Respectfully Submitted,

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