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

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	No. 05 C 0208
Plaintiff,	)	Honorable James B. Zagel
v.	)	Magistrate Martin C. Ashman
SIDLEY AUSTIN LLP,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO EEOC'S MOTION FOR PROTECTIVE ORDER

Sidley Austin LLP ("Sidley") requests that the Court deny the Equal Employment Opportunity Commission's ("EEOC") motion for protective order. Before addressing the EEOC's motion, Sidley notes that there are two different Protective Order motions pending before the Court. The first is Sidley's Motion For Protective Order, addressing additional confidentiality measures for certain documents and information associated with post-Sidley performance ("Sidley's Protective Order Motion"). The EEOC and Sidley made progress towards reaching agreement on that order, but several issues remain for the Court's ruling.

The EEOC's Motion For Protective Order, in contrast, seeks to quash discovery, including deposition questioning, on two subjects. The first subject, information relating to certain of the putative claimants' performance at subsequent law firms, raises the very same issue the Court addressed and ruled upon on October 6, 2006. The second subject,

< REDACTED > [1] is so obviously relevant to the 1999 events that the claimant himself felt it

[1] Confidential and sensitive information has been redacted from the publicly-filed version of this Opposition.

necessary to testify about it at length in an *ex parte* statement taken by the EEOC in advance of the case.

Sidley first addresses the relevance of the post-Sidley performance information, then the issuance of employer subpoenas (as to which there is a narrow dispute), and finally,

< REDACTED > .

PRODUCTION OF POST-SIDLEY PERFORMANCE INFORMATION

1. Sidley issued subpoenas seeking information on the putative claimants' equity and ownership interests, hours, billings, business development and business in mid-June 2006. The EEOC produced documents pursuant to subpoena in late July, August and September, but objected to and refused to produce any performance information relating to subsequent positions. In late September, Sidley moved to compel production of such information, explaining that it was relevant to mitigation and damages and to whether Sidley's reasons for changing the status of these individuals were a pretext for age discrimination. If Sidley's reasons for its decision included the fact that a partner did not obtain and retain clients or was not willing or able to work hard, for example, the fact that the former partner had a similar experience at another firm is certainly calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(c).

2. At the hearing on October 6, 2006, the Court agreed with Sidley's arguments. The Court noted its experience in another case where "[i]nvestigation of [plaintiff's] subsequent employer established that at the subsequent employer he did the same thing, and at the employer after that he did the same thing. And I thought it did a pretty good job of destroying the pretext argument. . . ." (EEOC Ex. 2, Tr. of Oct. 6, 2006 Hr'g at 16.) The Court identified a number of ways in which subsequent experience could be relevant, including business development efforts, relationships with clients or views that a partner was not as productive as others, (id. at 16-17), and stated that "[i]t would be important for them to know if at a subsequent firm they had the

same opinion of him and if he did the same things" (EEOC Ex. 2, Hr'g Tr. at 17). Stating that "they're [Sidley] entitled to find that," the Court required Sidley to first commit to the stated reasons for its decisions. (Id. at 17.) The Court ruled that "when they have stated their reasons why they have done what they have done with respect to each of these individuals, they're entitled to mine the future conduct of those individuals to find out if there is anything which supports their theory . . ." (Id. at 17-18; Id. at 18 ("You're entitled to have Sidley commit to its stated reasons, but once they commit to their stated reasons they are free to see if there is anything in the subsequent conduct that would confirm their judgment with respect to this.")).

3. The EEOC argues that, by agreeing to the accuracy of the putative claimants' hours, billings, volume of business development and time devoted to specific clients, they render Sidley's request for post-Sidley performance information moot. The Court specifically addressed this argument at the last hearing, when the EEOC asserted that there was no need to inquire about subsequent hours because the EEOC was unlikely to challenge the factual statements as to hours at Sidley. The Court stated that the issue was "more complicated than that," citing as a hypothetical example of relevant evidence an individual's decision to take a later position requiring fewer hours as potentially supporting a Sidley defense that the individual did not meet billing expectations. (EEOC Ex. 2, Hr'g Tr. at 22.)

4. In its current motion, the EEOC makes exactly the same argument. That argument is without merit for the same reasons Sidley cited in its prior briefing and as this Court ruled on October 6, 2006. (Id. at 22.) **< REDACTED >** Many of the putative claimants clearly and undeniably had below-average hours and billings for partners with their experience. Sidley has identified those below-average hours and billings as contributing to Sidley's decision to change the putative claimants' status. The EEOC and the putative claimants may attempt to

attribute those below-average hours and billings to something other than lack of effort or talent, but a similar experience at the putative claimants' subsequent law firm will belie such an argument. The EEOC has not offered to stipulate that these individuals were not effective at attracting or retaining clients or that they chose not to work as hard as the average Sidley partner or that these were the real reasons for the decisions, as would be necessary to moot the pretext issue.[2] The putative claimants' post-Sidley performance information is therefore relevant to rebut the EEOC's claim of pretext.

5. Finally, the EEOC ignores entirely the fact that post-Sidley performance information is relevant to the issues of damages and mitigation, as briefed at length in Sidley's motion to compel and reply in support of same. (Def.'s Mem. in Supp. of Its Mot. to Compel at § C, attached as Ex. B; Def.'s Reply Mem. in Supp. of its Mot. to Compel at § C, attached as Ex. C; EEOC Ex. 2, Hr'g Tr. at 15.)[3]

6. In sum, the Court has already ruled on the issue of relevance and it should (again) reject the EEOC's attempt to avoid production of the putative claimants' post-Sidley performance documents. Sidley requests that the Court order production of these documents within seven (7) days.

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[2] Nor does the EEOC state that it will not seek to introduce post-Sidley performance information affirmatively as evidence of absence of pretext. Indeed, the EEOC has already opened the door to this information by relying on it affirmatively in an attempt to attack Sidley's stated reasons for changing the status of former partners. At Ms. Aronson's deposition, EEOC Regional Counsel John Hendrickson asked, "Let me ask you a question again about quality. I mean you know, I assume, that several of the partners who were downgraded went on after Sidley to have bang up careers in other environments . . . That's one thing that I have trouble reconciling." (Aronson Dep. at 127:12-18, Feb. 23, 2006, attached as Ex. A.)

[3] Pursuant to the Amended Protective Order entered in this case, Exs. A and D, which contain confidential information, will be filed under seal.

THIRD-PARTY SUBPOENAS

7. On November 7, 2006, the parties met and conferred telephonically regarding a number of discovery issues, including the EEOC's concern that Sidley intended to serve subpoenas on the putative claimants' current employers or law firms. Sidley agreed that it would not serve subpoenas on the putative claimants' current employers or law firms without giving the EEOC a week's notice of its intention to do so, so that the EEOC would have sufficient time in which to seek protection from the Court. The EEOC did not appear to object to this proposal, and the parties did not confer further on this issue. Without indicating to Sidley that its proposal was not acceptable, the EEOC now moves the Court for an order requiring Sidley to provide the EEOC with ten days' notice before Sidley moves for permission to serve subpoenas on the putative claimants' current employers or law firms.

8. As an initial matter, Sidley does not object to the EEOC's request that it provide the EEOC notice of its intention to serve employer subpoenas, and ten days is an acceptable time period. That time period should not apply, however, if Sidley will have to move for leave to subpoena the employer. After consideration, and in the interest of compromise, Sidley does not object to the burden being on the requesting party to move for permission to serve these subpoenas if it is unable to obtain necessary information from the putative claimants in the first instance. (This procedural burden shifting should not affect substantive burdens. Once Sidley has established that the information is calculated to lead to the discovery of admissible evidence, the EEOC bears the burden of establishing that it violates Fed. R. Civ. P. 26(c)).

9. It appears from the EEOC's motion, however, that the EEOC has already determined that it will not produce the subpoenaed information and documents even if ordered to do so. (EEOC's Mot. for Prot. Order at ¶ 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 does not, however, identify which of the Former Partners that statement applies to, or on what grounds they are "not authorized" to produce the requested documents. If the EEOC knows at this time that, regardless of the outcome of Section I of their Motion for Protective Order (and section I of Sidley's Motion For Enforcement), the putative claimants will refuse to produce post-Sidley performance documents, the EEOC should be required, within seven (7) days, to identify the persons to whom that statement applies, and to provide sworn affidavits by those individuals stating that they are not authorized to produce the requested documents and the reasons why they are not authorized to do so. Depending on the results of those affidavits, Sidley will consider whether it needs to move (with two days' notice to the EEOC, as this Court requires) to serve subpoenas on putative claimants' current law firms or employers. If it is forced to do so, Sidley is willing to draft its subpoenas in a manner that does not reveal any more information than necessary, but it is not willing to refrain from seeking relevant information because these individuals have not told their law firms of their involvement in the current suit.

< REDACTED >

WHEREFORE, for the reasons set forth above, Sidley respectfully requests that the Court order:

(i) the EEOC to produce post-Sidley performance documents within seven (7) days;

(ii) the EEOC to identify, within seven (7) days, the persons who are not authorized to produce post-Sidley performance documents; and to provide sworn affidavits by those individuals stating that they are not authorized to produce the requested documents and the reasons why they are not authorized to do so; and

(iii) < REDACTED >

Dated: November 20, 2006

Respectfully submitted,

SIDLEY AUSTIN LLP

By: /s/ Maile H. Solís
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **November 20, 2006**, I caused true and complete copies of the foregoing **DEFENDANT'S OPPOSITION TO EEOC'S MOTION FOR PROTECTIVE ORDER** to be served by Electronic Mail Transmission via ECF as to Filing Users upon the following:

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/s/ Maile H. Solís

EXHIBIT A
FILED UNDER SEAL

EXHIBIT B

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

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	No. 05 C 0208
Plaintiff,	)	Honorable James B. Zagel
v.	)	Magistrate Martin C. Ashman
SIDLEY AUSTIN BROWN & WOOD LLP,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLIANCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DEFICIENT DISCOVERY RESPONSES

The Equal Employment Opportunity Commission (the "EEOC") began investigating Sidley Austin LLP's ("Sidley") decision to change the status of 32 of its partners to counsel or senior counsel six years ago. Over the last 18 months, Sidley has produced nearly 40,000 pages of documents, in response to four sets of document requests, and has provided lengthy responses to five different sets of interrogatories. In contrast, however, the EEOC has refused to provide the most basic information relating to the allegations of the putative claimants. Apparently, the EEOC believes that one set of rules applies to Sidley, but an entirely different set of rules applies to the EEOC. However, the EEOC is subject to the Federal Rules of Civil Procedure just like any other litigant.

This motion seeks (1) a complete response to three Sidley interrogatories seeking the EEOC's position on damages, mitigation and similarly-situated younger individuals (Section I); (2) certain information relating to the putative claimants' post-Sidley employment, including their tax returns and supporting documents (Section IIA), documents reflecting the terms and conditions of their post-Sidley employment (Section IIB) and documents relating to

issues of damages and mitigation. For example, an attorney's later partnership or employment agreement may discuss terms and conditions of employment which might be different than the terms of their Sidley employment. They will almost certainly include information on benefits and compensation formulae. *See CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 996 (7th Cir. 2002) (holding that defendants are entitled to certain documents in order to present an alternative and lower calculation of damages than the plaintiff had submitted). The value of an ownership interest may also relate to damages.

Documents relating to ownership interests and terms and conditions of employment also are relevant to the issue of mitigation. For example, Sidley is entitled to know if a putative claimant's compensation is based in part on the number of hours worked or billings in order to determine whether the individual made reasonable and diligent efforts to mitigate damages, *i.e.*, whether the individual worked at full capacity. The documents requested will allow Sidley to explore the EEOC's damages claim and its own defenses relating to mitigation.

C. The EEOC Should Be Required to Produce Documents Relating To The Putative Claimants' Post-Sidley Performance.

Sidley has requested documents relating to the putative claimants' performance in subsequent employment, including hours billed to clients, revenues generated from billings to clients, business generated or clients retained, and business development efforts. (Ex. K, request nos. 5, 6, 7, and 8.) The EEOC has refused to produce any documents responsive to these requests, asserting that the requested documents are not relevant.

1. The Requested Documents Are Relevant to the Issue of Mitigation.

As explained above, Sidley is entitled to know the efforts each putative claimant has undertaken to mitigate any damages. The information that Sidley seeks in response to these subpoena requests is directly relevant to a mitigation analysis. For example, the number of hours

a putative claimant has billed will help determine whether an individual worked at full capacity after leaving Sidley. A decision to voluntarily work part-time or accept a lesser job, for example, may relate to mitigation of damages. Likewise, business and revenue generation and business development all relate to a putative claimant's reasonable efforts to mitigate damages.

2. Documents Similar to Those Requested by Sidley Were Sought by and Produced to the EEOC.

The EEOC has itself requested post-status-change performance information from Sidley, arguing that information regarding the post-status-change performance of *each* partner whose status was changed is "relevant" and citing *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 365 F. Supp. 2d 919, 932 (N.D. Ill. 2006) (Denlow, M. J.) (plaintiff's subsequent performance reviews admissible at trial) and *Bauer v. Chicago Title & Trust Co.*, 1985 WL 4900 at *6 n.3 (N.D. Ill. Dec. 12, 1985) ("[s]ubsequent performance is highly relevant to plaintiff's discharge"). Sidley produced post-1999 performance information for those attorneys still at Sidley under an "Attorneys' Eyes Only" designation. The EEOC, having demanded (and received) this information itself, cannot now credibly resist production of information relating to those individuals who no longer work at Sidley.

3. The EEOC Has Placed the Putative Claimants' Post-1999 Performance At Issue.

The EEOC has itself put the post-Sidley performance of the putative claimants at issue in this case and thus has opened the door to production of these documents. At the deposition of Sidley partner Virginia Aronson, EEOC attorney John Hendrickson questioned Ms. Aronson about the post-Sidley performance of former Sidley partners, asking her how several of the partners "could have such great careers post Sidley and their quality have been so bad at Sidley," and representing that "several of the partners who were downgraded went on after Sidley to have bang up careers in other environments." (Ex. L, Feb. 23, 2006 Deposition of

Virginia Aronson at 127:12-21.) The EEOC cannot simultaneously rely on an individual's supposed post-Sidley performance while refusing to provide Sidley with the evidence that would either support or rebut this assertion. *See Wolfolk v. Rivera*, 729 F.2d 1114, 1119 (7th Cir. 1983) (trial court properly admitted evidence concerning plaintiff's performance at previous employment in order to impeach his testimony concerning his performance there). The EEOC should be ordered to produce putative claimants' post-1999 performance information.

III. The EEOC's Supplemental Discovery Responses Remain Deficient.

During the parties' August 31, 2006 discovery conference, the EEOC agreed to supplement its responses to provide certain requested information. The EEOC provided its Fourth Supplemental Responses to Sidley's First Set of Discovery Requests and the EEOC's First Supplemental Responses to Sidley's Second Set of Discovery Requests to Sidley on September 8, 2006. (Exs. I and M.) Despite Sidley's numerous attempts to obtain the information and responses to which it is entitled, the EEOC's discovery responses remain deficient and must be addressed.

A. Information Learned From Former Sidley Partners (Interrogatory No. 9 of Sidley's First Set of Interrogatories)

In this interrogatory, Sidley asked the EEOC to identify all communications regarding this litigation between the EEOC and any Sidley partner or employee. Despite supplementing its responses three times, the EEOC's response to this interrogatory did not contain all such communications. Counsel for the EEOC acknowledged this fact during the August 31 meet and confer, stating that because different people in the office were conducting the interviews, the drafters of the discovery responses could not be sure that the answer was complete. The EEOC agreed, however, to provide a verification that its answer was complete

EXHIBIT C

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

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	Case No. 05 CV 0208
Plaintiff,	)	Honorable James B. Zagel
v.	)	Magistrate Judge Ashman
SIDLEY AUSTIN BROWN & WOOD LLP,	)	
Defendant.	)	

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLIANCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DISCOVERY RESPONSES[1]

The EEOC has insisted on complete and final responses to its discovery requests, while providing only incomplete and preliminary responses to Sidley's discovery requests.[2] In response to specific issues addressed by Sidley's motion to compel, the EEOC asserts that it should be able to pick the form of discovery to which it will respond (*e.g.*, depositions and document production instead of interrogatory answers) and claims that interrogatories pending for more than a year are "premature." The EEOC's positions are not supported by the Federal Rules of Civil Procedure or the authority interpreting those rules. The discovery sought by Sidley is plainly relevant, and the EEOC should be ordered to comply now with its discovery obligations.

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[1] Last week, this Court urged the parties to attempt to reach a reasonable compromise on the issues in Sidley's motion to compel. The EEOC chose to stand on its objections in their entirety, providing only an additional fact relating to the two putative claimants who were 39 years old at the time of the events in question. (*See* Ex. B to EEOC's Mem. in Opp'n to Sidley's Motion ("EEOC Opp'n").)

[2] As of the date of filing of Sidley's motion, for example, the EEOC had responded to Sidley's June 2006 subpoenas for only 5 of 27 putative claimants it claimed to represent. On September 25, 2006, nearly 3 ½ months after issuance of those subpoenas, the EEOC produced documents for another group of claimants, but has failed to produce documents for the final seven individuals.

pursue that discovery method. A party is free to make reasonable use of the various discovery devices provided by Rule 26 through 37 as he sees fit").

In any event, deposition testimony is not an adequate substitute for production of these documents. Sidley has a limited amount of time to pose questions at a deposition. FED. R. CIV. P. 30(d)(2). It should not be forced to squander deposition time or depose witnesses twice to discover facts that could be quickly derived from a document (even in the unlikely event that a witness could recall the specific information contained in such documents). Moreover, the objective facts presented in documents might conflict with the testimony of an interested witness. Sidley is entitled to discover relevant information and collect documents that might verify or conflict with deposition testimony. This information is necessary for Sidley to frame its defense to the EEOC's claims.

C. Documents Relating to Post-Sidley Performance Are Relevant to the EEOC's Claim of Pretext, Mitigation, and to Test the EEOC's Assertions Regarding the Putative Claimants' Post-Sidley Performance.
(Sub. Req. Nos. 5-8; EEOC Opp'n Section V.)

Sidley's request for information on post-Sidley performance is unquestionably relevant. The EEOC concedes (Opp'n at 11) that it will challenge as pretextual the performance-based reasons behind the status changes, including the claimants' low billable hours, low client billings and failure to take steps to attract new clients. At the same time, the EEOC contends that Sidley is not entitled to discovery that will show that the putative claimants had those same performance problems after they departed Sidley for new firms. This information will provide powerful evidence that Sidley's justifications were non-discriminatory. Again, Sidley's subpoena requests are very narrowly tailored to seek precisely that information.

(*See* Ex. K[8] at ¶¶ 5 (billable hours), 6 (client billings), 7 (business generation) and 8 (business development efforts).)

There is also no merit to the EEOC's claim that the putative claimants' post-Sidley performance is not relevant to mitigation. In order to show that a putative claimant did not mitigate damages, Sidley bears the burden of proving that he or she did not take reasonable actions to find *comparable* employment. Sidley's document requests are relevant to determining whether any such subsequent employment was comparable to that at Sidley, including whether the job was part-time. Again, the requests are narrowly tailored to avoid harassment or intrusion. Sidley has not sought such documents as subsequent performance reviews or disciplinary records and has agreed to production of the documents on an "Attorneys'-Eyes-Only" basis.

The EEOC's attempts to justify its refusal to provide this information with the conclusory statement that the putative claimants had "different clients and different expectations" in their new firms. That is not an excuse for avoiding discovery, but a preview of the argument that the EEOC will offer on this issue at trial and, at most, goes to the weight rather than the discoverability of the evidence. Again, the EEOC cannot claim significant damages on behalf of the claimants while barring Sidley from obtaining the evidence it needs to show that the EEOC's contentions are factually unsupportable.

To confirm that the EEOC's attempt to bar this discovery is specious, the Court need look no further than the discovery that the EEOC has itself propounded in this lawsuit. As noted in Sidley's opening brief, the EEOC has requested and received information about putative claimants' performance after their status was changed. Moreover, the EEOC has claimed in discovery that the putative claimants have gone on to have successful post-Sidley careers.

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[8] Exs. A-M are attached to Sidley's opening memorandum.

(Ex. L.) The EEOC cannot simultaneously rely on an individual's supposed post-Sidley performance while refusing to provide Sidley with the evidence that would either support or rebut this assertion. *See Wolfolk v. Rivera*, 729 F.2d 1114, 1119 (7th Cir. 1983) (trial court properly admitted evidence concerning plaintiff's performance at previous employment in order to impeach his testimony concerning his performance there).

Therefore, because the documents requested are relevant to mitigation and pretext and because the EEOC has placed post-Sidley performance at issue, the Court should order the EEOC to produce the putative claimants' post-1999 performance information.

D. Information Relating to the Putative Claimants' Performance Prior to the Status Change is Relevant and Should be Produced. (Sub. Req. No. 9.)

In its Opposition, the EEOC concedes, as it must, the relevance of the putative claimants' performance while at Sidley. The EEOC has refused, however, to respond to portions of the subpoena that seek information relating to their performance. In particular, Sidley sought information about the putative claimants' business development efforts while at Sidley. (Ex. K at ¶ 9.) Because business development and billings were among the factors in Sidley's decision to change the status of the putative claimants, this request seeks evidence that obviously relates to Sidley's non-discriminatory reasons for the status changes. Without explanation, the EEOC continues to refuse to provide this information. It is relevant, and the Court should compel the EEOC to produce it.

III. THE COURT SHOULD ORDER THE EEOC TO PROVIDE A VERIFICATION AND SHOULD BIND THE EEOC TO ITS ANSWERS.

In its motion, Sidley requested verification of the EEOC's interrogatory responses, as required by the Federal Rules of Civil Procedure. The reason for the EEOC's

EXHIBIT D
FILED UNDER SEAL