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

UNITED STATES EQUAL EMPLOYMENT	)	
OPPORTUNITY COMMISSION,	)	
	)	
	)	No. 05 CV 208
	)	
Plaintiff,	)	
	)	
vs.	)	Chicago, Illinois
	)	
SIDLEY, AUSTIN, BROWN &	)	
WOOD, L.L.P.,	)	October 6, 2006
	)	
Defendants.	)	10:13 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES B. ZAGEL

For the Plaintiff:  
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
BY: Deborah L. Hamilton  
Laurie S. Elkin  
500 West Madison Street  
Suite 2800  
Chicago Illinois 60661

For the Defendant:  
GRIPPO & ELDEN  
BY: Lynn H. Murray  
Maile Solis-Szukala  
111 South Wacker Drive  
Chicago Illinois 60606

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Blanca I. Lara, CSR, RPR  
219 South Dearborn Street  
Room 2504  
Chicago, Illinois 60604  
(312) 435-5895

1 opposed to substance.

2           There are some other disputes with respect to  
3 substance, and that is that Sidley wants to have a lot of  
4 information about mitigation, and some of this information is  
5 sensitive, sensitive in two respects. Sensitive because, as  
6 we know, perhaps no single individual whose case is being  
7 plead by the EEOC has the slightest interest in having a case  
8 pursued for professional reasons and maybe personal ones as  
9 well.

10           So the kind of barrier that we never see in an  
11 ordinary case where you have a truly willing plaintiff exists  
12 here because we have at least some unwilling plaintiffs, and  
13 even if they're privately willing they are publicly  
14 unwilling.

15           So the ordinary willing plaintiff says, oh, this is a  
16 pain in the neck, I don't want to give this stuff, but I want  
17 the money, I want the remedy, I want the injunction, so I'll  
18 go through it. But that incentive doesn't exist here for the  
19 individual employee, partner, unknown status persons.

20           In addition to that, even if they were perfectly  
21 willing individuals, there's some stuff particularly with  
22 respect to firm partnership agreements that would drive any  
23 sane lawyer crazy.

24           The short end of this is, I am willing to require  
25 production of this but it will be under an extraordinarily

1 stringent protective order applicable to both the EEOC and  
2 Sidley. You can devise one of your own, but these are the  
3 sine qua non of such a protective order:

4           One, the information will be produced only pursuant  
5 to a court order. The information can be given to only one  
6 designated damage expert who can be advised by one attorney.  
7 In the case of Sidley, it may not be a person employed by  
8 Sidley, it has to be outside counsel. In the case of the  
9 EEOC, it can be an EEOC attorney but only that one.

10           The only reason I'm permitting attorney access to it  
11 is because a damage expert may not, in fact, understand the  
12 implications of a partnership agreement. I think all of the  
13 other stuff they'll understand, the compensation, but they may  
14 not understand the significance of the partnership agreement.

15           The documents, the actual original documents, will be  
16 placed under seal and held by the Court after examination with  
17 something that will order the destruction after the litigation  
18 is over. Or if the producers prefer, return it to them.  
19 These will be papers for which copies may not be made.

20           I'm also toying with the idea of having them produce  
21 only one copy which can be examined in turn by one side and  
22 then the other. In this case, of course, it would be Sidley  
23 that would go first because Sidley is the one that really  
24 wants to look at it.

25           And I suspect in many cases this is not something

1 conceive of a case, and although the case settled, I have had  
2 a case in which somebody was ostensibly fired and the given  
3 reason for firing was that the individual committed a series  
4 of violations of firm procedures. And not terribly important  
5 firm decisions, just there were procedures and their attitude  
6 was this guy just doesn't follow the rules and that's why we  
7 got rid of him. And he had a lot of other explanations of  
8 reasons that are prohibited by the law.

9 Investigation of his subsequent employer established  
10 that at the subsequent employer he did the same thing, and at  
11 the employer after that he did the same thing. And I thought  
12 it did a pretty good job of destroying the pretext argument  
13 that was offered by the plaintiff, so good a job that the case  
14 settled for what was essentially a nominal amount.

15 But the reason that both of you may have a point with  
16 respect to this is, to do this in the best way to ascertain  
17 the truth, what Sidley has to do, and they should do this  
18 first so that you are not facing a shifting stance, what  
19 Sidley has to say is, we changed the status of partner X  
20 because the guy would never have a lunch with the client,  
21 never went out and solicited business, worked a lot of hours  
22 but somebody else always had to make the rain. Or terrific  
23 lawyer but if the client was coming to our office, we had to  
24 send them out because he was always angry at the client for  
25 one reason or another and communicated this and this is why we

1 thought he was not as productive as others, had nothing to do  
2 with the fact that he was 58 years old and somebody who was 38  
3 years old started doing their work. It would be important for  
4 them to know if at a subsequent firm they had the same opinion  
5 of him and if he did the same things.

6 That, I think, is what they're looking for, and  
7 they're entitled to find that, but for the purposes of the  
8 plaintiff in this case you don't want to put them in a  
9 position -- or let's put it this way, if I were in your shoes,  
10 I wouldn't want to put them in a position where they discover  
11 that some guy goes to a new firm and does a series of things  
12 which the firm thinks they're not good, not bad enough to get  
13 rid of him but really things that are problems, becomes a  
14 problem partner in another firm and these are the problems, X,  
15 Y and Z. You don't want to have that kind of discovery and  
16 then have Sidley come and say, well now that we think about  
17 it, in addition to these other things that we raised with you  
18 there was also X, Y and Z.

19 So you don't want to put them in a position where  
20 they've heard the story. And that I'm willing to let you  
21 avoid. But eventually when they have stated their reasons why  
22 they have done what they have done with respect to each of  
23 these individuals, they're entitled to mine the future conduct  
24 of those individuals to find out if there is anything which  
25 supports their theory and where applying the Sussannah and the

1 Elders technique from the Apocrypha. Do you remember this?

2 MS. HAMILTON: I have to admit that I don't.

3 MS. MURRAY: No.

4 THE COURT: When I was starting out, this was a  
5 staple of closing arguments in cases. The story of Sussannah  
6 and the Elders is that there's a young attractive woman -- the  
7 Apocrypha, as you recall, are the books that many people think  
8 should have been in the Bible but aren't. She comes to the  
9 authorities, to the prophet, whoever it is, and says -- you  
10 know, I can't even remember which way it goes. I can't  
11 remember if she says they assaulted her or they come and  
12 report that she had seduced them, that she was a wanton woman.  
13 Maybe it's Solomon who does this, he separates the elders.  
14 And he said, "And where did all this happen, these acts of  
15 which you complain?" And the first elder says, "under yonder  
16 oak tree." Then he sends that elder away, goes to the other  
17 elder and says, "where did this happen?" "It was under the elm  
18 tree." The separation of witnesses.

19 And this is basically the technique that you're  
20 entitled to use. You're entitled to have Sidley commit to its  
21 stated reasons, but once they commit to their stated reasons  
22 they are free to see if there is anything in the subsequent  
23 conduct that would confirm their judgment with respect to  
24 this. Unless, of course, you are going to take the position,  
25 which I can't believe you would do, that these are the real

1 reasons but the real reasons aren't permitted by the law.  
2 Well, you're not going to say that because they're not going  
3 to say something like that.

4 MS. HAMILTON: If I could raise one other point,  
5 which is much of the information they've requested may or may  
6 not even be accessible to these individuals at their new law  
7 firms. We simply don't know whether these individuals are  
8 able to access --

9 THE COURT: What is inaccessible is inaccessible.  
10 And if we get past the first wave of this stuff, we may very  
11 well be dealing with ways in which that information can be  
12 made accessible.

13 I quite agree with you that a lot of it will not be  
14 accessible to the individuals. It's accessible in other ways,  
15 but that raises a whole other issue. And what happens is that  
16 they start dropping subpoenas on various law firms, they're  
17 going to get a series of Rule 45 letters and it's all going to  
18 wind up here anyway. But this basic theory permits them a  
19 certain amount of discovery, but I'm willing to require them  
20 to go first and state their reasons, and I'm sure they're  
21 quite capable to doing it.

22 MS. MURRAY: Your Honor, we have on September 14th  
23 given a long description pursuant to an earlier order of the  
24 Court and we can work with the EEOC on that.

25 THE COURT: Okay. So those are my parameters for

1 that one.

2 MS. HAMILTON: And I do expect it quite likely that  
3 even if the individual could look at the information  
4 themselves, they will not be able to turn it over to Sidley.  
5 But, obviously, we will speak to the individuals involved and  
6 get back to you once we have more information about they can  
7 or cannot turn over.

8 THE COURT: And, in all honesty, I don't know that in  
9 practical terms it's going to be an enormous problem because  
10 if these individuals have gone on to other firms and done  
11 reasonably well, it's not likely to be a very promising area  
12 for Sidley to mine, but let's see where we go.

13 MR. GOCHANOUR: So if I understand correctly, we're  
14 going to look at these on an individualized basis in terms of  
15 the reasons given first for these individuals --

16 THE COURT: Right.

17 MR. GOCHANOUR: -- and then if there is some basis,  
18 you know, from the information that we've given them about  
19 their subsequent performance, if there is no indication of  
20 problems subsequent in employers, I take it there's no real  
21 basis for this sort of intrusive discovery.

22 THE COURT: Well, no, we're going to have to  
23 establish a threshold there. We're going to have to establish  
24 a threshold there. And one of the things that makes life very  
25 difficult for employers who want to raise this defense is,



1 they may very well fire somebody because they're habitually  
2 late to work, works fine but they're habitually late, and then  
3 you look at all the future employees and it's a disaster for  
4 the defendant because they're never late now. It is true that  
5 usually the reasons they're never late now is because they got  
6 fired in the first place and realized the concept. So  
7 sometimes this stuff doesn't work, but I'm not going to say no  
8 to them right off the bat.

9 MS. MURRAY: Your Honor, just as an example, I'd say  
10 more than two-thirds of the folks here had, in our view, very  
11 low hours and we've asked for their hours in post-Sidley  
12 employment at law firms and --

13 THE COURT: Look, some of this stuff is going to be  
14 simple, some of it is not going to be simple. I mean, if you  
15 have a fairly complicated reason for changing the status of a  
16 partner -- by "complicated" I mean the kind of thing where the  
17 partner has undoubted merits and claimed demerits and they're  
18 kind of closely balanced, then these things become very  
19 complicated and the investigation becomes very contemplated.  
20 If you're talking about something relatively simple, like  
21 hours, it's easier. So, basically, you'd be a better judge of  
22 that than I am knowing what I know now. Later, if I know more  
23 it might be difference.

24 MS. HAMILTON: I think we would argue that this point  
25 of low hours at Sidley, how they performed elsewhere, you

1 know, the hours are what the hours are in the sense they've  
2 produced to us the charts that show the hours, and so there's  
3 really no need to inquire at their subsequent employer what  
4 their hours are. I don't think it's a factual basis. We're  
5 going to be saying, no, they actually worked more than the  
6 15-, 16-, 1700 hours that are illustrated on the documents.

7 THE COURT: It's more complicated than that. If, for  
8 example, somebody leaves Sidley because Sidley says we want  
9 2000 hours, and they haven't been at 2000 hours, and then they  
10 go to another law firm that says we don't want 2000 hours, we  
11 may not pay you as much but we want 1800 hours.

12 The significance of that is a little more equivocal,  
13 but Sidley could be in a position of saying the person really  
14 wasn't willing to do this, this was the real reason we let him  
15 go and look at what happened, he went to another place and he  
16 chose this place because they only wanted 1800 hours. So it  
17 may matter. It may matter. Comparative hours, in and of  
18 itself, don't establish anything one way or the other. And  
19 if, for example, that's all they have, they may have discovery  
20 of it but their chances of getting it admitted are nil.

21 MS. HAMILTON: I think in that kind of a  
22 circumstance, you know, we may not object, but what we would  
23 ask is if they take the depositions of these individuals and  
24 if the individual says yes, I chose someplace that had a lower  
25 hour expectation, then I think that provides a much more

1 significant basis on which to ask the individuals to give up  
2 this private information that belongs to their firm. But to  
3 do it solely on the basis of an assertion of low hours, it  
4 seems like a great -- you know, as you yourself said, is very  
5 unlikely to be admissible except in certain limited  
6 circumstances. So if we were able to require Sidley to make  
7 somewhat more of a showing than just low hours --

8 THE COURT: Look, I will stop them from doing a  
9 fishing expedition, but I have a feeling that in many cases  
10 they will be able to define exactly what they're interested  
11 in. And the reason why I think they'll be able to do that is,  
12 these are pretty much people who worked for them for a long  
13 time, and whatever warts there are, I think they're probably  
14 quite precise in their description of them and they will be  
15 able to look for stuff and ask questions. The other thing is,  
16 I am perfectly willing to seal this stuff if it turns out to  
17 be a dead end too.

18 MS. HAMILTON: Well, I think it would absolutely need  
19 to be sealed, but perhaps, as I'm looking at the language of  
20 their subpoena, what would make more sense is to place on  
21 Sidley the burden of identifying for which individuals they  
22 believe they need which subpoena requests, because for each  
23 individual they have asked --

24 THE COURT: It's implicit in what I've said that  
25 they're going to have to do that.