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 LLP,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS

Despite Sidley Austin LLP's ("Sidley") many attempts to obtain discoverable information without involving the Court, the Equal Employment Opportunity Commission ("EEOC") has refused to provide information and documents going to the heart of its claims and Sidley's defenses. In particular, Sidley has requested (1) the names of persons who were subjected to, or exceptions to, Sidley's alleged age-based retirement policy or policies; (2) the bases for the EEOC's assertion that Sidley's legitimate, performance-based reasons for the status changes of 31 former partners are a pretext for age discrimination; (3) information necessary in order for Sidley to quantify the putative claimants' alleged damages and to determine whether the putative claimants attempted to mitigate any such damages; (4) information and documents relating to the putative claimants' post-Sidley performance; and (5) information relating to communications the EEOC has had with former Sidley partners.

The EEOC has issued scores of interrogatories (with hundreds of subparts) to which Sidley has provided individually tailored responses containing information specifically relating to the 34 putative claimants. The EEOC, in contrast, offers plainly deficient, boilerplate, and cut-and-pasted answers designed to prevent Sidley from discovering crucial information and documents. Sidley is therefore forced to file this motion and respectfully requests that the Court order the EEOC to supplement the discovery responses at issue within 14 days.

Local Rule 12(k)/37.2 Statement

The parties have met and conferred but have been unable to reach agreement regarding the discovery issues raised in this motion. After the EEOC served its original response (after a two-week extension) to Sidley's Third Set of Interrogatories and Requests for the Production of Documents (Ex. A),[1] Sidley sent the EEOC a letter setting forth the deficiencies in every single one of the EEOC's responses (Ex. B, 12/15/06 Ltr). On January 4, 2007, the parties discussed telephonically the issues raised in Sidley's letter. During the teleconference, the EEOC immediately agreed to provide supplemental responses to all interrogatories (1 through 6) and Document Requests 1 and 2 and confirmed that the parties were at an impasse as to Document Request 3. (Ex. C, 1/4/07 Ltr.) The EEOC agreed to provide certain supplemental responses by January 19th and to completely supplement its responses by February 1st. Without explanation, however, the EEOC did not serve responses on these dates, and Sidley counsel was required to make three additional requests to obtain supplemental responses (Exs. D, E, and F, e-mails from M. Solís to L. Elkin), which the EEOC finally served on February 9, 2007. Even though the EEOC served its supplemental responses three weeks late, the EEOC's answers remain deficient and fail to provide the information the EEOC promised to provide during the parties' meet-and-confer.

ARGUMENT

The EEOC's main objection to Sidley's discovery requests appears to be that to do so would require some effort on its part. This is not a valid objection. Complex litigation often requires parties to "spend considerable time and energy answering interrogatories." *See Bell v. Woodward Governor Co.*, No. 03 C 50190, 2005 WL 289963, at *2 (N.D. Ill. Feb. 7, 2005). The EEOC has received over 40,000 pages of documents from Sidley and has access to its clients, the putative claimants whom the EEOC represents. There is no valid reason why the EEOC cannot

[1] References are to exhibits attached to this Memorandum. Confidential information has been redacted from the exhibits and publicly-filed version of this Memorandum. In addition, pursuant to the Amended Protective Order in this case, Exhibits A, B, G, H, I, J, K and M have been filed under seal.

respond to Sidley's discovery requests. The EEOC should be ordered to provide responsive information and documents immediately.

I. The EEOC Should Be Required to Provide Sidley With Information and Documents Relating To (A) The EEOC's Allegation That Sidley Had An Age-Based Retirement Policy; (B) Pretext; (C) Alleged Untrue Reasons Given For An Individual's Status Change; (D) Alleged Damages and Mitigation; and (E) Post-Sidley Performance.

A. The EEOC Refuses To Identify the Individuals Affected By the Alleged Age-Based Retirement Policy.

In Interrogatory 1 of Sidley's Third Set of Interrogatories, Sidley asked the EEOC to:

> Describe the "age-based retirement policy" referred to at ¶ 6(A) of the EEOC's Complaint, including, but not limited to, the age at which the EEOC contends Sidley partners were or are forced to retire, all individuals impacted by the policy and any exceptions to the policy.

(Ex. G, EEOC's First Supplemental Resp. to Sidley Austin LLP's Third Set of Interrogs. and Reqs. for the Produc. of Docs.) In response, the EEOC described two alleged "policies" in general terms, stating that prior to 1999, "the firm's normal policy required that partners retired [sic] at or around age 65" but that "some partners" were permitted to work past "the normal retirement age but with a cut in their participation, but . . . were eventually required to retire" and that "a few partners" were "permitted to remain as partners on a year-to-year basis." The EEOC further stated that in 1999, Sidley "reduced the retirement age from at or around 65 to a sliding scale between 60 and 65." Finally, the EEOC provided a list of partners allegedly "impacted" by "the policy," without specifying to which alleged "policy" each partner was impacted. (Ex. G, Interrog. 1.) The EEOC did not list any individuals who were "exceptions" to the policy.

The EEOC's responses are plainly deficient. First, the EEOC cannot generally claim that "some" partners were impacted by an alleged policy without identifying such partners. If the EEOC is aware of former partners who were "required to retire," it should be required to identify those former partners by name. Second, the EEOC must specifically identify any partners who were exceptions to the alleged policy rather than simply stating that "a few" partners were excepted. (If, for instance, more partners were "exceptions" to the alleged policy than were

impacted by it, it calls into question the EEOC's contention that there was any policy at all.) Third, because the EEOC has described two different alleged retirement policies, the EEOC should not be permitted to generally state that certain partners were impacted by "*the* policy." The Court should require the EEOC to clarify which partners the EEOC contends were impacted by which alleged age-based retirement policy. Finally, the EEOC should not be permitted to continue to state that its "investigation continues." After nearly seven years of investigation and with only one month remaining in written discovery, the time has come for the EEOC to fully describe Sidley's alleged retirement policy (or policies) and those partners impacted by those policies, subject to the normal rules of supplementation based on after-acquired evidence.

B. The EEOC Must Specifically Identify the Evidence That Supports Its Contention That Sidley's Proffered Performance-Based Reasons Are a Pretext For Age Discrimination.

In Interrogatory 2 of Sidley's Third Set of Interrogatories, Sidley asked the EEOC:

> For each of the following Putative Claimants, state whether the EEOC contends that the reasons for the decisions in Supplemental Amended Exhibit D were a pretext for discrimination, and, if so, (i) provide all facts on which the EEOC relies; (ii) identify all persons with knowledge of such facts; and (iii) identify all documents relating to such contention.

(Ex. G.) For each of the putative claimants, the EEOC provides the same general explanation for its contention that the proffered reasons for each putative claimant's status change are pretextual:

> The proffered reasons contained in Supplemental Amended Exhibit D are a pretext for discrimination based on the facts that the proffered reasons were not communicated to [putative claimant] at the time of [his] expulsion from the partnership, no contemporaneous documents have been produced reflecting or indicating that the reasons proffered now were the reasons for [putative claimant's] expulsion, the contemporaneous documents indicate that the expulsions of partners in 1999 and before were motivated by age; contemporaneous statements to the press and to the partnership indicate that the motivation behind the momentum plan was age.

(Ex. G, Interrog. 2.)

What the EEOC seems to be claiming is (1) Sidley did not say at the time of the status changes what it says now and (2) other, general documents – not specifically referencing or relating to the individual putative claimant – suggest the real reason was age. This response, however, is both non-responsive and deficient because it does not provide a response specifically tailored to each putative claimant or identify the "contemporaneous documents" that purportedly relate to that particular putative claimant.

1. The EEOC Must Provide an Individually-Tailored Response.

Documents and general statements referencing retirement created or made at the time of the 1999 status changes plainly do not relate to most of the putative claimants who, in September 1999, varied in age from 39 to 65. For instance, a statement describing a retirement age of 60 or 65 could not possibly be a basis for the EEOC's contention that the proffered reasons for the changes in status of < **REDACTED** > and < **REDACTED** > (both 39 at the time of the decision), or the other 14 putative claimants who were age 55 or younger in September 1999, are a pretext for age discrimination. *See, e.g.*, *Cianci v. Pettibone Corp.*, 152 F.3d 723, 727 (7th Cir. 1998) (citation omitted) ("[B]efore seemingly stray workplace remarks will qualify as direct evidence of discrimination, the plaintiff must show that the remarks were related to the employment decision in question.") The EEOC must specifically identify the evidence currently in its possession that supports the EEOC's contention that Sidley's proffered performance-based reasons are a pretext for age discrimination *as to each particular putative claimant.* If the EEOC has no such evidence, it should be required to so state.

2. The EEOC Must Identify Specific Documents That Support Its Contention That Sidley's Proffered Reasons Are Pretextual.

Although the EEOC cites "contemporaneous documents" and "contemporaneous statements" in support of its pretext claim, it does not identify to which documents it refers, let alone by Bates number as it agreed to do during the parties' January 4, 2007 meet-and-confer. Simply referring to six prior discovery responses without identifying particular documents and statements cited in those responses is not sufficient. The EEOC should be required to identify,

by Bates number, which of the dozens of documents and statements it considers to be responsive to Interrogatory 2 *as to each particular putative claimant*.

3. The EEOC Must Specifically Identify Similarly-Situated Partners.

In addition to the general, boilerplate response set forth above, with respect to 20 of the putative claimants, the EEOC makes one or more of the following statements:

< **REDACTED** > (Ex. G, Interrog. 2.)

Despite making these blanket statements that "other" or "younger" partners were treated more favorably than the putative claimants, the EEOC does not name any such "other" or "younger" partner (let alone a "similarly situated" younger partner, as required in order to be relevant to the EEOC's pretext claim). *Banks v. CBOCS West, Inc.*, No. 01 C 0795, 2003 WL 1888844, at *4 (N.D. Ill. Apr. 16, 2003). The Court should not permit the EEOC to make these blanket statements without providing, at a minimum, the names of "similarly situated" partners falling into the categories the EEOC has identified *as to each particular putative claimant.*[2]

4. The EEOC Cannot Generally Incorporate Deposition Testimony Or Cite To a Deposition Without a Record Reference.

An additional problem with the EEOC's response to Interrogatory 2 is its attempt to generally refer to or incorporate deposition testimony without any transcript citations. (*E.g.*, "*See* deposition testimony of < **REDACTED** > " or "EEOC incorporates Mr. < **REDACTED** > deposition testimony bearing on Sidley's proffered reasons.") The EEOC's attempts to incorporate or refer to deposition testimony without page citations is plainly improper. *See Bell*, 2005 WL 289963 at *4 ("If Defendant wishes to include an adoption of the testimony of a particular . . . witness as part of (*not in lieu of*) its answer to Interrogatories . . ., it must do so with specificity as to the citation of deposition testimony . . . . A general reference to a . . . deposition as an answer . . . will not suffice.").

Citing an example of discovery abuse closely analogous to this case, the Seventh Circuit explained: "Defendants served a contentions interrogatory asking [Plaintiff] what evidence he

[2] For a discussion of "similarly situated," see Sidley Austin LLP's Memorandum (A) On Comparators and (B) Opposing EEOC Motion Regarding Client Complaints at 6-9 (filed Feb. 15, 2007).

had . . . . [Plaintiff] supplemented his answer a second time, referring generally to depositions but not including any record references. This left defendants adrift and made much of the discovery process pointless from their perspective—though it remained expensive." *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 810 (7th Cir. 2003). As in *Nisenbaum*, the EEOC's "answers," which incorporate and refer generally to deposition testimony without any record citations, appear to be drafted in a way to leave Sidley "adrift."

C. The EEOC Should Be Required To Specifically Identify the Statements It Contends Are Untrue Contained In Sidley's Detailed Explanations For Each Former Partner's Status Change and the Process and Criteria Used To Make the Decisions.[3]

In response to the EEOC's discovery requests, Sidley has provided the EEOC with detailed explanations of the performance-based reasons for each former partner's status change (Ex. H, Supplemental Am. Ex. D) and the process employed and criteria used to make the decisions (Ex. I, Sidley's Objs. and Resps. to the EEOC's 30(b)(6) Notice). In its Second Set of Interrogatories, Sidley asked the EEOC to identify any statements in these two documents it contends are untrue, the reasons why, and a description of all facts and documents supporting the EEOC's contention. The EEOC has objected on various grounds, including burden, and has refused to provide any answer whatsoever. (Ex. J, EEOC's Resp. to Sidley Austin LLP's Second Set of Interrogs. and Reqs. for the Produc. of Docs., Interrogs. 2 & 3.)

If the EEOC is going to take the position that any stated reason or criterion is untrue, Sidley is entitled to know that so it can, while discovery is ongoing, develop evidence to support its case and rebut the EEOC's pretext claim. For example, if the EEOC intends to argue that Sidley's representation of a particular putative claimant's billable hours is untrue, Sidley is entitled to know that, and the basis for the EEOC's statements, so that it can provide evidence to rebut the EEOC's claim. Likewise, if the EEOC claims that a particular claimant engaged in business development, Sidley is entitled to know that this is the EEOC's contention, so that Sidley can demonstrate that the claimant did not actually do so or was a less effective business

[3] The parties discussed the EEOC's response to this interrogatory during an October 16, 2006 meet-and-confer, and the EEOC confirmed that it would not supplement its initial response.

generator than others who were kept. It is not unduly burdensome to require the EEOC to provide the requested information, as its clients can simply point to assertions that they contend are false. The Court should order the EEOC to provide a complete and final response to these interrogatories.

D. The EEOC Refuses To Provide Complete Information Relating to the Putative Claimants' Alleged Damages and Mitigation Of Any Such Damages.

1. The EEOC Must Completely and Finally Identify the Putative Claimants For Whom It Seeks Relief.

As an initial matter, the EEOC has not consistently identified the putative claimants for whom it is seeking front pay, back pay, or liquidated damages. When asked to identify these persons in prior written discovery, the EEOC excluded putative claimants **< REDACTED >**, **< REDACTED >**, and **< REDACTED >**. (Ex. K, EEOC's Fifth Supplemental Resp. to Def.'s First Set of Interrogs., Interrog. 3.) However, without explanation, the EEOC now includes Messrs. **< REDACTED >**, **< REDACTED >**, and **< REDACTED >** in response to Interrogatories 3 (seeking descriptions of mitigation efforts) and 4 (seeking the age until which a putative claimant contends he or she would have worked) of Sidley's Third Set of Interrogatories as putative claimants for whom the EEOC seeks relief. At the same time, the EEOC provides no response to Interrogatory 3 vis-a-vis **< REDACTED >**, **< REDACTED >**, **< REDACTED >**, and **< REDACTED >** and Interrogatory 4 with respect to **< REDACTED >**, **< REDACTED >**, **< REDACTED >**, and **< REDACTED >**, all putative claimants for whom the EEOC had previously indicated that it *does* seek "backpay, liquidated damages, and reinstatement or front pay." (Ex. K, Interrog. 3.) As a first step, this Court should require the EEOC to provide a complete and final list of the putative claimants for whom the EEOC seeks front pay or reinstatement, back pay, and/or liquidated damages.

2. The EEOC Must Specify the Efforts Each Putative Claimant Undertook To Obtain a Substantially Equivalent Position.

In Interrogatory 3 of Sidley's Third Set of Interrogatories, Sidley asked the EEOC:

> For each Putative Claimant for whom the EEOC seeks front pay, back pay or liquidated damages, describe what efforts were taken to obtain a position that was the substantial equivalent of a position as a Sidley partner.

(Ex. G.) For those putative claimants who remained with Sidley after 1999 (< **REDACTED** > ,[4] < **REDACTED** >), the EEOC does not list any steps these putative claimants took to obtain a position that was the substantial equivalent of a position as a Sidley partner – except for < **REDACTED** > , whom the EEOC describes as having worked with a headhunter and having applied for a number of positions at other law firms and companies. It is unclear from the EEOC's response whether it contends that a position as a Sidley counsel or senior counsel is the "substantial equivalent" of a position as a Sidley partner or, if not, whether the above-named putative claimants took any steps to obtain such a position. Simply stating that certain of the putative claimants remained with Sidley does not answer the interrogatory.

The deficiencies in the EEOC's responses do not end there. As with its response to Interrogatory 2, where a putative claimant has been deposed, the EEOC cites generally to the putative claimant's deposition testimony: "See [putative claimant's] deposition testimony regarding his efforts to mitigate his damages." (Ex. G, Interrog. 3.) As explained in Section I.B.4., above, references to deposition testimony without record citations are improper. The Court should order the EEOC to identify the specific transcript pages that provide the requested information. In addition, where the putative claimants' deposition testimony does not provide a complete response to the interrogatory, the EEOC should be ordered to provide a complete written response to this interrogatory.[5]

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[4] Mr. < **REDACTED** > died on < **REDACTED** > .

[5] With respect to putative claimant < **REDACTED** > , the EEOC provides no substantive response, stating only "response to be provided." (Ex. G., Interrogs. 3 & 4.) The EEOC has represented to Sidley that Mr. < **REDACTED** > is suffering from health problems, and Sidley has postponed his deposition indefinitely on that basis. However, considering these interrogatories were served four months ago and because the close of written discovery is drawing near, Sidley requests that the Court set a date certain by which the EEOC must answer Interrogatories 3 and 4 with respect to Mr. < **REDACTED** > .

3. In Order For Sidley To Calculate Potential Damages, the EEOC Must Identify How Long Each Putative Claimant Would Have Worked At Sidley.

In Interrogatory 4 of Sidley's Third Set of Interrogatories, Sidley asked the EEOC:

> For each Putative Claimant for whom the EEOC seeks front pay, back pay or liquidated damages, state how long that individual would have continued to work as a partner at Sidley if the individual's status had not been changed.

(Ex. G.) As explained above, the EEOC has stated that it is seeking front pay on behalf of a number of putative claimants. But the EEOC cannot seek endless front pay on behalf of these putative claimants; it must specify a timeframe for which it seeks such pay. *See Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994) ("In deciding whether to award front pay, the court considers such factors as . . . whether the time period for the award is relatively short . . . ."). In order for Sidley to calculate and analyze potential damages in this case, the EEOC must provide an age until which it will seek front pay on behalf of the putative claimants.

The EEOC has instead simply provided a boilerplate response for each of the putative claimants that he or she had "no plans whatsoever to cease working as a partner at Sidley. [His] plan was to continue as a Sidley partner indefinitely." (Ex. G, Interrog. 4.) This response is insufficient and plainly designed to confuse, rather than narrow, issues. The information is wholly within the EEOC's control, and it should be required to supplement its response to provide the requested information. Accordingly, the Court should order the EEOC to provide a final and complete answer with respect to each putative claimant for whom it seeks relief, identifying the age until which the putative claimant contends he or she would have worked; or, if the putative claimant has been deposed and has provided a complete response to this interrogatory, the EEOC must specify the transcript pages that purportedly provide the requested information.[6]

[6] As with its responses to Interrogatories 2 and 3, the EEOC continues to cite to deposition testimony without any record references, merely stating: "See [putative claimant's] deposition testimony regarding how long [he] would have continued working as a Sidley partner." (Ex. G, Interrog. 4.)

4. The EEOC Must Provide a Description Of Putative Claimants' Post-Sidley Work.

Interrogatory 5 of Sidley's Third Set of Interrogatories asks the EEOC:

> For each Putative Claimant who does not currently practice at Sidley, provide: (i) the names and addresses of all positions held after the allegedly discriminatory acts; (ii) the individual's title in each such position; (iii) the individual's job responsibilities in such position; and (iv) the dates the individuals held any such position.

(Ex. G.) The EEOC has refused to provide the requested information. For those putative claimants who have been deposed, the EEOC, yet again, cites to entire deposition transcripts without record citations, stating: "*See* [claimant's] deposition testimony regarding position held since Sidley." (Ex. G., Interrog. 5.) The EEOC should be required to provide a final and complete answer identifying the specific transcript pages that provide the requested information. Further, because the putative claimants' deposition testimony does not provide all of the requested information, the EEOC should also be required to provide a complete written response to the Interrogatory.

With respect to those putative claimants who have not been deposed, the EEOC has not provided all of the requested information. For example, the EEOC does not state the address of Ms. < **REDACTED** > post-Sidley job, describe her job responsibilities, or provide the dates of her employment. Similar deficiencies exist for each of the identified putative claimants. The Court should order the EEOC to provide a final and complete answer to this interrogatory.

5. As Sidley Provided To the EEOC, the EEOC Must Identify Post-Sidley Employment Benefits the Putative Claimants Have Received.

Interrogatory 6 of Sidley's Third Set of Interrogatories asks the EEOC:

> For each Putative Claimant who does not currently practice at Sidley, identify each employment benefit received from the time each Putative Claimant left Sidley to the present (including health insurance, life insurance, disability insurance, and pension benefits) and state the cost charged to each Putative Claimant and the cost paid by others for such benefit.

(Ex. G.) The EEOC's refusal to answer this Interrogatory is inexplicable. The EEOC served Sidley with an identical interrogatory (Ex. L, EEOC's Eighth Set of Interrogs. to Sidley Austin), and on November 6, 2006, Sidley provided an 8-page response comprehensively setting forth the benefits received by its partners from 1998 to present (Ex. M, Sidley Austin LLP's Resp. to EEOC's Eight Set of Interrogs. at Ex. 1). Despite requesting – and receiving – identical information that Sidley now seeks, the EEOC objected to the Interrogatory when posed by Sidley as "premature on the ground that the time to set forth damage calculations set by the Court is not until May 16, 2007. Subject to and without waiving this objection, *see* tax returns produced by the class members represented by the EEOC." (Ex. G, Interrog. 6.)

The EEOC's position lacks all merit. Sidley should not be forced to wait until May 16, 2007 to receive information regarding damages, at which time it will be precluded from issuing further written discovery. (Written discovery is to close on March 30, 2007.) Moreover, the putative claimants' tax returns do not provide any – let alone all of – the information sought by this Interrogatory.[7] The Court should order the EEOC to provide the post-Sidley benefits information requested by Interrogatory 6.

6. The EEOC Must Produce All Documents Relating To Damages and Post-Sidley Employment Benefits.

Document Request 1 of Sidley's Third Set of Document Requests seeks "[a]ll documents relating to damages allegedly suffered by any Putative Claimant," and Document Request 2 seeks "[a]ll documents relating to employment benefits received by any Putative Claimant after the Putative Claimant left Sidley." (Ex. G.) The EEOC's supplemental response does nothing but refer Sidley to the putative claimants' tax returns. (Ex. G, Reqs. 1 & 2.)

In its original answer, the EEOC stated that "responsive documents have been or are in the process of being produced." (Ex. A, Reqs. 1 & 2.) During the parties' January 4, 2007

[7] The EEOC's responses are deficient even assuming that the tax returns provided the requested information, which they do not. Simply citing generally to tax returns is insufficient under the Federal Rules, which require the EEOC to specify "in sufficient detail to permit [Sidley] to locate and to identify, as readily as can [the EEOC], the records from which the answer may be ascertained." FED. R. CIV. P. 33(d). As the Advisory Committee Notes to Rule 33 make clear, "a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived."

teleconference, the EEOC agreed to provide the Bates numbers of the responsive documents referenced in its responses. (Ex. C.) The EEOC's supplemental responses do not contain any Bates numbers. If the tax returns are the only documents responsive to Document Requests 1 and 2, the EEOC should limit its response accordingly. If additional documents exist, as the EEOC's previous responses indicate, the EEOC should identify such documents by Bates number, as it had previously agreed to do.

E. As the Court Has Already Ruled, the EEOC Must Produce All Documents Relating To Post-Sidley Performance In a Legal Position.

Sidley asked the EEOC to produce "[a]ll documents relating to any Putative Claimant's performance in any legal position after leaving Sidley." (Ex. G, Req. 3.) The EEOC has objected to this request "on the ground that it seeks documents that are not relevant. And it is not reasonably calculated to lead to the discovery of admissible evidence." (Ex. A, Req. 3.) Again, the EEOC has refused to produce these documents despite the fact that it requested – and received – post-1999 performance information for those attorneys still at Sidley. 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.

This Court has already ruled (twice) that documents relating to the putative claimants' post-Sidley performance are discoverable.[8] At the EEOC's urging, the Court has also entered a protective order that gives heightened protection to post-Sidley performance documents. There is no reason why the EEOC should continue to refuse to produce these documents. Sidley, therefore, asks the Court to again compel the EEOC to produce documents responsive to this request.

[8] *See* Ex. N, Tr. of 10/6/06 Hr'g at 17 ("It would be important for them [Sidley] to know if at a subsequent firm they had the same opinion of him and if he did the same things. That, I think, is what they're looking for, and they're entitled to find that . . . .") and Ex. O, Tr. of 11/21/06 Hr'g at 6 ("And I suspect that the [post-Sidley employment] information does have some relevance.").

II. The EEOC Must Now Finally Provide Information It Previously Agreed To Provide Regarding Communications With Former Sidley Partners.

A. The EEOC Must Identify All Communications With Former Sidley Partners.

Sidley has already moved to compel the EEOC to identify communications with any current or former Sidley partners relating to this litigation. *See* Ex. P, Section III.A. of Sidley's Sept. 15, 2006 Mot. to Compel. During the parties' November 7, 2006 teleconference, which took place after Sidley prevailed on its motion to compel, the EEOC agreed – yet again – to review its response to this interrogatory and ensure that that response is complete. The EEOC has not supplemented its response or identified any additional communications since September 8, 2006. Sidley, however, is aware of EEOC communications with a number of former Sidley partners regarding this litigation in the last month alone. Despite its promise to supplement its responses, and its obligation to do so under the Federal Rules, the EEOC has not been forthcoming with its supplementation. Accordingly, the Court should order the EEOC to provide a full response and a verification that the EEOC's response is now finally complete.

B. The EEOC Must Produce a Log Reflecting Alleged Privileged Communications With Putative Claimants Not Represented By the EEOC.

More than four months ago, the EEOC agreed to "provide a log of all written communications with class members who have declined EEOC representation." (Ex. K, Interrog. 9.) Despite numerous requests by Sidley, the EEOC has never done so. As a result, Sidley has no choice but to ask this Court to order the EEOC to comply with its promise and provide Sidley with a log of all communications with putative claimants whom the EEOC does not represent in this litigation.

CONCLUSION

For the reasons set forth above, Sidley respectfully requests the Court enter an order directing the EEOC to provide information and documents relating to

(1) Sidley's alleged age-based retirement policy;

(2) the EEOC's assertion that Sidley's legitimate, performance-based reasons for the status changes of certain former partners are pretextual;

(3) the reasons given for an individual's status change and criteria used in making the decision that the EEOC contends are untrue;

(4) the putative claimants' alleged damages and efforts to mitigate damages;

(5) the putative claimants' post-Sidley performance; and

(6) to completely and finally identify all former Sidley partners with whom it has communicated regarding this litigation, including

(7) production of a log reflecting the EEOC's written communications with putative claimants it does not represent and over which it claims a privilege.

Dated: March 2, 2007

Respectfully submitted,

SIDLEY AUSTIN LLP

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

Gary M. Elden (#0728322)
Maile H. Solís (#06256696)
Matthew A. Bills (#06277137)
GRIPPO & ELDEN LLC
111 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 704-7700
Email: msolis@grippoelden.com

CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **March 2, 2007**, I caused a true and complete copy of the foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS** to be served by Electronic Mail Transmission via ECF as to Filing Users upon the following:

Deborah L. Hamilton (deborah.hamilton@eeoc.gov)
Laurie Elkin (laurie.elkin@eeoc.gov)
Justin Mulaire (justin.mulaire@eeoc.gov)
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
500 West Madison Street
Suite 2800
Chicago, Illinois 60661

/s/ Maile H. Solís
Maile H. Solís