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.	)	

SIDLEY AUSTIN LLP'S SUR-REPLY IN RESPONSE TO EEOC'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF CLIENT COMPLAINT INFORMATION OR TO PRECLUDE RELIANCE THEREON

In an effort to justify wide-ranging and excessive discovery, and to avoid having to face what is genuinely at issue in this case, the EEOC contends that because Sidley generally reviewed all partners in connection with the September 1999 decisions to change the status of some partners, every single Sidley partner in 1999 may be a "similarly-situated" individual treated more favorably than those partners whose status was changed. The EEOC refuses to narrow its requests by first identifying any specific "similarly-situated" individuals, despite the fact that it has had for a considerable time – years in some cases – information which includes all partners' hours, billings, compensation, practice groups, location, group heads, office heads, committees, a large number of personnel files, and date of birth, as well as detailed responses to interrogatories.

The identification of "similarly-situated" comparators is essential to the EEOC's case. The EEOC has pled what is, at a minimum, a very unusual age case. The 32 individuals whose status was changed ranged in age at the time from 36 to 64, and there is no suggestion that everyone over any particular age was "targeted" for a change in status. The EEOC must still establish that the age of any affected partner was the reason for the change in status, and it should be required to identify other younger partners similarly-situated who were treated more favorably than those individual partners affected by the status change (if, indeed, there are any).

As discussed below, the EEOC mischaracterizes the case as involving a reduction in force ("RIF") when what was involved was instead a change in status, and ignores clear precedent from the Seventh Circuit and this Court on the comparator issue while relying on decisions previously overruled. Sidley urges the Court to require the EEOC to identify comparators according to that authority in order to focus the issues and discovery in a proper and reasonable manner. This is critically important because, based on its misguided views, the EEOC seeks to compel the search for and production of highly sensitive information for every single Sidley partner in 1999 in addition to the volumes of partner-specific information it has already been given for every partner. Indeed, the EEOC has recently informed Sidley that it seeks 49 additional depositions (in addition to the 15 already taken and the 23 already scheduled) for a total of 87 depositions in this case, a number that is clearly excessive and inappropriate.

I. THE EEOC MUST IDENTIFY SIMILARLY-SITUATED YOUNGER PERSONS WHO WERE TREATED MORE FAVORABLY

A. The EEOC Misstates The Definition Of "Similarly-Situated."

The EEOC asserts that, because Sidley reviewed all partners for performance issues, "all partners at the firm in 1999 are potential comparators. At the very least, none can be ruled out as a comparator during discovery." (EEOC Reply at 8). *See also* EEOC Reply at 12 ("… there is no meaningful way to rule out potential comparators."). The EEOC's radical suggestion – that there is no need to identify similarly-situated individuals who were treated more favorably when the performance of a large group of individuals was generally reviewed – is not merely unsupported by any relevant legal authority but is flatly contradicted by recent Seventh Circuit precedents.

The EEOC asserts that a RIF case should be treated differently for purposes of identifying similarly-situated younger individuals, implying that no individual-by-individual comparison need be made. But this is *not* a RIF case: no positions were eliminated; virtually all of the individuals were offered the opportunity to remain at Sidley and many, in fact, are with the firm today. Even in a true RIF case, however, the authorities, including those cited by the EEOC, apply the same legal standards as are applied to claims by a single individual. The case cited by the EEOC, *Adams v. Ameritech Services*, 231 F.3d 414, 422 (7th Cir. 2000), addressed the legal standard for determining whether an individual was "replaced" by a younger person when a position was eliminated (an issue not in this case). After stating that the potential

comparators were those the employers chose to retain, the court used the same fundamental legal framework for analyzing a RIF case as in other types of ADEA cases. *Id.* In agreement are two frequently cited and more recent Seventh Circuit cases on RIFs. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000) (summary judgment for employer when employee who was laid off in a RIF failed to show that similarly-situated but substantially younger employees were treated more favorably); *Balderston v. Fairbanks Morse Engine Division of Coltec Industries*, 328 F.3d 309, 322 (7th Cir. 2003) (summary judgment for employer because plaintiffs failed to establish that "the retained or transferred younger employees possessed analogous attributes, experience, education and qualifications relevant to the positions") (citation omitted). The EEOC cannot simply ignore this prong of the *McDonnell-Douglas* test. 411 U.S. 792, 802 (1973).

B. The EEOC's Pretext Argument Is Factually Wrong And Invokes A Legal Standard Since Overruled.

The EEOC asserts that it needs information about client complaints pertaining to all partners to show that Sidley did not "routinely strip partners of their partnership status when they received client complaints." But there is no dispute on that issue. If there is any doubt on the point, Sidley hereby stipulates that it did not "routinely strip partners" of their partnership status upon receipt of a client complaint.

In 1999, Sidley carefully examined external and internal demand for its partners' services and their quality of work. For 6 of the 34 individuals (**< REDACTED >**), clients had previously expressed views that Sidley's management was aware of and affected their judgments in 1999 about these individuals. The clients' views had previously led to a reduction in billing rate (**< REDACTED >**), a declination to use an individual as a lead attorney on a transaction (**< REDACTED >**), a request not to assign a lawyer to a matter (**< REDACTED >**), and statements of dissatisfaction that were communicated to (and admitted by) one of the putative claimants at the time they were made (**< REDACTED >**).

Sidley's decisions on **< REDACTED >** were also influenced by the fact that he embroiled the firm in a highly public malpractice case **< REDACTED >** . There can be no serious doubt that this issue was considered in changing **< REDACTED >** status.

The EEOC's Reply states that "client complaints were common at Sidley" (at 6), implying that Sidley did not consider such issues to be serious. Only inappropriate use of ellipses allows the EEOC to take such a position, especially regarding the testimony of

< REDACTED > . As to < REDACTED > , < REDACTED > , here is what the EEOC quotes, omitting the immediately-preceding Q and A:

< REDACTED >

< REDACTED >

The EEOC clearly knows that client complaints and particularly any implication that such complaints are "common" (which is factually inaccurate), could be harmful to the reputation of Sidley and its current (and former) partners. It seeks to preclude Sidley from relying on such client complaints for the six affected partners, though clearly relevant to Sidley's defense, by threatening to exact a steep toll in the form of a search for and disclosure of all client complaints over a four-year period concerning more than 300 Sidley partners. That is not the way "to secure the just, speedy and inexpensive determination of" this case. Fed. R. Civ. P. 1.

Finally, the EEOC cites overruled pretext law, *Testerman v. EDS Technical Products Corp.*, 98 F.3d 297, 303 (7th Cir. 1996), which held that evidence tending to prove pretext includes evidence that the employer's proffered reasons are "[i] factually baseless [ii] were not the actual motivation for the discharge in question; or [iii] were insufficient to motivate the discharge." *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006) overruled that test, and *Testerman* specifically, holding that identifying prong [ii], "actual motivation," is the only legitimate test and that the other two prongs added only confusion. Since 2006, in this Circuit, the only pretext issue is honesty of beliefs. That issue can be fully explored through the compromise proposal offered by Sidley and discussed below.

II. SIDLEY'S PROPOSED COMPROMISE IS A REASONABLE AND PRACTICAL WAY TO ADDRESS THE ISSUE.

Summary judgment authority is clearly pertinent here – the Seventh Circuit has repeatedly ruled that individuals of similar ages, in different departments, with different schedules, in different countries are not "similarly-situated," and there is, therefore, no legitimate reason to inquire into highly personal information about more than 300 individuals most of whom are not similarly-situated. That is why many authorities Sidley has already cited deny discovery of sensitive personal documents in just these circumstances. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 320 (7th Cir. 2003) (district courts properly limited discovery to potential comparators "close enough to [the plaintiff] to make comparisons productive"); *accord*: *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994); *Banks v.*

CBOCS West, Inc., 2003 WL 1888844, at *4 (N.D. Ill. Apr. 16, 2003); *Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 620 (S.D. Ind. 2002). The EEOC cites no contrary authority.

In its reply memorandum, the EEOC relies heavily upon *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007), for its statement that the similarly-situated standard should not be unyielding or inflexible. The *Humphries* opinion, however, is entirely consistent with Sidley's position here. As that court stated, "[T]he purpose of the similarly situated requirement is to eliminate confounding variables, such as different roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination." *Id.* Accordingly, while *Humphries* holds that a plaintiff need not show complete identity to a comparator, it reaffirms the well-established premise that a plaintiff must show "substantial similarity." *Id.* (citing *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000)).

A. Substantially Younger

Seventh Circuit cases generally require comparators to be 10 years younger, although *dicta* suggests courts may relax that rule if there is *direct* evidence an employer considered age significant. *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997) ("In cases where the disparity is less [than 10 years] the plaintiff may still present a triable claim if she directs the court to evidence that her employer considered her age to be significant. In that instance, the issue of age disparity would be less relevant. Indeed, it may not be relevant at all because the employee's case likely would be one of direct evidence, not the burden-shifting indirect evidence framework . . . ."); *see also Balderston*, 328 F.3d at 322 (a comparator should generally be at least "ten years younger" than the plaintiff); *Cardenas v. Fleetwood, Inc.*, 406 F. Supp. 2d 998, 1006 (N.D. Ill. 2005) (six and seven year gaps are "presumptively insubstantial") (citation omitted). If the EEOC limits itself to potential comparators ten (or even nine, for discovery purposes) years younger, that immediately eliminates most "comparators" so far used by the EEOC.

B. Similarly-Situated With Respect To Performance, Qualifications and Conduct

1. Part-Time/Full-Time Distinction

The EEOC does not dispute that the Seventh Circuit authority cited in Sidley's opening memorandum plainly adopts the rule that "full-time employees are simply not similarly situated to part-time employees." *See Ilhart v. Sara Lee Corp.*, 118 F.3d 1151, 1155 (7th Cir. 1997). If the EEOC respects that rule here, more than 20% of its "comparators" drop out of the case. In addition, this ruling will likely result in the withdrawal of at least six deposition notices of attorneys in Chicago, Los Angeles and Washington D.C.

2. International Offices

Aside from one 36-year old in its London office who the EEOC must admit is plainly outside the statute's coverage, Sidley took no action in fall 1999 regarding any lawyer in an international office. The EEOC, after six years of investigation, can provide no basis for believing lawyers in other countries (mostly in new start-up offices) are comparable to those in domestic offices. As it relates specifically to client complaints, particularly, the EEOC makes no attempt to establish that a complaint about a London attorney would be relevant to a decision about a Chicago attorney. Given the significant expense and time required to do international discovery, the goals of Fed. R. Civ. P. 1 are best met by ruling that international lawyers are (at least presumptively) not "similarly-situated" to domestic lawyers.

3. Practice Groups/Location

The case gets greatly narrowed (indeed for most claimants there will be no comparator) if this Court follows cases like *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 727 (7th Cir. 1998) (corporate associate was not similarly-situated to a litigation associate because the corporate associate "was not a litigator nor did she ask to be considered for a position in the litigation department"); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002) (potential comparator not similarly-situated if he "held an entirely different position in another division of the company"); *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491-92 (7th Cir. 2007) (same). The EEOC cites no contrary authority.

The EEOC asserts that Sidley did not consider practice groups in making its decisions, citing nothing of record and ignoring Sidley's extensive interrogatory answers to the

contrary, *e.g.*, Suppl. Amended Ex. D at 2 (**< REDACTED >**). The EEOC should therefore be required to identify comparators in the same or similar practice groups.

4. Hours

Sidley has repeatedly stated that hours and billings played a major role in these decisions, including in many contemporaneous documents. The EEOC initially identified as comparators individuals with lower hours and billings than the putative claimants, later calling them "hours and billings comparators." The EEOC later discovered that many of these alleged "comparators" were part-time, in foreign start-up offices, and different practice areas from the affected partners. The EEOC therefore now asserts that "low hours and/or billings cannot be used to screen out potential comparators." (EEOC Reply at 15.) The EEOC position makes no sense and the EEOC should be required to identify comparators with the same or similar hours and billings.

5. Brown & Wood Partners

The EEOC conceded that Brown & Wood lawyers in 1999 cannot serve as comparators and we assume it will amend its interrogatory answers to eliminate those lawyers.

CONCLUSION

For the reasons set forth above and those in Sidley's opening memorandum, Sidley respectfully requests that this Court enter an order (1) limiting discovery on comparators to partners who are similarly-situated, substantially younger, and treated more favorably; (2) on that basis, denying the EEOC's motion to compel; and (3) to simplify further proceedings, giving the parties guidelines on the proper definition of comparator (ten years younger, full time, domestic office, same or similar practice area, same or more hours or billings, and not Brown & Wood partners in 1999).

Dated: March 19, 2007

Respectfully submitted,

SIDLEY AUSTIN LLP

By: /s/ Lynn H. Murray
One of Its Attorneys

Gary M. Elden (#0728322)
Lynn H. Murray (#06191802)
Maile H. Solís (#6256696)
GRIPPO & ELDEN LLC
111 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 704-7700
Email: lmurray@grippoelden.com

CERTIFICATE OF SERVICE

I, Lynn H. Murray, an attorney, hereby certify that on **March 19, 2007**, I caused a true and complete copy of the foregoing **SIDLEY AUSTIN LLP'S SUR-REPLY IN RESPONSE TO EEOC'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF CLIENT COMPLAINT INFORMATION OR TO PRECLUDE RELIANCE THEREON** 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/ Lynn H. Murray
Lynn H. Murray

EXHIBIT A

FILED UNDER SEAL

EXHIBIT B

FILED UNDER SEAL