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

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

PLAINTIFF EEOC'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS

Defendant's motion to compel addresses a host of issues, some of which could have been easily resolved without expending judicial resources had Defendant complied with the meet-and-confer process laid out in the federal rules. Where such resolution is possible, EEOC will agree to provide the requested information and has noted that in this brief, which, to aid the court, utilizes the same order as the Defendant's motion to compel.

The substantive issues that remain between EEOC and the Defendant are a result of Defendant's apparent desire to separate each decision to downgrade partners in the fall of 1999 from each other and from the decision to reduce the firm's retirement age, as well as a result of Defendant's continuing attempt to require EEOC to answer discovery requests even where Defendant has refused to provide to the EEOC underlying factual information necessary to answer those requests.

Defendant essentially complains that EEOC has answered certain interrogatories insufficiently because EEOC relies on the same evidence regarding the Momentum Plan and the change in retirement age to show that each affected partner was a victim of illegal age discrimination. The evidence EEOC has obtained thus far from the Defendant, however, illustrates that all of the affected partners were downgraded pursuant to the same Plan, called the Momentum Plan, which is rife with references to age and to the firm's maintenance of an age-based retirement policy.

Defendant also asserts that because EEOC has not fully answered Defendant's requests regarding evidence of pretext and the untrue statements in Defendant's justifications for the changes status. Yet Defendant has not answered EEOC's interrogatories requiring the identification of other partners at the firm with the same performance deficiencies as the class members but whose status was not changed, making it impossible at this stage for the EEOC to provide all evidence of pretext and to point out all of the untrue statements in Defendant's after-the-fact justifications. Through deposition testimony, EEOC is aware that — at least with regard to certain purported performance deficiencies of the class members — there were other partners with the same alleged performance issues but EEOC does not have comprehensive discovery responses from Defendant on this point, and EEOC is filing its own motion to compel on the issue today. *See* EEOC Motion to Compel Interrogatory Responses to EEOC's Tenth Set of Interrogatories, Case No. 05 c 0208 (March 23, 2007). EEOC has answered Defendant's discovery requests on pretext and the untrue statements in Defendant's statement of reasons for the expulsions as completely as is possible at the present time. EEOC will supplement when further information is provided by Sidley.

Defendant also seeks more information about EEOC's damages contentions and about the class members' performance in post-Sidley employment. This Court has already addressed related issues in prior rulings. Accordingly, EEOC proposes resolution in accord with those rulings whereby further information related to damages would be produced at the same time as EEOC's damages contentions are due to Defendant under the scheduling order, May 16, 2007, and whereby Defendant would be limited to the post-Sidley employment information that this Court has already ordered produced.

I. EEOC Has Sufficiently Responded to Defendant's Discovery Requests Regarding (A) Sidley's Age-Based Retirement Policy; (B) Pretext; (C) the Untrue Reasons Given for An Individual's Status Change; (D) Damages and Mitigation; and (E) Post-Sidley Performance

As explained below, EEOC has fully answered Defendant's discovery requests regarding Sidley's age-based retirement policy, EEOC's evidence of pretext, and the untrue reasons given by Defendant for each class member's status change based on the information currently available to the EEOC. EEOC will supplement its responses to provide cites to relevant pages of deposition testimony and to identify additional evidence of pretext and untrue statements as EEOC receives responsive information from Defendant.

EEOC will also agree to provide additional information regarding benefits received by class members after their employment at Sidley ended or to waive any claim for the value of lost benefits by May 16, 2007, the date when EEOC's damages calculations are currently due. At this time, EEOC will also identify by Bates number all documents that support its claim for damages. EEOC has responded as fully as possible regarding class members' efforts to obtain a position after their expulsion from Sidley and the length of time that class members would have

continued to practice at Sidley. Defendant is not entitled to further information regarding class members' performance at legal jobs held subsequent to their expulsion from Sidley.

A. Sidley's Age Based Retirement Policy

In responding to Sidley's interrogatory seeking a description of Sidley's age-based retirement policy, EEOC explains that prior to the implementation of the Momentum Plan in 1999, the firm's normal policy required that partners retire at or around age 65 but that some partners were permitted to continue to work past the normal retirement age with a cut in their participation and that a few partners who were making, in the firm's words, "an extraordinary contribution" were permitted to remain as partners on a year-to-year basis. After 1999, the Momentum Plan changed the retirement age from 65 to a sliding scale of between 60 and 65. See Defendant's Exhibit G, EEOC's First Supplemental Resp. to Sidley Austin LLP's Third Set of Interrogatories and Requests for the Production of Documents at pp. 1-2, attached to Defendant's Memorandum in Support of Motion to Compel Responses and filed only under seal.

Nowhere in its answer does EEOC identify two separate retirement policies. Rather the retirement age and the special exceptions to it were part and parcel of the same age-based retirement policy according to Sidley's own documents. Thus, Sidley's claim in this motion that EEOC needs to identify which individuals were affected by which policy is just a misunderstanding of EEOC's answer that retirement was age-based though the age varied in certain circumstances. EEOC has described the policy as specifically as it is currently known to the EEOC and identified the partners impacted by it. Sidley cannot now demand that the EEOC do more than what its interrogatory asks.

B. Sidley's Performance Based Reasons Are a Pretext for Age Discrimination

EEOC has responded to Sidley's interrogatory seeking the identification of evidence that Sidley's age based reasons are pretextual by stating that: (i) these reasons were not communicated to the class members; (ii) no contemporaneous documents have been produced showing that these were the reasons; (iii) the contemporaneous documents illustrate the role of age; and (iv) Defendant's contemporaneous statements to the press and the partnership illustrate that the motivation was age. *See* Defendant's Ex. G, EEOC's First Supplemental Resp. to Sidley Austin LLP's Third Set of Interrogatories and Requests for the Production of Documents at pp. 2-21, attached to Defendant's Memorandum in Support of Motion to Compel and filed only under seal. EEOC has cited deposition testimony that differs for the various class members, and EEOC has also cited EEOC's interrogatory responses 2 and 6 to Sidley's first set of interrogatories, which describe in detail the evidence that the process for selecting individuals for demotion or downgrade was age-based and where the EEOC lists partners who had lower hours and billings than each of the downgraded partners but who were younger and were not downgraded. *See* Exhibit A (containing all of EEOC's responses to Interrogatories 2 and 6 of Defendant's First Set of Interrogatories and filed only under seal).

Defendant seeks more individually tailored responses and the identification of responsive documents for each class member as well as the identification of similarly situated partners and the page cites to deposition testimony. Defendant's demand for a more individualized response and for the individualized identification of relevant documents simply ignores the reality that the Defendant itself made the decision to downgrade partners pursuant to a single ageist Plan, the Momentum Plan. Defendant cannot simply state that the evidence that relates to this Plan is not relevant to many of the class members when it is Defendant's own documents that link

Defendant's age-based retirement policy to the decision to change the status of a group of partners in 1999. Accordingly, Defendant's call for a more individually tailored response and for the individualized identification of documents simply ignores the fact that the documents illustrating the age based retirement policy and the consideration of age in Momentum Plan are relevant to the claims of each of the class members and have already been identified to the Defendant in EEOC's prior discovery responses. Thus, EEOC believes that it has provided Defendant with the individually tailored response to which it claims that it is entitled.

This is particularly true because one of the methods of proof available to the EEOC to prove this disparate treatment discrimination case is the pattern or practice method of proof. *See Adams v. Ameritech Servs*., 231 F.3d 414, 422 (7th Cir. 2000) (discussing a pattern or practice claim in the context of ADEA case and noting that it "is another theory of intentional discrimination [where] plaintiff bears the burden of showing . . . that [age] discrimination was the company's standard operating procedure—the regular rather than the unusual practice." (internal quotations and citations omitted)). In cases involving pattern and practice claims, the trial is usually bifurcated into liability and damages phases. *Franks v. Bowman Transportation Co., Inc*., 424 U.S. 747, 772 (1976); *International Bd. Of Teamsters*, 431 U.S. 324, 359-61. In the liability phase, the plaintiffs can use both statistical proof and anecdotal evidence to prove that the defendant engaged in a "pattern and practice" of discrimination, i.e., that the incidents of discrimination were not isolated or sporadic acts. *EEOC v. O&G Spring and Wire Forms Specialty Co*., 38 F.3d 872, 876 (7th Cir. 1994). Such proof, by its nature, is likely to be proof that relates to a whole class of affected employees as does the proof the Momentum Plan and its relationship to the age-based retirement policy at issue in this case.

Further, Defendant ignores the fact that – in addition to EEOC's reliance on the evidence regarding the Momentum Plan and the maintenance of an age-based retirement policy — EEOC has already given an individually tailored response by referencing specific partners with lower hours and billings who were younger in response to interrogatory 2 of Defendant's First Set. *See* Exhibit A, filed only under seal.

In addition, where EEOC has received information showing that particular performance based reasons (like client complaints) were not the true motivation for a change in status because other partners had the same supposed performance problems but did not have their status changed, EEOC has identified this evidence. Because Defendant has refused to respond to EEOC's interrogatories seeking information to identify other partners with the same supposed performance deficiencies (including, for example, EEOC's request to identify all partners removed as group heads), EEOC's responses regarding similarly situated partners on this point remain incomplete. EEOC will further identify additional similarly situated partners when it receives further information from Defendant. *See* Transcript of Oct. 6, 2006 hearing, p. 3, attached as Exhibit B (in which Court notes that "Sidley is as capable as the EEOC is, more capable perhaps, of identifying everybody that the EEOC might possibly use as a comparator. They have as full a knowledge as anybody could possibly have as to what people could possibly be comparators, similarly situated persons.") Thus, given Defendant's own refusal to answer EEOC's discovery, Defendant's call for further identification of similarly-situated partners is premature. [1]

[1] EEOC will agree to provide page cites where deposition testimony is included in response to Interrogatory number 2 of Sidley's Third Set of Interrogatories.

C. Untrue Statements in Sidley's After-the-Fact Justifications for the Change in Each Former Partner's Status

Defendant has provided the EEOC with a forty-nine page document drafted long after the decisions to downgrade the class members in this case were made and drafted only in response to discovery in this case. *See* Defendant's Ex. H, attached to Defendant's Memorandum In Support of Motion to Compel and filed only under seal. Defendant seeks to compel the EEOC identify each of the purported reasons for a downgrade contained in this document that is untrue. *See* Defendant's Ex. J, Sidley's Second Set of Interrogatories, No. 2, attached to Defendant's Memorandum In Support of Motion to Compel and filed only under seal. EEOC has already made abundantly clear that it is the position of the EEOC that none of the reasons contained in this document reflect the true reasons for the changes in status of the class members — and that age was the true reason.

In EEOC's responses to Defendant's interrogatory regarding pretext, which are discussed above, EEOC is already providing a detailed statement of all of its evidence of pretext for each class member. Defendant's attempt to require EEOC to respond individually to each statement in Defendant's Supplemental Amended Exhibit D borders on the impossible, particularly given the nature of the statements in this document. For example, with regard to **<redacted>**, Sidley says "As group head, **<redacted>** was often called by partners in other groups for assistance. **<redacted>** was perceived as tending to do that work himself, rather than distributing it among members of his group." Sidley identifies no time period for this alleged perception and no individuals who had this perception. Sidley continues, "views varied on **<redacted>** interpersonal skills, but some partners found him not particularly articulate or confidence inspiring." Again, Sidley identifies no time period and no individuals by who had this perception. Likewise, with regard to **<redacted>**, Sidley states, "**<redacted>** was considered

taciturn and difficult to work with by some of his firm colleagues." *See* Defendant's Ex. H, attached to Defendant's Memorandum In Support of Motion to Compel and filed only under seal, at pp. 16-17. Again, no time period or individuals are named. Given the nature of the so-called reasons listed by Defendant in Supplemental Amended Exhibit D and the fact that EEOC is responding to other interrogatories with a detailed summary of its evidence of pretext, any further response to this interrogatory is unnecessary and would be unduly burdensome.

D. Damages and Mitigation of Damages

Sidley provides a laundry list of complaints about EEOC's responses to Sidley's interrogatory and document production responses regarding damages. Many of Sidley's complaints are without merit or are premature given that this Court has already established a discovery schedule according to which EEOC's damages contentions are not due to the Defendant until May 16, 2007. EEOC, however, will provide a description of the class members' post-Sidley work (including citations to deposition pages) within thirty days (Sidley's paragraph D.4). EEOC will also agree that along with its damages contentions that are due on May 16, 2007, EEOC will identify post-Sidley employment benefits that the class members have received and provide responsive documents related to those benefits (Sidley's paragraph D.5). At that time, EEOC will also identify by Bates number documents responsive to Sidley's requests for documents related to damages and employment benefits (Sidley's paragraph D.6). Requiring EEOC to do this earlier than the due date for damages contentions is simply unrealistic given that EEOC's assessment of the damages suffered by class members is ongoing.

1. The Class Members For Whom EEOC Seeks Relief

Defendant seeks clarification regarding the individuals for whom the EEOC seeks relief. Because Defendant has asked a number of different interrogatories related to this issue, Defendant claims to be confused because EEOC has been able to answer some interrogatories regarding certain partners but not others. This is the type of issue that could have been resolved during a meet-and-confer, but EEOC will address these points here. EEOC is not seeking front pay, back pay or reinstatement for **<redacted>**, who earned more money in his subsequent employment at another law firm. EEOC, however, is continuing to seek such relief for **<redacted>**.

With regard to Defendant's claim that EEOC has failed to answer Defendant's interrogatories seeking descriptions of mitigation efforts and information regarding the age at which the former partner would have ceased working as a partner at Sidley for four partner former partners, EEOC has responded with all of the information that is currently available. EEOC does not represent two of the partners for whom such information is missing (**<redacted>** and **<redacted>**), and (as EEOC has communicated to Defendant) one of the other partners is currently very difficult to reach (**<redacted>**) because he works out of the country. EEOC will again try to reach him within the next thirty days to see if any additional information can be provided. Any failure to respond on behalf of the two other partners, **<redacted>** and **<redacted>**, was inadvertent and will be corrected.

2. Efforts to Obtain a Substantially Equivalent Position

Defendant claims that EEOC's response to its interrogatory regarding class members' efforts to find a "substantially equivalent position" is insufficient for all partners. EEOC,

however, has responded with all of its current knowledge regarding class members' efforts to find a new job after they were downgraded by Sidley. Defendant's complaint that the responses are insufficient because the EEOC has not taken a legal position regarding whether class members' subsequent jobs at Sidley as counsel or senior counsel are substantially equivalent to their prior positions as partners is wholly without merit. This calls for a legal conclusion and not the production of any factual information.[2] Because the failure to mitigate is an affirmative defense, it is Defendant, and not the EEOC who has the burden of proof to show that the class members did not mitigate their damages. Thus, it is the Defendant, and not the EEOC, who must take a legal position on whether a downgraded partner who accepted the job of counsel or senior counsel at Sidley failed to mitigate because the counsel position is not "substantially equivalent" to his or her prior job as a Sidley partner.

3. Length of Time Class Members Would Have Remained At Sidley As Partners

EEOC has also responded to Defendant's interrogatory regarding the length of time that each class member would have remained at Sidley by explaining that each class member had no plans to cease working as a partner at Sidley and by citing responsive deposition testimony where available. The fact that Defendant does not like this response does not make it insufficient.

E. Post-Sidley Performance in a Legal Position

Defendant complains that EEOC has not responded to Defendant's document production request seeking all documents related to any class member's "performance in any legal position after leaving Sidley." Sidley's Ex. A. at pg. 6. This is an extremely broad request and any

[2] EEOC will agree to supplement its response by providing deposition page numbers where we have cited to deposition testimony regarding efforts to find a position subsequent to being ousted from the partnership.

response would be unduly burdensome given that Defendant is requesting all documents related to the vast category of an individuals' job performance for a period of time that (for many class members) is now seven years.

The law is well-established that such material is irrelevant and that ordering the production of such material would be harassment of the victims of discrimination. *See, e.g.*, *Perry v. Best Lock Corp.*, 1999 WL 33494858 *2 (S.D.Ind. 1999), in which the court quashed a subpoena on plaintiff's subsequent employer for personnel records, including performance reviews. In quashing the subpoena, the court stated, "If filing . . . a case alleging . . . employment discrimination opens up the prospect of discovery directed at all previous, current, and prospective employers, there is a serious risk that such discovery can become 'an instrument for delay and oppression.'" *Id*.

Further, Defendant ignores the fact that this Court recognized the sensitivity of the production any information relating to class members' performance in subsequent jobs and required Defendant to make an individualized showing that such information was relevant to the reasons Sidley has asserted for the expulsions. *See* Transcript of Oct. 6, 2006 hearing, pp. 20-24, attached as Exhibit B ("EEOC Attorney Gochanour: So if I understand correctly, we're going to look at these on an individualized basis in terms of the reasons given first for these individuals – The Court: Right.").

Consistent with the court's prior order, the EEOC has produced (and is continuing to produce) information relating to class members' hours and billings at their subsequent law firms where this information was contained in Sidley's subpoenas to the class members and where it is within the possession or knowledge of the class members. (Sidley subpoenaed this information

only for class members who went on to work at other law firms.) Sidley's request for more is unreasonable, unsupported by law and inconsistent with this Court's prior rulings.

II. Communications With Former Partners

Sidley's motion to compel EEOC to provide an updated response regarding communications with former partners and a log reflecting privileged communications with class members not represented by the EEOC illustrates Sidley's preference for seeking court intervention rather than for bringing up the issue with the EEOC. Had Sidley simply raised this issue with the EEOC in the meet-and-confer process set out by the Federal Rules of Civil Procedue, EEOC would have agreed both (i) to further supplement its response to identify all communications with former Sidley partners and (ii) to provide a log reflecting communications with class members not represented by the EEOC. EEOC will supplement its discovery responses to provide this information within 30 days.

CONCLUSION

For the foregoing reasons, Sidley's motion to compel should be denied except to the extent that EEOC has agreed to provide responsive information.

Respectfully submitted,

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