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

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| UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. SIDLEY, AUSTIN, BROWN & WOOD, L.L.P., Defendants. | No. 05 CV 208<br>Chicago, Illinois<br>October 6, 2006<br>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

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

THE CLERK: 2005 CV 208, EEOC versus Sidley, Austin, Brown.

MS. MURRAY: Good morning, your Honor.

Lynn Murray on behalf of Sidley.

MR. BILLS: Matt Bills on behalf of Sidley.

MS. HAMILTON: Deborah Hamilton on behalf of the EEOC.

MR. GOCHANOUR: Good morning, your Honor.

Greg Ogchanour on behalf of the EEOC.

THE COURT: We're here to discuss some things with respect to the motions to compel and my initial reaction to them.

Basically, I have some underlying sympathy with the position of the EEOC because what the motions present to me, generally speaking--and the reason I say "generally" is there are issues of confidentiality with respect to some information that don't fall within this context--generally, as I read the positions of the parties, the defendant says, you know, we've given them a ton of information, pretty much everything they asked for, and we're not getting what we need from the EEOC and we deserve it, and it's not even that the EEOC says no, you can't have it, they're saying you have to wait because our investigation is continuing.

On its face, my initial reaction to this is that this is perfectly reasonable because Sidley is perfectly capable of

investigating on its own, and perhaps has already done so extensively, what it did when it altered the status--I'm trying to use as neutral words as I can--when it altered the status of some of its partners.

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.

So because what happened here--and this is usually true with the defendant in any of these cases--they're perfectly capable of launching a full investigation which will disclose to them where the weaknesses are. And this is particularly true when you're dealing with a legally sophisticated entity such as Sidley and Austin.

And I think the EEOC's position is, look, we're going to tell you all of this, we have to tell you all of this but we can't tell you now because we're not through with our investigation.

And that struck me as reasonable, as long as it is clear that the EEOC understands that they're going to have to answer all those questions eventually in reasonable time for preparation of trial in this case, because I have a feeling that this case is headed for trial. And that's the first reaction to that part of the dispute which involves timing as

opposed to substance.

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

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

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

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

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

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

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

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

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

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

And I suspect in many cases this is not something

that is particularly wavy for the EEOC. My guess is is that there might be something in these various papers that are requested that might make the EEOC reluctant to bring perhaps two or three more of the plaintiffs' cases, but not a lot.

I am willing also to order the production of the tax returns. The reason I'm willing to order the production of tax returns is, while there are alternative methods to get this stuff, it will be faster and easier if they get it off the tax returns. So that's basically where I stand on this.

Also, because I am permitting the EEOC to respond with "investigation continues" with respect to some of this data, which is, in fact, quite important to Sidley in terms of preparing, you can confer with each other with respect to deadlines so that this comes to an end quickly.

Some of this with respect to deadlines I am doing because of an odd thing that was sent to me. I am not a regular newspaper reader. I have never been a regular newspaper reader. I probably read more now than I ever did because I read them off the web, particularly after all these newspapers foolishly decided to put this stuff free on the web.

But someone I know who takes an interest in seeing stuff and knew about this case sent me a press clipping about this case with the comment, vague comment, this is a person who is not that interested in this, "gee, I think you got this

really big case and this is why," and what I read is the following -- this is after denial of cert. in the case in which I and later the Seventh Circuit construed Waffle House. And, incidentally, I don't fault Sidley for trying for cert. in that case because the truth is is Sidley had an argument which I didn't much like and Judge Posner in the Seventh Circuit didn't much like it either because we didn't believe that the specific language at the Supreme Court in the Waffle House case really supported the argument they were making.

But it wasn't that the Supreme Court was explicit, it's just the way we read it. And the only people on the face of the earth who could do anything about it is the Supreme Court because I don't think an inferior court could have ruled any way other than the way I ruled and the Seventh Circuit ruled. So if anybody is going to clarify, the only place they can go is the Supreme Court. So they went.

Okay. What I then read is a quote from one John Hendrickson who says, and I quote,

> "I think this is an extraordinary decision. It's one more in a whole stream of decisions since the beginning of the case that Sidley has lost. The law has been running against Sidley, Austin ..."

I'll tell you what my problem with that is. It's not that a lawyer crows about a victory. They do it all the time. I did it. It's that the last time I looked a denial of cert.

was a decision of nothing. And what Mr. Hendrickson's comments caused, the concern it caused me, was the belief that if Mr. Hendrickson does not understand what a denial of certiorari is, it may signal a certain lack of understanding in him and perhaps in the EEOC as to what their obligations are under other aspects of the law such as discovery. It was a foolish statement and an inaccurate statement and it caused me pause.

Another statement he made and the reason I'm concerned about time, is the,

> "... whether it takes six months or whether it takes ten years, we will go on ..."

so on and so forth. Which is fine. Not quite as fine as a comment on a Court decision, but something which he's entitled to say. The only thing that bothered me about it is, I'm beginning to get the distinct feeling from the postures of the parties in discovery that it is not Sidley that is stopping it at six months, it's the EEOC that's making it go ten years, and that concerns me.

And what concerns me about this case is, this case presents novel and very interesting issues of law. You're talking, in essence, about a substantial variation from the formalism for which the law has addressed corporate and partnership organizations for many years. And the position of the EEOC and perhaps the position of courts has been the time

has come when a closer look has to be taken as to what these forms of business organizations really mean. And accountants have been discussing this for years and the lawyers started discussing this for years particularly when you got to the LLC's and the LLP's, and not just in the context of your concerns here but in the broader context of liability.

I can understand why it is that the EEOC bringing this case, which it does and should regard as an important matter, wants to cross every "t" and dot every "i," but I don't think the EEOC should be talking about ten years in the context that clearly implies that it is not they, the EEOC, that are going to be responsible for the ten years.

So when you discuss this with your various authorities at the EEOC, you should emphasize my concern that we move speedily toward resolution, and we can't move speedily toward resolution until you stop saying "investigation continues" and give them the answers.

Now, ordinarily I wouldn't care at all what Mr. Hendrickson said. It's certainly not going to influence the decision in this case. In all honesty, I don't think any significant even measurable public relations damage has been done to Sidley. If some government lawyer or some nongovernment lawyer wants to stand on the table and thump its chest and say the equivalent of "we're never going to go away, we're the champion, we're number one," so be it, but it

bothered me in the context of this case because of the way the case is moving.

So it's not the substance of it. Maybe Sidley is deeply offended by this, I'm not. What I'm concerned about is the meaning of this for the manner in which the agency is pursuing the case.

And the comment about the cert. petition does, in fact, raise questions as to precisely how clear the EEOC's understanding of its own obligations are. The only reason, for example, that I am not granting with relative alacrity the motion to compel is because when I first read it I saw the logic of the position of the EEOC, and I still see that logic. But by making a statement like this, the EEOC -- one lawyer in the EEOC, not the EEOC, has raised a specter that I find disquieting in the context of the manner in which this case is proceeding.

So Sidley's motion to compel with respect to the production of material on which investigation continues is denied subject to a reasonable deadline being established for compliance with it.

Sidley's motion to compel production of various material on individuals who are in the case is granted subject to an entry of an appropriate protective order, the basic conditions in which I've described to you.

MS. MURRAY: Your Honor, may we raise two points?

THE COURT: Absolutely.

MS MURRRAY: One, on the timing. Our client saw the same article and had a very visceral reaction to the last statement in particular.

We were planning on working first with the EEOC to try to come up with a definitive scheduling order that had dates in a relatively short order because it is our position that it is certainly not us who are causing any sort of delay in the case.

We will talk with the EEOC about that and we'd like to be back before your Honor, talking with your Honor about a reasonable schedule for proceeding up through trial. I don't know if you'd like us just to come back at the next status hearing and ask for that or if there's a vehicle for having that discussion in three or four weeks.

THE COURT: The week of November 7th, put it on the Friday of that week and put it at noon.

THE CLERK: That may be a holiday.

THE COURT: Is that Veterans Day?

THE CLERK: Yes, sir.

THE COURT: Yeah, it could be Veterans Day. Put it on the next week, on a Tuesday at noon because I'll still be on trial with Experian, I think.

THE CLERK: That date is November 14 and that's at noon.

MS. MURRAY: Thank you, your Honor.

And on the ruling on our motion to compel. We understand your ruling on comparators. There are issues going into depositions. The comparators the EEOC has identified now are very different than those individuals and we plan to explore that in depositions. It is a situation where we may not be able to explore in depositions other new comparators after that but --

THE COURT: If for some reason the EEOC -- which is, in fairness to it, dealing with a fairly complex case. It's a large law firm and administrations of large law firms tend to be very complex, and that's even discounting the ego of lawyers, just ordinarily tend to be very complex. And it may very well be the EEOC changes its mind about what is a comparator and I'm willing to let them do that, but you will not be in a position, for example, where something comes up, some new name is proposed, some new theory is proposed, and you will be denied discovery.

MS. MURRAY: Thank you, your Honor.

THE COURT: And the truth is, that's the same offer to the EEOC. They may very well find out that an avenue they thought was useful is a dead end and have something that's probably not all that apparent in the beginning and now seems to be promising to them, I'm not going to deny them discovery either.

MS MURRAY: And the last point that I had, your Honor, was on the damages contention. We do not have from the EEOC a damage contention. And, in particularly, there are two things that are within their possession that we simply can't investigate and that is how long they contend that these folks would have continued to work and whether or not each of the individuals seeks reinstatement. Those are important things for us to be able to access the case right now on a going-forward basis and to be able to ask folks about in their depositions which are coming up fairly soon.

MS. HAMILTON: I think that with regard to those issues, as we've already heard from Sidley, there is a whole variety of factors that go into what an individual's performance is, what an individual's compensation is, and I think once we've gotten some more information about that we'll be able to provide Sidley with more concrete numbers and answers, but until we have more information ourselves, we're not able to fully answer those questions.

We've indicated to Sidley that we do intend to engage a damages expert, and so we just can't, at this point, provide more information, but we will.

THE COURT: Given the nature of this case, I think actually they do have a problem which is going to take them some time to address. So I will give them the time, but the truth is is this very discussion is the reason that I'm asking

you to start setting dates.

MS. HAMILTON: Your Honor, if I could, I'd like to respond to a couple of issues that have been raised. I certainly don't want to leave you with the impression that the EEOC is dragging its heels. I'll give you an example. We know that we need to identify comparators. On September 14th we received from the defendants a statement of the reasons that individuals' status was changed or they were downgraded from partnership.

That list of reasons included, for example, client complaints. We issued discovery to the defendants asking them to identify other lawyers who also had client complaints leveled against them. The defendant refused to respond to our discovery. So then we are in a situation where we simply can't answer their questions and where discovery is protracted and is delayed because we're not able to sit down with our people because we don't have the information we need.

We feel, in some sense, despite the thousands of pages that Sidley has provided, they haven't actually answered many of our questions and we are likely to find ourselves before you again. We don't want to delay. There's lots of benefit for us of moving forward as quickly as we can, at the same time we can't do it without the information. So I just want to make that clear to you.

Then I wanted to respond on a couple of other things

where I have some concern that there's not complete clarity. I realize that you particularly addressed the partnership agreement issue. The defendants also requested information about the former partners' performance at their new law firms, including hours billed, revenues generated, efforts to attract new clients. There's no basis for saying that that information is relevant to determine mitigation.

As you know, the way that mitigation is calculated is by looking at whether the individual actually sought comparable employment and whether they retained it. So getting into exactly how these former partners performed at a new law firm is just not relevant to that.

At some points the defendants have also suggested it might be relevant to pretext, but that has no basis. Those decision to demote and downgrade the partners were made in 1999 on the basis of their performance at Sidley, and there's no reason to say that how they performed subsequently at a new law firm with different support and different expectations bears on that decision.

So I understand what you said with regard to partnership agreements, but we, obviously, are very concerned even about producing those, but we simply do not believe there's any basis for producing this performance information at the individuals' subsequent firms.

THE COURT: Well, maybe and maybe not. I can

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

Investigation of his 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 that was offered by the plaintiff, so good a job that the case settled for what was essentially a nominal amount.

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

thought he was not as productive as others, had nothing to do with the fact that he was 58 years old and somebody who was 38 years old started doing their work. It 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.

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

So you don't want to put them in a position where they've heard the story. And that I'm willing to let you avoid. But eventually 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 and where applying the Sussannah and the

Elders technique from the Apocrypha. Do you remember this?

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

MS. MURRAY: No.

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

And this is basically the technique that you're entitled to use. 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. Unless, of course, you are going to take the position, which I can't believe you would do, that these are the real

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

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

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

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

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

THE COURT: Okay. So those are my parameters for

that one.

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

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

MR. 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. HAMILTON: Okay.

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

MS. HAMILTON: Okay.

MS. MURRAY: We'll do that, your Honor.

THE COURT: Okay. Thanks.

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I, BLANCA I. LARA, DO CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Blanca I. Lara

10-10-06

Date