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 REPLY IN SUPPORT OF MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND DOCUMENT PRODUCTION REQUESTS

The EEOC's response brief illustrates the hurdles that the EEOC is unnecessarily placing in front of Sidley in written discovery in this case. With every written response, the EEOC's positions change so that, rather than narrowing the issues or clarifying what is really in dispute in this case, Sidley continues to have to guess what the EEOC's case against Sidley really is.

Take the case of putative claimant < **REDACTED** >. Before Sidley took < **REDACTED** > deposition on November 29, 2006, the EEOC stated in no uncertain terms that it was not seeking "back pay, liquidated damages, reinstatement or front pay" on his behalf. (Ex. 1, Oct. 16, 2006 Ltr. from L. Elkin to M. Conway; Ex. 2, Oct. 17, 2006 Ltr. from M. Solis to L. Elkin.) For this reason, the EEOC refused to produce damages-related information prior to < **REDACTED** > deposition (and, indeed, the EEOC did not provide tax returns, about which Sidley has questioned every putative claimant, until March 2006, over three months later), and Sidley did not fully explore < **REDACTED** > damages claim at the deposition. Now, for the first time since October 2006, the EEOC suggests in its response brief that, in fact, it is seeking damages on

< **REDACTED** > behalf, as well as on behalf of a number of other putative claimants for whom it previously indicated no damages would be sought.

The EEOC's claim that Sidley maintained a "mandatory retirement policy" serves as another example. After two initial responses to Sidley's interrogatory seeking an explanation of the age-based retirement policy that the EEOC contends that Sidley has maintained, the EEOC states for the first time in its response brief that "retirement [at Sidley] was age-based though the age varied in certain circumstances." (EEOC's Mem. in Opp'n at 4.) Rather than clarifying matters, this simply further confuses issues.

The EEOC's excuse seems to be that it is difficult and time-consuming to answer Sidley's discovery requests. Sidley understands the time-consuming nature of this process, itself having responded to over 150 of the EEOC's discovery requests. But this is not a legitimate excuse for the EEOC's refusal to do so. Sidley's discovery requests seek information that goes to the heart of the EEOC's allegations. With written discovery set to close, the time has come for the EEOC to provide complete responses to which they will be held, particularly in light of the fact it has now had more than four months to do so. Sidley therefore requests that the Court order the EEOC to provide such supplemental responses (including identification of bates numbers or specific transcript citations to referenced deposition testimony) within fourteen days of this hearing (or by April 24, 2007).

I. The EEOC Must Provide Sidley With *Complete* Information and All Documents Relating To (A) The EEOC's Allegation That Sidley Had An Age-Based Retirement Policy; (B) Pretext; (C) Alleged Damages and Mitigation; and (D) Post-Sidley Performance.

A. The EEOC Refuses To Provide a Complete Response To Interrogatory No. 1 (3rd Set), Which Seeks the Identity Of the Individuals Affected By the Alleged Age-Based Retirement Policy And Any Exceptions Thereto.

Given the EEOC's allegations of an age-based retirement policy, Sidley posed a perfectly reasonable interrogatory asking the EEOC to identify the policy, the age at which partners were forced to retire, all individuals impacted by the policy and any exceptions to the policy. (Ex. G to Sidley's Mem. in Supp., Interrog. 1.) The EEOC's responses to this relatively straightforward interrogatory continue to be a moving target. First, the EEOC claimed that there was, prior to 1999, a requirement that partners retire "at or around 65" (with certain exceptions) but that in 1999 the retirement age was reduced to "between 60 and 65." Now, however, the EEOC claims that Sidley maintained a single retirement policy, which is not really a policy at all (*i.e.*, "retirement was age-based though the age varied in certain circumstances"), and therefore need not indicate which former partners were subject to which policy. The one consistent point is that the EEOC offers no justification for its refusal to identify partners who were "exceptions" to the policy.

Rather than clarify the EEOC's claims, which is precisely the goal of discovery, the EEOC's "supplemental" response simply further muddies the waters. If Sidley allegedly maintained an age-based retirement policy but the age varied, that would indicate that there was no age-based policy at all, but rather an individualized assessment of performance at all ages. If this is the EEOC's position, it should say so. In all events, given that many of the partners were allegedly impacted by such policy were over 65 (*e.g.* < **REDACTED** >, who retired when he was 71, < **REDACTED** >, who retired when he was 72, *etc.*), it is unclear from the EEOC's response

whether it believes the partners it identifies were actually subjected to the alleged retirement policy or were the exceptions thereto.

In order to clarify its claim so that Sidley can defend itself, including in the upcoming depositions of over 60 current and former Sidley partners, the EEOC should be ordered to identify clearly and unequivocally: (1) what it contends the alleged retirement policy was; (2) the names of all partners allegedly subjected to the policy; and (3) the partners who were exceptions to the policy. There is no legitimate reason for the EEOC to withhold this information, and, as this Court noted, such information is essential in order for Sidley to know the precise line of attack the EEOC intends to take in its case. (Ex. 3, Tr. of Mar. 9, 2007 Hr'g at 4-5).

B. The EEOC Should Be Required To Identify the Evidence That Allegedly Supports Its Contention That Sidley's Proffered Performance-Based Reasons Are a Pretext For Age Discrimination *As To Each Particular Putative Claimant.*

Sidley's Interrogatory No. 2 (3rd Set) asks the EEOC to describe the evidence supporting its claim that Sidley's stated reasons are a pretext. The EEOC responded by providing boilerplate and duplicative responses for each putative claimant and alluding to unidentified "contemporaneous documents," unidentified "contemporaneous statements" and unidentified "younger" or "other" partners who purportedly had the same performance issues as the putative claimants but whose status did not change. The EEOC's responses are designed to confuse rather than narrow the issues in the case, and the Court should order the EEOC to supplement its responses.

Given the different backgrounds, ages and performance issues of each of the 34 putative claimants, the EEOC's boilerplate responses are inappropriate and insufficient. As Sidley was forced to undertake the massive effort of providing individually tailored responses detailing the reasons for each putative claimant's status change, so should the EEOC be required to state on an

individual basis the reasons why Sidley's stated reasons are pretextual. The EEOC's argument that it need not provide individualized reasons because it is pursuing a "pattern or practice method of proof" makes no sense unless it is relying on some (yet unidentified) evidence that Sidley engaged in a pattern or practice of discriminating against the alleged "class" in this case, *i.e.*, partners between the ages of 36-65. If the EEOC has such evidence, it should be required to produce it or identify it by bates range. The EEOC should also be ordered to identify by bates range the "contemporaneous documents" and "contemporaneous statements" that support its claim of pretext as to each putative claimant. Finally, the EEOC should be ordered to identify by name the "other" or "younger" partners that the EEOC claims were treated more favorably than certain putative claimants. If the EEOC is not currently aware of any such partners, its discovery responses are inaccurate and should be amended.[1]

C. The EEOC Can Easily 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.

Sidley's Interrogatory No. 2 (2nd Set) asks the EEOC simply to identify any untrue statements in Sidley's detailed, individually-tailored explanations for each putative claimant's change in status so that Sidley can fully prepare its defense. For instance, Sidley is entitled to know whether the EEOC disputes Sidley's assertion that "**< REDACTED >**." (Ex. H to Sidley's Mem. in Supp. at 12.) The EEOC either agrees with this statement or not, and if it does not, it should be required to explain why and identify or produce any evidence it believes contradicts Sidley's position.

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[1] The EEOC cannot blame its inability to come up with the names of the allegedly "younger" and "other" partners on Sidley's objections to the EEOC's vastly overbroad discovery requests. As set forth in Sidley's Response and Sur-Reply Memoranda on Client Complaints and Comparators, the EEOC's issued discovery (*e.g.*, identify all partners with client complaints between 1995-1999; identify all partners who at any time were dependent on others for work) is plainly not targeted to lead to the discovery of similarly-situated younger partners and Sidley will not respond to these requests on that basis.

The EEOC asserts that providing a response to this interrogatory "borders on the impossible." (EEOC's Mem. in Opp'n at 8.) Sidley fails to see why. The EEOC can easily do so by speaking with its clients, the 29 putative claimants whom the EEOC purports to represent, who can point to assertions that they contend are untrue. In addition, the EEOC can refer to the documents and information that Sidley has provided in discovery in order to determine whether the EEOC disputes Sidley's assertions.

Likewise, Interrogatory No. 3 (2nd Set) asks the EEOC to identify statements it contends are untrue in Sidley's statement of the process and criteria employed by the firm in deciding to change partners' status in 1999. If the EEOC is not in possession of contrary evidence, it should simply so state rather than posing a baseless objection designed to avoid answering altogether.

D. The EEOC Has No Basis For Refusing 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.

The EEOC acknowledges that it has provided inconsistent responses regarding the putative claimants for whom it seeks relief. (EEOC Mem. in Opp'n. at 12.) As described above with regard to < **REDACTED** >, the EEOC's failure to take consistent positions directly impacts Sidley's defense, and the Court should therefore order the EEOC to provide a full and final response to Interrogatory No. 3 of Sidley's First Set of Interrogatories (seeking the identity of the individuals for whom the EEOC is requesting relief and a description of the type of relief sought for each person) and clarify its responses to Interrogatory Nos. 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 for every putative claimant on whose behalf the EEOC seeks relief no later than April 24, 2007.

The EEOC should also be required to provide responses relating to < **REDACTED** >. The EEOC's excuse for not providing responses regarding < **REDACTED** > because it does not represent them makes no sense in light of the fact that the EEOC does not represent < **REDACTED** > either, but nevertheless provided responses on their behalf.

Moreover, the EEOC should not be excused from providing information or documents relating to putative claimant < **REDACTED** > simply because he lives outside of the country. The EEOC purports to represent < **REDACTED** > and is seeking damages from Sidley on his behalf. Sidley served a subpoena for < **REDACTED** > documents on October 10, 2006, nearly six months ago. Despite Sidley's repeated attempts to obtain the requested documents, the EEOC has not produced *any* documents on < **REDACTED** > behalf, making it difficult for Sidley to prepare its defense or to analyze the EEOC's case or < **REDACTED** > potential damages. The Court should order the EEOC to provide all information regarding < **REDACTED** > and documents responsive to Sidley's subpoena to < **REDACTED** > by April 24, 2007, or bar the EEOC from pursuing any claim for damages (monetary or otherwise) on his behalf.

Finally, the EEOC does not address when it will provide discovery responses on behalf of putative claimant < **REDACTED** >. Sidley understands that < **REDACTED** > has been ill, and has been willing to postpone his deposition (served on October 5, 2006) for that reason, but the EEOC has given no explanation for its inability to provide written discovery responses on his behalf. If the EEOC is pursuing a claim for damages on < **REDACTED** > behalf, Sidley respectfully requests that the Court order the EEOC to provide written responses regarding < **REDACTED** > by April 24, 2007.

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

In order to mitigate damages, a putative claimant must take steps to obtain a position that is the substantial equivalent of a position as Sidley partner. *See Hybert v. Hearst Corp.*, 900 F.2d 1050, 1054 n.7 (7th Cir. 1990) (also cited to the EEOC in Ex. B to Sidley's Memorandum In Support Of Its Motion To Compel.) Sidley does not dispute that it bears the burden of proving that the putative claimants failed to mitigate their damages, which is exactly why the EEOC must provide the information requested in Interrogatory No. 3 (3rd Set). The EEOC's assertion that it will not provide information regarding putative claimants' efforts to obtain a "substantially equivalent" position and will only provide "all of [the EEOC's] current knowledge regarding class members' efforts to find a new job after they were downgraded by Sidley" (EEOC's Mem. in Opp'n at 11.) is unreasonable. The EEOC should be able to easily obtain this information from its clients, the putative claimants, and there is no just reason why the EEOC should not do so.

3. The EEOC's Response Regarding How Long Each Putative Claimant Would Have Worked At Sidley Is Not Sufficient.

The EEOC claims that its boilerplate answers to Interrogatory No. 4 (3rd Set) (that the putative claimants had absolutely no plans to retire) is a sufficient response to Sidley's interrogatory seeking the age to which each claimant would have worked as a Sidley partner but for the 1999 status change. However, as Sidley explained in its opening brief, the EEOC cannot seek endless front pay on behalf of the 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 . . . ."). Without knowing the age until which the EEOC will seek front pay on behalf of the putative claimants, Sidley cannot calculate and

analyze potential damages in this case. For reasons not specified, the EEOC has also refused to provide deposition transcript citations that purportedly provide the requested information, apparently contending that "See [putative claimant's] deposition testimony regarding how long [he] would have continued working as a Sidley partner" (Ex. G to Sidley's Mem. in Supp., Interrog. 4) is a sufficient response. It is not, and the EEOC should be ordered to supplement its response.

4. The EEOC Has Agreed To Provide a Description Of Putative Claimants' Post-Sidley Work.

The EEOC has agreed to "provide a description of the class members' post-Sidley work (including citations to deposition pages)." (EEOC's Mem. in Opp'n at 9.) As set forth above, Sidley asks the Court to order the EEOC to provide all of the information sought in Interrogatory No. 5 (3rd Set) no later than April 24, 2007.

5. The EEOC Should Be Required To Identify, Prior to May 16, 2007, Post-Sidley Employment Benefits the Putative Claimants Have Received.

Although the EEOC has agreed to provide Sidley with employment benefits information identical to that which the EEOC requested from Sidley – and which Sidley produced on *November 6, 2006* – the EEOC has unilaterally decided that it will not produce such information until May 16, 2007, the date its damages contentions are due. This position is wholly without merit. The Court set May 16, 2007 as the date by which the EEOC must produce its final damages *contentions*, not all information and documents relating to damages. Moreover, Sidley seeks to use this information during the ongoing depositions of putative claimants. There is no reason why the EEOC should not be required to provide this information within the timeframe required by the Federal Rules (particularly where Sidley did the same months ago.) Sidley

requests that the Court order the EEOC to provide this long overdue information by April 24, 2007.

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

As with Interrogatory 5, the EEOC agrees to provide a complete response and "identify by bates number documents responsive to Sidley's requests for documents relating to damages and employment benefits." (EEOC's Mem. in Opp'n at 9.) Again, however, the EEOC refuses to provide any such documents until May 16, 2007. There is no reason for this delay. Sidley seeks an order requiring the EEOC to produce the responsive documents by April 24, 2007.

E. Pursuant to This Court's Previous Rulings, the EEOC Must Produce All Documents Relating To Post-Sidley Performance In a Legal Position.

The EEOC is attempting to re-litigate an issue already decided. The Court has already ruled (twice) that documents relating to the putative claimants' post-Sidley performance are discoverable. (Ex. N to Sidley's Mem. in Supp. 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 to Sidley's Mem. in Supp. at 6 ("And I suspect that the [post-Sidley employment] information does have some relevance.").)

The EEOC's citation to *Perry v. Best Lock Corp.*, 1999 WL 33494858 (S.D. Ind. Jan. 21, 1999), for the proposition that "[t]he 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" (EEOC's Mem. in Opp'n at 12) is misleading. Acknowledging that the subpoenas at issue in *Perry* could lead to the discovery of admissible evidence, the court, exercising its discretion under Federal Rule of Civil Procedure 26(b)(2), determined that the burden in the "fairly routine case alleging individual employment discrimination" outweighed

the benefit. *Id.* at **2-3. This Court has already ruled that post-Sidley employment information is relevant, and in order to protect the confidentiality of such information the Court entered a protective order that gives heightened protection to post-Sidley performance documents. Therefore, as the Court has previously ruled, the EEOC should be required to produce the requested documents.

II. The EEOC Has Finally Agreed To Identify All Communications With Former Sidley Partners and Produce a Log Reflecting Alleged Privileged Communications With Putative Claimants Not Represented By the EEOC.

The EEOC's claim that Sidley failed to meet and confer on these issues is disingenuous in light of the number of times that Sidley has met and conferred with the EEOC in an attempt to get the EEOC to supplement its discovery responses identifying oral communications – and producing written communications – with former Sidley partners whom the EEOC does not represent. Indeed, in October 2006, Sidley was forced to move to compel the EEOC to identify communications with any current or former Sidley partners relating to this litigation, at which time the EEOC claimed it had identified all communications with former Sidley partners.

Since Sidley's motion to compel in October 2006, it became aware of additional communications – both written and oral – with former Sidley partners. The parties met and conferred on this issue on October 16, 2006, resulting in the EEOC's agreement to supplement its responses by October 31, 2006, and to produce written communication with those former Sidley partners whom the EEOC does not represent. (Ex. 2, Oct. 17, 2006 Ltr. from M. Solis to L. Elkin.) The EEOC failed to do so, and Sidley was forced to hold yet another meet and confer on November 7, 2006, in which the EEOC again agreed to provide this information and these documents. Despite this agreement, the EEOC has never supplemented its responses nor produced those written communications. In light of this history and the ever-shortening discovery period, the EEOC's request for even more time to provide this long overdue

information is unreasonable. Its request for another five weeks to provide a log of written communications with those putative class members who have declined EEOC representation is also unreasonable given that the EEOC agreed (but failed) to do so five months earlier. (Ex. K to Sidley's Mem. in Supp., Interrog. 9.) Sidley requests that the Court order the EEOC to produce responsive information, documents and a privilege log by April 24, 2007.

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:

a) production of written communications with former Sidley partners; and

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

Dated: March 30, 2007

Respectfully submitted,

SIDLEY AUSTIN LLP

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

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CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **March 30, 2007**, I caused a true and complete copy of the foregoing **DEFENDANT'S REPLY 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)
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UNITED STATES EQUAL EMPLOYMENT
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/s/ Maile H. Solís
Maile H. Solís

EXHIBIT 1

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Chicago District Office

500 West Madison Street, Suite 2800
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October 16, 2006

Michael Conway
Grippo & Elden LLC
111 S. Wacker Dr.
Chicago, Illinois 60606

Re: *EEOC v. Sidley Austin Brown & Wood*, Case No. 5 C 0208

Dear Mike:

I write to clarify the relief EEOC is seeking on behalf of Messrs. and With respect to each, EEOC is seeking a finding of liability and injunctive relief. In settlement negotiations with Messrs. Miller and Conlon, the EEOC outlined the nature of the injunctive relief it is seeking on behalf of the class, including and

EEOC is not seeking back pay, liquidated damages, reinstatement or front pay on behalf of either or Mr.

Please call me if you have any questions.

Very truly yours,

Laurie Elkin

Laurie S. Elkin
Trial Attorney

REDACTED

EXHIBIT 2

GRIPPO & ELDEN LLC
111 South Wacker Drive
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(312) 704-7700
FAX (312) 558-1195
(312) 263-7356

To Call Writer Direct
(312) 704-7764
msolis@grippoelden.com

October 17, 2006

Via Electronic Mail

Laurie S. Elkin
Justin Mulaire
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
500 West Madison Street, Suite 2800
Chicago, Illinois 60661

Re: EEOC v. Sidley Austin LLP

Dear Laurie and Justin:

This letter will confirm our discussion during our October 16, 2006, meet and confer respecting the issues laid out in my October 9, 2006 letter. Please let me know right away if this does not accurately reflect our conversation.

A. Interrogatory No. 1 (1st Set)
(Persons with Knowledge)

The EEOC will supplement its response to this interrogatory by October 31, 2006.

B. Interrogatory No. 3 (1st Set) and Interrogatory No. 7 (2nd Set)
(Relief/Damages Sought for Each Putative Claimant)

You stated that the EEOC is not seeking back pay, front pay, reinstatement, or liquidated damages on behalf of Messrs. and You also stated that the EEOC is not seeking damages on behalf of Mr. "at this time."

The EEOC will supplement its response to this interrogatory by October 31, 2006 to specify the types of damages it is seeking for each putative claimant.

REDACTED

C. **Interrogatory No. 9 (1st Set) and Document Request No. 7 (1st Set) (Communications with Former Sidley Partners)**

You agreed to supplement the EEOC's responses to these discovery requests by October 31, 2006 and to produce written communications with those former Sidley partners whom the EEOC does not represent.

D. **Interrogatories No. 10 and 16 (1st Set) and Document Request No. 17 (1st Set) (Communications with Members of the Media)**

You stated that the EEOC has kept no records of communications with members of the media and that you are aware of only one e-mail between any EEOC attorney and a member of the media. The EEOC will not produce copies of its press releases relating to this case and will not search its e-mails or other written documents for communications with the media.

E. **Interrogatory No. 1 (2nd Set) (Persons who did not perform as well as the Putative Claimants)**

You stated that the EEOC is not aware of any comparators at this time other than the "hours and billing comparators" it has previously identified.[1] You will supplement the EEOC's response to this interrogatory after you receive information regarding client complaints and after the EEOC issues additional discovery to identify other comparators.

F. **Interrogatories No. 2 and 3 (2nd Set) (Statements the EEOC Contends Are Untrue in Sidley's Supplemental Amended Exhibit D and 30(B)(6) Objections and Responses)**

The EEOC will not supplement its responses to these interrogatories and will stand on its previously stated objections.

G. **Interrogatory No. 5 (2nd Set) (and Coverage Under ADEA)**

The EEOC agreed to supplement this interrogatory by October 31, 2006 to state that Ms. and Mr. are covered by the ADEA because Sidley's decision to change their status took effect when each of them was 40 years old.

[1] As we stated on the phone, we do not agree that the law allows for different sets of comparators, such as "hours and billings" comparators and "client complaint" comparators.

REDACTED

&

H. Document Request No. 1 (1st Set)

You will confirm that the EEOC has produced all non-privileged documents that are responsive to this document request and will produce any additional non-privileged responsive documents by October 31, 2006.

I. Privilege Logs

You agreed to provide a log of those written communications with putative claimants the EEOC does not represent and over which it claims a privilege.

You stated that you would not be logging privileged communications between the EEOC and any putative claimant that it represents created after the formation of the purported attorney-client relationship with the EEOC.

You agreed to discuss and let us know whether the EEOC will provide to Sidley the date on which each putative claimant represented by the EEOC formed an attorney-client relationship with the EEOC, which will serve as a cut-off date for logging privileged documents. Please provide us a response by October 31, 2006.

J. Document Production Regarding Sidley's Motion To Compel

As we discussed, we sent a letter last Tuesday, October 10, 2006, laying out a proposed procedure for documents whose production Judge Zagel compelled on October 6, 2006 and seeking production by October 23, 2006. We have received no response to this letter. You agreed to provide us by the end of this week an update as to when the EEOC will begin producing the documents that were the subject of Judge Zagel's recent ruling on Sidley's motion to compel.

* * *

We look forward to receiving your supplemental responses on October 31, 2006 and hearing from you regarding the production of documents you have been compelled to produce by the end of this week. In the meantime, please contact me if you want to discuss any of the above.

Sincerely,

Maile H. Solis-Szukala

MHS:db

EXHIBIT 3

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

UNITED STATES OF AMERICA)
)
) No. 05 CV 208
)
Plaintiff,)
)
vs.) Chicago, Illinois
)
SIDLEY, AUSTIN, BROWN &)
WOOD, L.L.P.,) March 9, 2007
)
Defendants.) 12:17 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

For the Plaintiff:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BY: Justin Mulaire
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For the Defendant:
GRIPPO & ELDEN
BY: Lynn H. Murray
Maile Solis-Szukala
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Blanca I. Lara, CSR, RPR
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THE CLERK: 2005 C 208, EEOC versus Sidley Austin.

State your names for the record.

MS. MURRAY: Good morning, your Honor.

Lynn Murray and Maile Solis-Szukala for the defendants, Sidley, Austin, L.L.P.

MS. ELKIN: Good morning, your Honor.

Laurie Elkin for the plaintiff, EEOC.

MR. MULAIRE: Justin Mulaire for the EEOC.

MS. HAMILTON: Deborah Hamilton for the EEOC.

THE COURT: We're here for a brief status. Also, my one question is, I have received and read the defendant's memorandum to compel, is that basically the subject of the status?

MS. MURRAY: I believe so, your Honor.

THE COURT: Okay.

MS. ELKIN: I don't believe this was the subject of the status, but just so we're all up to date, the EEOC had filed a motion to compel regarding client complaint issues, Sidley, Austin had responded, and we filed our reply yesterday. So we're now fully briefed on that issue as well.

THE COURT: Okay. Do you want to make an oral response to Sidley's motion to compel?

MS. ELKIN: Your Honor, I think that we would ask for 14 days to respond in writing if you're going to entertain the motion.

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I do want to state for the record that the motion to compel goes to some supplemental responses that we filed and Sidley never requested a meet-and-confer with us on the supplemental response. I just wanted to make that clear.

THE COURT: You can take the 14 days, but having read this and the exhibits, there are a couple of observations that I want to make.

The first is, I'm not inclined to beat Sidley over the head on a failure to meet and confer, because there has been a lot of meeting-and-conferring and sometimes it's helpful, but most of the time it's not.

My concern is, the underlying theme of what Sidley is saying is that you're not telling us enough about your case against us to allow us to focus our efforts on what the defense might be. And I hear this kind of stuff fairly often here. But I have some sympathy with their position that I don't have in the ordinary case, and that has to do with the fact that this case is not following well-worn paths in its most important aspect, from the viewpoint, I think, of the world outside the parties of this case, and maybe for the EEOC as well, and that is the application, if appropriate, of certain anti-discrimination rules for partnerships. And my belief is based on statements of the EEOC, among others. This is, at least from the point of view of the Commission, fairly significant. It's an issue of some importance to them, and

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it's, obviously, an issue of importance to Sidley. That's the first premise I'm operating under.

The second premise I'm operating under is, when you are dealing in territory that is partially uncharted, it is difficult to anticipate what precise line the plaintiff will take, which is Sidley's point, and I think that is largely correct.

If you have an ordinary Title VII case with one employee suing a single employer, a corporate employer, it is rare for lawyers not to have some understanding what it is they're going to have to look at in a particular case.

But in this particular case, the EEOC could take a variety of approaches, and Sidley wants to know which one. And unlike what will happen in some cases where the defense is asking this question simply to impose a burden on the plaintiff when the defendants well know what approach they're going to take, I don't think that that's true here.

Finally, the third premise. Like most large law firms, Sidley is not only large, but it's probably relatively complex in its operations, internally. So from their perspective, they can foresee several different ways in which the EEOC might attack them and might build their case, and they probably can conceive of defenses or their lawyers can conceive of defenses to each of these, but it's difficult for them to go through the list of all the possibilities

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particularly when, to refer back to my first premise, we are in at least partly uncharted territory.

So the odds are, I am going to require answers from you that are more specific than those you have given me. For example, something which I will regard ordinarily as a quibble, which is the deposition pages, I think is not in this particular case a quibble. I think it's a meaningful request.

The other issue that crosses my mind, it is conceivable to me that the EEOC has not quite settled on which or how many lines of attack to take, but I assume they've excluded some, and I think Sidley is entitled to know that.

And, also, the two parties in this case are not quite on the same footing. There are two methods by which things get investigated, one is the way lawyers do it and the other one is the way the police do it.

When the police investigates something, they have documents, they have a variety of things. Some documents are surrendered or they get them through subpoenas on occasion. There are search warrants. They go question witnesses, then they look at documents, and sometimes they'll question the same witness four or five times.

Lawyers don't use that tool because, in many cases, they really have no authority, legal or otherwise, to require interviews and the police do. Also, our rules preclude them from using this because you get one deposition, one chance at

a deposition. And I think that that is what is bearing on Sidley, at least a little, which is that if they don't know exactly where you're going to attack them, a witness who may be perfectly capable of covering several subject matters, they have to hazard to guess or, in the alternative, they might take seven hours, five of which are wasted.

This particular aspect of Sidley's dilemma I can repair for them. And that is, if you come up with a theory and witnesses that didn't appear so crucial before now appear to be crucial, I may very well permit second depositions of some of these witnesses, and, to some extent, I may approve them in a limited way for both sides.

That's a suggestion that has been made to me on several occasions by litigants and I rarely grant that suggestion, rarely grant that request, but I might here.

So you can file whatever you want to file in fourteen days, you can respond in seven days, and you can come back again at noon in four weeks, 28 days, and we'll talk about it again.

Unlike most discovery disputes that are before me, I think that this has some importance and I want to deal with it thoroughly, partly because the last thing I want to do is grant second depositions, but I might, and I'm willing to do it for both sides.

Anything else?

MS. MURRAY: Your Honor, one point on the client complaint and comparator issue which is now before you after the brief yesterday. As you may recall, procedurally the way this came up, there was a very short motion to compel to begin we, we filed a longer brief, the EEOC has just filed a 20-page brief yesterday raising some new legal issues, including different standards for reduction-in-force cases which they --

THE COURT: You want more pages?

MS. MURRAY: We'd like a short reply in 14 days, if we could, your Honor?

THE COURT: This is a surreply?

MS. MURRAY: This would officially be a surreply.

THE COURT: How many pages do you want?

MS. MURRAY: 10.

THE COURT: Okay, you can have 10.

MS. MURRAY: Thank you.

THE COURT: And you can have 5 for your sur-surreply.

MS. ELKIN: Okay. Thank you, your Honor.

And what would be the time frame for the sur-surreply?

THE COURT: When are you going to file it?

MS. MURRAY: We can file it in 10 days, your Honor.

THE COURT: Okay, you have a week after that.

MS. ELKIN: Okay.

THE COURT: Anything else?

MS. ELKIN: May I just clarify the date of the next status hearing here?

THE COURT: 28 days from today.

THE CLERK: April 6th.

THE COURT: 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 Date