

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

FILED

AUG - 4 2005
AUG 4 2005
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

SIDLEY AUSTIN BROWN & WOOD LLP,

Defendant.

Case No. 05 cv 0208

Judge James Zagel

Magistrate Judge Ashman

**EEOC'S REPLY IN SUPPORT OF EEOC'S MOTION TO COMPEL PRODUCTION
AND FOR ENTRY OF A PROTECTIVE ORDER**

In its response to EEOC's Motion to Compel the Production of Documents and for Entry of a Protective Order, Defendant Sidley Austin Brown & Wood ("Sidley") proposes new limitations on disclosure in four areas of the Protective Order. Sidley's proposals do not just address what information would be made public in this litigation. They go to the heart of EEOC's ability to litigate this case effectively.

First, Sidley advocates that Confidential Information could be disclosed only to those individuals working for Sidley who had seen the information before or to the individual whose performance is at issue. This limitation would have far-reaching effects on the litigation, precluding the EEOC, for example, from communicating with its own class members about their comparative performance in terms of hours, billings, and compensation as well as precluding the EEOC from asking partners who worked with its class members about whether particular performance reviews or compensation differentials were justified or accurate.

Second, Sidley proposes expanding the definition of Confidential Information to such an extent that Sidley could keep confidential not only the names of the downgraded individuals but

also its “private” or “proprietary” materials and “policies, procedures, and agreements.” Without further delineation, these categories could encompass nearly all of the documents produced.

Third, Sidley suggests the creation of a twenty-one day period prior to requesting permission from the Court to file material under seal so that individuals whose Confidential Information may be disclosed in a pleading can be notified and given an opportunity to object. This could turn the filing of any document with Confidential Information in it into a multi-party dispute over the appropriate Protective Order, a procedure that has been adopted by no other court in a federal employment discrimination case.

Finally, Sidley proposes that prior to releasing to the EEOC any of the personnel files requested by the EEOC in discovery (including the files of EEOC’s class members), Sidley be given permission to notify the individuals and obtain their consent. Again Sidley’s proposal could create a massive subset of litigation over whether particular files should be turned over and could preclude the EEOC from discovering vital information regarding the performance of its class members, which Sidley claims was the basis for its downgrade decisions. No court that we are aware of has ever ordered the EEOC to obtain consent prior to discovering class member personnel files. There is no basis for creating a special procedure for these former “partners.”¹

Not surprisingly, Sidley’s brief never mentions the legal standards that will govern resolution of the question whether Sidley violated the Age Discrimination in Employment Act (“ADEA”) by downgrading a group of partners to counsel and senior counsel in the fall of 1999 and by maintaining a mandatory retirement age. Nor does Sidley discuss the established body of

¹By its use of the term “partners” to refer to these individuals throughout the brief, EEOC does not intend to convey that they were in fact partners rather than employees for the purposes of the ADEA. To the contrary, EEOC’s position is that attorney employees who have been designated partners but who are not on the firm’s Executive or Management Committees are not true partners *for purposes of the ADEA*.

Seventh Circuit law adopting a strong presumption against the use of broad protective orders such as Sidley is proposing. Discussion of these legal standards shows that the Confidential Information that the EEOC seeks must be shared with class members and witnesses to enable the EEOC to prove its case and that Sidley cannot simply remove the facts developed in this litigation from the public record. Sidley's attempt to have this Court adopt as a matter of law Sidley's firm culture of secrecy is inconsistent with the governing law and should be rejected as an unjustified intrusion into the EEOC's ability to prove its case.

I. SEVENTH CIRCUIT LAW FAVORS LITIGATION ON THE PUBLIC RECORD NOT LITIGATION IN SECRET

At every turn, Sidley's proposed Protective Order thwarts the Seventh Circuit's repeated statements that litigation should be conducted in public. According to Sidley, the public -- and all of the class members in this action -- should have access to neither the names of the individuals Sidley downgraded from partner status in October of 1999 nor to any of the documents that support Sidley's claim that its actions were based upon these individuals' performance (with the exception that the class members could see their own personnel files).

The Seventh Circuit, however, has been quite clear and consistent on this issue. "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying public access to the proceedings." *Jepson Inc. v. Makita Electric Works*, 30 F.3d 854, 858 (7th Cir. 1994) (internal citations and quotes omitted). "The public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999). "Most cases endorse a presumption of public access to discovery materials." *Id.* (citing cases)

Before making the determination to limit access, courts should be "firmly convinced that disclosure is inappropriate. . . .[A]ny doubts must be resolved in favor of disclosure." *Grove*

Fresh Distrib. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994). There is no suggestion in any of these cases that an employer's firm culture of secrecy should be adopted by the courts to override the strong presumption of conducting litigation in public.

II. SIDLEY'S PROPOSAL PRECLUDING DISCLOSURE OF CONFIDENTIAL INFORMATION TO CLASS MEMBERS AND WITNESSES WOULD SEVERELY IMPEDE EEOC'S ABILITY TO LITIGATE ITS CASE

Not only has Sidley proposed a broad definition of Confidential Information, Sidley proposes that – even where information is designated as Confidential Information and class members and witnesses are instructed as to their obligations under the Protective Order – class members and witnesses should not be able to view and provide testimony regarding such information (unless they had previously seen it or it specifically relates to their own performance). Such limitations on the use of Confidential Information would greatly impede EEOC's ability to prove its case.

To show that Sidley violated the law when it downgraded partners in the fall of 1999 and by maintaining a mandatory retirement age, EEOC will first have to establish that the affected former partners are within the coverage of the federal anti-discrimination laws and then that they were selected for downgrading because of their age rather than for performance reasons as Sidley claims. To meet these standards, EEOC will have to develop detailed evidence about the operations of the firm and present comparative evidence regarding partners' performance. Accordingly, and where it has already been agreed that the information will be treated as Confidential under the Protective Order, there should be no doubt that EEOC's need for access to the information by class members and witnesses trumps Sidley's confidentiality concerns.

A. The Governing Legal Standards

The Supreme Court has explained that the question whether an individual with the title partner is entitled to the protections of the federal anti-discrimination laws focuses “on the common-law touchstone of control.” *Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538

U.S. 440, 450 (2003) (adopting EEOC's Compliance Manual standard). This inquiry requires EEOC to present detailed evidence regarding the operations of Sidley.²

In order to prevail on the merits EEOC will then have to show that the partners selected for downgrading in the fall of 1999 were chosen because of their age -- and not because of their performance, as Sidley claims. One way of proving this is by showing that similarly situated partners who were not as old were not terminated. *See Cerutti v. BASF Corp.*, 349 F.3d 1055, 1060-61 (7th Cir. 2003). In cases like this one, the performance of individuals who suffered an adverse action is frequently compared with the performance of younger workers who were retained in their jobs. *See, e.g., Vonckx v. Allstate Ins.*, 2004 WL 1427105 (N.D. Ill) (discussing use of comparators in ADEA disciplinary case).

These legal standards require the EEOC to develop significant evidence regarding Sidley's operations and the comparative performance of its partners. EEOC's ability to develop, understand, and present such evidence will be severely impeded if it cannot discuss the basic fundamental facts of the case with class members and witnesses.

B. Neither the Law Nor Commonsense Support Sidley's Attempt to Preclude EEOC from Sharing Confidential Information Necessary to Prove EEOC's Case

Sidley's attempt to restrict access to Confidential Information is an unnecessary limitation given that Sidley's concerns about disclosure have already been addressed by treating the Information as Confidential Information subject to the terms of the Protective Order such that class members and witnesses are precluded from disclosing the Confidential Information to

² The *Clackamas* standard suggests six relevant factors for determining when individuals with the title partner are properly regarded as employees entitled to the protections of the federal anti-discrimination laws "1) whether organization can hire or fire individual or set rules for work; 2) extent of supervision organization exercises over individuals work; 3) whether individual reports to someone higher up in organization; 4) whether individual is able to influence organization; 5) whether parties intended that individual be an employee; 6) whether individual shares in profits, losses and liabilities of organization." *Id.*

others and from using it for purposes other than litigation. Sidley's further attempt to restrict the use of Confidential Information to only those who have seen it before or to the class member to whom the performance review pertains creates the likelihood that the EEOC will be unable to prove its case because the EEOC will be unable to develop the necessary evidence.

The following are only a few examples of the ways in which Sidley's proposal would limit EEOC's ability to engage in discovery:

- EEOC could not disclose information to its class members regarding other partners' hours, billings and performance reviews to ask its class members whether and why such individuals are or are not good comparators and to allow its class members to make an informed decision regarding their own participation in this lawsuit.
- EEOC could not ask Practice Group Heads (who were not on the Management and Executive Committee or who did not otherwise have access to compensation data) to review the compensation and hours of all the members of their Practice Group and explain whether differences in performance of class members or other partners are or are not reflected in those numbers.
- EEOC could not ask its own class members to review the billings and hours of other members of their Practice Group and account for their own comparative performance.
- EEOC could not ask partners who worked with the demoted partners whether performance reviews of the demoted partners reflected their work experiences with the same partners.

Given this list of examples, it is not surprising that none of the cases Sidley cites in its brief provide support for Sidley's request that in a federal employment discrimination case class members are unable to review information regarding the compensation and performance of comparators. Further, Sidley cites no case regarding what sort of information can be protected from disclosure even to class members and witnesses where the operations of Defendant's business are at issue, as they are here to prove coverage. *See* Sidley Brief at pages 5-9 citing cases that are easily distinguishable. *El Dorade Sav. & Loan Assn v. Superior Ct.*, 190 Cal. App. 3d 345 (1985) involves a California state law claim and relies on the California state constitution to deny disclosure of a personnel file, and even that case acknowledges that disclosure of

personnel files may be required where there is no less intrusive means to get such information and it is relevant. *Katazanos v. Navistar Intl. Transp. Group*, 948 F.2d 332 (7th Cir. 1991) and *Weihaup v. AMA*, 874 F.2d 419 (7th Cir. 1989) explain that a plaintiff's perception of himself as a good performer is not sufficient evidence of pretext to avoid summary judgment but say nothing about whether comparative performance information should be disclosed to a class member to help identify comparators and assess performance reviews as well as so that the class member can make an informed decision about participation in the lawsuit. Finally, *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 601 (2d. Cir.) upheld an order granting only plaintiff's lawyers (and not plaintiffs themselves) access to personnel files produced in discovery where the trial judge found that plaintiff consented to the order. Such consent is clearly not present here.

The case most similar to the case at bar is *EEOC v. Morgan Stanley & Co, Inc.*, 2002 WL 1431685 (S.D.N.Y. July 1, 2002) in which the court "balance[d] EEOC's desire to develop its case of alleged employment discrimination against certain of Defendant's female employees with Defendants' concerns for privacy and proprietary company information." The court considered EEOC's request "to show potential class members certain documents . . . relating to cohort promotion history and compensation," and "agree[d] that the EEOC is entitled to develop its case, including the circumstances surrounding discrimination against individual women." *Id.*

Like the EEOC in *Morgan Stanley*, the EEOC here has agreed to procedural safeguards to ensure that class members will not disclose Confidential Information. The class members will be apprised of the Protective Order and advised that the information can be used only for purposes of this litigation. In these circumstances, the balancing of EEOC's need to disclose Confidential Information to its class members and witnesses against Defendant's interest in maintaining its firm culture of secrecy weighs in favor of disclosure.

**C. Sidley's Proposed Protective Order Permits Only Sidley – and Not EEOC
– Access to Evidence to Support Its Case.**

Sidley's proposal that review of Confidential Information be limited to those who have seen it before or to the individual whose performance is discussed creates a situation where virtually all of the testimony regarding Confidential Information will come from Management and Executive Committee members, who were the only partners at Sidley routinely privy to information regarding the compensation, billings and performance of other partners. Thus, all of the evidence on these issues would come from the very people that EEOC believes violated the ADEA by downgrading partners in the Fall of 1999 and maintaining a mandatory retirement age. Unlike the EEOC, Sidley's attorneys will be able to discuss Confidential Information with their client. This biased playing field unduly favors Sidley and would be a severe limitation on EEOC's ability to understand, develop, and present evidence in support of its case.

**III. SIDLEY'S DEFINITION OF CONFIDENTIAL INFORMATION IS
OVERLY BROAD**

Sidley's proposed definition of confidential information is overly broad. Sidley would like this Court to agree with its designation of a vast amount of material as Confidential Information. Yet Sidley's firm culture of non-disclosure should not determine what is designated as Confidential Information for purposes of this litigation. EEOC has taken a very reasonable position regarding that definition, one that is more consistent with the Seventh Circuit's preference for limited and specific protective orders.

**A. EEOC's Definition of Confidential Information Protects
Proprietary Trade Secrets**

Sidley and the EEOC have reached agreement on four categories of information that can be treated as confidential. See Paragraph I.A.4 of EEOC's Proposed Protective Order, Attached as Exhibit A ("a) non-public information regarding Sidley & Austin's revenues, profits and

expenses; b) non-public information regarding chargeable and non-chargeable hours, hourly billing rates, billings, collections and realization where that information is associated with an individual who is identified by name; c) non-public information regarding performance of individual attorneys where that information is associated with an individual who is identified by name; non-public information regarding Sidley & Austin's strategic plans and business goals; and d) partner compensation criteria list.")

EEOC has proposed that the preamble to this list read "proprietary trade secrets as to which Sidley & Austin has maintained confidentiality and which are not disclosed outside Sidley & Austin including . . ." Id. Sidley would like the preamble to read "private, proprietary, or trade secret information that Sidley & Austin has maintained as Confidential and that has not been disclosed outside of Sidley & Austin, which includes information regarding . . ." Sidley Br. Exhibit A, Para. I.A.5.

EEOC's proposed preamble is sufficiently broad to protect all of the subsequent information that the EEOC and Sidley agree should be treated as Confidential Information, and by using the term "trade secret" EEOC's proposal provides a clear limitation on any additional information that could be designated Confidential Information. *See In re Bank One Sec. Litig.*, 222 F.R.D. 582, 587-88 (N.D. Ill. 2004) (defining trade secret in Fed. R. Civ. P. 26(c)(7) with reference to the Illinois Trade Secret Act which provides that a trade secret is "information, including but not limited to, technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that: (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances

to maintain its secrecy and confidentiality.”) Under EEOC’s proposal, any such additional information that a party wants to designate as confidential must rise to the level of a trade secret.

Sidley’s addition of the words “private, proprietary” is at best confusing and is not necessary to protect the information that parties currently agree should be treated as Confidential Information. The terms “private or proprietary” are subject to an array of meanings. At a minimum they are merely other ways of describing what has already been defined and agreed to as “Confidential” and at a maximum they would describe nearly all information in the litigation. If these terms are included, they create a greater risk of future disagreements regarding what can be included in the definition of Confidential Information. *Cf. Citizens*, 178 F.3d at 945 (“Also much too broad is ‘other confidential information’” when used in a protective order.) There is no reason to add the words “private” or “proprietary,” and good reason to avoid doing so.

B. Policies Procedures and Partnership Agreements Without Further Designation Is Too Broad A Category for Confidential Treatment

Sidley’s request that “policies, procedures and its agreements with its partners” be treated as confidential without further designation is too broad. EEOC has already indicated that if Sidley were to provide a complete list of the policies, procedures, and agreements with its partners that it believes are Confidential Information, some further agreement between the EEOC and Sidley might be possible. In the absence of such a list, EEOC cannot agree that it is appropriate to treat these broad categories of information as confidential.

C. The Names of the Affected Partners Should Be Disclosed

Sidley also seeks to keep confidential the names of its former partners who were downgraded to counsel or senior counsel status in the fall of 1999. This attempt to keep from the public even the most basic information about this action is flatly inconsistent with Seventh Circuit law. *Doe v. City of Chicago*, 360 F.3d 667 (7th Cir. 2004) (“The concealment of a party’s

name impedes public access to the facts of the case, which includes the parties' identity.")

Further, EEOC does not believe that this information has been treated as confidential in the years since the termination. Individuals are routinely identified on Sidley's website as partners, counsel or senior counsel. Thus, anyone who visited the website after the demotions in the fall of 1999 could have determined which individuals who used to be partners were now identified as counsel or senior counsel.

IV. CONFIDENTIAL INFORMATION SHOULD BE FILED UNDER SEAL ONLY AFTER EXPLICIT REVIEW BY THE TRIAL JUDGE

Seventh Circuit law provides, "The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record or part of it." *Citizens*, 178 F.3d at 945. Consistent with this standard and the practical considerations of brief-writing, EEOC has proposed that prior to filing any pleading containing Confidential Information, the filing party must give sufficient notice to the other party to allow that party time to file a motion seeking leave to file the information under seal or to oppose such a motion. EEOC Draft Protective Order at Para. II. C, D. Sidley has said that it requires twenty-one days notice of any filing containing such Confidential Information. Such an extended period will simply slow the litigation unnecessarily. If Sidley requires that much time to review a particular filing, Sidley can simply raise that issue with the Court at the time that it receives notice that EEOC intends to file a pleading containing Confidential Information.

Sidley has also said that it requires this twenty-one day period of time so that the individuals whose Confidential Information will be filed with the Court can be notified. Sidley, however, does not cite to a single case that has adopted such a notification procedure in a federal employment discrimination case. This is probably because such notification is fundamentally inconsistent with the notion that "most portions of discovery that are filed and form the basis of

judicial action must eventually be released.” *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). “Calling [something] confidential does not make it a trade secret, any more than calling an executive’s salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination).” *Id.* at 567.

Sidley’s desire to notify any individual whose information might be included in a pleading would simply create additional litigation by third parties, which would be highly disruptive to litigation over the merits of EEOC’s claims.

V. NOTIFICATION TO INDIVIDUALS OF RELEASE OF THEIR PERSONNEL FILES WOULD CREATE A NEW BARRIER TO EEOC’S ABILITY TO LITIGATE DISCRIMINATION CLAIMS

Sidley’s proposal that it be permitted to notify “individuals whose personnel files and performance reviews might be disclosed in discovery to provide them with an opportunity to object” is completely unsupported by case law in federal employment discrimination cases. This proposal appears to the EEOC to be an attempt to interfere with EEOC’s relationship with the individuals who are members of the class for whom the EEOC seeks relief. In addition, this procedure creates the possibility of numerous requests for individualized protective orders from individuals which would impose a significant litigation burden on the parties and the Court.

In its first set of Document Production Requests to Defendant, EEOC requested the personnel files of the 31 individuals Defendant previously identified to the EEOC as being demoted to counsel or senior counsel in the Fall of 1999 as well as the personnel files of the individuals who served on the Management or Executive Committees of Sidley, which made the

decision regarding the partners to be downgraded.³ EEOC anticipates that it will request the personnel files of comparators.

It is well-established in employment discrimination cases that the plaintiff is entitled to the personnel files of class members and decisionmakers even where the defendant has objected to production because of privacy concerns. *See, e.g., Sykes v. Target Stores*, 2002 WL 5544505 (N.D. Ill, April 15, 2002) (ordering production of personnel files of supervisors who made employment discrimination decisions at issue and personnel files of applicants for the positions at issue but permitting defendant to redact "confidential medical information.") *See also Bhagwandass v. Hovenssa, L.L.C.*, 2002 WL 32349814 (D. Virgin Islands) (In determining appropriate discovery to be allowed from the files of other employees, the Court must weigh Plaintiff's right to relevant discovery against the privacy interest of such non-parties. On balance, it appears that the extent of discovery allowed must be tailored to the particular allegations at issue." (citing cases)); *Tomanovich v. Autumn Glen*, 2002 WL 1858795 (S.D. Ind. 2002) (ordering production of personnel files of individuals who held the same job as plaintiff over defendant's objection on privacy grounds but permitting defendant to redact social security numbers); *Spina v. Forest Preserve of Cook County*, 2001 WL 1491524, *3 (N.D. Ill, Nov. 23, 2001) (ordering defendant to produce to plaintiff personnel files of individual defendants and of females, who like plaintiff, complaint of sexual harassment and/or discrimination); *Cason v. Builders Firstsource-Southeast Group, Inc.*, 159 F. Supp. 2d 242 (W.D. N.C. 2001) ("[W]here the files sought are those of employees whose action or inaction has a direct bearing on the Plaintiff's claims or Defendant's affirmative defenses and especially where, as the here, the court has issued an appropriate confidentiality order, personnel files are subject to discovery." (citing

³ Sidley has refused to produce the personnel files of Management and Executive Committee on the basis that they are irrelevant. This objection flies in the face of established case law ordering production of decisionmakers' personnel files. *See, e.g., Byers v. Illinois State Police*, 2002 WL 1264004, *13 (N.D. Ill. 2002)

cases)) (Protective Order provided that documents could not be disclosed to anyone other than parties or their counsel or used for purposes other than the litigation).⁴

Sidley has suggested that its notification procedure is justified because otherwise Sidley could be sued by partners upset about the release of their files. The law in Illinois, however, specifically permits the release of records where that release is "ordered to a party in a legal action." Illinois Personnel Record Review Act, 820 ILCS 40/7-8. Sidley has referenced the law of California as being of particular concern but Sidley has provided no examples of cases where an employer was found liable for turning over personnel records after being ordered to do so as part of discovery in a federal case.⁵

Sidley's proposed procedure requiring notification and consent from the 31 class members prior to disclosure of their personnel files appears to the EEOC (like Sidley's *North Gibson* motion) to challenge EEOC's authority to bring suit on behalf of these class members

⁴ We have found only one single case that created a mechanism requiring consent before the release of personnel files. See *Cook v. Yellow Freight Sys.*, 132 F.R.D. 548 (E.D. Cal. 1990). That case, decided over a decade ago in California, was a sex discrimination action where the personnel files at issue were only for the purpose of identifying witnesses with knowledge. *Id.* at 552. The requested personnel files did not relate to the class members or decisionmakers, and Defendant was not relying on a performance defense. Here the personnel files at issue go to the heart of EEOC's case and Defendant's performance-based defense. Further, that case relied in part on the State of California's law regarding the privacy interests at stake in personnel files. See *Id.* at 550-552 n.3, an approach that has now been rejected. See *Jackson v. County of Sacramento*, 175 F.R.D. 653, 654 (E.D. Cal. 1997) (holding *Cook* and *Pagano* overruled to the extent the case suggests federal privilege law is informed primarily by the law of the forum state as a matter of comity rather than by the law of the 50 states in the aggregate).

⁵ Sidley argues that one of the reasons individuals should be permitted "to object to the filing of his or her private information" is that "[i]n just the last six months, the EEOC has generated substantial publicity for this lawsuit." Sidley Response p. 14, n. 3. Sidley also attaches two of EEOC's press releases to its Response. Sidley's apparent argument is that there is something unethical or untoward about EEOC's issuance of press releases and public comment. However, as an agency with extraordinarily limited resources which files few cases nationwide each year, EEOC considers it appropriate to move as many cases as possible into the public eye so that employers, employees, and others are educated about the federal prohibitions on employment discrimination and the rights of employees and employers under the statutes. That is a legitimate law enforcement objective. Sidley's suggestion to the contrary is nonsense. Further, although neither Sidley nor other defendant employers are enthusiastic about media coverage of EEOC cases, review of that coverage and EEOC press releases demonstrates that although agency personnel do speak publicly and on the record, they consistently do so responsibly and within the rules and without embarrassing individuals. (Sidley does not refer to the heavy media coverage it generated itself with respect to the 1999 expulsion of the 31 from the partnership with, for example, firm Chairman Charles Douglas telling the *Chicago Tribune* "This puts in place a structure for the future that provides for greater opportunity for the younger lawyers down the road," (*Chicago Tribune* 12/8/99) and the firm's own web-site making it easy for anyone to identify by name the partners who were downgraded.)

where it is clear that at least one of them does not support the suit.⁶ See Sidley Br. Exhibit B (letter from unnamed partner to Trial Attorney Hamilton, June 24, 2005). This question, however, has already been answered. EEOC enforcement authority permits a lawsuit by the agency where no affected individual "has filed a charge with the EEOC, and indeed, none supports the lawsuit." *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1536-37 (2d. Cir. 1996). Part of this authority must include EEOC's ability to obtain the personnel records for these class members, even without their consent, particularly where a defendant (like Sidley) has asserted that they were selected for an adverse job action based on their performance.

CONCLUSION

For the reasons stated above, EEOC respectfully requests that this Court grant EEOC's Motion to Compel Production and for Entry of a Protective Order without modification.

Respectfully Submitted,



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⁶ With respect to the Court's inquiry as to agency policy as to notification and consent, this Reply is the Reply of the EEOC and *does* reflect the policy of the agency.

CERTIFICATE OF SERVICE

Deborah L. Hamilton, an attorney, hereby certifies that she caused a copy of the foregoing motion to be faxed and mailed, postage pre-paid, on August 4, 2005, to counsel of record at the following address:

To: Gary M. Elden
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A handwritten signature in cursive script, appearing to read "Deborah L. Hamilton", written over a horizontal line.

Deborah L. Hamilton

EXHIBIT A

**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,

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Case No. 05 cv 0208

Judge James Zagel

Magistrate Judge Ashman

PROTECTIVE ORDER

This matter came before the Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for the entry of a Protective Order governing the disclosure of documents and information pertaining to confidential matters. It appears to the Court that entry of this Order is appropriate.

In order to preserve and maintain the confidentiality of certain documents and information to be produced in this litigation, the Court hereby orders as follows:

I. CONFIDENTIAL INFORMATION

A. The term "Confidential Information" is defined as any of the following types of information:

- 1) social security numbers;
- 2) unlisted home address and telephone numbers;
- 3) financial information stating any individual information that is not available to the public, including information regarding an individual's participation or compensation, capital accounts and retirement payments.

- 4) Proprietary trade secrets as to which Sidley & Austin has maintained confidentiality and which are not disclosed outside Sidley & Austin including: a) non-public information regarding Sidley & Austin's revenues, profits and expenses; b) non-public information regarding chargeable and non-chargeable hours, hourly billing rates, billings, collections and realization where that information is associated with an individual who is identified by name; c) non-public information regarding performance of individual partners and attorneys where that information is associated with an individual who is identified by name; non-public information regarding Sidley & Austin's strategic plans and business goals; and d) partner compensation criteria list.

B. The term "Confidential Document" refers to a document that contains any of the above types of information defined as "Confidential Information," including but not limited to memoranda, databases, compilations and discovery responses that incorporate such Confidential Information.

C. As used herein, "disclosure" or "to disclose" shall mean to divulge, reveal, describe, summarize, paraphrase, quote, transmit, or otherwise communicate directly or indirectly Confidential Information or compilations derived therefrom.

II. RESTRICTION ON USE OF CONFIDENTIAL INFORMATION

A. During the pendency of this litigation, Confidential Information shall be retained solely in the custody of the parties' attorneys and shall not be placed in the possession of or disclosed to any other person, except as otherwise allowed by this Order, as agreed upon by the parties, as otherwise required by law subject to Paragraph II.F of this Order, or as ordered by the

Court. Confidential Information shall be utilized only for the purpose of this litigation (including any appeals).

B. Confidential Information protected by this Order shall not be disclosed in any manner, directly or indirectly, to any persons except as follows, provided that any such person agrees to abide by the terms and conditions of this Order:

- 1) Confidential Information may be used by the parties, class members, witnesses, their attorneys, legal interns and any clerks, paralegals, secretaries, data processors and other support staff in the employ of or retained by such parties or attorneys for the purpose of this litigation provided that all such persons agree to be bound by this Order.
- 2) Confidential Information may be used in all pretrial discovery proceedings, such as depositions, and may be filed in Court, such as in support of or in opposition to summary judgment, or other motions without limitations other than those set forth in Paragraph C of this Order or by Order of the Court.
- 3) Confidential Information may be reviewed by an expert witness or consultant expressly employed or retained by counsel or a party to this litigation to whom it is necessary or appropriate to disclose Confidential Information for the purpose of prosecuting or defending this litigation, provided that these persons agree to be subject to the terms of the Protective Order by signing Exhibit A.

- 4) Confidential Information may be used for motions, at trial, and on appeal of this case, without limitations other than those set forth in Paragraph C of this Order or by Order of the Court.
- 5) Confidential Information may be disclosed to a court reporter during the course of a deposition.

C. Should Confidential Information be included in a pleading, motion, or other court filing, either party may seek leave, upon further order of the Court and for good cause shown, to file such Confidential Information under seal. No document or part of a document shall be filed under seal without Court approval, and in the event that a document or part of a document is filed under seal, the filing party shall also prepare a public version of the document to be filed with the Court with the Confidential Information redacted.

D. A filing party desiring to use Confidential Information shall give the other party sufficient time to comply with the Court's notice of motion requirements to file a motion seeking leave to require the information to be filed under seal or to oppose such a motion. If notice to the other side is impractical under the circumstances, the filing party will take reasonable precautions to exclude Confidential Information or discussion of the particulars of such material until an Order of the Court regarding the filing of the Information is issued. Pending a decision by the Court, documents can be filed under normal Court procedures if the Confidential Information listed in Paragraph I.A. of this Order has been redacted or otherwise removed from the document.

E. Nothing shall prevent disclosure of Confidential Information beyond the terms of this Order if both parties consent in writing to such disclosure, or if the Court, after notice to all affected parties, permits such disclosure.

F. If Confidential Documents are subpoenaed by a third party or requested pursuant to a request under the Freedom of Information Act, the EEOC Compliance Manual, or otherwise, the party subpoenaed or to whom the request is directed will provide the producing party ten days notice when feasible, but no less than five days notice prior to production to enable that party to seek a Protective Order from the Court.

III. DESIGNATION

A. A document or portion of a document that a party determines in good faith to contain Confidential Information as defined in Paragraph I may be designated as Confidential by (1) stamping the word "CONFIDENTIAL" on the document, (2) otherwise indicating that it contains Confidential Information, (3) employing other means provided by this order, or (4) using any other reasonable method agreed upon by the parties.

B. A party may, on the record of a deposition or oral hearing or by written notice to opposing counsel not later than fourteen (14) days after receipt of the transcript of such deposition or oral hearing, designate any portion(s) of the deposition as confidential if the party determines in good faith that the designated portion(s) contain(s) Confidential Information as defined in paragraph I. Until expiration of the above fourteen (14) day period, all transcripts will be deemed "Confidential Documents" under this Protective Order and information therein will be deemed "Confidential Information" under this Protective Order unless otherwise agreed to in writing by the parties. After expiration of this period, any portion of a transcript that has not been designated as Confidential shall not be subject to this Protective Order.

C. If a party inadvertently fails to designate Discovery Material as Confidential Information, it may make the designation belatedly so long as it does so promptly after learning of the oversight. Counsel for the receiving parties shall take reasonably necessary steps to ensure the confidentiality of the Confidential Information, including reasonable efforts to secure return

of the Confidential Information from individuals to whom disclosure was made but would not have been permitted by this Protective Order had the Discovery Material been originally designated as Confidential Information.

IV. MISCELLANEOUS

A. This Order does not limit the right of any party to object to the scope of discovery in this case.

B. This Order does not constitute a determination of the admissibility or evidentiary foundation for the documents or a waiver of any party's objections thereto.

C. Within 90 days after the final completion of the litigation (including any appeals) the parties shall return to each other or (upon request) destroy all copies of Confidential Documents except as required by applicable law or regulation. All retained documents will remain subject to the terms of this Protective Order.

D. The designation of documents or information as Confidential Information or as Confidential Documents shall not be construed as a waiver of any applicable privilege or other immunities from discovery (including without limitation the attorney-client privilege and the attorney work product doctrine) or as a concession by the designating party that such information is relevant or material to any issue or is otherwise discoverable.

E. This Order shall continue indefinitely during and after this litigation, unless modified or terminated by order of this Court.

F. The restrictions set forth in any of the preceding paragraphs shall not apply to Confidential Information that was, is, or becomes public knowledge in a manner other than by violation of this Order.

ORDER

IT IS ORDERED.

Dated: _____, 2005

James B. Zagel, United States District Judge
United States District Court

Dated: _____, 2005

Exhibit A

Statement of Confidentiality and Agreement to Abide by Protective Order

By signing this document, I hereby certify that I have read the Protective Order issued by the United States District Court for the Northern District of Illinois, Eastern Division, governing production and disclosure of Confidential Information in EEOC v. Sidley Austin Brown & Wood, Case No. 05 cv 0208. I understand the Protective Order and agree to be bound by and abide by its contents. I understand that pursuant to the Protective Order, I am prohibited from disclosing the Confidential Information, or any information derived from the Confidential Information, to anyone. I submit to the jurisdiction of the Court for purposes of enforcing the Protective Order.

Signature

Name

Date