EEOC v. Sidley Austin Brown. Doc. 31 Att. 1

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

FILED
AUG - 9 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 B. Zagel
Magistrate Judge Ashman

SIDLEY AUSTIN BROWN & WOOD'S SUR-REPLY IN RESPONSE TO THE EEOC'S REPLY IN SUPPORT OF EEOC'S MOTION TO COMPEL PRODUCTION AND FOR ENTRY OF A PROTECTIVE ORDER

Sidley seeks leave to file this sur-reply to address the new arguments and newly-cited cases in the EEOC's Reply In Support of its Motion To Compel Production And For Entry Of Protective Order ("EEOC Reply").

I. SEVENTH CIRCUIT LAW REQUIRES A BALANCING OF PRIVACY INTERESTS AND THE NEED FOR PUBLIC DISCLOSURE.

The EEOC argues in favor of full disclosure of all pretrial discovery, citing Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) and Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) for the proposition that pretrial discovery should be conducted in the public record. Both Jepson and Citizen's Bank involved concerns about broad "umbrella orders," entered by stipulation of the parties, which allowed the parties to file virtually all documents under seal.

Here, in contrast, Sidley has identified specific categories of protectable information, and supported their confidentiality by describing the privacy and proprietary interests at stake. See Sidley Resp. at 5-7. It has proposed an order that protects those categories of information only during discovery, and requires specific proof of confidentiality before

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sealing any documents filed with the Court. See In re Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) (Easterbrook in chambers) ("Confidentiality while information is being gathered . . . promotes disclosure: parties having arguable grounds to resist discovery are more likely to turn over their information if they know that the audience is limited.")

As a legal matter, the EEOC fails to address the cases that support the balancing of confidentiality concerns with the public's need for access. (Sidley Resp. at 4-5, 7-8) As a factual matter, the EEOC fails to address Sidley's argument that the discovery requests are not narrowly tailored but instead seek production of a broad range of private information for hundreds of Sidley partners. (Sidley Resp. at 3-4, 6) The EEOC fails to address the fact that public release of private performance information could damage reputations. (Sidley Resp. at 5-6) The EEOC fails to address the argument that release of Sidley's confidential strategic plans and financial information to persons working at competitive firms would present unnecessary risk. (Sidley Resp. at 6) The EEOC also fails to address the practical problems presented by public discussion of performance issues in connection with current Sidley attorneys. (Sidley Resp. at 6-7)

Dismissing these legitimate concerns by labeling them a "culture of secrecy," the EEOC's Reply suggests that disclosure to alleged class members is necessary to select a comparative group and analyze differences in performance. The EEOC is free, of course, to ask potential witnesses to identify attorneys who were performing similar work in the same office and/or practice group, and to seek any performance information those attorneys possess. Moreover, in contrast to compensation information (see Sidley Resp. at 6), in many cases, billing and hour information was generally available to partners within a practice group, and class members would have access to that information even under Sidley's Proposed Protective Order

(see ¶ II.B(4)). To alleviate the EEOC's concerns, Sidley is willing to expressly modify its Proposed Protective Order to confirm that the 32 attorneys specifically identified by the EEOC can be shown client billing and partner hour information within their practice group for the three-year period preceding the 1999 decisions.[1]

The EEOC's proposed disclosure of confidential information is far broader than its stated rationale, however. Based on its assertions regarding retirement, its group of "class members" could include every former Sidley partner, wherever currently employed. The group of potential witnesses is even larger and less defined. The EEOC's proposed Protective Order allows disclosure of all confidential information (including Sidley's strategic plans, compensation for hundreds of partners, personnel files with personal information, performance reviews, billing rates and other confidential materials) to all of those individuals. Such disclosure is not justified and the need for disclosure does not outweigh the privacy and commercial interests in this case.

II. SIDLEY'S DEFINITIONS PROTECT LEGITIMATE CATEGORIES OF CONFIDENTIAL INFORMATION.

The EEOC and Sidley have agreed on at least four categories of confidential information. The EEOC's preamble, limiting this information to "proprietary trade secrets," is inherently confusing. Performance reviews, for example, are unlikely to be considered "proprietary trade secrets" yet they constitute one of the four categories. Expanding the preamble as proposed in Sidley's draft order to "private, proprietary or trade secret information that Sidley & Austin has maintained as confidential and that has not been disclosed outside of

[1] Sidley also does not object to Practice Group Heads being shown information relating to individuals in their practice groups. Those partners were privy to most of this information in the course of their ongoing responsibilities as Group Heads.

Sidley & Austin," with the further limitation to specific, expressly defined categories, ensures that the protected information is legitimately confidential or private.

This preamble also eliminates the EEOC's concerns regarding Sidley's proposed category of "policies and procedures." A discrimination policy, for example, would not be "private, propriety or trade secret" information, maintained as confidential. A policy on client billing procedures, however, almost certainly fits that category. Moreover, to the extent the EEOC believes policies or procedures have been misdesignated as confidential, it can challenge those designations.[2]

Finally, as to the names of parties whose status changed, Sidley is not proposing absolute or indefinite confidentiality. It is clear that the EEOC's definition of "class members" includes certain individuals who it likely will decide were not discharged on the basis of age. The EEOC Reply does not address, for example, the three partners who were not members of the protected class at the time of the decision. (Sidley Resp. at 3, 12) Sidley asks only that the names be maintained as confidential until the EEOC supplements its identification of class members based on discovery information and those class members have a chance to protest the public disclosure of their names, if they care to do so. Keeping names confidential is supported by the very case the EEOC cites, Doe v. City of Chicago, 360 F.3d 667, 669 (7th Cir. 2004) (the presumption that the names of the parties' are public information can be rebutted by showing that the harm to the party exceeds the likely harm from concealment.) Here, of course, the individuals are not parties, as the EEOC has made clear to at least one former partner (Sidley Resp. at Ex. B), making privacy rights even more compelling.

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[2] The EEOC has not responded to Sidley's argument that confidential agreements by and between partners should be treated as confidential. (Sidley Resp. at 11)

III. SIDLEY'S PROPOSAL REGARDING TIMING OF OBJECTIONS TO FILING UNDER SEAL IS MORE REASONABLE UNDER THE CIRCUMSTANCES.

Sidley is no more anxious to litigate confidentiality than the EEOC, and suspects that agreement will be typical and that the need for court intervention will be rare. The EEOC's proposal, however, would mean that Sidley could be forced to file papers supporting confidentiality with only two or three days' notice. That is an unrealistic timeframe for a case involving numerous individual privacy interests and a substantial volume of commercially sensitive information. Sidley's 21-day alternative proposals are far more realistic, both to allow time to raise the issue with the Court and to notify any individual whose privacy rights appear affected by the filing.

IV. NOTIFICATION OF PRODUCTION OF PERSONNEL FILES AND PERFORMANCE REVIEWS IS JUSTIFIED IN THIS CASE.

The EEOC contends, without citation, that its inherent authority includes the authority to obtain personnel records without individual consent. It also objects to Sidley's plan to voluntarily notify individuals of the EEOC's request for personnel files and performance records.

Illinois law generally supports the confidentiality of personnel records by requiring written notice to an individual before providing certain disciplinary information. 820 ILCS § 40/7-8. There are two potential exceptions: (1) the information is requested by a government agency as a result of a complaint by the employee; or (2) there has been a court order requiring production. Neither applies here. In addition, the cases the EEOC cites do not support its position. In those cases, the courts considered objections and often denied requests for production of personnel files or allowed narrow production only after review and redaction. See Sykes v. Target Stores, 2002 WL 554505, at *3-5 (N.D. Ill. April 15, 2002); Bhagwandass v. Hovensa, L.L.C., 2002 WL 32349814, at *2 (D. Virgin Islands, October 29, 2002); Tomanovich

v. Autumn Glen, 2002 WL 1858795, at *7 (S.D. Ind. 2002). In the one case cited by the EEOC that expressly mentions consent, the court denied production of personnel files based in part on "these employees' understandable refusal to consent to disclosure of their otherwise confidential personnel files." Cason v. Builders Firstsource-Southeast Group, Inc., 159 F. Supp. 2d 242, 248 (W.D. N.C. 2001).

In order to suggest a concern about third party litigation over confidentiality, the EEOC discusses all of the other personnel files it has sought or may seek. There have been no discovery discussions about those files (some of which have not yet been requested in discovery), and Sidley strongly disagrees that wholesale production is warranted. To the extent the EEOC is seeking an order compelling production, however, the issue is for a later day after compliance with Local Rule 12 and a motion to compel, if necessary.

Dated: August 9, 2005

Respectfully submitted,

SIDLEY AUSTIN BROWN & WOOD LLP

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CERTIFICATE OF SERVICE

I, Lynn H. Murray, an attorney, hereby certify that on **August 9, 2005**, I caused a true and complete copy of the foregoing **SIDLEY AUSTIN BROWN & WOOD'S MOTION FOR LEAVE TO FILE SUR-REPLY** to be served via Electronic Mail and Messenger Delivery upon the following:

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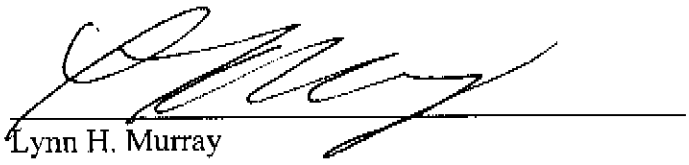

Lynn H. Murray