CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER HAS BEEN READACTED IN COMPLIANCE WITH PROTECTIVE ORDER

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

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

PLAINTIFF EEOC'S MOTION TO COMPEL A FED. R. CIV. P. 30(B)(6) DEPOSITION REGARDING THE REASONS SIDLEY PARTNERS WERE CHANGED IN STATUS FROM "PARTNER" TO "SENIOR COUNSEL" OR "COUNSEL"

With this motion EEOC seeks an Order compelling the Defendant law firm of Sidley Austin Brown & Wood ("Sidley & Austin") to produce a witness or witnesses pursuant to Fed. R. Civ. P. 30(b)(6) to testify regarding the reasons individual Sidley partners were selected for downgrading to counsel or senior counsel or for expulsion from the firm.

As described below, taken together, Sidley's written responses to discovery, its correspondence, and the statements of defense counsel combine to signal an unmistakable defensive litigation strategy. The strategy is for Sidley *never* to become "locked in" to any definitive set of reasons for the expulsion of the partners at issue from the partnership. Each response from Sidley with respect to each partner brings forth new reasons for the downgrades. All that is relevant are the reasonable factors other than age which were, in fact, *actually known* to the Management and Executive Committee members in 1999 and which *at that time (in 1999) caused them to expel the partners at issue.* Given that Sidley itself asserts that it made the decisions for performance based reasons – and not because of age -- it is entirely reasonable to

require Sidley to designate a witness to testify, pursuant to Fed. R. Civ. P. 30(b)(6), about the subject matters identified by the EEOC.

For the reasons that follow, EEOC respectfully requests that this Court order Sidley's compliance with Fed. R. Civ. P. 30(b)(6):

1. On April 10, 2006, Plaintiff EEOC served Defendant Sidley & Austin with a Fed. R. Civ. P. 30(b)(6) deposition notice. That notice seeks a deposition of Defendant regarding "any and all reasons (and if more than one reason, the relative weight of the reasons)" that the Defendant selected certain identified partners for a change in status from "partner" to "senior counsel" or "counsel" or for removal from the Firm. A copy of the EEOC's Deposition Notice is attached as Exhibit A (emphasis added).[1]

2. Defendant has refused to produce a Fed. R. Civ. P. 30(b)(6) deposition witness or witnesses to testify on these topics, claiming that it is too burdensome because the changes in status resulted from the consensus decision of the Management and Executive Committees so the production of a witness would require the collection of knowledge from each member of these committees. Indeed, Defendant seems to believe that it simply does not have to provide to the EEOC a complete explanation of the reasons that it selected certain former partners for downgrade or expulsion.

3. As the culmination of an extended attempt to resolve this discovery dispute, EEOC agreed that it would not pursue its 30(b)(6) deposition on the reasons for the partners' downgrades or expulsions from the firm if Sidley would state that Sidley's written discovery responses regarding the reasons for the downgrades "reflected consultations with all of the decision-makers" and "included each and every reason for the downgraded or expelled partners'

[1] Exhibit A is being filed only under seal because it identifies the affected former Sidley partners by name, which is Confidential Information pursuant to the Protective Order entered on September 2, 2005.

change in status." *See* Letter from EEOC Trial Attorney Hamilton to Sidley counsel Murray, June 14, 2006, attached as Exhibit B.

4. Sidley refused to so state. Instead Sidley said that in producing its written discovery responses, "[W]e did not conduct individual interviews with each and every Management and Executive Committee member concerning every former partner at issue. . . . We have explained in prior discovery that the status changes resulted from a consensus decision by Sidley's Management and Executive Committees. Thus, it is possible those discussions may yield additional facts that an individual Management or Executive Committee member considered when supporting the decision to change a former partner's status." Sidley did agree that it would supplement its response if it learns of such additional facts. *See* Letter from Sidley counsel Conway to EEOC Trial Attorney Elkin, June 16, 2006 (emphasis added), attached as Exhibit C.

5. As outlined below, the EEOC has complied with Local R. 12(K) and has attempted to resolve our dispute concerning the 30(b)(6) deposition with the Defendant both in writing and via a face-to-face meeting. No such resolution is possible.

a. In lieu of producing a witness or witnesses (and after correspondence from the EEOC asserting EEOC's need for the information on the topics contained in the 30(b)(6) deposition notice), on May 4, 2006, Defendant suggested that by May 15, 2006, it would provide the EEOC with an amended response to EEOC's interrogatories regarding how particular partners were selected for a change in status. (Those interrogatories were served over a year ago on April 28, 2005.) Defendant suggested that this response might "obviate the need for the 30(b)(6) depositions" or "provide a framework for a revised 30(b)(6) request that would be mutually agreeable." *See* Letter from Sidley counsel Conway to Trial Attorney Elkin, May 4, 2006, attached as Exhibit D.

b. EEOC communicated to Sidley that any revised interrogatory response should include "the identity of each and every reason for the partner's selection for a change in status; each and every reason known, considered and/or used for changing the partner's status and for each such reason, each fact, witness and/or document supporting or relating to that reason; all persons who participated in the decision to change the partner's status and all facts and documents which evidence such participation; and all occasions on which the partner failed to perform his or her duties in an acceptable manner, including the date of the failure, the witnesses to the failure, and the documents evidencing or related to the failure." *See* Letter from Trial Attorney Elkin to Sidley counsel Conway, May 9, 2006 (emphasis in original removed), attached as Exhibit E. Along with the letter EEOC also served an additional interrogatory asking Sidley to provide the "relative weight" of each of the reasons for each of the affected partners' downgrade or expulsion from the Firm.

c. On June 5, 2006 -- only after EEOC sent Sidley still another letter seeking the information regarding the reasons that certain partners were downgraded -- Sidley provided EEOC with a revised written response for each partner regarding the reasons that partner was selected for a change in status. This revised response is entitled Amended Exhibit D. Sidley prefaced its amended interrogatory response by noting that it was providing a "discussion" of each of the 34 individual attorneys whom the EEOC has identified as potential claimants. Sidley stated that its investigation was ongoing and noted that its "Management and Executive Committees conduct performance evaluations of Sidley partners and were involved in the decisions relating to potential claimants. Therefore, each member of those committees during the relevant time period may have

general knowledge concerning the performance of the potential claimants and the reasons for their change in status." A copy of Amended Exhibit D is attached as Exhibit F.[2]

d. In response to EEOC's interrogatory regarding the relative weight of each of the reasons for which each partner was selected for a downgrade or expulsion, Sidley referred EEOC to Amended Exhibit D, which contains no discussion of the relative weight of the factors. *See* Exhibit F.

e. EEOC replied to Sidley by explaining that this amended response was not an adequate substitute for the noticed 30(b)(6) deposition and requested a face-to-face meeting to discuss the issue, which was held on June 14, 2006. Trial Attorneys Elkin, Hamilton and Mulaire along with Supervisory Trial Attorney Gochanour attended on behalf of the EEOC, and Sidley was represented by Counsels Murray and Conway.

f. After the parties' face-to-face meeting, EEOC sent the letter to Sidley stating the 30(b)(6) deposition would not be necessary if Sidley would send a letter "stating that all decision-makers were consulted in connection with Supplemental Exhibit D provided to the EEOC on June 5, 2006 and that Supplemental Exhibit D reflects each and every reason for the change in status of each of the former Sidley partners for whom a response has been given." *See* Exhibit B.

g. Sidley refused to make such a statement. *See* Exhibit C.

6. The information on the reasons for the affected partners' downgrades or expulsions about which the EEOC seeks Defendant's testimony goes to the heart of this case. EEOC's Complaint alleges that Defendant "discriminated against a class of attorney employees age 40 and older by downgrading or expelling them on account of their age in about October 1999 in

[2] Because Amended Exhibit D references the affected former partners by name and contains performance information specific to each individual, which is Confidential Information under the Protective Order, it is being filed only under seal.

violation of the ADEA." *See* Complaint, attached as Exhibit G. In its answer, Sidley specifically denied this allegation, and stated "the decisions made with respect to the individuals for whom Plaintiff purports to seek relief were made in good faith and were reasonably based on factors other than age." *See* Answer at ¶ 7 and Seventh Separate Defense, attached as Exhibit H.

7. Fed. R. Civ. P. 30(b)(6) by its terms applies to partnerships and states that a person designated "shall testify as to matters known or reasonably available to the organization."

8. "Rule 30(b)(6) is a vehicle for streamlining the discovery process." *SmithKline Beecham Corp. v. Apotex Corp*., 2000 WL 116082, *8 (N.D. Ill.) One of the purposes of the Rule is "to prevent business entities from 'bandying,' the practice of presenting employees for their deposition who disclaim knowledge of facts known by other individuals within the entity." *Id*.; *see also* Fed. R. Civ. P. 30(b)(6) Advisory Committee Notes.

9. It is just that type of action -- the denial of knowledge as to the reasons for the changes in status or the identification of new and previously undisclosed reasons -- as to which the EEOC is vulnerable here if Defendant is not required to produce a witness to testify as to the reasons that the EEOC class members were downgraded or expelled from the firm.

10. Sidley's claim that the collection of information regarding the reasons for the changes in status would be burdensome is not a legitimate basis on which to avoid a Fed. R. Civ. P. 30(b)(6) deposition. "Once the deposing party specifies the topics of the deposition, it becomes the corporation's duty to designate one or more individuals able to testify about the relevant areas." *Canal Barge Co. v. Commonwealth Edison Co*., 2001 WL 817853 (N.D. Ill.) Courts have often explained that "preparing for a 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate [or other organizational] form in order to conduct business." *Ross v. J.P.*

Morgan Chase, 2003 WL 23218481 (D. Virgin Islands) (noting that "[e]ven if the documents are voluminous and the review of those documents would be burdensome, corporate defendants are still required to review them in order to prepare themselves to be deposed.")

11. Without complete information as to the reasons for the changes in status, EEOC cannot fully prepare its case. For example, if the EEOC does not know all the reasons for the partners' changes in status, the EEOC cannot issue the discovery necessary to identify appropriate comparators. The EEOC also cannot ask witnesses – or even our own class members -- for their recollections as to various performance issues without knowledge of the performance problems upon which Sidley relied to make its decisions.

12. The discovery responses that EEOC has received thus far serve to illustrate Defendant's failure to gather the information available to it. During her deposition, Management Committee Member Virginia Aronson responded to EEOC's questions about why a particular former partner was downgraded by saying that

." See Aronson Dep. at 254 (emphasis added), attached as Exhibit I.[3] The written discovery responses regarding this partner received by the EEOC prior to Aronson's deposition, however, say only that this former partner **"**

" *See* Exhibit F at 14. Nowhere do Sidley's written discovery responses or Sidley's Exhibit D alert the EEOC to the fact that "

[3] Exhibit I is being filed only under seal because it identifies an affected former Sidley partner by name, which is Confidential Information pursuant to the Protective Order entered on Sept. 2, 2005. The discussion of the former partner's performance issues is being treated as Confidential Information because it also identified the former partner by name and accordingly has been redacted from the public version of this document.

." See Exhibit I at 254. Additionally, in its Amended Exhibit D, Sidley has not described the content of various partners' knowledge about the performance issues nor has it provided any response at all as to the weight of the various factors that led to the changes in status nor has Sidley given any detail about many of the reasons that it does list. See Exhibit F.

13. In addition to the noticed 30(b)(6) deposition, EEOC has already indicated to Sidley that EEOC intends to take the deposition of each member of the Management and Executive Committees regarding their reasons for the downgrades and expulsions. These depositions, however, are not a substitute for the 30(b)(6) deposition. Those depositions are necessary to allow EEOC to inquire in detail into each committee member's recollection regarding the reasons and personal knowledge of the reasons for the changes in status. The 30(b)(6) deposition is necessary to allow the EEOC to develop its discovery requests, communicate with its class members about their performance at the firm, and prepare for the Management and Executive Committee members' depositions.

14. EEOC's request that the Defendant be required to produce a witness to testify as to the reasons for the downgraded and expelled partners' change in status is entirely reasonable. This information is known by the Defendant's Management and Executive Committee, and the Defendant has put it in issue by asserting that the former partners were selected for a change in status not on the basis of age but for other reasons.

WHEREFORE, we respectfully request that this Court order Defendant to produce a witness or witnesses to testify in response to EEOC's Fed. R. Civ. P. 30(b)(6) notice.

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July 10, 2006

Respectfully Submitted,

_s/ Deborah Hamilton_____
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CERTIFICATE OF SERVICE

Deborah Hamilton, an attorney, hereby certifies that on July 10, 2006, she caused copies of the foregoing public version of the document, to be served electronically, via the court's Electronic Case Filing system, upon counsel to defendant Sidley Austin Brown & Wood, L.L.P. A confidential copy of the document along with the Exhibits that contain confidential information was served by hand.

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