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 BROWN & WOOD LLP,	)	
Defendant.	)	

DEFENDANT SIDLEY AUSTIN LLP'S RESPONSE TO 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"

The EEOC seeks an order compelling Sidley Austin LLP ("Sidley") to produce a second 30(b)(6) witness to testify on 34 new topics, in addition to the 8 topics covered in a previous 30(b)(6) deposition. Those new topics are virtually identical to the questions posed in an EEOC interrogatory served in mid-2005, to which Sidley responded at length. Moreover, the EEOC has stated that it intends to take the deposition of every Sidley Management or Executive Committee member involved in the decisions at issue to elicit their personal knowledge on these same matters, meaning that the 30(b)(6) deposition will duplicate both past and future discovery.

As discussed in more detail below, the EEOC's deposition notice improperly seeks a second 30(b)(6) deposition without leave of court. It is cumulative and duplicative, first, because it seeks precisely the same information provided in a written discovery response and, second, because it requires a witness to gather the personal knowledge of dozens of other individuals, who will be deposed at a later date regarding that same personal knowledge. Sidley therefore requests that the EEOC's motion be denied.

I. Sidley's Interrogatory Answer States Its Position On The Topics Identified In The EEOC Notice.

The EEOC's deposition notice duplicates its previously served interrogatories almost exactly. Early in discovery, the EEOC served interrogatories seeking the following information for each individual it alleges was affected by age discrimination:

> "[E]ach reason known, considered and/or used as a basis at that time for changing his or her status from partner to counsel or senior counsel."

(Ex. 1, Interrogatory No. 15 of EEOC's First Set of Interrogatories to Sidley Austin Brown & Wood.)[1]

In July 2005, Sidley submitted a lengthy description of those reasons. In early June 2006, it supplemented that response to include information about individuals newly identified by the EEOC, additional information obtained during interviews with knowledgeable Sidley partners, and the names of those Sidley partners. (*See* Ex. F to EEOC Motion.) In addition to the written description of the reasons for changing status, Sidley has provided documents and information relating to each identified individual's performance, including objective statistics on hours, billings, compensation and billable rates. At the EEOC's request, Sidley provided that data in electronically searchable form, including in some instances by creating an electronically formatted document. (Ex. 2, 10/6/05 letter from A. McMurtrie to L. Elkin.)

The EEOC's 30(b)(6) deposition notice seeks the same information for each individual it alleges was affected by age discrimination: "Any and all reasons (and if more than one reason, the relative weight of the reasons) that [the individual] was selected in 1999 for a change in status from partner to [senior counsel/counsel.]"[2] The EEOC contends in court filings that the

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[1] Exhibits 1-3 are filed under seal pursuant to the Court's 6/20/06 Amended Protective Order.

[2] As Sidley has explained, there was consensus on the criteria to be applied (Ex. 3, Sidley's Objections and Responses to the EEOC's 30(b)(6) Notice), but no "relative weighting" of the reasons for these decisions at the time they were made.

deposition is required 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." (EEOC Motion at 8.)[3] In the parties' meet and confer conference, the EEOC explained that Sidley's written description of performance issues is insufficient because it does not answer "follow-up questions." It is those unidentified "follow-up questions," however, that make the 30(b)(6) format impossibly burdensome in a case involving decisions about 34 different individuals, made by a group consisting of more than 30 different Sidley partners. Courts facing similar situations have recognized the unfairness of expecting a 30(b)(6) witness to memorize and testify about a broad subject area, and have endorsed the use of written answers to such broad questions. *See Smith v. Univ. of Pa.*, 2006 WL 1722402, *2 (E.D. Pa. June 21, 2006)[4] (plaintiff's 30(b)(6) notice seeking testimony regarding every discrimination lawsuit filed against defendant and the salaries of every African-American employee at the University was burdensome; court ordered notice of deposition to be treated as interrogatories and requests for production of documents); *In re Independent Service Organizations Antitrust Litigation*, 168 F.R.D. 651, 654 (D. Kan. 1996) (plaintiff's attempt to discover facts through 30(b)(6) deposition "overbroad, inefficient and unreasonable" as it sought to have counsel "marshal all of its factual proof and prepare a witness" to testify where information was discoverable through other means, including summary of underlying facts that defendant offered to provide plaintiff); *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275, 286 (N.D. Cal. 1991), reversed on other grounds, 765 F. Supp. 611 (N.D. Cal. 1991) (party's use of 30(b)(6) deposition for purpose of detailing bases for contentions improper; contention interrogatories more

[3] Sidley is informed that the EEOC sent members of the press an e-mail stating that the EEOC was attempting to "compel Sidley & Austin to articulate any reasons other than age which compelled the expulsion of 'partners'", attaching this motion. (Ex. 4, 7/11/06 email from J. Hendrickson.) As the EEOC knows, Sidley has articulated those reasons in its lengthy written response, but that response is confidential under the terms of the Protective Order in order to protect the individuals' privacy interests.

[4] A copy of all unpublished decisions cited in this brief are attached as Ex. 5.

appropriate discovery vehicle where "no one human being can be expected to set forth, especially orally in deposition, a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken").

Even the case that the EEOC cites, *SmithKline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082 (N.D. Ill. Jan. 24, 2000) (Kocoras, J.), reaches the same conclusion. The EEOC quotes selectively from that case, citing it only for the undisputed proposition that "Rule 30(b)(6) is a vehicle for streamlining the discovery process," and referring to the fact that the Court did order a 30(b)(6) deposition on certain narrow factual topics. (EEOC Motion at 6.) But the EEOC fails to inform the Court that in *SmithKline*, the Court also stated that:

> the recipient of a Rule 30(b)(6) request is not required to have its counsel muster all of its factual evidence to prepare a witness to be able to testify regarding a defense or claim . . . This rule holds especially true when the information sought is likely discoverable from other sources.

Id. at *9. The Court further ruled, consistent with Sidley's position here, that Plaintiff was *not* required to present a 30(b)(6) witness to testify regarding responses to interrogatories and requests for productions, because the information could be more readily and efficiently obtained by propounding standard interrogatories. *Id.* at *10. The Court reasoned that a 30(b)(6) topic relating to the "factual basis" for Plaintiff's claim that Defendant had infringed the patent imposed an "undue burden" and was "needlessly duplicative because Defendants will already be receiving this information." *Id.* Finally, the Court refused to require Plaintiff to produce a 30(b)(6) witness to testify about the "investigation and testing activities which led to the conclusion that Defendants were infringing" the patent because a 30(b)(6) deposition would be an "inefficient means of ascertaining the information" sought, and use of standard interrogatories would allow plaintiff to "synthesize the information from all of the necessary sources, which would then be presented to Defendants in a comprehensible manner." As in

SmithKline, the written response provided in this case represents a synthesis of information from the relevant sources, presented in a comprehensive manner. *Id.*

The EEOC quotes selectively from a letter from Sidley counsel to suggest that Sidley refused to interview its Management and Executive Committee members to identify the relevant facts. In fact, as stated in that letter, Sidley gathered facts from all Management and Executive Committee members (and other Sidley partners) who had personal knowledge of the performance of the partners at issue. Sidley also identified the most knowledgeable individuals for the EEOC. Sidley did *not* interview each committee member about each individual when their knowledge was derivative of others, explaining to the EEOC that such a project would delay the response. Those broader interviews are underway, and Sidley can supplement Amended Exhibit D with any resulting changes or additions within the next few weeks.[5] To the extent that Sidley later attempts to supplement this interrogatory answer with new information that the EEOC contends should have been disclosed earlier, the Federal Rules of Civil Procedure and this Court's own views on proper supplementation will control.

II. The EEOC's Deposition Notice Is Procedurally Improper, Cumulative And Duplicative.

Earlier this year, the EEOC sought a 30(b)(6) deposition of a Sidley witness to testify about 8 different topics (or 13, including subparts), including the process and criteria Sidley employed in 1999 for selecting partners for changes in status, reduction in compensation, retirement, termination, a change in method of compensation or for placing partners in categories or groups, the identity of individuals involved in those decisions and the authors of various handwritten documents. Though broad, the topics related to Sidley's general decision-making process, and Sidley presented a member of its 1999 Management Committee for what turned out

[5] Despite Sidley's mid-June offer to schedule Management and Executive Committee depositions, the EEOC has not yet noticed any such depositions, and a supplemental response would not result in any delay.

to be a deposition lasting until after 7 p.m. Sidley also voluntarily provided a written description of those criteria and processes. (*See* Ex. 3.) Consistent with its current position, Sidley stated that the witness could not provide all facts relating to each decision at issue, but that he could (and did) explain the chronology and the general criteria applied in making these decisions.

The EEOC's attempt to unilaterally notice a second round of 30(b)(6) depositions, without leave of court, flies in the face of Fed. R. Civ. P. 30(a)(2)(B). That rule provides that a party may take the testimony of any person without leave of court *unless* "the person to be examined has already been deposed in this case." This Rule applies equally to 30(b)(6) depositions as to individual depositions. *See In re Sulfuric Acid Antitrust Litigation*, 2005 WL 1994105, *2 (N.D. Ill. Aug. 19, 2005) (invalidating second round of 30(b)(6) deposition notices, issued without leave of court, rejecting defendant's contention that the rule does not apply to "new topics"). *See also Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 193 (1st Cir. 2001) (affirming district court order quashing subpoena for 30(b)(6) deposition where previous 30(b)(6) deposition taken). As the Court discussed in *In re Sulfuric Acid Antitrust Litigation*, the successive deposition is to be allowed only if the Court determines that the requested discovery is not unreasonably cumulative or duplicative, and is not obtainable from an alternative more convenient or less burdensome source. 2005 WL 1994105 at *2.

In this case, the second 30(b)(6) deposition is clearly duplicative and cumulative. In addition to the information already provided in interrogatory responses, the EEOC has confirmed that it intends to depose each of the individuals who has personal knowledge of the performance of any individual. The Federal Rules discourage duplication and unnecessary discovery, *see* Fed. R. Civ. P. 26(b)(2)(i). At best, a 30(b)(6) witness could only be expected to provide the kind of detail produced in Sidley's 36-page written response. The EEOC's proposed "follow-up" questions are nothing more than an attempt to obtain force a witness *without personal knowledge*

to memorize and regurgitate the personal knowledge of others, with the resulting potential for error and mistakes.

CONCLUSION

Sidley has already provided complete responses to the EEOC's deposition topics in response to virtually identical EEOC discovery requests. It has provided a corporate spokesperson on a wide range of general topics. The EEOC intends to depose all decision-makers to seek their personal knowledge. The EEOC's request for oral testimony of a company spokesperson on these broad topics, based on information to be gleaned from dozens of sources, is an invitation to a mistake which the EEOC would then argue binds Sidley to a position. A request of such breadth can only be fairly addressed in writing, after careful review by the individuals who possess the personal knowledge reflected therein. For those reasons, Sidley requests that the Court deny the EEOC's motion.

Dated: July 12, 2006

Respectfully submitted,

SIDLEY AUSTIN LLP

By: /s/ Maile H. Solís
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CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **July 12, 2006**, I caused a true and complete copy of the foregoing **DEFENDANT SIDLEY AUSTIN LLP'S RESPONSE TO 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"** to be served by Electronic Mail Transmission via ECF as to Filing Users upon the following:

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