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

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	No. 05 C 0208
Plaintiff,	)	Honorable James B. Zagel
v.	)	Magistrate Martin C. Ashman
SIDLEY AUSTIN BROWN & WOOD LLP,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DEPONENT WILLIAM WHITE TO ANSWER QUESTIONS REGARDING HIS CONVERSATIONS WITH SIDLEY MANAGEMENT AND FOR COMPLETION OF HIS DEPOSITION

William White's deposition was taken on July 26, 2006.[1] Since the deposition, Sidley and the EEOC have been in regular contact, including a lengthy meet-and-confer on discovery issues only three days before the EEOC filed this motion. None of the many conversations, e-mails and correspondence between the parties included a single word relating to the White deposition. Rather than honoring its meet and confer obligation, the EEOC elected to file a motion insinuating, without basis, that the conversations in question were somehow inappropriate. This continues a troubling pattern of inflammatory public filings concerning disputes that could easily be resolved by the meet-and-confer process, and which filings are undoubtedly intended only to capture the attention of the press.

Sidley has never objected to continuing Mr. White's deposition. Moreover, Sidley's objections at the White deposition were made to avoid a privilege waiver; Sidley welcomes full disclosure of the conversations, particularly given the unfounded suggestions

[1] Mr. White was Sidley's Finance Director from 1983 until 2000. Since 2000, Mr. White has continued to work for the firm as a part-time consultant.

made in the EEOC's motion. As discussed below, Sidley offers a compromise that allows the EEOC to pursue discovery without creating the risk of waiver. Sidley would have offered this compromise at any time after the deposition. However, because of the EEOC's silence and failure to follow common courtesy and established meet-and-confer procedures, Sidley assumed that the EEOC had decided not to pursue these issues.[2]

In short, this motion is a waste of the time of the Court and the parties. The Court should deny the motion to compel. The Court should also instruct the EEOC that it may not file further discovery motions absent full compliance with Local Rule 12(k)/37.2.[3]

ARGUMENT

I. Sidley Properly Requested That Mr. White Not Answer Questions That Might Waive Sidley's Privilege.

During his deposition, Mr. White testified at length and without objection concerning the letter that he addressed (but did not send) to the Social Security Administration. Sidley did object, however, when the EEOC inquired about conversations that Mr. White had with Ted Miller and Bill Conlon. The EEOC is well aware that Mr. Miller and Mr. Conlon are Sidley attorneys who are acting as counsel to the firm and assisting in the litigation of this case. (*See, e.g.*, Pls.' Ex. E at 163:22-164:4; Ex. F at 189:6-19.) The foundational questions at the deposition raised the possibility that these conversations were undertaken by Sidley's counsel as part of their investigation of the underlying issues. Accordingly, Sidley objected to the questions on privilege grounds.

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[2] Given the EEOC's own expansive and improper views of the attorney-client privilege, Sidley had every reason to assume that the EEOC would not pursue Sidley's valid assertion of privilege. For example, the EEOC has asserted the attorney-claimant privilege to shield disclosure of communications with individuals whom are not claimants and whom the EEOC does not purport to represent.

[3] All references to Local Rule 37.2 also refer to Local Rule 12(k).

Contrary to the argument in the EEOC's motion, the applicable privilege was not Mr. White's privilege, but Sidley's privilege. If Mr. Conlon or Mr. Miller were communicating with Mr. White for the purpose of collecting information necessary to render legal advice to Sidley, the communications were clearly privileged. *See Upjohn Co. v. United States*, 449 U.S. 383, 394-95, 101 S.Ct. 677, 685 (1981); *see, e.g., Stopka v. Alliance of Am. Insurers*, No. 95 C 7487, 1996 WL 204324, at *5 (N.D. Ill. April 25, 1996) ("The attorney-client privilege applies to communications made by corporate employees concerning matters pertinent to their corporate duties if sought by the corporation's attorney in order to formulate and render legal advice to the corporation."); *EEOC v. Koch Meat Co., Inc.*, No. 91 C 4715, 1992 WL 332310, at *3 (N.D. Ill. Nov. 5, 1992) (denying motion to compel where counsel communicated with employee in order to investigate and advise client regarding discrimination charges). Courts have recognized that this privilege extends to communications with former employees and independent contractors. *See, e.g., In re Allen*, 106 F.3d 582 (4th Cir. 1997) (former employee); *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994) (independent contractor); *Cool v. Borgwarner Diversified Transmission Prods. Inc.*, No. IP 02-960-C(B/S), 2003 WL 23009017, at *2 (S.D. Ind. Oct. 29, 2003) (former employee); *Rager v. Boise Cascade Corp.*, No. 88 C 1436, 1988 WL 84724, at *4 (N.D. Ill. Aug. 5, 1988) (agent).

To avoid a potential waiver concerning the Conlon and Miller conversations, Sidley requested that Mr. White not answer the EEOC's questions. However, Sidley offered multiple times to have a conversation with Mr. White off the record to determine whether he could respond to the question without waiving the privilege. (*See, e.g.,* Pls.' Ex. F at 190:1-4. ("I can have a conversation with him in the hallway. If it's not privileged, then I'll let him testify. But you're not giving me that opportunity."); *see also,* 186:4-6.) The EEOC's counsel

obstinately refused, stating that she and the court reporter would follow Sidley's counsel into the hallway if such a conversation was attempted. *Id.* at 186:7-9.

It is commonplace for counsel and a witness to confer during the course of a deposition to avoid a privilege waiver. Had the EEOC cooperated, this motion would have been unnecessary, as we explain below. The EEOC did not cooperate, so Sidley was required to stand on its objections and investigate the matter after the conclusion of the deposition.

II. Sidley Will Allow Mr. White To Testify To His Conversation With Mr. Conlon (Subject To A Non-Waiver Agreement) And To His Conversation With Mr. Miller.

After the deposition concluded, Sidley investigated the substance of the conversations at issue. Sidley has confirmed that Mr. Miller did not communicate with Mr. White for the purpose of investigating the EEOC's claim and providing advice to Sidley. Therefore, Sidley has no objection to allowing Mr. White to answer questions relating to his conversation with Mr. Miller.

The Conlon conversation, on the other hand, does fall within the privilege. Mr. Conlon was communicating with Mr. White for the purpose of investigating the EEOC's claim and providing legal advice to Sidley. Thus, under the authority cited above, that conversation is privileged.

Sidley, however, has no interest in "thwarting" discovery on any issue, particularly this conversation. Sidley has been more than cooperative in discovery matters, producing tens of thousands of documents and responding to over one hundred written discovery requests. Sidley's only concern is preventing the EEOC from claiming that disclosure of this conversation constitutes a waiver of Sidley's privilege concerning any other communication.

Sidley, therefore, will not assert a privilege objection to any question about any conversation between Mr. White and Mr. Conlon on the basis of privilege on the condition that

the EEOC will agree that Mr. White's testimony does not waive Sidley's privilege with regard to any other communication. This is a reasonable means of addressing this issue. Sidley would have offered this compromise at any time if the EEOC had undertaken the required courtesy of raising this issue prior to filing a motion.

III. Sidley Has No Objection To Continuing The Deposition.

Sidley has no objection to the EEOC's request to continue the deposition for an additional hour. Contrary to the EEOC's suggestion, Sidley never objected to allowing the EEOC to continue with the deposition. That is more than clear from the transcript excerpts that the EEOC cites.

CONCLUSION

This motion is an unfortunate waste of the parties' and Court's resources. Had the EEOC honored its obligations under Local Rule 37.2, this dispute could have been avoided. The EEOC's failure to take reasonable steps to resolve these issues prior to making a public record raises serious questions about the EEOC's true motive for filing this motion. (*See, e.g.,* reference on p. 3 of the EEOC's motion to the press coverage resulting from its prior motion concerning Mr. White).

The Court should deny the EEOC's motion. The Court should also explicitly instruct the EEOC to follow the letter of Local Rule 37.2 prior to filing any future discovery motion.

Dated: September 15, 2006

Respectfully submitted,

SIDLEY AUSTIN LLP

By: s/ Michael P. Conway
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CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **September 15, 2006**, I caused a true and complete copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DEPONENT WILLIAM WHITE TO ANSWER QUESTIONS REGARDING HIS CONVERSATIONS WITH SIDLEY MANAGEMENT AND FOR COMPLETION OF HIS DEPOSITION** to be served by Electronic Mail Transmission via ECF as to Filing Users upon the following:

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