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

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

EEOC'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLAINCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DISCOVERY RESPONSES

Despite Sidley's lengthy motion to compel, there are only two categories of documents and/or information in dispute. The first is the discoverability of tax returns where interim earnings are available from other sources and the second is the discoverability of information (other than interim earnings) about *subsequent* employment of class members who are no longer at Sidley. As demonstrated below, none of the other issues raised in Sidley's motion are in dispute as EEOC has fully responded to Sidley's discovery requests regarding such issues with all information presently available. With regard to tax returns and performance in subsequent employment, Sidley's requests are intrusive, harassing and not reasonably calculated to lead to the discovery of admissible evidence.[1]

I. EEOC Has Provided Responsive Information on Damages, on Comparators, on Sidley's Age-Based Retirement Policy, and on Liquidated Damages

It is curious that Sidley has moved to compel EEOC to provide its *contentions* on damages, on "comparators", on Sidley's age-based retirement policy, and on liquidated damages

[1] The names of individuals have been redacted from the publicly-filed version of this Memorandum pursuant to the protective order in this case. The unredacted version of this Memorandum is being filed under seal. Additionally, exhibits in support of this Memorandum are being filed under seal because they contain confidential information.

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as EEOC has never objected to providing this information[2] and indeed, has provided all responsive information it has at the present time. As is necessarily so with responses to contention interrogatories served before the close of discovery, EEOC's responses are based on its current opinion of the relevance of information discovered to date. As discovery progresses, EEOC will no doubt learn of additional evidence supporting its various contentions in this case. EEOC's view of the relevance of evidence it has received to date may also change as EEOC learns more about the case through the discovery process. It is for this reason, that courts often defer contention interrogatories until after the close of discovery. Rather than asking the Court to defer these interrogatories, however, EEOC has been willing from the outset to answer Sidley's contention interrogatories and has continually supplemented its interrogatory answers as it has learned information through discovery.[3]

In short, to date, EEOC has fully responded to Sidley's contention interrogatories based on information available and will continue to supplement those answers throughout the discovery process. EEOC is not withholding any responsive information and simply cannot be compelled to provide information it does not have.

A. EEOC's Response to Interrogatory No. 7 of Sidley's Second Set of Interrogatories Seeking Information of Damages

Interrogatory No. 7 reads as follows:

> Describe for each Alleged Claimant each element or item of damages you contend the Alleged Claimant suffered as a result of Sidley's alleged discrimination. For each element or item of damages identified, state: (i) the type (e.g., back pay, front pay, liquidated damages, etc.) and the amount of each element or item of alleged damages you contend were suffered; (ii) how each element or item of damages was calculated;

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[2] EEOC has objected to these interrogatories on the basis that they are premature, but has never contended that Sidley is not entitled to the information sought.

[3] To date, EEOC has served four supplemental responses to Sidley's first set of contention interrogatories and one supplemental response to Sidley's second set of interrogatories. EEOC has provided these supplemental responses in a timely manner as it has discovered new information. *See* EEOC's Interrogatory Responses, attached as Exhibit A.

> (iii) all facts supporting EEOC's contention that the Alleged Claimant suffered such damages; and (iv) all documents you believe support EEOC's contention.

In response to this interrogatory, EEOC stated that it is seeking back pay (including benefits), front pay (including benefits) or reinstatement, and liquidated damages. As back pay is calculated by subtracting interim earnings from the amount each class member would have earned if he or she had remained a partner at Sidley, EEOC has been in the process of producing the interim earnings of each class member it represents. To date, EEOC has provided this information for all but seven of the class members it represents and anticipates providing the interim earnings of five of the remaining class members by September 29, 2006. EEOC will provide the information for the remaining two class members shortly thereafter.

What EEOC does not know and cannot provide at this point in the litigation is what each class member would have earned had he or she remained a partner at Sidley. Indeed, it is Sidley who possesses this information. Through oral discovery of Defendant's witnesses, EEOC intends to learn how annual increases for partners have been calculated from 1999 (*i.e.*, the time of the challenged demotions) through the present in terms of both units and percentages. EEOC also needs information on the value and cost of lost benefits and has indicated to Sidley that it will be issuing discovery on these questions. Given the complexity of damages in this case, EEOC will likely retain a damages expert but has not done so yet. As it has done in the past, EEOC will continue to supplement its interrogatory responses as information is discovered.[4]

B. EEOC's Response to Interrogatory No. 2 of Sidley's First Set of Interrogatories Seeking the Identity of Comparators

Interrogatory no. 2 of Sidley's First Set of Interrogatories seeks the names and ages of any

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[4] In an effort to reach a compromise or resolution on Sidley's Motion to Compel, EEOC sent a letter to Sidley's counsel on September 20, 2006, setting forth what it has agreed to or is willing to agree to produce in discovery. On September 25, 2006, Sidley responded to that letter. The letter and response are attached as Exhibit B.

individuals similarly situated to the class members whom EEOC contends were treated more favorably. On September 8, 2006, in its Fourth Supplemental response to Sidley's First Set of Interrogatories, EEOC provided a list of all comparators of whom it is currently aware. As EEOC explained in its Fourth Supplemental Response, based on the information obtained from Sidley through discovery, EEOC was able to identify younger partners whom did not perform as well as the class members in terms of hours and billings.

EEOC will continue to identify additional comparators as information becomes available through discovery. Sidley previously identified client complaints as a reason for the demotion of some of the class members. Accordingly, in order to identify comparators, EEOC issued discovery to identify other partners about whom clients complained. EEOC is awaiting Sidley's response to this discovery. Upon receipt of such response, EEOC will supplement its interrogatory responses to identify additional comparators. Additionally, on September 14, 2006, less than 10 days ago, EEOC received from Sidley its final and complete recitation of alleged reasons for downgrading the class members. Now that EEOC has this recitation, EEOC can engage in discovery to identify partners who had the same performance "deficiencies" that Sidley alleges the class members had.

In summary, EEOC has provided all comparators of which it is aware and will timely supplement its discovery responses when it learns of additional comparators. Sidley's suggestion that the Court should set a date by which the EEOC must identify all comparators simply does not make sense as it is through the discovery process that a plaintiff learns of such information.

Sidley perhaps may be thinking that turnabout is fair play – since it had to identify by a date certain all proffered reasons for the change in status of the class members, EEOC should

have to identify all comparators by a date certain. That, however, does not make sense. Sidley was aware of all the reasons in 1999 when it made the decisions and obviously, did not need to learn of the reasons through the discovery process.

C. EEOC's Response to Interrogatory No. 6 of Sidley's First Set of Interrogatories Regarding Evidence of an Age-based Retirement Policy

As the EEOC explained in its September 20, 2006 letter to Sidley, EEOC has set forth all facts (in its initial and supplemental responses) of which it is currently aware supporting its contention that Sidley maintained an age-based retirement policy. These facts include, for example, statements to partners that they had to retire because they were 65. See Exhibit A. EEOC will continue to supplement its interrogatory answers in a timely fashion as it learns of more facts supporting its contention that Sidley maintained an age-based retirement policy.

D. **EEOC's Response to Interrogatory No. 8 of Sidley's Second Set of Interrogatories Regarding Liquidated Damages**

EEOC has objected to this contention interrogatory as premature, but has answered with the facts discovered to date. Thus far, EEOC has taken the deposition of only one member of the 32 member Executive Committee that made the decisions at issue. In the depositions of the Executive Committee members, EEOC will probe what each member's knowledge of the ADEA was at and before the decisions at issue were made. These depositions may likely yield additional information responsive to Sidley's contention interrogatory. In addition, EEOC has noticed the deposition of Sidley's labor and employment attorney who provided the Executive Committee with advice on the decisions. This deposition also may likely reveal additional responsive information. Again, here Sidley's attempt to preclude the EEOC from relying upon any documents or information that EEOC currently has in its possession but which it has not

cited in support of its contentions is simply unreasonable. EEOC's view of documents and testimony in its possession may evolve as discovery continues.

II. EEOC Has Provided Information on Mitigation Efforts

Interrogatory no. 9 of Sidley's First Set of Interrogatories asks EEOC to "Describe for each Alleged Claimant all efforts you contend were taken by the Alleged Claimant to mitigate his or her alleged damages." As with the requests relating to damages and comparators, EEOC has never objected to Interrogatory no. 9 and is in the process of providing responsive information.

In response to subpoena request no. 1 (which EEOC has also never object to), EEOC is producing all documents which each class member has regarding his or her mitigation efforts. Sidley indicates in its motion, that "to the extent they turned down that offer [to remain as Sidley as "counsel" or as "senior counsel"], Sidley is entitled to documents reflecting the individual's rationale for doing so." EEOC is not aware of the existence of any such documents. In short, EEOC is producing all non-privileged documents responsive to Interrogatory no. 9 and to subpoena request no. 1.[5]

III. EEOC Has Produced Tax Returns Where Necessary to Reflect Income from Working

For each class member it represents, EEOC has agreed to produce documents sufficient to show *all* compensation for work performed from the time of his or her change of status to the present. Where, for example, W-2s and/or Form 1099s reflect all such income, these are the documents EEOC is producing. If, however, 1040 tax returns are the only documents sufficient

[5] There are two class members who have earned so much more in subsequent employment than they did at Sidley, that it is unlikely they have any back pay and EEOC is not seeking back pay or front pay on their behalf. Because EEOC is not seeking back pay or front pay on their behalf, EEOC is not producing any information or documents related to their mitigation efforts or subsequent employment.

to show all compensation from working, EEOC is producing the 1040 tax returns. EEOC's production is consistent with the law in this Circuit.

The very case cited by Sidley makes clear that a defendant is not entitled to an individual's 1040 tax returns if the information defendant seeks is available from other sources. Sidley claims that *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 75 (7th Cir. 1992) holds that tax returns are discoverable when a plaintiff puts his or her income at issue. This is not what *Poulos* holds. In *Poulos*, the Seventh Circuit held that the plaintiff's tax returns in that case were discoverable because "there was no reasonable alternative source for the information requested." *Id.* Consistent with *Poulos*, courts have denied a request for tax returns where the amount of a plaintiff's interim earnings is available from other sources. *See, e.g.*, *Bagnall v. Freeman Decorating Co.*, 196 F.R.D. 329, 333 (N.D.Ill. 2000)(denying the defendant's request for 1040s where W-2s were produced); *Gattegno v. Pricewaterhouse*, 205 F.R.D. 70 (D.Conn. 2001)(denying defendant's request for 1040s when information was available from other sources).

The above law makes clear that EEOC's practice in this case of not producing tax returns where the amount of interim earnings is available from other sources is completely appropriate and sufficient.

IV. Documents Reflecting Ownership Interests in Other Law Firms and the Terms and Conditions of Employment

Sidley claims that its request for documents regarding the class members' ownership interests in law firms in which they have worked after leaving Sidley and documents regarding the terms and conditions of subsequent employment is calculated to obtain three categories of information: (1) benefits received in subsequent employment; (2) compensation formulae, if any, applicable in subsequent employment; and (3) whether the class member worked part-time

or full-time. These requests are overly broad and harassing because EEOC has agreed to provide this information from other sources and because compliance with the requests would require the class members to seek permission from their new firms to take out information that is no doubt considered confidential and highly sensitive.

EEOC has already agreed to give Sidley the compensation, benefit, and working capacity information (part-time versus full-time) from other sources. As indicated above, EEOC has agreed to provide Sidley with documents sufficient to show the interim earnings of each class member. Therefore, there is no need to get internal documents from subsequent law firms showing compensation formulae. It is the actual amount of compensation which is relevant to a calculation of back pay. Likewise, EEOC has agreed to provide Sidley with documents reflecting benefits received and/or available from subsequent employment. Finally, EEOC has agreed that Sidley may ask each class member during his or her deposition whether he or she is working full or part-time. Sidley does not need documents from other law firms for this purpose.

Other courts in this circuit have refused to compel discovery regarding subsequent employment where the plaintiff has provided the amount of interim earnings and benefit information. These courts have found the requests overbroad, irrelevant and harassing because they necessarily interfere with a claimant's subsequent employment. In *EEOC v. Caterpillar, Inc.*, No. 03 C 5636 (N.D.Ill. February 18, 2005), defendant served a subpoena on a class member's subsequent employer seeking, *inter alia*, documents regarding her performance, compensation, promotions (if any), and demotions (if any). *See* Subpoena, attached hereto as Exhibit C. Plaintiff had already provided information regarding her compensation and benefits. *See* Transcript of Proceedings, *EEOC v. Caterpillar, Inc.*, No. 03 C 5636, February 18, 2005, at p. 17, attached hereto as Exhibit D. Nevertheless, defendant's counsel argued that it was entitled

to this information since the class member was seeking back pay. *Id.* at 19. Judge Pallmeyer rejected defendant's argument and quashed the subpoena, stating, "I really think that this is an unnecessary and harassing endeavor to obtain information. I think the Court is supposed to impose appropriate limits on discovery. That's what I am doing here." *Id.* at p. 21.

Similarly, Judge Shadur granted a protective order against defendant's request for documents regarding a claimant's subsequent employment. In granting the protective order, Judge Shadur stated that defendant's request "has all of the earmarks of basically harassment" and "is the kind of thing for which discovery is not geared." *EEOC v. Pepsi Americas, Inc.*, No. 03 C 6576 (N.D. Ill. September 17, 2004). Transcript of Proceedings, attached hereto as Exhibit E. Additionally, in *Perry v. Best Lock Corp.*, 1999 WL 33494858 *2 (S.D.Ind. 1999), the court quashed a subpoena on plaintiff's subsequent employer for personnel records, including performance reviews. In quashing the subpoena, the court stated, "If filing . . . a case alleging . . . employment discrimination opens up the prospect of discovery directed at all previous, current, and prospective employers, there is a serious risk that such discovery can become 'an instrument for delay and oppression.'"[6]

V. Sidley Is Not Entitled to Documents Regarding Post-Sidley Performance

In addition to seeking documents reflecting ownership interest in subsequent firms, Sidley is seeking documents reflecting performance in new firms. Sidley makes the novel argument that performance in subsequent employment is relevant to the issue of mitigation. Not surprisingly, Sidley has not cited a single case in support of this proposition.

Specifically, Sidley seeks the following:

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[6] That Sidley served the subpoenas on the class members rather than their subsequent employers is immaterial. The class members no doubt would have to seek permission from their subsequent employers to take out and share such sensitive information as ownership interests.

- All documents reflecting or relating to annual hours billed or charged to clients since becoming an employee or partner of a firm since leaving Sidley;
- All documents reflecting or relating to revenues generated from billings to clients the class member originated or is responsible for;
- All documents regarding clients retained since leaving Sidley; and
- All documents regarding business development efforts.

Sidley's argument presumably is that a class member could have earned more had they billed more hours, generated more billings, etc. and that, therefore, any back pay amount should be reduced by the increased amount the class member could have earned had he or she billed more hours, had more clients, etc.[7] This is simply not how the doctrine of mitigation works. As the Court knows, pursuant to the doctrine of mitigation, if defendant proves that a claimant did not engage in reasonable efforts to *find* comparable employment or to *retain* comparable employment once found, and defendant proves the *amount* the claimant would have earned had he engaged in reasonable efforts to find and/or keep (that is, not be discharged from) a job once found, then a claimant's claim for lost wages will be reduced by that amount. *See, e.g., United States v. City of Chicago*, 853 F.2d 572, 578-79 (7th Cir. 1998); Federal Civil Jury Instructions of the Seventh Circuit, Instruction 3.12.

There is no doctrine which allows a defendant to argue that had a plaintiff performed better in subsequent employment, he would have earned more and therefore the back pay award should be reduced. Any such argument would be completely speculative and not based on admissible evidence. To even attempt to make such an argument, Sidley, at the very least, would have to depose management members of the new firm to discover how many billable hours are expected, how the claimant's billable hours compare to others, how billings are assigned to

[7] Sidley, in its motion, once again makes the argument that these documents are relevant to whether a class member worked full-time or part-time. These requests are overly broad and intrusive, and certainly not necessary to ascertain whether a class member worked part-time in subsequent employment.

particular attorneys, how revenues are calculated, how compensation is determined and what part billings and hours play in the determination of compensation, and theoretically how much more a claimant would have to bill, etc. to earn more. Even if Sidley were to engage in this kind of intrusive and far reaching discovery, there is simply no way for Sidley to present to a jury an amount a class member would have made had his performance been different.

As the above demonstrates, the requests are not reasonably calculated to lead to admissible evidence and EEOC should not be compelled to respond. Moreover, the requests are extremely intrusive and harassing and should not be allowed for that reason, as the cases cited in the above section recognize.

Sidley argues that it is entitled to this information not only because it is relevant to mitigation, but because it produced for class members who stayed at Sidley in their demoted classifications documents regarding the class members' performance after their demotions. Sidley is comparing apples to oranges. For class members who stayed at Sidley, documents regarding their performance after their demotions are relevant to pretext. Sidley has proffered performance as the reasons for the demotion of many of the class members. If class members who remained at Sidley performed well after their demotions and Sidley allowed them to work on the same or similar projects as they had before their demotions, those facts would cast doubt on the veracity of Sidley's proffered reasons for the demotions. How class members performed in different law firms with different clients and different expectations is irrelevant to the validity of Sidley's proffered reasons.

VI. The EEOC Has Identified All Non-Privileged Communications With Former Sidley Partners

As EEOC explained to Sidley in its September 20, 2006 letter, EEOC has fully responded

to Interrogatory No. 9 of Sidley's First Set of Interrogatories by identifying all non-privileged conversations it has had to date with former Sidley partners and/or employees.[8] With regard to **[REDACTED]**, EEOC has determined that he is not a member of the class. However, all conversations EEOC has had with **[REDACTED]** have been for the purpose of providing legal advice regarding whether he is eligible to be a class member in this case. EEOC is in the process of obtaining a declaration from **[REDACTED]** which so states and will provide the declaration to Sidley upon receipt. Because all conversations were for the purpose of obtaining legal advice, they are protected from disclosure by the attorney-client privilege, a privilege which belongs to **[REDACTED]**.

VII. Claims Relating to [REDACTED] and [REDACTED]

EEOC has fully responded to Interrogatory No. 5 of Sidley's Second Set of Interrogatory asking whether EEOC contends whether **[REDACTED]** and **[REDACTED]** are covered by the ADEA and to explain the basis for the contention. EEOC has responded that it does so contend because Sidley's decision to strip them of partnership status took effect when each them was 40 years old. In its motion, Sidley states that it is entitled to know what employment action EEOC deems operative in determining that **[REDACTED]** and **[REDACTED]** are covered by the ADEA, but EEOC has already answered this.

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[8] Sidley states in its September 25, 2006 letter (Exhibit B) that EEOC failed to disclose a conversation with former partner **[REDACTED]**. EEOC did speak briefly with **[REDACTED]** to set up a time to meet. EEOC had no substantive discussion with **[REDACTED]** and of course, if it had, would have disclosed any substantive discussion.

CONCLUSION

Fore the foregoing reasons, Sidley's motion to compel should be denied.

August 17, 2006

Respectfully Submitted,

_s/ Justin Mulaire________

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CERTIFICATE OF SERVICE

Justin Mulaire, an attorney, hereby certifies that on June 5, 2006, he caused a copy of the foregoing **Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel** (redacted form) to be served electronically, via the court's Electronic Case Filing system, upon counsel to defendant Sidley Austin, L.L.P.

September 25, 2006

_s/ Justin Mulaire________

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