EEOC v. Sidley Austin Brown. Doc. 96

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'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLIANCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DISCOVERY RESPONSES[1]

The EEOC has insisted on complete and final responses to its discovery requests, while providing only incomplete and preliminary responses to Sidley's discovery requests.[2] In response to specific issues addressed by Sidley's motion to compel, the EEOC asserts that it should be able to pick the form of discovery to which it will respond (*e.g.*, depositions and document production instead of interrogatory answers) and claims that interrogatories pending for more than a year are "premature." The EEOC's positions are not supported by the Federal Rules of Civil Procedure or the authority interpreting those rules. The discovery sought by Sidley is plainly relevant, and the EEOC should be ordered to comply now with its discovery obligations.

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[1] Last week, this Court urged the parties to attempt to reach a reasonable compromise on the issues in Sidley's motion to compel. The EEOC chose to stand on its objections in their entirety, providing only an additional fact relating to the two putative claimants who were 39 years old at the time of the events in question. (*See* Ex. B to EEOC's Mem. in Opp'n to Sidley's Motion ("EEOC Opp'n").)

[2] As of the date of filing of Sidley's motion, for example, the EEOC had responded to Sidley's June 2006 subpoenas for only 5 of 27 putative claimants it claimed to represent. On September 25, 2006, nearly 3 ½ months after issuance of those subpoenas, the EEOC produced documents for another group of claimants, but has failed to produce documents for the final seven individuals.

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I. THE EEOC SHOULD BE REQUIRED TO DESCRIBE THE DAMAGES IT SEEKS, IDENTIFY ITS MITIGATION EVIDENCE, AND NAME ANY COMPARATORS.

The EEOC cites no cases in support of its objection that Sidley's "contention interrogatories" are premature. It cannot, because the legal authority in this district is to the contrary. Discovery has been underway for 16 months, following an investigation lasting almost five years. Sidley has produced 40,000 pages of documents, multiple sets of data in electronic form and has answered six sets of interrogatories and five sets of document requests. "When one party poses contention interrogatories after considerable discovery, and the opposing party refuses to answer the interrogatories, courts routinely compel the resisting party to answer the interrogatories." *Calobrace v. American Nat'l Can Co.*, No. 93 C 999, 1995 WL 51581, at *1 (N.D. Ill. Feb. 6, 1995). *See, e.g., In re Arlington Heights Funds Consol. Pretrial*, No. 89 C 701, 1989 WL 81965, at *1 (N.D. Ill. July 11, 1989) (granting motion to compel answer to contention interrogatories where well-calculated to narrow the issues appropriately, given the nature of plaintiff's claims; allowing plaintiff to supplement answers "if and to the extent that any future developments may give [plaintiff] the basis for additional answers to the Interrogatories"); *Rusty Jones, Inc. v. Beatrice Co.*, No. 89 C 7381, 1990 WL 139145, at *2 (N.D. Ill. Sept. 14, 1990) (granting defendant's motion to compel answer to contention interrogatories where plaintiff had access to thousands of pages of defendant's documents, where defendant had already answered interrogatories and document requests, and because plaintiff had an obligation to investigate claim before filing complaint).

A. The EEOC Must Describe The Putative Claimants' Alleged Damages. (Int. No. 7 (2nd Set); EEOC Opp'n Section I(A).)

Although the EEOC initially objected to Sidley's damages interrogatory by stating that it was premature, it does not, as it cannot, rely on that argument here. "Contention

interrogatories that seek damage theory and methodology information from a plaintiff almost invariably will comport with the requirements of Rules 26(b)(1) and 33(c) of the Federal Rules of Civil Procedure, seeking as they do, information about an inherent element of the claim." *See United States ex rel. Tyson v. Amerigroup Illinois, Inc.*, 230 F.R.D. 538, 544 (N.D. Ill. 2005) (denying plaintiff's motion to compel defendant to respond to contention interrogatory seeking defendant's counter-theories on plaintiff's damages; explaining that damages interrogatories posed by defendant are proper and even encouraged). The EEOC even concedes that Sidley is entitled to this information, stating that it "has never contended that Sidley is not entitled to the information sought." (EEOC Opp'n at n.2.) The EEOC argues, however, that the fact that it has provided documents with which Sidley can come up with its own damages calculations is sufficient.

Sidley is entitled to a present statement of the EEOC's and the putative claimants' position on damages. Sidley has provided all information requested, including by voluntarily providing damage-related information in response to the EEOC's claims that certain information was needed to calculate damages. (*See* Ex. 1 attached hereto, July 21, 2006 letter from L. Murray to L. Elkin, without enclosure.) Moreover, the EEOC has an obligation to state the number of years the putative claimants contend they would have continued to work as partners at Sidley if their status had not been changed. The EEOC and the putative claimants, 27 of whom the EEOC claims to represent, also have access to information on partners' income in the years after the decisions. Thus, both the EEOC and the putative claimants are in a position to describe the income they assert the putative claimants would have made at Sidley and to contrast those numbers to their actual income from other employment.

The EEOC impliedly concedes that it has undertaken a damages analysis.[3] It argues, however, that because such an analysis might be incomplete, it should not have to respond at all. This argument ignores Federal Rule of Civil Procedure 26(a), which requires a plaintiff to provide a defendant, at the outset of the case, with a statement of its damages. The EEOC presents no reason – persuasive or otherwise – why it should be permitted to escape this obligation.

B. The EEOC Refuses To Be Bound By Its Mitigation Interrogatory Response. (Int. No. 9 (2nd Set); EEOC Opp'n Section II.)

In response to Sidley's interrogatory seeking a description of all efforts to mitigate damages, the EEOC states that it will produce *documents* relating to mitigation.[4] The EEOC is not producing "business records" pursuant to Federal Rule of Civil Procedure 33(d), and no document production would completely answer questions relating to mitigation. The EEOC fails to even comment on Sidley's request for an answer to its mitigation interrogatory.

The EEOC's current response to Interrogatory No. 9 provides nothing more than a recitation of certain claimants' subsequent employment. It does not describe what, if anything, each putative claimant did to mitigate damages, including, for example, the reasons they did not accept the positions offered by Sidley, whether they applied for other jobs, attended interviews or turned down better-compensated positions. This information relating to mitigation is factual (and not a contention interrogatory) and is solely within the EEOC's control. Sidley is entitled to

[3] EEOC Attorney Hendrickson made statements to the press regarding the amount of damages at issue and the EEOC hired an accounting expert as early as 2003 to prepare a damages analysis. The EEOC entirely ignores these facts in its Opposition.

[4] The EEOC states that it is not seeking back pay or front pay for two putative claimants, as these putative claimants have made so much in subsequent employment that they do not have any damages, and thus has refused to produce any documents relating to mitigation or subsequent employment. To the extent the EEOC is not seeking liquidated damages on behalf of these putative claimants, Sidley will withdraw its requests for documents relating to mitigation only.

a full and complete description of any mitigation efforts. To the extent the EEOC contends that its response is complete, it should be bound by that response and barred from seeking to use other evidence of mitigation.

C. <u>The EEOC Must Identify and Be Bound to Its List of Comparators.</u> (Int. No. 2 (1st Set); EEOC Opp'n Section I(B).)

Over the next few months, it is likely that the EEOC and Sidley together will take in the range of 30-50 depositions, in at least four cities. The depositions will include putative claimants, who will be asked questions designed to identify similarities and differences between themselves and those the EEOC identifies as comparators. Without that identification, the depositions cannot fully explore the EEOC's (and putative claimants') assertions that the putative claimants were treated less favorably than younger partners.

The EEOC presently has in its possession the key information with which to identify comparators, if any: hours, billings, compensation, practice group and other information for all partners in the period in question, as well as access to the putative claimants' views in identifying comparators.

Despite this wealth of information, the EEOC has not identified a single comparator for four of the 34 individuals it identifies as putative claimants. If the EEOC intends to use the burden-shifting method of proof, it is required to identify younger, similarly-situated individuals who were treated more favorably, and has failed to do so. Thus, Sidley seeks to bar additional evidence as to those individuals.

To the extent the EEOC has identified younger, similarly-situated individuals whom it contends were treated more favorably than the putative claimants, Sidley requests that the EEOC be bound to that identification absent new information that could outweigh the prejudice caused by having to redo discovery.

II. THE EEOC SHOULD BE REQUIRED TO PROVIDE RELEVANT INFORMATION RESPONSIVE TO SIDLEY'S SUBPOENAS TO THE PUTATIVE CLAIMANTS.

A. The Putative Claimants' Tax Returns Are Necessary to Show All Relevant Income and Should Be Produced. (Sub. Req. Nos. 2 and 3; EEOC Opp'n Section III.)

The EEOC acknowledges that the putative claimants' tax returns are discoverable. In fact, it has agreed to produce tax returns where they "are the only documents sufficient to show all compensation from working . . . ." (EEOC Opp'n at 6-7.) The EEOC claims, however, that it is not required to produce tax returns when W-2s, K1s, or Form 1099s reflect compensation for work performed. Those documents do not capture all of the information to which Sidley is entitled, however.

The documents the EEOC seeks to produce are limited to employment compensation. However, in order to calculate damages, Sidley must know more than just income from working. For example, Sidley is entitled to know the amount of IRA distributions (Form 1040 line 15a), pensions and annuities (line 16a), and Social Security benefits (line 20a), none of which is reflected on a K1, W-2 or 1099, because such earnings operate to reduce the amount of back pay. *See, e.g., Flowers v. Komatsu Mining Sys., Inc.*, 165 F.3d 554, 558 (7th Cir. 1999) (explaining that district court has discretion to set off interim earnings and that plaintiff did not appeal district court's setoff of pension benefits and affirming setoff of social security disability payment); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 756 (7th Cir. 1983) (agreeing in ADEA case that lower court did not abuse its discretion in deducting from the total damage award all amounts received by plaintiff from unemployment compensation benefits and from retirement pension benefits). An individual's tax return contains all of the information relevant to the calculation of damages and is the best evidence of *all* sources of income.

Contrary to the EEOC's position, *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 75 (7th Cir. 1992), supports the production of tax returns. First, the court recognized that in the event of untimely objections to the production of tax returns – like the EEOC's here – objections are waived.[5] *Id.* Second, even accepting the EEOC's argument that tax returns are only discoverable where there is no alternative source, the EEOC has not offered any alternative source for the IRA, pension, and Social Security income to which Sidley is entitled. Therefore, the Court should order the EEOC to produce the putative claimants' tax returns.[6]

B. Documents Reflecting the Putative Claimants' Ownership Interests in Other Law Firms and the Terms and Conditions of Post-Sidley Employment Are Relevant to the Issues of Damages and Mitigation and Should Be Produced. (Sub. Req. Nos. 4, 10; EEOC Opp'n Section IV.)

The EEOC cannot dispute the relevance of Sidley's requests for documents regarding ownership interests and terms and conditions of employment are relevant to issues of damages and mitigation. The EEOC does not dispute that a putative claimant's subsequent partnership agreement will include information regarding benefits and compensation, including whether compensation is based in part on the number of hours worked or billings generated.

Rather than making a futile relevance argument, the EEOC asserts that the requests are intended to harass the putative claimants. That is absolutely not the case. These requests are narrowly tailored to seek only (1) documents reflecting ownership in a firm and (2) documents describing the terms and conditions of a putative claimant's employment,

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[5] As Sidley pointed out in its opening memorandum, the EEOC's objections to Sidley's subpoenas were untimely because they were not provided within 14 days of service as Federal Rule of Civil Procedure 45(c)(2)(B) requires. The EEOC does not challenge this point.

[6] In addition, as Sidley explains in its opening memorandum at page 8, in order to fully understand the tax returns and all sources of income, it is also entitled to the underlying data (*e.g.*, W-2 or K-1 forms and pension, IRA, or Social Security statements). *See, e.g., Britton v. D.A. Stuart Co.*, No. 03 C 6493, 2004 WL 2385006, at *1 (N.D. Ill. Oct. 25, 2004) (Zagel, J.) (directing plaintiff to produce W-2 forms and tax returns). For example, if a putative claimant and his or her spouse file a joint income tax return, without these supporting documents Sidley will not be able to determine the income allocable to the putative claimant.

information that the EEOC concedes to be relevant. To the extent the EEOC is concerned about confidentiality, Sidley agreed to production of the documents on an "Attorneys'-Eyes-Only" basis (an offer to which the EEOC did not respond).

Indeed, Sidley's requests are far more limited than those at issue in the three "harassment" cases the EEOC cites at pages 8 and 9 of its Opposition. Sidley has not sought performance evaluations, personnel files, and disciplinary files, even though the EEOC has opened the door to such documents by the positions it has taken in this litigation. The cases the EEOC cites each relate to a subpoena served on a claimant's subsequent employer.[7] In contrast, Sidley's subpoenas seek information directly from the claimants, eliminating any burden on the employer and embarrassment to the putative claimants. Obviously, the potential for harassment is far greater when discovery is directed at a third party as opposed to a claimant who is seeking substantial damages.

The EEOC claims that Sidley could obtain some of this information in a deposition. (EEOC Opp'n at 8.) As a threshold matter, the law does not permit the EEOC to dictate the method Sidley employs to ascertain discoverable information. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2039 (2d ed. 1994) ("Generally the party seeking discovery is entitled to make an initial choice of the method by which it is to be had and the court will not interfere unless sound reasons are shown."); *see also, e.g.*, *Kainz v. Anheuser-Busch, Inc.*, 15 F.R.D. 242, 248 (N.D. Ill. 1954) ("[A party's] claim of willingness to submit to oral deposition [does not] oblige the defendant to

[7] Sidley attaches as Ex. 2 the EEOC's Motion for Protective Order in EEOC v. PepsiAmericas, Inc., which establishes that the hearing reflected in the EEOC Exhibit E relates to a subpoena served on the claimant's employer, not the claimant herself.

pursue that discovery method. A party is free to make reasonable use of the various discovery devices provided by Rule 26 through 37 as he sees fit").

In any event, deposition testimony is not an adequate substitute for production of these documents. Sidley has a limited amount of time to pose questions at a deposition. FED. R. CIV. P. 30(d)(2). It should not be forced to squander deposition time or depose witnesses twice to discover facts that could be quickly derived from a document (even in the unlikely event that a witness could recall the specific information contained in such documents). Moreover, the objective facts presented in documents might conflict with the testimony of an interested witness. Sidley is entitled to discover relevant information and collect documents that might verify or conflict with deposition testimony. This information is necessary for Sidley to frame its defense to the EEOC's claims.

C. Documents Relating to Post-Sidley Performance Are Relevant to the EEOC's Claim of Pretext, Mitigation, and to Test the EEOC's Assertions Regarding the Putative Claimants' Post-Sidley Performance. (Sub. Req. Nos. 5-8; EEOC Opp'n Section V.)

Sidley's request for information on post-Sidley performance is unquestionably relevant. The EEOC concedes (Opp'n at 11) that it will challenge as pretextual the performance-based reasons behind the status changes, including the claimants' low billable hours, low client billings and failure to take steps to attract new clients. At the same time, the EEOC contends that Sidley is not entitled to discovery that will show that the putative claimants had those same performance problems after they departed Sidley for new firms. This information will provide powerful evidence that Sidley's justifications were non-discriminatory. Again, Sidley's subpoena requests are very narrowly tailored to seek precisely that information.

(*See* Ex. K[8] at ¶¶ 5 (billable hours), 6 (client billings), 7 (business generation) and 8 (business development efforts).)

There is also no merit to the EEOC's claim that the putative claimants' post-Sidley performance is not relevant to mitigation. In order to show that a putative claimant did not mitigate damages, Sidley bears the burden of proving that he or she did not take reasonable actions to find *comparable* employment. Sidley's document requests are relevant to determining whether any such subsequent employment was comparable to that at Sidley, including whether the job was part-time. Again, the requests are narrowly tailored to avoid harassment or intrusion. Sidley has not sought such documents as subsequent performance reviews or disciplinary records and has agreed to production of the documents on an "Attorneys'-Eyes-Only" basis.

The EEOC's attempts to justify its refusal to provide this information with the conclusory statement that the putative claimants had "different clients and different expectations" in their new firms. That is not an excuse for avoiding discovery, but a preview of the argument that the EEOC will offer on this issue at trial and, at most, goes to the weight rather than the discoverability of the evidence. Again, the EEOC cannot claim significant damages on behalf of the claimants while barring Sidley from obtaining the evidence it needs to show that the EEOC's contentions are factually unsupportable.

To confirm that the EEOC's attempt to bar this discovery is specious, the Court need look no further than the discovery that the EEOC has itself propounded in this lawsuit. As noted in Sidley's opening brief, the EEOC has requested and received information about putative claimants' performance after their status was changed. Moreover, the EEOC has claimed in discovery that the putative claimants have gone on to have successful post-Sidley careers.

[8] Exs. A-M are attached to Sidley's opening memorandum.

(Ex. L.) The EEOC cannot simultaneously rely on an individual's supposed post-Sidley performance while refusing to provide Sidley with the evidence that would either support or rebut this assertion. *See Wolfolk v. Rivera*, 729 F.2d 1114, 1119 (7th Cir. 1983) (trial court properly admitted evidence concerning plaintiff's performance at previous employment in order to impeach his testimony concerning his performance there).

Therefore, because the documents requested are relevant to mitigation and pretext and because the EEOC has placed post-Sidley performance at issue, the Court should order the EEOC to produce the putative claimants' post-1999 performance information.

D. Information Relating to the Putative Claimants' Performance Prior to the Status Change is Relevant and Should be Produced. (Sub. Req. No. 9.)

In its Opposition, the EEOC concedes, as it must, the relevance of the putative claimants' performance while at Sidley. The EEOC has refused, however, to respond to portions of the subpoena that seek information relating to their performance. In particular, Sidley sought information about the putative claimants' business development efforts while at Sidley. (Ex. K at ¶ 9.) Because business development and billings were among the factors in Sidley's decision to change the status of the putative claimants, this request seeks evidence that obviously relates to Sidley's non-discriminatory reasons for the status changes. Without explanation, the EEOC continues to refuse to provide this information. It is relevant, and the Court should compel the EEOC to produce it.

III. THE COURT SHOULD ORDER THE EEOC TO PROVIDE A VERIFICATION AND SHOULD BIND THE EEOC TO ITS ANSWERS.

In its motion, Sidley requested verification of the EEOC's interrogatory responses, as required by the Federal Rules of Civil Procedure. The reason for the EEOC's

refusal to provide such a verification, more than two weeks later, can be found in its response to Interrogatory No. 9 of Sidley's First Set of Interrogatories.

A. Information Learned from Former Sidley Partners.
(Int. No. 9 (1st Set); EEOC Opp'n Section VI.)

Sidley has sought identification of all communications relating to this litigation between the EEOC and any Sidley partner. The EEOC supplemented its response three times. Sidley recently learned that at least one Sidley partner had been contacted by the EEOC, but the EEOC never disclosed that contact in its interrogatory response or its supplements. Sidley informed the EEOC, which responded that it did not disclose this communication because the EEOC spoke to this individual only "briefly" and the discussion was not "substantive." Sidley's interrogatory, however, requires identification of *all* communications with current or former partners. (Ex. I.) Indeed, in its discovery responses, the EEOC identified conversations that clearly lacked "substance." (*See, e.g.*, Fourth Supplemental Response to Interrogatory No. 9 ("[former partner] indicated that she did not wish to speak to the EEOC[;]" "Spoke to former Sidley partner . . . to set up date to meet in person[;]" "[former partner] left message for Trial Attorney Hamilton saying that he did not want to talk to the EEOC without a subpoena").) The EEOC's failure to disclose all communications, and its hair-splitting approach to responding, illustrates Sidley's point. The Court must order the EEOC to provide a complete response and a verification that the EEOC's response is finally complete.

B. Evidence of an Age-Based Retirement Policy
(Int. No. 6 (1st Set); EEOC Opp'n Section I(C).)

The EEOC contends that it has identified all evidence of which it is "aware," but wishes to be free to identify further evidence from the documents and information already in its possession. The EEOC is free to supplement its answers, as provided by the Federal Rules, but should not be permitted to do so based on information and documents currently in its possession.

C. Basis for Claim of Liquidated Damages (Int. No. 8 (2nd Set); EEOC Opp'n Section I(D).)

The EEOC states that it requires depositions of a Sidley partner and members of the Executive Committee to determine Sidley's knowledge of ADEA at the time of the status changes. To date, however, it has provided not one fact to support its claim of a willful violation. The EEOC should not be permitted to supplement unless it can establish that additional facts were obtained after this date. The EEOC's statement that its view of the documents and information presently in its possession may "evolve" based on Sidley's later discovery simply makes no sense, and is in fact no answer.

IV. SIDLEY WILL WITHDRAW SECTION III(C) OF ITS MOTION, IF THE EEOC WILL AMEND ITS DISCOVERY RESPONSES. (Int. No. 5 (2nd Set); EEOC's Opp'n Section VII.)

For the first time, the EEOC states that it contends that two former Sidley partners, < **REDACTED** > and < **REDACTED** > (both 39 at the time of the decision to change status) are covered by the ADEA because Sidley's decision to change their status "*took effect* when each [sic] them was 40 years old." (EEOC Opp'n at 12.) Before its opposition brief, the EEOC has never clearly stated this, despite Sidley's many requests that it do so. If this is indeed the EEOC's position, Sidley requests that the EEOC be ordered to amend its answer accordingly and be bound by this answer. If so, Sidley will withdraw this portion of its motion to compel.

CONCLUSION

For the reasons set forth above, Sidley hereby requests that this Court enter an order: (1) directing the EEOC to answer Interrogatory Nos. 7 and 9 of Sidley's Second Set of Interrogatories; (2) setting a date by which the EEOC can no longer supplement, subject to an interest of justice exception, its answer to Interrogatory No. 2 of Sidley's First Set of

Interrogatories; (3) directing the EEOC to produce documents of the putative claimants it allegedly represents, in response to Requests 2-10 of Sidley's subpoenas; (4) holding the EEOC to its current deficient discovery responses unless it can establish that later responses were formulated through information learned after its prior response; and (5) requiring the EEOC to amend its response to Interrogatory No. 5 of Sidley's Second Set of Interrogatories to conform to its letter response.

Dated: September 27, 2006

Respectfully submitted,

SIDLEY AUSTIN LLP

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CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **September 27, 2006**, I caused a true and complete copy of the foregoing **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLIANCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DISCOVERY RESPONSES** to be served by Electronic Mail Transmission via ECF as to Filing Users upon the following:

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