

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	:	
EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	ECF Case
	:	Civil Action No. 10-cv-0655(LTS) (MTD)
Plaintiff	:	
	:	
v.	:	
	:	
KELLEY DRYE & WARREN, LLP	:	
	:	
Defendant.	:	
-----X	:	

DECLARATION OF JEFFREY BURSTEIN PURSUANT TO 28 U.S.C. §1746

Jeffrey Burstein declares under penalty of perjury:

1. I am a Senior Trial Attorney with Plaintiff Equal Employment Opportunity Commission (“EEOC”) representing EEOC in this litigation. As such, I am familiar with the EEOC investigative file concerning the Age Discrimination in Employment Act (“ADEA”) charge filed by Charging Party Eugene T. D’Ablemont.
2. Mr. D’Ablemont filed an age discrimination and ADEA retaliation charge with the EEOC on February 29, 2008. A true and correct copy of the charge (not inclusive of multiple attachments more fully detailing the charge), which had been served on Kelley Drye & Warren, LLP (“Kelley Drye”), is attached hereto as Exhibit A (with Mr. D’Ablemont’s address and date of birth redacted).
3. After Mr. D’Ablemont filed his charge, the EEOC conducted its investigation, that included obtaining a position statement and response to EEOC’s request for information from Kelley Drye. EEOC then issued a Letter of Determination on March 20, 2009,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, May 3, 2010, I electronically filed the foregoing Declaration with the CM/ECF system which will send an electronic copy of this document to:

Bettina B. Plevan, Esq.
Proskauer Rose, LLP
1585 Broadway
New York, N.Y. 10036

Joseph C. O'Keefe, Esq.
Proskauer Rose, LLP
One Newark Center
Newark, N.J. 07102

Attorneys for Defendant Kelley Drye & Warren, LLP

_____/s/_____
Jeffrey Burstein
Senior Trial Attorney, EEOC

EXHIBIT A

AMENDED

EEOC Form 5 (5/01)

<p style="text-align: center;">CHARGE OF DISCRIMINATION</p> <p style="font-size: small;">This form is affected by the Privacy Act. See enclosed Privacy Act Statement and other information before completing this form.</p>	<p>Charge Presented To: _____ Agency(ies) Charge No(s): _____</p> <p> <input type="checkbox"/> FEPA <input checked="" type="checkbox"/> EEOC 520-2008-02342N </p>
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New York State Division of Human Rights and EEOC
State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.) Eugene T. D'Ablemont	Date of Birth
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Street Address _____ City, State and ZIP Code _____

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two are named, list under PARTICULARS below.)

Name Kelley Drye & Warren LLP	No. Employees, Members over 500	Phone No. with Area Code (212)808-7718
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Street Address **101 Park Avenue** City, State and ZIP Code **New York, NY 10178**

Name	No. Employees, Members	Phone No. with Area Code
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Street Address _____ City, State and ZIP Code _____

<p>DISCRIMINATION BASED ON (Check appropriate box(es).)</p> <p> <input type="checkbox"/> RACE <input type="checkbox"/> COLOR <input type="checkbox"/> SEX <input type="checkbox"/> RELIGION <input type="checkbox"/> NATIONAL ORIGIN <input checked="" type="checkbox"/> RETALIATION <input checked="" type="checkbox"/> AGE <input type="checkbox"/> DISABILITY <input type="checkbox"/> OTHER (Specify below) </p>	<p>DATE(S) DISCRIMINATION TOOK PLACE</p> <p>Earliest _____ Latest _____</p> <p><input checked="" type="checkbox"/> CONTINUING ACTION</p>
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THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

Denial of compensation to Active Life Partners because of age as more fully set forth in the attached letter, dated February 29, 2008, with Exhibits A, B, C, D, E, F, G, and H.

Retaliation as set forth in the attached letter, dated February 29, 2008, with Exhibits I, J, and K.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - When necessary for State or Local Agency Requirements

I declare under penalty of perjury that the above is true and correct.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

2/29/08

 Date Charging Party Signature

SIGNATURE OF COMPLAINANT _____

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

EXHIBIT B



Spencer H. Lewis, Jr.
District Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

33 Whitehall Street, 5th Floor
New York, NY 10004-2112
For General Information: (800) 669-4000
TTY: (800) 669-6820
District Office: (212) 336-3620
General FAX: (212) 336-3625

In the matter of:

EEOC Charge No.: 520-2008-02342

Charging Party
Eugene D'Ablemont, Esq.

v.

Respondent
Kelley Drye & Warren, LLP
c/o Bettina Plevan, Esq.
Proskauer Rose, LLP
1585 Broadway
New York, NY 10036-8299

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the above cited charge filed under Age Discrimination in Employment Act, as amended ("ADEA").

Charging Party alleged in his charge that Respondent has discriminated against him on account of his age and retaliated against him for complaining of discrimination, both internally and to the EEOC. Specifically, Charging Party alleged that, ever since he transitioned from Active Partner to Life Partner in 2001, his compensation is seven to ten times less than what it was before transitioning to a Life Partner, despite continuing to make contributions to the firm's revenue through his continued practice of law at the firm. Charging Party claims that his compensation, which is given to him in the form of an annual bonus, is calculated at the sole discretion of the firm and is wildly disproportionate to the compensation awarded to younger Active Partners at the firm whose contributions to the firm's revenue are comparable to his own. Furthermore, Charging Party claimed that in 2008, after he complained about age discrimination, his annual bonus was reduced from what it had consistently been in previous years.

Respondent argued that Charging Party is not covered by the ADEA because he is a partner of the firm, and therefore, an employer and not an employee. Nonetheless, Respondent claimed that, even if Charging Party could establish that he is an employee as defined by the ADEA, he has suffered no harm. Respondent contends that Charging Party has been adequately if not overcompensated for his work since becoming a Life Partner because his average billable hours are seven to ten times less than what they were before he became a Life Partner. Respondent goes on to state that the 2008 reduction in Charging Party's bonus had nothing to do with his complaints of discrimination, but was done in anticipation of poor economic conditions. Respondent also claims that the Annual Life Partner Payment is intended to provide compensation to Life Partners for past and current contributions to the firm. Furthermore,

Respondent notes that the annual bonuses of the two other Life Partners who continue in the practice of law at the firm were also reduced.

As a threshold matter, the Commission has determined that the Charging Party, and other Life Partners who continue in the practice of law at the firm, are employees as defined by the ADEA. Such individuals have limited to no ability to influence the organization and do not share in the profits, losses, and liabilities of the firm.

The record shows that Respondent has discriminated against Charging Party and other Life Partners who continue in the practice of law at the firm by failing to fairly compensate them for their contributions to the firm when compared with younger Active Partners. Additionally, the record shows that Respondent has retaliated against Charging Party for complaining about age discrimination.

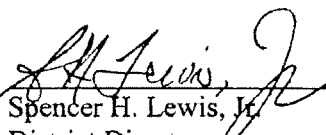
If the Commission determines that there is reasonable cause to believe that violations have occurred, it shall endeavor to eliminate the unlawful employment practices by informal methods of conference, conciliation, and persuasion. Having determined that there is reason to believe that violations have occurred, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter.

Enclosed please find EEOC's Conciliation proposal in this matter. Please provide a written response to each item in the proposal by April 3, 2009.

If Respondent declines to discuss settlement or when, for any reason, a settlement acceptable to the EEOC New York District Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission.

On Behalf of the Commission:

3/20/2009
Date



Spencer H. Lewis, Jr.
District Director