UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFF EEOC'S REPLY MEMORANDUM IN SUPPORT OF EEOC'S MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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ARGUMENT

I. DEFENDANT'S FACTUAL AVERMENTS OUTSIDE OF THE PLEADINGS SHOULD BE STRICKEN

It is fundamental that "[i]n deciding a motion to strike, a court will not consider matters outside the pleadings…." Index Fund v. Hagopian, 107 F.R.D. 95, 100 (S.D.N.Y. 1985). See also Garofalo v. City of New York, 1994 U.S.Dist LEXIS 8584 at *3 (S.D.N.Y. 1994) ("the court may not consider" evidence outside the pleadings "in ruling on a Rule 12(f) motion"). In Defendant's Memorandum of Law in opposition to Plaintiff's Motion to Strike (hereafter "DM"), Defendant improperly presents a 4-page statement of "facts" almost entirely consisting of facts not set forth in the pleadings; and thereafter laces its arguments with references to other unsupported facts not contained in any pleading (DM at 2-5). Indeed, some of these unsupported factual assertions are expansions of the allegations in the Fifteenth Affirmative Defense that EEOC asserts should be stricken under Rule 12(f) because they are immaterial to this compensation discrimination action (e.g. allegations of Mr. D'Ablemont "improperly" getting legal assistance for personal matters), and/or involve "impertinent" and "scandalous" allegations. EEOC submits that all such references to unsupported facts in Defendant's Memorandum of Law should be stricken and totally disregarded by this Court in deciding EEOC's Motion.[1]

[1] Not only are these factual allegations outside the pleadings, they are not supported by any affidavit but rather just refer to the unsworn section of the Preliminary Pre-Trial Statement ("Statement") written by Defendant. EEOC strongly disputes the allegations set forth in Defendant's factual portion of its Memorandum (DM at 2-5). EEOC's portion of the Statement makes clear that (1) the legal services obtained by Mr. D'Ablemont (DM at 4) involved conduct entirely consistent with Kelley Drye's long-standing practices for attorneys at the firm (Statement, pp. 11-12); (2) that Mr. D'Ablemont's receipt of a retainer from a client (DM at 4-5) had been disclosed and was consented to by Kelley Drye over 10 years ago, was an arrangement similar to those approved for other attorneys at the firm, and was an issue that only surfaced after Mr. D'Ablemont's filed his EEOC charge in 2008 (Statement, pp. 10-11); and (3) that Mr. D'Ablemont's receipt of client development allowances (DM at 4) were wholly appropriate and based on a standard formula utilized by the firm (Statement, p. 12). Also, though EEOC does not specifically address the additional unsupported assertions in this

II. EEOC WILL BE PREJUDICED IF REQUIRED TO LITIGATE AFFIRMATIVE DEFENSES THAT HAVE NO BASIS IN LAW

Contrary to Defendant's assertion (DM at 8-10), the harm identified by EEOC if the challenged Affirmative Defenses are not stricken--the unnecessary expenditure of limited resources to deal with discovery, post-discovery and trial of legally irrelevant defenses--has been found more than sufficient by courts to support motions to strike. Thus, in an EEOC case involving a Rule 12(f) challenge to various affirmative defenses raised by a Title VII defendant (including "unclean hands," also asserted by Defendant here), EEOC v. Bay Ridge Toyota, Inc., 327 F.Supp. 2d 167 (E.D.N.Y. 2004), the court granted the motion to strike the erroneous defenses because they "would prejudice EEOC 'by needlessly lengthening and complicating the discovery process and trial of this matter.'" Id. at 174, quoting SEC v. McCaskey, 56 F.Supp.2d 323, 326-327 (S.D.N.Y. 1999). See also SEC v. Electronics Warehouse, Inc., 689 F.Supp. 53, 73 (D. Conn. 1988), aff'd 891 F.2d 457 (2d Cir. 1998), cert. den. 496 U.S. 942 (1990) (Rule 12(f) motion granted to "avoid wasting time and money litigating the invalid defense"); Federal Deposit Ins. Corp. v. Eckert Seamans Cherin & Mellott, 754 F.Supp. 22, 23 (E.D.N.Y. 1990) (when "the defense is insufficient as a matter of law, the defense should be stricken to eliminate the delay and unnecessary expense from litigating the invalid claim"). Prejudice sufficient to support striking defenses also exists where immaterial affirmative defenses would unduly complicate discovery and trial, harm that plainly would occur if the legally erroneous or irrelevant Affirmative Defenses involved in this Motion are allowed to stand. Calif. Dept. of Toxic Substances Control v. Alco Pacific, Inc., 217 F.Supp. 2d 1028, 1033 (D.C.Cal. 2002); Bristol-Myers Squibb Co. v. IVAX Corp., 77 F.Supp.2d 606, 619-620 (D.N.J. 2000).

Memorandum to avoid burdening the Court with irrelevant issues, as seen in EEOC's portion of the Statement, EEOC does not accept the veracity of the various other unsupported factual allegations in Defendant's Memorandum.

III. DEFENDANT'S ARGUMENTS REST ON ITS ERRONEOUS CLAIM THAT EEOC IS A PROXY FOR THE CHARGING PARTY, WHEN INSTEAD THIS ACTION INVOLVES A CHALLENGE TO DEFENDANT'S FACIALLY DISCRIMINATORY POLICY THAT AFFECTED A CLASS OF ATTORNEYS

Defendant's arguments are premised on its repeated--and fallacious--claim that EEOC is the alter ego for Mr. D'Ablemont, asserting that "this suit is focused entirely on the claim for damages on behalf of D'Ablemont" (DM at 5); that "the only person with any interest in the outcome is D'Ablemont" (id. at 9); and that "the EEOC is proceeding on behalf of a single individual with whom it is in privity" (id. at 10). Defendant's repeated assertions that EEOC is a mere proxy for Mr. D'Ablemont, which underlie most of the legal arguments Defendant presents in opposition to EEOC's Motion, ignore the plain language of the Complaint and firmly established case law. First, the Complaint squarely centers on an ADEA challenge to a discriminatory policy, namely Kelley Drye's policy of requiring attorneys who wish to continue to practice law after the age of 70 to relinquish their equity interest in the firm and be compensated solely through a discretionary bonus, a policy that negatively affected not just Mr. D'Ablemont but also a class of other similarly situated attorneys who worked past the age of 70 and who were under-compensated solely based on their age (Complaint, ¶7(a)).

Moreover, even if this were a case where EEOC was just seeking individual relief for a single discrimination victim--and this action goes well beyond that--it is firmly established that "EEOC is not merely a proxy for the victims of discrimination." General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980). See also EEOC v. Int'l ProfitAssocs., Inc, 2008 U.S.Dist. LEXIS 14984 at *5 (N.D. Ill. 2008) ("Established case law has determined that the individual, non-intervening claimants and the EEOC are not in privity"); EEOC v. Bay Ridge Toyota, Inc., 327 F.Supp.2d 167, 173 (E.D.N.Y. 2004) ("EEOC maintains a right of action independent of the charging party"); EEOC

v. Morgan Stanley & Co., Inc., 132 F.Supp.2d 146, 153 (S.D.N.Y. 2000) (EEOC's enforcement powers are independent of a charging party's actions).

The Supreme Court's decision in EEOC v. Waffle House, 534 U.S. 279 (2002), makes even clearer the inherent flaws in Defendant's Affirmative Defenses that center not on EEOC, the plaintiff in this action, but rather on Mr. D'Ablemont, an individual affected by the challenged discriminatory policy. For the Court in Waffle House expressly held that in a discrimination case, an employee's waiver of his right to bring a lawsuit for damages does not constitute a waiver of EEOC's right to bring an action both for injunctive and victim-specific relief for the claimant who had waived his rights. While the Court recognized that such employee's conduct may be relevant to the quantum of damages (e.g. if the employee obtained monetary recovery in arbitration), "it simply does not flow from the cases holding that the employee's conduct may affect the EEOC's recovery that the EEOC's claim is merely derivative," as "EEOC does not stand in the employee's shoes." Id. at 297. Just as the waiver by the charging party in Waffle House did not flow to the EEOC, so too in this case are the Affirmative Defenses raised by Defendant that center on Mr. D'Ablemont's conduct--specifically, the equitable defenses in the Thirteenth and Fifteenth Affirmative Defenses that include, inter alia, waiver, estoppel and laches--inapplicable here and should be stricken.

Defendant's attempt to avoid the plain implications of Waffle House to this Motion are unavailing. The primary case relied on by Defendant, Vines v. Univ. of La., 398 F.3d 700 (5th Cir. 2005), cert. den. 546 U.S. 1089 (2006) (DM at 11), expressly held that there is no privity between EEOC and a charging party in a case where EEOC "seeks to enjoin discrimination against an entire class or attempts to protect a broader interest than simply that of the individual plaintiff," id. at 707, the precise setting here, in which EEOC is challenging a discriminatory policy and is seeking relief for a class of attorneys negatively affected thereby. Defendant also relies on the pre-Waffle House case of

EEOC v. United States Steel Corp., 921 F2d 489 (3d Cir. 1990) (DM at 11-12). While the Waffle House Court approvingly cited this decision's statement that a charging party cannot obtain a double-recovery for the same violation, id., 534 U.S. at 297, the separate part of United States Steel Corp. relied on by Defendant, i.e. that when seeking victim-specific relief, EEOC "functions…as their representative" (DM at 12), is plainly at odds with the fundamental holding of Waffle House that EEOC is not the proxy of the charging party. Similarly, EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987) (DM at 12), and EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) (DM at 13), pre-date and are inconsistent with Waffle House. Finally, EEOC v. W.H. Braum, Inc., 347 F.3d 1192 (10th Cir. 2003) (DM at 12), only serves to support EEOC's Motion, as it holds that EEOC is not barred from seeking relief for a claimant whose individual action would be time barred.

In light of the above, as well as for the reasons set forth in EEOC's initial Memorandum, the Thirteenth Affirmative Defense and most of the Fifteenth Affirmative Defense, which solely pertain to alleged conduct of Mr. D'Ablemont and not EEOC, should be stricken.

IV. EVEN IF A STATUTE OF LIMITATIONS APPLIES TO AN ADEA ACTION BROUGHT BY EEOC, AND ONE DOES NOT, THE FOURTH AFFIRMATIVE DEFENSE ALLEGING A STATUTE OF LIMITATIONS BAR FAILS AS A MATTER OF LAW

In its initial Memorandum (pp. 3-5), EEOC relied on a series of cases, including from the Southern District, EEOC v. Venator Group Specialty, Inc., 2002 WL 181709 (S.D.N.Y. 2002), making clear that as a result of 1991 amendments, EEOC no longer has a statute of limitations for bringing ADEA actions. This is consistent with the Supreme Court's holding that EEOC is not constrained by any statute of limitations when bringing Title VII actions. Occidental Life Ins. Co. of California v. EEOC, 432 U.S. 355, 361 (1977). See also EEOC v. Sara Lee Corp., 923 F.Supp. 994, 999 (W.D. Mich. 1995) (no statute of limitations for EEOC under ADEA); EEOC v. Village of Amityville, Civ. Action No. 09-3742 (ADS) (May 26, 2010) (statute of limitations defense stricken under Rule 12(f) in

EEOC ADEA case) (a copy of the Answer and the May 26, 2010 Order to Strike in this case are attached hereto as Exhibits A and B respectively). Defendant's argument to the contrary (DM at 13-15) relies on a single case, McConnell v. Thomson Newspapers, 802 F.Supp. 1484, 1499-1500 (E.D. Tex. 1992). The statement in McConnell that EEOC is subject to a statute of limitations in ADEA actions has been criticized by every court that has examined this aspect of the decision, including being rejected by the Southern District of New York in EEOC v. Venator Group Specialty, Inc., supra, 2002 WL 181709 at *2. See also EEOC v. AT&T, 36 F.Supp.2d 994, 995-996 (S.D. Oh. 1998) (expressly rejecting McConnell in holding that no statute of limitations applies to EEOC ADEA lawsuits); Wilkerson v. Martin Marietta Corp., 875 F.Supp. 1456, 1460 (D.C.Col. 1995) (same); EEOC v. Univ. of Louisiana, 2007 WL 4962932 (W.D. La. 2007) at *2, adopted in relevant part, 2008 WL 544273 (W.D. La. 2008), aff'd 559 F.3d 270 (5th Cir. 2009) (same). In light of the Southern District decision in Venator Group, the Eastern District decision in EEOC v. Inc. Vill. of Valley Stream, 535 F.Supp.2d 323, 326-327 (E.D.N.Y. 2008), and the other cases cited above which hold that EEOC is not constrained by any statute of limitations for ADEA cases, the McConnell decision is an anomaly whose rationale has been rejected by courts in the Second Circuit.

Moreover, even accepting Defendant's argument that "EEOC should remain subject to the two/three year limitations period under the FLSA" (DM at 16), there still would be no limitations bar here. EEOC filed this action in January 2010 alleging an ongoing policy and practice of pay discrimination based on age; this followed EEOC's investigation of Mr. D'Ablemont's 2008 ADEA charge alleging that he was awarded discriminatorily low compensation for 2008 and for the eight previous years. Thus, there simply is no limitations bar even under Defendant's erroneous assertion that there is a three year statute of limitations for EEOC ADEA actions where willful misconduct is alleged (as is the case here). Finally, even assuming the existence of a statute of limitations for EEOC,

Defendant is conspicuously silent about the Lilly Ledbetter Fair Pay Act amendment to the ADEA, at 29 U.S.C. §626(d)(3), that plainly applies to the allegations of ongoing pay discrimination presented here. See Phen Vuong v. N.Y. Life Ins. Co., 2009 U.S. Dist. LEXIS 9320 at *25 (S.D.N.Y. 2009) (under Ledbetter Fair Pay Act, "every payment that gives effect to a prior 'discriminatory compensation decision or practice'" is unlawful).

For these reasons and those in EEOC's initial Memorandum, the Fourth Affirmative Defense should be stricken.

V. AS DEFENDANT PRESENTS NO CASES CHALLENGING EEOC'S ARGUMENT THAT THE NINTH, TENTH AND ELEVENTH AFFIRMATIVE DEFENSES ARE WITHOUT LEGAL BASIS, THESE AFFIRMATIVE DEFENSES SHOULD BE STRICKEN

In its initial Memorandum (pp.5-6), EEOC argued that the Ninth Affirmative Defense, asserting that the Complaint improperly contains unspecified claims not in Mr. D'Ablemont's EEOC charge, is legally flawed, citing numerous cases that permit EEOC to sue on any violation found in the course of its investigation, including in ADEA contexts. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); EEOC v. Thomas Dodge Corp., 524 F.Supp.2d 227, 234-238 (E.D.N.Y. 2007). EEOC then argued (pp. 6-7) that the Tenth Affirmative Defense, asserting that EEOC and Mr. D'Ablemont did not satisfy unspecified "statutory and/or administrative prerequisites" for bringing an ADEA action, is legally baseless, as it is undisputed that EEOC met all prerequisites in this matter to bringing suit, i.e. giving Defendant notice of the charge, conducting an investigation, issuing a Letter of Determination finding reasonable cause, and engaging in conciliation. Next, EEOC argued that the Eleventh Affirmative Defense, asserting that EEOC cannot seek recovery for individuals affected by the challenged policy who did not file discrimination charges, is erroneous as a matter of law due to well-established decisions, including in the ADEA context, such as EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1556-57 (2d Cir. 1996), and EEOC v. Sidley Austin, 437 F.3d 695 (7th Cir. 2006).

EEOC's challenges to these three Affirmative Defenses solely involve questions of law. In its Memorandum (DM at 17-18), Defendant does not cite a single case contradicting the consistent legal authority presented by EEOC that demonstrate why these three Affirmative Defenses are without legal basis; instead Defendant simply relies on the previously discredited claim that in this action EEOC is a mere proxy for Mr. D'Ablemont. As EEOC has shown that the Ninth, Tenth and Eleventh Affirmative Defenses have no basis in law, they should be stricken.

VI. THE IMPERTINENT ALLEGATIONS CONTAINED IN THE FIFTEENTH AFFIRMATIVE DEFENSE SHOULD BE STRICKEN

An affirmative defense can also be stricken under Rule 12(f) "[w]here the materiality of the alleged matter is highly unlikely, or where its effect will be prejudicial." Reiter's Beer Dist., Inc. v. Christian Schmidt Brewing Co., 657 F.Supp. 136, 147 (E.D.N.Y. 1987). See also Talbot v. Robert Matthews Dist. Co., 961 F.2d 654, 664 (7th Cir. 1992) (same). As is plain from EEOC's Complaint, this case challenges a compensation policy of Defendant that was intended to and in fact resulted in dramatically reduced compensation, solely on the basis of age, for attorneys who continued to work at the firm after turning 70. The "materiality" to this ADEA challenge against a compensation policy of Defendant's allegations in its Fifteenth Affirmative Defense--i.e. dredging up issues regarding (1) D'Ablemont's retainer agreement entered into and discussed with the firm back a decade ago (DM at 4-5), (2) his use of the firm's legal services years ago for a family matter, and (3) his engaging in unspecified "objectionable behavior"--is simply non-existent.[2] Despite Defendant's protestation to the contrary (DM at 23), the challenged portions of the Fifteenth Affirmative Defense appear to be an effort to put irrelevant, "scandalous" allegations into the public record, precisely what Rule 12(f) is designed to avoid.

[2] As noted supra in footnote 1, apart from their irrelevancy, EEOC strongly denies these allegations of purported improprieties by Mr. D'Ablemont.

VII. EEOC CAN RECOVER COMPENSATORY AND PUNITIVE DAMAGES FOR THE RETALIATION CLAIM, WARRANTING THE STRIKING OF THE SIXTEENTH THROUGH EIGHTEENTH AFFIRMATIVE DEFENSES

In response to EEOC's arguments in support of striking the Sixteenth through Eighteenth Affirmative Defenses, which Defenses erroneously assert that compensatory and punitive damages cannot be recovered in this action even though the Complaint asserts a retaliation claim, Defendant argues that because there is a split in the Circuit Courts of Appeal that have addressed this issue, the question of the availability of compensatory and punitive damages for an ADEA retaliation claim cannot be decided in the context of a Rule 12(f) motion (DM at 24-25). But as detailed in EEOC's initial Memorandum of Law, the one court in the Southern District of New York that has examined this split has found that compensatory and punitive damages are available in FLSA retaliation cases, Sines v. Service Corp. Intern., 2006 WL 3247663 (S.D.N.Y. 2006); this necessarily means that such relief is available in ADEA retaliation actions due to the incorporation of FLSA remedies into the ADEA. Therefore, this is not a "disputed" question of law in the Southern District of New York, warranting the striking of the three Affirmative Defenses related to this issue.

CONCLUSION

For the foregoing reasons and those in EEOC's initial Memorandum of Law, Plaintiff EEOC respectfully requests that this Court issue an Order under Fed. R. Civ. P. 12(f) striking Defendant's Fourth, Ninth, Tenth, Eleventh, Thirteenth, Fifteenth, Sixteenth, Seventeenth and Eighteenth Affirmative Defenses.

Dated: June 1, 2010
Newark, New Jersey

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, June 1, 2010, I electronically filed the foregoing Reply Memorandum in Support of EEOC's Motion to Strike Affirmative Defenses with the CM/ECF system which will send an electronic copy of this document to:

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Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Civil Action Number 09-3742

ANSWER

Plaintiff,

-against-

VILLAGE OF AMITYVILLE and the AMITYVILLE FIRE DEPARTMENT,

ASSIGNED DISTRICT JUDGE, SPATT, J.
ASSIGNED MAGISTRATE JUDGE, ORENSTEIN, MJ

Defendant.

----------x

RESPONDING TO ALLEGATIONS IN THE COMPLAINT

1. Defendants, VILLAGE OF AMITYVILLE (hereinafter "VILLAGE") and the AMITYVILLE FIRE DEPARTMENT (hereinafter "AFD") admit the allegations contained in Paragraphs "1","2", "3", "4", "7", "12", "13" and "16" of the Complaint.

2. Defendants admit the allegations contained in Paragraph "5" of the Complaint that the VILLAGE is an employer within the meaning of the Age Discrimination and Employment Act of 1967, as amended, but deny that volunteer firemen are employees of the VILLAGE.

3. Defendants admit the allegations contained in Paragraph "6" of the Complaint that the VILLAGE has at

least twenty (20) employees, but deny that volunteer firemen are employees of the VILLAGE.

4. Defendants admit the allegations contained in Paragraph “14" of the Complaint that the Plaintiff submitted a proposed Conciliation Agreement to the Defendants, but deny that the Defendants were given the opportunity to discuss, conference or resolve this matter on terms mutually agreeable to the parties.

5. Defendants admit the allegations contained in Paragraph "17" of the Complaint that the VILLAGE established a length of service award program for volunteer firefighters of the AFD effective, January 1, 1992, but deny that such program was created by the VILLAGE as same was duly established pursuant to, and in strict conformance with the requirements of the General Municipal Law of the State of New York, and with the approval of the voters of the VILLAGE of AMITYVILLE.

6. Defendants admit the allegations contained in Paragraph “18" of the Complaint that volunteer firefighters must have at least five (5) years of firefighting service, but deny that same is the sole criteria, as participation requirements also determine eligibility for a service award.

7. Defendants admit the allegations contained in Paragraph “19" of the Complaint that until January 1, 2004,

volunteer firefighters sixty-five (65) and older did not earn additional credit under the service award program pursuant to the applicable provisions of the New York State General Municipal Law, but deny that such program violated the ADEA.

8. Defendants admit the allegations in Paragraph "20" of the Complaint to the extent that between January 1, 2004 and December 2, 2004, volunteer firefighters between the ages of sixty-two (62) and sixty-five (65) did not receive additional fire service credit, but deny that same is a violation of the ADEA.

9. Defendants deny each and every allegation contained in Paragraphs "8", "9", "10", "11", "15", "21", "22" and "23" of the Complaint.

FAILURE TO STATE A CLAIM

10. The VILLAGE is a municipal corporation duly established pursuant to the Village Law of the State of New York.

11. The AFD is a duly established agency of the VILLAGE in accordance with the applicable laws of the State of New York.

12. Edwin Lawrence and others similarly situated are members of the AFD as volunteer firemen.

13. Volunteer Firemen are not employees of the

VILLAGE and serve without compensation.

14. The Board of Trustees of the VILLAGE are also the Board of Fire Commissioners pursuant to the Village Law of the State of New York.

15. In 1991 the Board of Trustees with voter approval established a defined benefit service award program for volunteer firemen in the AFD, as authorized by Section 216 of the General Municipal Law of the State of New York effective, January 1, 1992.

16. The establishment of such program was discretionary and not mandated by the General Municipal Law, or any other law.

17. The purpose of such program was to provide a service award upon reaching age sixty-five (65) to volunteer firemen who met certain participation criteria for fire service.

18. The entitlement age was subsequently lowered to age sixty-two (62) by the Board of Trustees with voter approval effective, January 1, 2004, after the General Municipal Law had been amended to allow such change.

19. The program as established by state law precluded the accruing of service award credit after a firefighter reached entitlement age, until the state law was amended in 2004.

20. Once said law was amended, the Board of Trustees, with voter approval, amended the fire service award program to allow accruing credit after the entitlement age effective, January 1, 2006.

21. Section 216 Subdivision 3e of the General Municipal Law states that any such amendment shall only apply prospectively.

22. Edwin Lawrence and others similarly situated received service credit and compensation adjustments to their service award prospectively from January 1, 2006.

23. The first notice of a potential claim for service credit and compensation for the period prior to January 1, 2006 came in an e-mail from another volunteer firefighter, Ken Lang, to the Village Administrator and the Village Treasurer on December 3, 2007.

24. No notice of any kind was received from Edwin Lawrence or the Equal Employment Opportunity Commission prior to April 23, 2009.

25. The Board of Trustees, at the request of the Village Attorney, directed an inquiry to the Comptroller of the State of New York as to the authority to provide retroactive credit and compensation. The request for an opinion by the Comptroller dated November 12, 2008 is attached hereto as Exhibit “A”

26. Counsel to the Comptroller responded in December, 2008, and provided copies of the decision by the New York Supreme Court, Erie County, entitled "Dipirro et al. v. Clarence Fire District No. 1" 2005WL5749298 affirmed 35AD3d 1153, 825 NYS2d 398 (4th Dept 2006) and several Comptroller's Opinions.

27. The Village Attorney issued a legal opinion in the form of a Memorandum dated January 22, 2009, revised January 27, 2009, which recommended that the Board of Trustees provide retroactive credit and payment to eligible firefighters for three (3) years back to December 3, 2004 in reliance on the decision in the Clarence Fire District case and the three (3) year statute of limitations imposed on obligations created by statute in Section 214(2) of the Civil Practice Law and Rules . A copy of such Memorandum is attached hereto as Exhibit "B".

28. Said Memorandum acknowledges that failure to provide service credit and compensation to eligible firefighters after reaching entitlement age is a violation of the State Human Rights Law as a form of age discrimination and that the applicable period of reimbursement is three (3) years from receipt of notice of such claim.

29. In accordance with such legal opinion, the

VILLAGE reimbursed Edwin Lawrence and others similarly situated back to December 3, 2004 and adjusted their service awards accordingly.

30. Said volunteer firemen have been reimbursed in full for a period of three (3) years prior to the time when the VILLAGE received any notice of a claim for such reimbursement based on alleged age discrimination.

31. As a result of the foregoing, the Complaint fails to state a claim upon which relief can be granted.

AFFIRMATIVE DEFENSE-STATUTE OF LIMITATIONS

32. Edwin Lawrence and other volunteer fireman similarly situated have received full service credit and retroactive payment of benefits from December 3, 2004 to the present, and consequently, this action is barred by the Statute of Limitations.

AFFIRMATIVE DEFENSE-PAYMENT

33. Edwin Lawrence and other firemen similarly situated have received payment in full of all retroactive LOSAP payments to which they are entitled and as a result, no further retroactive payments are due.

PRAYER FOR RELIEF

WHEREFORE, the Defendants respectfully request that the Court dismiss the Complaint, or in the alternative,

determine the applicable period for which Edwin Lawrence and other similarly situated volunteer firemen are entitled to retroactive benefits under the length of service award program, along with such other relief as to the Court seems just.

Dated: November , 2009

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Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-against-

VILLAGE OF AMITYVILLE and the AMITYVILLE FIRE DEPARTMENT,

Defendants.
----------X

ORDER
09-cv-3742 (ADS)(MLO)

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SPATT, District Judge.

The plaintiff Equal Employment Opportunity Commission ("EEOC") commenced the present case on August 29, 2009 against the defendants Village of Amityville and the Amityville Fire Department. The EEOC seeks permanent injunctive relief enjoining the Amityville Fire Department from discriminating against fire fighters on the basis of age, and also requests that the Court order the

defendants to make whole certain fire fighters who had previously been discriminated against.

On November 19, 2009, the defendants answered the plaintiff's complaint, and asserted a statute of limitations defense. On December 14, 2009, the plaintiff moved to strike the defendants' statute of limitations defense as legally insufficient, and on January 1, 2010, the defendants conceded the issue, and stated that "the EEOC was not barred from commencing this action by the Statute of Limitations." (Defs.' Opp. to Pl.'s Mot. to Strike at 4.) The Court therefore grants the plaintiff's motion to strike, and orders that the defendants' statute of limitations defense be stricken from the defendants' answer.

In addition, the Court notes that the docket in this case indicates that no discovery has yet taken place. The Court therefore directs the parties to contact United States Magistrate Judge Michael L. Orenstein to schedule a discovery conference.

SO ORDERED.

Dated: Central Islip, New York
May 26, 2010

/s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge