UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFF EEOC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS DEFENDANT'S NINETEENTH AFFIRMATIVE DEFENSE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Jeffrey Burstein
Senior Trial Attorney
One Newark Center, 21st Floor
Newark, NJ 07102
Email: jeffrey.burstein@eeoc.gov
Tel: (973) 645-2267
Fax: (973) 645-4524

PRELIMINARY STATEMENT

Plaintiff Equal Employment Opportunity Commission ("EEOC") alleges that Defendant Kelley Drye & Warren, LLP ("Kelley Drye" or "Defendant") violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq., by establishing and maintaining a compensation system whereby the Charging Party, Eugene T. D'Ablemont, and other Kelley Drye attorneys who continued practicing law after reaching the age of 70, have been significantly undercompensated solely on the basis of their age. Additionally, Kelley Drye retaliated against Mr. D'Ablemont by reducing his compensation after he complained about such discriminatory practices and filed his charge with the EEOC. EEOC is seeking injunctive relief; back pay and liquidated damages for Mr. D'Ablemont and other attorneys affected by Defendant's unlawful age-based policy and practice; and compensatory and punitive damages for Mr. D'Ablemont with regard to the retaliation claim.

In its Affirmative Defenses (and in discovery conducted to date), Kelley Drye has attempted to divert the focus of this litigation from its unlawful age-based practices to a litany of alleged "objectionable behavior" by Mr. D'Ablemont, an attorney in good standing with Kelley Drye for over 50 years (and a successful equity partner over 30 of those years). These personalized allegations, wholly unrelated to the compensation practices being challenged by EEOC and remote in time, are contained in the various allegations that comprise Kelley Drye's Thirteenth and Fifteenth Affirmative Defenses. These Defenses are the subject of a Motion to Strike brought by EEOC under Federal Rule 12(f), which is pending before this Court. Such allegations also comprise Defendant's Nineteenth Affirmative Defense as well, which had not been the subject of this earlier Motion. This Affirmative Defense seeks a setoff of any damage award EEOC obtains for Mr. D'Ablemont by "the total amounts D'Ablemont has received from third parties for legal services he has provided…, as well as amounts D'Ablemont...owes the Firm, and all debts of D'Ablemont

forgiven by the Firm." The component of this Affirmative Defense involving legal services Mr. D'Ablemont provided to third parties involves an issue that arose 11 years ago and was resolved in 2001, only to be raised again by Kelley Drye over 7 years later, after Mr. D'Ablemont filed his age discrimination charge. The reference to amounts Mr. D'Ablemont "owes the Firm" or debts "forgiven by the Firm" concerns two instances where legal services were provided to Mr. D'Ablemont and a family member by Kelley Drye attorneys without charge (consistent with its practice for other firm attorneys). These issues were resolved by Kelley Drye with finality in 2007 and 2008 respectively, only now to reappear in this litigation.

These stale disputes that Kelley Drye has injected into this litigation through its setoff claim in its Nineteenth Affirmative Defense have no nexus with the ADEA discrimination in compensation action brought by the EEOC. Under well-established case law, it is improper in a governmental enforcement action like this to permit defendant to bring personalized setoff claims against non-parties like Mr. D'Ablemont. If not dismissed, this litigation will be improperly prolonged by mini-trials regarding stale and previously resolved disputes that have no relationship to the discrimination claim brought by the sole Plaintiff in this case, the EEOC.

FACTUAL SUMMARY

Defendant's Nineteenth Affirmative Defense states: "To the extent D'Ablemont is successful in recovering any damages, Kelley Drye is entitled to a setoff of, *inter alia*, the total amounts D'Ablemont has received from third parties for legal services he has provided to those third parties, as well as amounts D'Ablemont has received from the Firm, or owes the Firm, and all debts of D'Ablemont forgiven by the Firm." As is clear from this language and as also stated in its February 10, 2011 letter, the primary setoff sought by Kelley Drye in this Affirmative Defense concerns "third party payments D'Ablemont received for legal services rendered by him to a firm

client" (EEOC's Local Rule 56.1 Statement of Material Facts in Support of its Motion for Partial Summary Judgment ("EEOC Facts") ¶1, 2). The Kelley Drye Partnership Agreement provision at issue in this litigation required that equity partners fully relinquish their equity interest in the Firm at age 70 and enter into "Life Partner" status (Id. ¶3). Mr. D'Ablemont turned 70 years of age in 2000 and in that year he lost his equity interest, becoming a Life Partner. That year, Mr. D'Ablemont entered into an agreement where he would continue to serve as counsel to two closely related long-standing clients and receive a retainer, while continuing to work for Kelley Drye on other clients' matters (Id. ¶4). This arrangement is identical in nature to Firm-approved agreements entered into by certain other Kelley Drye attorneys who received direct payments from clients for services rendered. (Id. ¶5). In his role as counsel for these clients since 2000, Mr. D'Ablemont selected Kelley Drye attorneys to perform legal work for these clients (apart from the legal services provided by Mr. D'Ablemont himself), which has resulted in substantial revenue to Kelley Drye (Id. ¶6). While Kelley Drye approved this arrangement, its initial position was that Mr. D'Ablemont could not obtain an annual "bonus" payment from the Firm as compensation for the legal services he rendered the Firm as a Life Partner and also receive these direct client payments. (Id. ¶7). In a March 12, 2001 memo, Mr. D'Ablemont argued that he should be permitted to obtain a bonus payment for work performed as a Life Partner in addition to these payments (Id. ¶7). Two days later, Kelley Drye agreed that Mr. D'Ablemont could receive a bonus in addition to the client payments (Declaration of Eugene T. D'Ablemont, ¶6).[1] Within three weeks, Mr. D'Ablemont received his bonus from Kelley Drye for his work performed in 2000, and has annually received such bonuses since. The retainer payments from these clients received by Mr. D'Ablemont (and his

[1] Defendant disputes this claim. Critically, however, EEOC is not seeking to have this Court decide the merits of this dispute. Rather, these facts are being presented to demonstrate that the components of the setoff assertion in the Nineteenth Affirmative Defense are stale, are wholly unrelated to EEOC's compensation discrimination claim, and thus are being improperly raised in this governmental enforcement action.

bonus payments) routinely were noted on Mr. D'Ablemont's annual tax returns, which were prepared by Kelley Drye; additionally, the cover letters to the bills sent to these two clients each month by Mr. D'Ablemont reflected that pursuant to the above-noted retainer agreements, there were no charges for Mr. D'Ablemont's time (EEOC Facts, ¶9). There were 7 years of total quiescence by the Firm on this issue until in July 2008 someone "accidentally" opened a check containing a monthly direct client payment sent to Mr. D'Ablemont at the Firm (as had occurred on a monthly basis since 2000); this incident took place a few months after Mr. D'Ablemont had filed his EEOC charge. This engendered memos between Kelley Drye and Mr. D'Ablemont, the last being an explanatory memo from Mr. D'Ablemont dated October 20, 2008. (Id. ¶12).

Another component of the Nineteenth Affirmative Defense involves "all debts of D'Ablemont forgiven by the Firm"; this refers to Kelley Drye's allegation, set forth in detail in its Fifteenth Affirmative Defense (which is a subject of the pending Motion to Strike), that Mr. D'Ablemont "received tens of thousands of dollars of free legal services from Firm attorneys…that he was not entitled to…" This setoff claim consists of two instances of Mr. D'Ablemont obtaining legal services from Kelley Drye attorneys: a matter involving real estate litigation that ended in 2006, and a patent application for a relative of Mr. D'Ablemont. The first matter was resolved by Kelley Drye in June 2007; and the second was resolved in July 2008. (Id. ¶13-14).

A final component of the setoff claim involves compensation paid by Kelley Drye to Mr. D'Ablemont for services he rendered during the back pay period. EEOC is not contesting the obvious principle that a back pay award is reduced by compensation actually received. But, as detailed infra, this method of calculating back pay is fundamental in the case law and need not be raised as an affirmative defense.

ARGUMENT

THE NINETEENTH AFFIRMATIVE DEFENSE SHOULD BE DISMISSED BECAUSE THE SETOFFS CLAIMED THEREIN ARE UNRELATED TO EEOC'S DISCRIMINATORY COMPENSATION ALLEGATIONS AND THUS ARE IMPROPER DEFENSES IN THIS GOVERNMENTAL ENFORCEMENT ACTION

As the ADEA, at 29 U.S.C. § 626(b), expressly incorporates the "powers, remedies and procedures" of the Fair Labor Standards Act, 29 U.S.C. § 216, et seq. ("FLSA"), decisions in FLSA cases concerning remedies are directly pertinent to issue regarding remedies under the ADEA. Lorillard v. Pons, 434 U.S. 575, 580-583 (1978). Certain federal courts, including the Fifth Circuit in a recent FLSA case, Martin v. Pepsiamericas, Inc., 628 F.3d 738, 740-743 (5th Cir. 2010), flatly have held that FLSA awards cannot be reduced through setoffs at all (except in the very narrow setting where the overtime obligations at issue were partly paid in advance by the employer). In reaching this result, the Fifth Circuit reasoned that "[t]o clutter [FLSA] proceedings with the minutiae of other employer-employee relationships would be antithetical to the purpose of the Act", id. at 741, quoting Brennan v. Heard, 491 F.2d 1, 4 (5th Cir. 1974). See also Donovan v. Pointon, 717 F.2d 1320, 1323 (10th Cir. 1983) (no setoffs in FLSA cases); Hodgson v. Lakewood Brad. Serv., 330 F.Supp. 670, 673 (D.Colo. 1971) (same). In contrast, other courts in FLSA and ADEA cases have recognized the viability of setoff claims in limited contexts. See Hansen v. ABC Liquors, Inc., 2009 U.S.Dist. LEXIS 108954 at *6-*7 (M.D.Fla. 2009) (in FLSA case, setoff allowed for wage overpayments); Munnelly v. Memorial Sloan Kettering Cancer Center, 434 F.Supp.2d 1314, 1321 (S.D.N.Y. 1990) (in ADEA termination case, setoff permitted of severance payment made by defendant employer).

But even where setoffs have been permitted in ADEA or FLSA litigation, the setoffs all have some logical nexus to the plaintiff's claim; they do not (like Defendant attempts here) involve enmeshing the court in wholly unrelated claims that would "clutter…the proceedings with the minutiae" of tertiary employer-employee disputes. Martin, supra. This is particularly true in the

setting here. First, the primary component of the Nineteenth Affirmative Defense, the payments to Mr. D'Ablemont by third parties, and the secondary component of this Defense, Mr. D'Ablemont receiving legal services, are completely separate from the claim presented in EEOC's Complaint, a challenge to a systemic policy and practice of under-compensation based on age (indeed, the third party payments obviously did not involve any payments to Mr. D'Ablemont made by Defendant at all). Second, the purported "misdeeds" of Mr. D'Ablemont, an attorney in good standing at Kelley Drye for over 50 years, that comprise this Defense involve stale disputes that seemingly were resolved years ago, until revived in this litigation. Specifically, as detailed in the accompanying submissions, the third party payment issue arose 11 years ago and ostensibly was resolved in March 2001, only to be recently resurrected. And the "free legal services" issue involves two matters where the question of time spent by Kelley Drye attorneys for such services was resolved in June 2007 and July 2008 respectively.

Most importantly, the setoffs are legally deficient because this litigation does not involve a dispute between private parties; rather, this is an action solely brought by an arm of the federal government, the EEOC, charged by Congress with primary enforcement authority of the ADEA. See 29 U.S.C. § 626. Courts have consistently held that in such governmental enforcement actions, the type of individualized setoff claims Kelley Drye raises here should not be part of the litigation. The rationale for barring setoff claims in such settings was discussed in detail by the Tenth Circuit in Donovan, supra:

> This action…was brought by the Secretary to enjoin Pointon from employment practices which the Secretary believed violated the Act…. Pointon sought to assert set-offs, counterclaims, and third-party complaints based upon claims that two of his employees allegedly owed him money for sums which he had advanced to them and that certain employees were liable to him in tort for acts of sabotage. Pointon sought to set off against any amounts found to be due his employees offsetting sums which he claimed were due him by such employees. The district court denied all such requests, and its ruling in this regard is now assigned as error. We find no such error.

> As indicated, the purpose of the present action is to bring Pointon into compliance with the Act by enforcing a public right. To permit him in a proceeding to try his private claims, real or imagined, against his employees would delay and even subvert the whole process. Pointon is free to sue his employees in state court, as we are advised he is doing, for any sum which he feels is due and owing him. Brennan v. Heard, 491 F.2d 1, 4 (5th Cir. 1974) and NLRB v. Mooney Aircraft, Inc., 366 F.2d 809, 811 (5th Cir. 1966).
>
> [Id., 717 F.2d at 1323]

Similarly, in NLRB v. Mooney Aircraft, Inc., supra, 366 F.2d at 811, the Fifth Circuit held that setoff claims by the employer were improper in an NLRB action where back pay was being sought because the governmental proceeding "is designed to enforce a public, not a private right." The court reasoned that "[a]ny private debts the employees owe the Company are irrelevant to these backpay proceedings. To allow such setoffs…would enmesh the Board in the crossfire of purely private controversies, creating an unwieldy if not unmanageable situation for the agency." Ibid.

If the setoff claims asserted in the Nineteenth Affirmative Defense are not dismissed, what the Tenth and Fifth Circuits warned of occurring in the above-cited decisions will take place in this litigation: enmeshing this agency action "in the crossfire of purely private controversies," Mooney Aircraft, supra, that will inevitably will "delay…the whole process." Donovan, supra.

The leading Supreme Court decision discussing the unique nature of litigation brought by EEOC to enforce statutes prohibiting workplace discrimination, EEOC v. Waffle House, 534 U.S. 279 (2002), further underscores why Kelley Drye's setoff claims are improper. In Waffle House, the Court reiterated that "the EEOC is not merely a proxy for the victims of discrimination…" Id. at 288, quoting General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 326 (1980). The Court went on to explain that the EEOC's claim is not "merely derivative" of the charging party's; and that "the EEOC does not stand in the employee's shoes." Id. at 297. These principles underscore why it is wholly inappropriate to allow Defendant to transform and enlarge this litigation by injecting personalized disputes between Kelley Drye and Mr. D'Ablemont, completely unrelated to

EEOC's under-compensation claim, which arose over Mr. D'Ablemont's 50 year career with the Firm.

Of course, as also stated in Waffle House, a charging party's conduct is relevant to an EEOC action that seeks individual relief insofar as the charging party is not entitled to an improper windfall, such as by entering into a private settlement with the employer and also obtaining back pay in the EEOC proceeding; charging parties cannot reap a "double recovery." Id. at 296-297. But Kelley Drye's setoff claims here are of a fundamentally different nature. The issues of third party payments and free legal services are purely private disputes with no nexus whatsoever to EEOC's allegation of a discriminatory compensation policy and practice and claim for back pay. They are particularly inappropriate in this setting where EEOC is "not a proxy" for Mr. D'Ablemont, Waffle House, supra, and where Mr. D'Ablemont has no right as a matter of law to intervene, see 29 U.S.C. § 626(c)(1) and EEOC v. Woodmen of the World Life Ins. Society, 479 F.3d 561, 568-569 (8th Cir. 2007), thus having no voice of his own in defending against these private claims.

Finally, a component of Kelley Drye's Nineteenth Affirmative Defense involves its right to subtract from any damage award the bonus compensation Mr. D'Ablemont received from the Firm. EEOC fully recognizes that compensation Mr. D'Ablemont received from Kelley Drye for services rendered during the damage period necessarily reduces any back pay award. But there simply is no need at all for a defendant to assert an affirmative defense in order to so reduce a back pay award. Rather, such subtraction of actual earnings is at the core of the way back pay is calculated in ADEA and other discrimination cases. See, e.g., EEOC v. Colgate-Palmolive Co., 612 F.Supp. 1476, 1479 (S.D.N.Y. 1985).

CONCLUSION

For the foregoing reasons, EEOC requests that the Court grant partial summary judgment in EEOC's favor and dismiss Defendant's Nineteenth Affirmative Defense.

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

s/

Jeffrey Burstein
Senior Trial Attorney
One Newark Center, 21st Floor
Newark, New Jersey 07102
Phone: (973) 645-2267
jeffrey.burstein@eeoc.gov

Dated: March 30, 2011
Newark, New Jersey