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.	:	

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.

2. Attached hereto as "Exhibit A" is a true and correct copy of a February 10, 2011 letter from counsel for Defendant Kelley Drye & Warren, LLP, Bettina B. Plevan, Esq.

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

Executed on March 30, 2011

s/
Jeffrey Burstein

EXHIBIT A

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A New York Limited Liability Partnership
Lawrence R. Sandak, Managing Resident Partner

February 10, 2011

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Re: *EEOC v. Kelley Drye & Warren LLP*, No. 10-CIV-0655 (LTS) (MHD)

Dear Jeff:

We write in response to your recent letter in which you suggest that the EEOC intends to file a motion to strike Kelley Drye's Affirmative Defense 19, based on a recent decision in an FLSA case by the 5th Circuit. The case you cite is inapposite. We will oppose any such motion as frivolous.

Courts in this District uniformly concluded that motions to strike an affirmative defense under Rule 12(f) are not favored and will not be granted unless "it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Durham Indus., Inc. v. North River Ins. Co.*, 482 F. Supp. 910, 913 (S.D.N.Y. 1979) (Sweet, J.)(internal citations omitted)(emphasis added). *See also Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015 (1986); *Specialty Minerals, Inc. v. Pluess-Staufer AG*, 395 F. Supp. 2d 109, 111 (S.D.N.Y. 2005) (Marrero, J.), *SEC v. Lorin*, 869 F. Supp. 1117, 1120 (S.D.N.Y. 1994) (Baer, J.). In addition, a "motion to strike for insufficiency was never intended to furnish an opportunity for the determination of disputed and substantial questions of law." *Salcer*, 744 F.2d at 939 (internal citations omitted).

The case that you cite, *Martin v. PepsiAmericas, Inc.*, 2010 WL 5300827 (5th Cir., Dec. 28, 2010), in wholly inapposite to the offsets sought in Kelley Drye's Affirmative Defense 19. In *Martin* the Court considered the District Court's decision to offset, against claimed unpaid overtime, a severance payment made as consideration for a release. In its analysis the court focused upon the fact that the consideration paid for a release was "not related to [the Plaintiff's] labors at all." *Id.* at 743. In stark contrast, the setoff sought by Affirmative Defense 19 is not for a contractual severance payment. Kelley Drye seeks, and is entitled to a setoff of amounts D'Ablemont was paid, by third parties, for legal services he provided, amounts the firm has already paid him, and related debts he owes or which have been forgiven by the firm. The setoffs Kelley Drye seeks are similar to the setoff considered by the 5th Circuit in *Johnson v. Martin*, 473 F.3d 220 (5th Cir. 2006), a case which the 5th Circuit did not overrule in *Martin v. PepsiAmericas*. In *Johnson*, an FLSA retaliation case, the Court considered the Defendant's position that damages should be offset by the plaintiff's post termination earnings. Significantly the *Martin* Court looked to the ADEA for guidance and provided the following analysis:

> The FLSA does not explicitly address whether wages earned after termination offset lost wage damages. In the context of the Age Discrimination in Employment Act ("ADEA"), courts must offset lost wage awards with post-termination earnings. *Stephens v. C.I.T. Group/Equip. Fin., Inc.*, 955 F.2d 1023, 1028 (5th Cir.1992). Under the ADEA, "[c]ourts uniformly offset interim earnings from back pay awards in order to make the plaintiff whole, yet avoid windfall awards." *Id.* The FLSA and ADEA have the same remedies provisions, so this ADEA precedent applies in the present case. *Lubke v. City of Arlington*, 455 F.3d 489, 499 (5th Cir.2006) ("Because the remedies available under the ADEA and the FMLA both track the FLSA, cases interpreting remedies under the statutes should be consistent.").

See also E.E.O.C. v. White and Son Enters., 881 F.2d 1006, 1013 (11th Cir. 1989) ("The language of Section 216(b) plainly calls for a deduction of interim earnings from gross back pay allowable as 'wages lost' due to a retaliatory discharge."); *Kossman v. Calumet County*, 849 F.2d 1027, 1029 (7th Cir.1988) (adopting the same rule). The offset Kelley Drye seeks in Affirmative Defense 19 (primarily direct third party payments D'Ablemont received for legal services rendered by him to a firm client) is much like the post-termination earnings analyzed by the 5th Circuit in *Johnson*, and by numerous other courts in the ADEA context, and the same result should be reached here.

In short, the EEOC cannot meet its burden of establishing "immunity from the defense as a matter of law." *SEC v. Packetport.com*, No. 3:05-CV-1747, 2006 WL 2798804 (D. Conn. Sept. 27, 2006). Please contact us if you wish to discuss any of the above issues further.

Very truly yours,

Bettina B. Plevan

cc: Joseph C. O'Keefe