

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY	:	
COMMISSION,	:	ECF Case
	:	Civil Action No. 10-cv-0655 (LTS) (MHD)
Plaintiff,	:	
	:	
v.	:	
	:	
KELLEY DRYE & WARREN, LLP,	:	
	:	
Defendant.	:	
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PLAINTIFF EEOC’S LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING DEFENDANT’S NINETEENTH AFFIRMATIVE DEFENSE

1. The Nineteenth Affirmative Defense of Defendant Kelley Drye & Warren, LLP (“Kelley Drye” or “Defendant”) states as follows: “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.” (Defendant’s Answer, pp. 7-8).

I. THE “THIRD PARTY PAYMENT” COMPONENT OF THE NINETEENTH AFFIRMATIVE DEFENSE

2. Kelley Drye has stated that the primary component of its setoff claims in its Nineteenth Affirmative Defense involve “direct third party payments D’Ablemont received for legal services rendered by him to a firm client.” (See Declaration of Jeffrey Burstein in Support of Motion for Partial Summary Judgment (“Burstein Dec.”) ¶2, Exh. A, February 10, 2011 letter from Bettina B. Plevan, Esq., counsel for Defendant, p.2).

3. The Kelley Drye Partnership Agreement provision at issue in this litigation required that equity partners fully relinquish their equity interest in the Firm and enter into “Life Partner” status at

70 years of age. (See Declaration of Eugene T. D'Ablemont in Support of Motion for Partial Summary Judgment ("D'Ablemont Dec."), ¶3, Exh. A).

4. The Charging Party, Eugene T. D'Ablemont, turned 70 years of age in 2000 and in that year he lost all of his equity interest at Kelley Drye. That year, after involuntarily relinquishing his equity partner status, Mr. D'Ablemont entered into an agreement to serve as counsel for two related long-standing clients, and receive a retainer while continuing to work for Kelley Drye as a Life Partner. Mr. D'Ablemont fully notified Kelley Drye about these arrangements. (D'Ablemont Dec., ¶3-4, Exhs. B and C).

5. The arrangement whereby Mr. D'Ablemont acted as counsel to these two related clients and received retainer payments is identical in nature to agreements entered into by other Kelley Drye attorneys who received direct payments from clients for services rendered, both before and after 2000. (Id., ¶5, Exhs. D, E, F,G and H).

6. In his role as counsel for these two clients since 2000, Mr. D'Ablemont selected only Kelley Drye attorneys to perform legal work for such clients (apart from the legal services provided by Mr. D'Ablemont himself), which has resulted in Kelley Drye's receipt of [REDACTED] in revenue since Mr. D'Ablemont was forced into Life Partner status (Id., ¶7).

7. While Kelley Drye was aware of and approved these arrangements, its initial position was that Mr. D'Ablemont could not obtain an annual bonus payment as compensation for legal services rendered to the Firm as Life Partner in addition to receiving these retainer payments. In a March 12, 2001 memo [REDACTED] Mr. D'Ablemont argued that he should be permitted to obtain a bonus payment for legal services rendered to Kelley Drye as a Life Partner in addition to these retainer payments. (Id., ¶6, Exh. I).

8. On April 10, 2001, Mr. D'Ablemont received a bonus from Kelley Drye for his legal services rendered to Kelley Drye in 2000, and has annually received such bonuses since. (Id., ¶6, Exh. J).

9. The retainer payments from these two related clients to Mr. D'Ablemont routinely were noted on Mr. D'Ablemont's annual tax returns, which were prepared by Kelley Drye. Additionally, the cover letters for the bills sent to these clients each month by Mr. D'Ablemont for legal services both by Mr. D'Ablemont and other Kelley Drye attorneys reflected that pursuant to the above-noted retainer agreements, there were no charges for Mr. D'Ablemont time. (Id., ¶8).

10. The issue of Mr. D'Ablemont receiving both payments from these clients and a bonus for work performed at Kelley Drye did not arise again for over seven years until the July 2008 when someone at the Firm "accidentally" opened a check with such a retainer payment, that had been sent to Mr. D'Ablemont at the Firm (as had occurred on a monthly basis since 2000). (Id., ¶9).

11. Mr. D'Ablemont had filed his age discrimination charge with EEOC on February 29, 2008. (Id., ¶ 2).

12. The opening of the check referenced in paragraph 10 above engendered memos between Kelley Drye and Mr. D'Ablemont on the retainer payment issue, the last being a memo from Mr. D'Ablemont dated October 20, 2008. (Id., ¶10, Exh. K).

II. THE "FREE LEGAL SERVICES" COMPONENT OF THE NINETEENTH AFFIRMATIVE DEFENSE

13. Kelley Drye's setoff claim regarding Mr. D'Ablemont's receipt of "free legal services" primarily involved legal fees in a real estate matter involving Mr. D'Ablemont and his son which went to litigation. Mr. D'Ablemont appeared as counsel pro se, but was assisted at trial by a Kelley Drye attorney because Mr. D'Ablemont was a witness. The time spent on this matter by this Kelley Drye attorney was written off by Kelley Drye in June 2007 pursuant to standard practice at the Firm, and Mr. D'Ablemont never was billed for this work. (Id., ¶11).

14. The second component of Kelley Drye “free legal services” claim involves work performed by Kelley Drye for a patent application for [REDACTED]. This issue was resolved with finality on July 18, 2008, by a letter from [REDACTED] writing off the time for work performed on this matter by a Kelley Drye attorney (Id., ¶12, Exh. L).

Respectfully submitted

Equal Employment Opportunity
Commission

s/
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Newark, New Jersey