Equal Employment Opportunity Commission v. Kelley Drye & Warren, LLP Doc. 49

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. KELLEY DRYE & WARREN LLP, Defendant.	No. 10 Civ. 655 (LTS)(MHD) **FILED UNDER SEAL**

DEFENDANT KELLEY DRYE & WARREN LLP'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF EEOC'S MOTON FOR PARTIAL SUMMARY JUDGMENT TO DISMISS DEFENDANT'S NINETEENTH AFFIRMATIVE DEFENSE

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PRELIMINARY STATEMENT

In response to the Amended Complaint of plaintiff Equal Employment Opportunity Commission ("EEOC"), defendant Kelley Drye & Warren LLP ("Kelley Drye" or the "Firm") asserted an affirmative defense claiming that, to the extent EEOC recovers damages for Charging Party Eugene D'Ablemont ("D'Ablemont"), the Firm is entitled to a setoff of the total amounts that he has received from third parties for legal services he has provided to those third parties, as well as amounts that he has received from the Firm, including bonuses the Firm paid him, and free legal services the Firm provided to him and his family. EEOC has now filed a groundless motion seeking partial summary judgment dismissing this well-founded affirmative defense.

EEOC's motion borders on frivolous, and flies in the face of established law, which provides for the setoffs the Firm seeks here. In both private litigation and government enforcement actions, setoffs against back pay awards, like those alleged here, are allowed because they constitute credit for compensation that the charging party—here, D'Ablemont—actually received from the Firm during the period of alleged discrimination. The factual foundation for EEOC's motion as set forth in its Rule 56.1 Statement consists of material disputed facts, precluding summary judgment. Moreover, the facts underlying Kelley Drye's setoff claims are unquestionably relevant to the defense of EEOC's claims because EEOC contends that Mr. D'Ablemont has been undercompensated since he became a Life Partner.

Notwithstanding EEOC's hollow references to the "public interest," this suit now seeks relief only in the form of compensation for D'Ablemont in light of the Firm's voluntary removal of the mandatory retirement provision from its Partnership Agreement. D'Ablemont's receipt of nearly $ Redacted in retainer payments, $ Redacted in annual bonuses, and $ Redacted in free legal services (as well as other payments and benefits, such as the substantial client development allowance that he received each year) must all be considered in order to evaluate the

compensation he received for services allegedly provided to Kelley Drye. If Kelley Drye is not permitted to seek the setoffs referenced in the Nineteenth Affirmative Defense, and back pay damages are awarded, D'Ablemont would receive an impermissible double recovery. Consequently, as explained more fully below, EEOC's motion for partial summary judgment should be denied.

FACTUAL SUMMARY

After D'Ablemont became a Life Partner in 2000 pursuant to Kelley Drye's then-Partnership Agreement, he entered into agreements with two Firm clients, whereby he agreed to provide legal services to the two clients and they agreed to pay D'Ablemont directly, rather than pay Kelley Drye, for his services. (Declaration of John M. Callagy in Opposition to EEOC's Motion for Partial Summary Judgment ("Callagy Dec.") ¶ 4.) He entered into this arrangement even though he had not obtained the Firm's agreement to it. (*Id.*)

Under Kelley Drye's Partnership Agreement, all amounts paid by clients for the legal services of Kelley Drye attorneys, including Life Partners, are considered the property of Kelley Drye. (*Id.* ¶ 3.) In rare instances, Kelley Drye Partners have been permitted to accept direct payments from clients, but only if these arrangements are approved, in advance, by the Firm and are part of a formal arrangement between the Firm and the Partner. (*Id.* ¶ 10.) D'Ablemont reached no such agreement with the Firm on the payments he received from the two clients at issue. (*Id.* ¶ 4.) Kelley Drye told D'Ablemont that he could not keep the retainer payments and still be eligible for bonuses from the Firm. (*Id.*) D'Ablemont's Declaration asserts that, in a March 14, 2001 meeting between him and Redacted Redacted allegedly told him that he could keep the retainer payments received in 2000 and still be considered for a Firm bonus for the year 2000. The only writing allegedly corroborating this

discussion is a short handwritten note by D'Ablemont himself and first disclosed by him more than seven years after the alleged meeting, and after he had accused the Firm of age discrimination. Apart from the question of that note's authenticity, even according to D'Ablemont's own description of the contents of the note, it reflects that whatever conversation he referenced related to compensation issues for just one year, and it states: "[w]ill look at again next year." (D'Ablemont Dec. ¶ 8, Exh. K.) Nevertheless, in each year since 2000, D'Ablemont demanded and received bonus payments from the Firm while continuing to receive direct retainer payments from the clients. (Callagy Dec. ¶ 5.)

Based upon documents produced by EEOC and provided by D'Ablemont in discovery, the Firm now knows that from 2000 through 2010, these two clients paid D'Ablemont at least $ Redacted (*Id.* ¶ 9.) Although D'Ablemont suggests that the Firm received substantial business from these clients during this period, he cannot dispute that the Firm received absolutely nothing for the services *he* provided to the clients.

D'Ablemont's retainer agreements with two Firm clients have not been as beneficial to the Firm as he asserts they have been. While D'Ablemont asserts that Kelley Drye has received approximately $ Redacted in revenue from the two clients from 2000 to 2010 (D'Ablemont Dec. ¶ 7), had he charged these clients for his time through Kelley Drye, the Firm's revenues would have been significantly greater. According to the limited data that the Firm has for 2004 and only parts of 2007–2009, the Firm would have billed and collected well over $ Redacted from these clients for D'Ablemont's time, in that limited time frame alone, and almost certainly substantially more for the years and periods for which Kelley Drye has not seen D'Ablemont's records of time incurred for these clients. (Declaration of Joseph C. O'Keefe in Opposition to EEOC's Motion for Partial Summary Judgment ("O'Keefe Dec.") ¶ 3.) Moreover, D'Ablemont

admitted in a letter to one of the two clients that his arrangements have "significantly reduced" the legal fees received from these clients by the Firm. (*Id.*, Exh. A.) In particular, he wrote that "the dollar value of the time I spent on [the client's] matters during the first six months of this year, for which Kelley Drye made no charge, approximated $ Redacted at the exorbitant rates Kelley Drye normally charges clients for my time. For that same period, the retainer [the client] paid me was $ Redacted . And, during that same period because I am doing a not insignificant part of the drafting work which I would normally pass on to Redacted or others, Kelley Drye's legal fees have been significantly reduced from what they had been in prior years." (*Id.*)

Incredibly, EEOC maintains that this Court, and the ultimate fact finder, must ignore the substantial sum D'Ablemont was paid for legal services rendered to these clients in assessing what back pay damages, if any, he is entitled to, even though he received those sums to the detriment of the Firm and those sums were properly considered Partnership Revenue under the terms of the Firm's Partnership Agreement.

In addition to the nearly $ Redacted D'Ablemont received directly from Firm clients, he has received substantial monetary benefits from the Firm in the form of free legal services. D'Ablemont filed a legal malpractice, breach of contract, and breach of fiduciary duty action on behalf of himself and his son against another law firm that he had hired to represent his son in a personal real estate eviction proceeding. (*Id.* ¶ 11.) D'Ablemont handled the matter *pro se* until it went to trial, when a fellow Kelley Drye partner served as his "trial counsel." (*Id.*) The "assistance" provided by this Partner, and in turn, by the Firm, amounted to over $ Redacted in legal fees for the work of the Partner and disbursements. (*Id.*) This amount does not include the value of the time D'Ablemont spent representing himself and his son in connection with this matter.

In another instance, Kelley Drye performed work on a [Redacted] for D'Ablemont's [Redacted], and reluctantly agreed to write off the legal fees and disbursements relating to the work after D'Ablemont balked at the prospect of either his [Redacted] or himself paying for them. (*Id.* ¶ 12.)

D'Ablemont himself had no basis for believing that he and his family were entitled to these free legal services from the Firm. To the contrary, he knew that he and/or his family would be required to pay the legal fees and costs incurred in these matters. For example, in an effort to support the merit of his son's case, he testified *under oath* at the trial in the legal malpractice action that, "I do know that I will, my son and I, will be billed for [Redacted]'s time as co-trial counsel." (*Id.* ¶ 11.) In connection with the patent application matter for his [Redacted], D'Ablemont recommended to a credit analyst within Kelley Drye that the Firm not require at the outset of the representation an advance retainer from this new client because, *inter alia*, Mr. D'Ablemont "would be surprised if our bill exceeds $10,000." (*Id.* ¶ 12.)

In fact, the Firm does not provide the type of legal services received by D'Ablemont and his family to its Partners for free. (*Id.* ¶ 11.) There is no Firm policy or practice to write off legal fees and disbursements if such work is performed. (*Id.*) The Firm's policy is [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted] (*Id.*) The Firm's policy certainly did not, and does not, entitle

partners to require that the Firm incur many tens of thousands of dollars of unbilled attorney time to litigate cases for partners' relatives. (*Id.*)

Finally, D'Ablemont also received compensation from Kelley Drye in the form of client development allowances in excess of his entitlement. D'Ablemont received over $140,000 more in client development allowances than he would have, had Kelley Drye calculated his allowance using the same formula it uses for other Partners. Instead, he received more because Kelley Drye acceded to his requests to calculate his allowance differently.

ARGUMENT

I.

SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THE PARTIES DISPUTE BOTH THE FACTS AND THE SIGNIFICANCE OF THOSE FACTS

A motion for summary judgment may be granted only if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, EEOC acknowledges that the parties vigorously dispute most of the facts set forth in support of its motion. For example, they dispute: (i) whether the Firm agreed to D'Ablemont's retainer arrangements with two Firm clients; (ii) whether arrangements entered by other Firm Partners were similar to D'Ablemont's arrangement, (iii) whether the payments he received from those two clients constituted Firm revenue and thus a form of compensation to him from the Firm; (iv) whether D'Ablemont and his family members were entitled to certain free legal services by the Firm; (v) whether the Firm's write-off of those legal fees constituted a

form of compensation to D'Ablemont by the Firm; and (vi) whether D'Ablemont received client development allowances in excess of his entitlement.

EEOC cannot ignore the factual disputes raised by its motion, since it asserts that the factual background is necessary to understand its assertion. It is apparent throughout EEOC's brief that its arguments only have merit if the Court accepts EEOC's version of the facts. On a motion for summary judgment, however, the evidence must be construed in the light most favorable to Kelley Drye, the non-moving party, and the Court must draw all reasonable inferences in Kelley Drye's favor. *North River Ins. Co. v. Ace American Reins. Co.*, 361 F.3d 134, 139 (2d Cir. 2004).

When the facts are viewed in the light most favorable to Kelley Drye (as they must be), EEOC's legal arguments have no merit. EEOC's contention that the Nineteenth Affirmative Defense is meritless cannot be considered in the absence of resolution of the many contested issues of material fact. Kelley Drye maintains that D'Ablemont's receipt of retainer payments from Firm clients, free legal services from the Firm, bonus payments from the Firm, and substantial client development allowances from the Firm, all constitute forms of compensation, to which he was not otherwise entitled. As a result, any fair calculation of damages, if liability is found, would include consideration of all of those payments. Under the applicable legal principles discussed below, compensation already received from the employer during the damages period constitutes an appropriate setoff against damages.

II.

SETOFFS ARE PERMITTED IN GOVERNMENT ENFORCEMENT ACTIONS

Partial summary judgment is inappropriate here, not only because of the disputed issues of fact, but also because EEOC cannot establish that it is entitled to judgment as a matter of law regarding Kelley Drye's Nineteenth Affirmative Defense. EEOC's contention that the setoffs

Kelley Drye seeks should not be allowed, or even be asserted at trial, is based on a purposefully erroneous reading of applicable law and a disregard for the numerous factual disputes relating to the setoff defense. As shown below, setoffs of the type sought by Kelley Drye *are* permitted in government enforcement actions under the Age Discrimination in Employment Act ("ADEA") pursuant to the enforcement provisions of the Fair Labor Standards Act ("FLSA").

A. EEOC's Suit Now Seeks Only Private Relief

EEOC's motion rests primarily upon the preposterous assertion that, in this action, it is enforcing a public right and not pursuing private relief. EEOC cites *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002), which, in fact, undermines, rather than supports, EEOC's argument. Although *Waffle House* states that EEOC is "not merely a proxy for victims of discrimination," the opinion also makes clear that, where EEOC seeks victim-specific relief, it acts in a dual capacity, part public and part private. *Id.* at 306–07 (emphasis added). EEOC's misinterpretation of the ruling in *Waffle House* is underscored by its omission of the word "merely" when it asserts, at page 8 of its brief, that "EEOC is 'not a proxy' for Mr. D'Ablemont," erroneously citing *Waffle House*'s "not a proxy" language. Under *Waffle House*, EEOC is a proxy for D'Ablemont even if it also serves an additional role of acting to protect some public right. The Third Circuit expressly acknowledged this principle in its 1990 opinion in *EEOC v. United States Steel Corp.*:

> The distinctive enforcement scheme of the ADEA shows unmistakenly that the EEOC has representative responsibilities when it initiates litigation to enforce an employee's rights. . . . We are convinced that Congress would not have crafted this enforcement scheme—on the one hand, creating an individual cause of action and, on the other, cutting off the individual's right to sue once the EEOC begins its action—unless Congress intended for the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights. . . . [t]he conclusion that the EEOC is the individual's representative in ADEA suits, like the one before us here seems inescapable.

* * *

> While it is true that the Commission has the responsibility to protect a vital public interest that transcends the interests of any or all aggrieved individuals, we have concluded, for the reasons previously explained, that the Commission's responsibilities include the representation of these grievants when it seeks individual relief on their behalf. Thus, when the Commission seeks individualized benefits under the ADEA for particular grievants, as it did in this case, the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies.

EEOC v. U.S. Steel Corp., 921 F.2d 489, 494–96 (3d Cir. 1990) (cited in *Waffle House*, 534 U.S. at 297) (emphasis added).

There can be no question that this action now seeks only relief for D'Ablemont—a private individual—and not the vindication of some public right. To the extent that EEOC will seek relief on behalf of others in this matter, it would be limited to a small number of other Kelley Drye Life Partners—also private individuals. EEOC readily admits that Kelley Drye has voluntarily eliminated its provision for mandatory retirement in the Partnership Agreement, thereby eliminating any need to pursue a "public right." The only remaining issues for the parties to litigate are (1) whether D'Ablemont is an employee protected by the ADEA; (2) whether Kelley Drye discriminated against D'Ablemont; (3) whether any of the Affirmative Defenses preclude Recovery, and (4) the amount of his damages. There can be no question that EEOC now invests its resources entirely on behalf of D'Ablemont (and possibly a small number of other Kelley Drye Life Partners) as his proxy to seek damages on his behalf. Consequently, Kelley Drye is entitled to the same defenses it would have if EEOC were not standing in D'Ablemont's shoes. *See Waffle House*, 534 U.S. at 297 (acknowledging that the charging party's "conduct may have the effect of limiting the relief that the EEOC may obtain in court").

B. <u>Setoffs Such as the Ones Kelley Drye Seeks Have Been Permitted in both Private and Government Enforcement Actions</u>

Even if EEOC's claim that it seeks to protect some public right had any merit, there can be no question that setoffs like the ones asserted in the Nineteenth Affirmative Defense are nonetheless permitted in the context of government enforcement actions, even where the primary goal is pursuit of the public interest. In *Waffle House*, the Supreme Court made this clear when it stated:

> [i]t is true . . . that [the charging party's] conduct may have the effect of limiting the relief that the EEOC may obtain in court. If, for example, he had failed to mitigate his damages, or had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly. As we have noted, it "goes without saying that the courts can and should preclude double recovery by an individual."

534 U.S. at 297 (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231–32 (1982) (Title VII claimant "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied"); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987) (holding EEOC's claim of backpay for charging party was barred because of her settlement with her employer, and noting that "the public interest in a back pay award is minimal" because "any recovery of back pay by the EEOC would go directly to" the charting party); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (barring EEOC's claims of backpay on behalf of individuals who had fully litigated their own suits against the employer, which were based on the same claims as EEOC's later suit); and quoting *General Telephone Co. v. EEOC*, 446 U.S. 318, 333 (1980)).

EEOC concedes that at least *some* setoffs are permissible. Significantly, EEOC admits in its brief that D'Ablemont's damage award should be offset by the bonus payments D'Ablemont received since he became a Life Partner. (EEOC Br. 4.) Like the bonus payments D'Ablemont

received, the other setoffs Kelley Drye seeks should not be foreclosed by the Court at this early stage of the litigation because they either reflect his efforts to mitigate damages or constitute alternate forms of compensation from the Firm. Whether a distinction can be drawn between the bonus payments and the setoff categories set forth in the Nineteenth Affirmative Defense must await a resolution of factual disputes, either through discovery or by the ultimate fact-finder.

As EEOC has expressly acknowledged, courts (including the Southern District of New York) have allowed setoffs in both ADEA and FLSA actions. EEOC itself cites two cases in which courts "have recognized the validity of setoff claims." (EEOC Br. 5.) In *Munnelly v. Memorial Sloan Kettering Cancer Center*, 741 F. Supp. 60, 62 (S.D.N.Y. 1990) (cited incorrectly by EEOC as 434 F. Supp. 2d 1314), the court concluded that "failure to offset any damage award by the amount of his severance pay would put Munnelly in a better position than he would have been had he not been terminated" and that "[s]uch a recovery would go beyond the make-whole purpose of the ADEA." In *Hansen v. ABC Liquors, Inc.*, No. 3:09-cv-966-J-34MCR, 2009 U.S. Dist. LEXIS 108954, at *6 (M.D. Fla. Nov. 9, 2009), also relied upon by EEOC, the district court refused to strike an affirmative defense seeking that "[a]ny damages for any alleged unpaid overtime wages that the Plaintiff is claiming [be] offset by any pay the Plaintiff was paid and/or overpaid for a particular workweek or by any pay that Defendant was not required to pay to the Plaintiff for a particular workweek." In the absence of any allegation that the plaintiff would receive a sub-minimum-wage award because of this setoff, the district court let the defense stand, reasoning that, "resolution of this issue necessarily involves factual determinations as to what exactly was paid and/or owed, [and] the Court cannot say that the defense has no possible relationship to the controversy." *Id.* at *9.

In addition, EEOC relies upon two FLSA cases acknowledging the appropriateness of certain setoffs. In *Martin v. PepsiAmericas, Inc.*, 628 F.3d 738, 742 (5th Cir. 2010) (citing *Singer v. City of Waco*, 324 F.3d 813 (5th Cir. 2003)), the Fifth Circuit acknowledged that setoffs are allowed under the FLSA, where "the money being set-off can be considered wages that the employer pre-paid to the plaintiff-employee." In *Singer*, "the district court allowed the employer to set-off overpayments in some work periods against shortfalls in others," and the Fifth Circuit "viewed these overpayments as akin to pre-payments, not prohibited by the Code of Federal Regulations or the FLSA, and affirmed." *Id.* at 741 (citing *Singer*, 324 F.3d at 826).

Given the *Martin* court's express acknowledgment that setoffs may be appropriate in FLSA cases, EEOC's reliance on *Martin* is puzzling. In addition, *Martin* is inapposite because it only holds that, in the context of an FLSA action, setoffs should not be allowed for severance payments made by an employer in exchange for a release agreement. In its analysis, the court focused on 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 setoffs sought by Kelley Drye are not related to contractual severance payments. There was no "bargained for" exchange. Kelley Drye received nothing in exchange for its alleged (and disputed) agreement to allow D'Ablemont to keep his retainer payments from third parties, while continuing to pay him an annual bonus, providing him with client development account funds in excess of his entitlement or for writing off significant legal fees and costs he incurred. Consequently, here, unlike in *Martin*, the setoffs sought are indisputably "related to [D'Ablemont's] labors."

The setoffs Kelley Drye seeks are distinguishable—both factually and legally—from the setoffs rejected in the handful of cases cited by EEOC because Kelley Drye only seeks setoffs for amounts that constitute alternative forms of compensation already paid to D'Ablemont. In

contrast, the employers in the cases cited by EEOC sought reimbursement for amounts that were advanced to the employee or to hold the employee liable for tort claims. For example, in *Donovan v. Pointon*, 717 F.2d 1320, 1323 (10th Cir. 1983), an FLSA enforcement action brought by the Department of Labor, the Court rejected the employer's request for setoffs attributable to the employer's allegations that "two of his employees allegedly owed him money for sums which he had advanced to them and [] certain employees were liable to him in tort for acts of sabotage." Likewise, in *NLRB v. Mooney Aircraft, Inc.*, 366 F.2d 809, 811 (5th Cir. 1966), the Court rejected the employer's request for setoffs against the back pay damages of employees who were "indebted to the Company either for goods sold the employees or for money lent them." These cases speak of amounts loaned to and debts owed by employees. By contrast, Kelley Drye did not advance anything to D'Ablemont; rather, his receipt of retainers from third parties, his receipt of client development allowance monies and free legal services from the firm amount to alternative forms of compensation from Kelley Drye, to which he was not otherwise entitled and for which Kelley Drye received no consideration. Therefore, the setoffs should be allowed.

Even if *Donovan* and *Mooney* were on point factually, the legal principles applied in those cases under the FLSA and NLRA are also not applicable here. As the Fifth Circuit recently explained, "the only function of the federal judiciary under the FLSA 'is to assure to the employees of a covered company a minimum level of wages," therefore, "[a]rguments and disputations over claims against those wages are foreign to the genesis, history, interpretation, and philosophy of the Act.'" *Martin v. PepsiAmericas*, 628 F.3d at 741. Consequently, courts have held that only "the employer's obedience to minimum wage and overtime standards" is to be considered, for "'[t]o clutter [FLSA] proceedings with the minutiae of other employer-

employee relationships would be antithetical to the purpose of the Act.'" *Id.* While the goal of damages under the FLSA is to assure that plaintiffs receive their statutorily-mandated wage and overtime payments regardless, the goal under the ADEA is to "ensure that victims of age discrimination [be] made whole." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727–28 (2d Cir. 1984) (cited in *Munnelly v. Mem'l Sloan Kettering Cancer Ctr.*, 741 F. Supp. 60, 62 (S.D.N.Y. 1990)). "[T]he make-whole approach requires that recoveries be calculated in order to prevent plaintiffs from receiving an unwarranted windfall." *Munnelly*, 741 F. Supp. at 62. To this end, *Munnelly* and other courts have routinely recognized the propriety of setoffs in ADEA actions.

III.

THE THIRD-PARTY PAYMENTS, CLIENT DEVELOPMENT ALLOWANCES, AND FREE LEGAL SERVICES D'ABLEMONT RECEIVED HAVE A LOGICAL NEXUS TO EEOC'S CLAIMS BECAUSE THEY CONSTITUTE ALTERNATE FORMS OF COMPENSATION THAT D'ABLEMONT RECEIVED FROM THE FIRM

EEOC's contention that the setoffs Kelley Drye seeks should be disallowed because they are "wholly unrelated" to its claims in this matter is totally unfounded. To the contrary, the facts underlying the setoffs sought by Kelley Drye are integrally related to EEOC's claims.

First, EEOC claims that D'Ablemont was treated less favorably in compensation than younger Partners because of his age, and in retaliation for complaining about discrimination. The factual bases for Kelley Drye's setoff arguments—D'Ablemont's acceptance of nearly $Redacted Redacted in third-party retainer payments for legal services he provided to a Firm client while, at the same time, demanding and receiving annual bonuses and excessive client development allowances, and the Firm's agreement to write off over $Redacted worth of legal costs he incurred (*see* Callagy Dec. ¶¶ 5, 11–12; Declaration of Thomas Carty in Opposition to EEOC's Motion for Partial Summary Judgment ("Carty Dec.") ¶ 5)—are not only relevant to establishing the

compensation he actually received since he became a Life Partner, and the many instances in which he was treated *more* favorably than others, but are also relevant to Kelley Drye's arguments as to the legitimate, non-discriminatory business reasons for its decisions concerning D'Ablemont and his compensation.

EEOC concedes that backpay damages are subject to setoff to account for other compensation received by an employee for his work for the employer: "EEOC is not contesting the obvious principle that a backpay award is reduced by compensation actually received. . . . this method of calculating backpay is fundamental in the case law and need not be raised as an affirmative defense." (EEOC Br. 4.) The same "obvious principle" applies to the setoffs Kelley Drye seeks, because they, too, constitute forms of compensation.

Here, the amounts D'Ablemont received directly from clients constituted a form of compensation just as much as the bonus payments he received from Kelley Drye. D'Ablemont was well aware that, under Kelley Drye's Partnership Agreement, all amounts paid by clients for the work of Kelley Drye attorneys are considered Firm revenue. (Callagy Dec. ¶ 3; Carty Dec. ¶ 2.) Just as the bonuses D'Ablemont received should admittedly reduce his backpay award, so too should the third-party payments he received as an alternate form of compensation from the Firm, since the monies belonged to the Firm. Furthermore, the Firm's Executive Committee informed D'Ablemont that he could *either* be considered for a bonus *or* retain the direct client payments (*id.* ¶ 4), which further demonstrates that those payments were an alternate form of Firm compensation.

Likewise, the substantial amount of free legal services received by D'Ablemont and his family members, which the Firm wrote off at his behest (Callagy Dec. ¶¶ 11–12), provided a tangible benefit to D'Ablemont and must also be considered a form of compensation to him.

Kelley Drye's policies entitle its Partners to have the Firm perform certain simple personal legal matters for them for free—namely, Redacted Redacted (*Id.* ¶ 11.) These legal services are but one form of compensation the Firm provides to its Partners. D'Ablemont acted outside of the policy by using Firm resources and attorney time on entirely personal legal matters for himself, his son, and Redacted, to the tune of $Redacted (*Id.* ¶¶ 11–12.) D'Ablemont was not entitled to such free legal services under Kelley Drye's policies. (*Id.* ¶ 11.)

In addition, D'Ablemont's client development allowance as a Life Partner has been far in excess of not only Redacted, but also the amount that ordinarily would be awarded to a Partner based upon Redacted Redacted (Carty Dec., ¶ 5.) The Firm has repeatedly acceded to D'Ablemont's requests that his annual client development allowance be based Redacted Redacted Redacted Redacted Redacted (*Id.*) Had D'Ablemont's client development allowance been calculated according to Redacted Redacted, he would have received allowances totaling $Redacted from 2000–2010. (*Id.*) Instead, the total client development allowance received by Mr. D'Ablemont for the years 2001–2010 was $Redacted. (*Id.*) Consequently, these amounts must also be considered a form of compensation and offset against any backpay damages that are ultimately awarded.

IV.

THE THIRD-PARTY PAYMENTS D'ABLEMONT RECEIVED ARE EVIDENCE OF MITIGATION

Not only are the retainer payments D'Ablemont received from Firm clients a form of compensation from the Firm, but they are also evidence of mitigation. To the extent that EEOC claims D'Ablemont lost income due to alleged age discrimination, D'Ablemont was successful in his efforts to replace that lost income with these retainers.

The Supreme Court in *Waffle House* expressly acknowledged that *failure* to mitigate would be a valid basis for setoff against a damage award in an EEOC enforcement action. *Waffle House*, 534 U.S. at 296. There is no reason why *successful* mitigation should not likewise be a ground for a setoff because "courts must offset lost wage awards with post-termination earnings" under the ADEA. *Johnson v. Martin*, 473 F.3d 220, 222 (5th Cir. 2006) (citing *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.*; *see also EEOC 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 retainer payments received by D'Ablemont are much like the post-termination earnings analyzed by the Fifth Circuit in *Johnson* and numerous other courts in the ADEA context, and therefore, any backpay award EEOC obtains on D'Ablemont's behalf must be offset by these earnings.

CONCLUSION

For the foregoing reasons, EEOC's motion for partial summary judgment should be denied in its entirety.

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Respectfully submitted,

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