Equal Employment Opportunity Commission v. Kelley Drye & Warren, LLP Doc. 50

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, -against- KELLEY DRYE & WARREN LLP, Defendant.	No. 10 Civ. 655 (LTS)(MHD) **Filed Under Seal**

DECLARATION OF JOHN M. CALLAGY PURSUANT TO 28 U.S.C. § 1746

John M. Callagy declares under penalty of perjury:

1. I am an attorney duly admitted to practice before this Court and the courts of the State of New York and a member of defendant Kelley Drye & Warren LLP ("Kelley Drye" or the "Firm"). Since 1993 I have been the Chairman of Kelley Drye's Executive Committee. I submit this declaration in opposition to the motion of plaintiff Equal Employment Opportunity Commission ("EEOC") for partial summary judgment in the above-captioned action.

2. Charging Party Eugene T. D'Ablemont ("Mr. D'Ablemont") became a Life Partner with Kelley Drye after he voluntarily relinquished his equity partner status pursuant to Kelley Drye's then Partnership Agreement, which he voluntarily entered into, and from which he

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received significant benefits during his tenure as a Kelley Drye Partner. At the outset, it is important to understand that the use of the phrase "Active Life Partner" by the EEOC and by Charging Party Eugene T. D'Ablemont ("D'Ablemont") in the papers submitted by the EEOC in support of its motion, and throughout this litigation, is inaccurate and misleading. The capitalization of these words by Mr. D'Ablemont (which practice has been adopted by the EEOC), suggests that "Active Life Partner" is a defined term in Kelley Drye's Partnership Agreement or some other legally operative document. It is not. Rather, Mr. D'Ablemont has invented the category of "Active Life Partner" in order to create the false impression that he has a formally recognized status that differentiates him from other Life Partners (the only such designation used in the Partnership Agreement) and that such self-created designation somehow entitles him as a Life Partner to compensation and other benefits additional to that of other Life Partners.

3. Most of the Declaration of Eugene T. D'Ablemont Pursuant to 28 U.S.C. § 1746 ("D'Ablemont Declaration") submitted by the EEOC in support of its motion concerns the so-called "retainer agreements" between Mr. D'Ablemont and **Redacted** and **Redacted**, pursuant to which Mr. D'Ablemont apparently has received and retained payments made directly to him by these clients. By way of background, under the Firm's Partnership Agreement, payments made by clients for legal services or other "legally-related services" ("Ancillary Income") are "Partnership Revenues," and "[a]ll Partnership Revenues shall be the property of the Partnership" (attached hereto as Exhibit A is a true copy of the relevant provisions of the Kelley Drye Partnership Agreement.) Thus, Mr. D'Ablemont was not free to keep for himself payments made by **Redacted** and Redacted unless the Firm had specifically authorized him to do so.

4. Mr. D'Ablemont alleges that he notified Kelley Drye about his arrangements with Redacted and Redacted, that Kelley Drye "approved" the arrangements, and that Kelley Drye "agreed that the term 'Partnership Revenues' in the Partnership Agreement would not be deemed to include the companion or other fees to me by Redacted and Redacted." (D'Ablemont Dec. ¶ 4.) In fact, Mr. D'Ablemont provided the Firm with copies of letters he received from the two clients, which did not specify the length of the engagement, the amount to be paid, or the nature of the work to be performed, (D'Ablemont Dec., Exh. B). Moreover, the Firm did not "approve" these arrangements. I and Kelley Drye's then Redacted, explicitly advised Mr. D'Ablemont in a February 22, 2000 memorandum that he could *either* retain the direct payments from Redacted and Redacted, or be considered for an annual bonus by the Firm's Executive Committee, but he could not have both (a true copy of that memorandum is annexed hereto as Exhibit B).

5. It became Mr. D'Ablemont's practice to submit to the Executive Committee at the end of each year, or early the following year, a memorandum requesting a bonus from the Firm for the year past as an "honorarium" and offering reasons for his request. (*See, e.g.*, his March 12, 2001 memorandum to me and Redacted. (D'Ablemont Dec., Exh. I.) In none of those memoranda seeking bonuses for calendar year 2001 or subsequent years, did D'Ablemont make any mention of his continuing receipt of payments directly from Redacted or Redacted. The memos focused in detail about work for and revenues received by the Firm from clients for which Mr. D'Ablemont was listed as the billing partner. For example, annexed hereto as Exhibit C, is a true copy of his memorandum of December 31, 2001, in which he sought a bonus for calendar year 2001. In this memorandum, Mr. D'Ablemont went into great detail about his efforts on behalf of the Firm, and argued, among other things, that his presence at the Firm had been "essential" to

the Firm's representation of the "Redacted" (which include Redacted and Redacted). But he said nothing about his receipt of payments directly from those clients, even though he had been told that he could not retain such payments and be considered for a Kelley Drye bonus.

6. Seeking to suggest that Firm management knew, or should have known, that Mr. D'Ablemont had continued to receive payments directly from clients over the years, D'Ablemont states in his declaration that those payments "routinely were noted in my annual tax returns prepared by Kelley Drye." (D'Ablemont Dec. ¶ 7). Those returns were prepared by an accountant and a tax attorney employed at Kelley Drye. The Executive Committee certainly was not involved in the preparation of and had no knowledge of Mr. D'Ablemont's income tax returns. Indeed, I was not even aware that Firm personnel prepared Mr. D'Ablemont's income tax returns.

7. Similarly, Mr. D'Ablemont's reliance on language that he alleges was included in cover letters to the bills he sent to Redacted and Redacted (D'Ablemont Dec. ¶ 8) proves nothing. The Executive Committee does not review bills sent to clients or involve itself in the partner's day-to-day details of the billing process. Firm partners, including Mr. D'Ablemont, enjoy a great deal of discretion and autonomy in the billing process and Firm management typically would become involved in the billing process only if a client had significant unpaid accounts receivable.

8. Mr. D'Ablemont's reliance on his tax returns and billing letters in this context is revealing, however. In seeking to show Firm knowledge of the Redacted and Redacted payments by arguing that someone, sometime, someplace within the Firm, had access to information showing these payments, Mr. D'Ablemont implicitly admits that year after year he applied to the

Executive Committee for bonuses without disclosing to the Committee his continuing receipt each year of these private payments.

9. In the course of this litigation, I have been surprised to learn that Redacted and Redacted have been making direct payments to Mr. D'Ablemont for years that have apparently totaled approximately Redacted through 2010.

10. Mr. D'Ablemont's claim that his payment arrangements with Redacted and Redacted "were identical in nature to those entered into by various other Kelley Drye attorneys who received direct payments from clients for services rendered" (D'Ablemont Dec. ¶ 5) is false. While the Firm has on occasion permitted a few partners to retain certain client payments for services rendered to Firm clients, it has done so pursuant to contractual arrangements negotiated and clearly agreed to in writing by the Firm and the partner at issue, where the Firm has determined, based upon the totality of the circumstances, that such a relationship is in the best interests of the Firm (See D'Ablemont Dec., Exhs. D–H.) Here, there was *no* such determination by the Executive Committee and *no* agreement, written or otherwise, with the Firm. Moreover, in the only two current, continuing arrangements where the Firm has approved of partners being paid directly by Firm clients for services rendered to the client, the client payments received by those partners, unlike Redacted and Redacted's payments to Mr. D'Ablemont for legal services, are intended to be compensation for business and consulting functions performed by those partners for the clients, and have been disclosed to the Firm as such. (See D'Ablemont Dec., Exhs. E, H.)

11. Mr. D'Ablemont's Declaration also addresses the issue of certain free legal services he obtained from the Firm, including the time charges that Kelley Drye's litigation partner Redacted incurred in trying a case relating to what Mr. D'Ablemont described as a "real estate matter and litigation." (D'Ablemont Dec. ¶ 11). In fact, it was not a real estate

matter, but rather a legal malpractice, breach of contract, and breach of fiduciary duty action filed by Mr. D'Ablemont and his son against another law firm that he had hired to represent his son in a personal real estate eviction proceeding. Mr. D'Ablemont handled the matter *pro se* until it went to trial, at which point Kelley Drye Partner **Redacted** appeared as Mr. D'Ablemont's trial counsel in or about April 2006. While the Firm ultimately did write off more than **Redacted** in time and expenses incurred by Kelley Drye, it did so in response to requests by Mr. D'Ablemont after the fact, not pursuant to "standard practice." (A true copy of the Bill Summary demonstrating the billable time and disbursements incurred by the Firm is annexed hereto as Exhibit D.) **Redacted**

Redacted

Redacted

Redacted

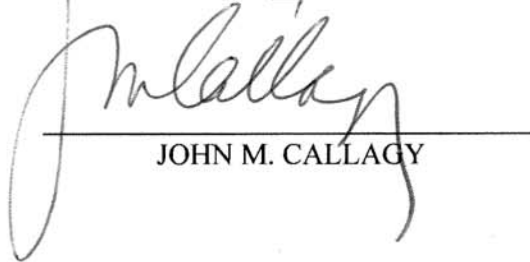
Redacted True copies of excerpts of Firm manuals setting forth this policy are attached hereto as Exhibits E (dated September 1999) and F (dated May 2004). **Redacted**

Redacted 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. Indeed, Mr. D'Ablemont knows it is false to state in his declaration that it was "pursuant to standard practice" that Kelley Drye did not charge him or his son for these extensive litigation services because, *inter alia*, at the trial of that case he **testified under oath** in an effort to support the merit of his son's case that, "I do know that I will, my son and I, will be billed for Mr. Crotty's time as co-trial counsel . . . ." (Trial Transcript of April 25, 2006, at p. 85, annexed hereto as Exhibit G).

12. Nor was it "standard practice" for the Firm to provide free of charge the more than Redacted worth of Redacted legal work done for the company of Mr. D'Ablemont's Redacted Redacted. As with the trial for his son, Mr. D'Ablemont knew perfectly well that his Redacted's company was expected to pay for this work, as reflected, for example, in a Firm e-mail chain of November 29, 2007 (a true copy of which is annexed hereto as Exhibit H), where Mr. 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." However, because D'Ablemont became a "squeaky wheel" on the subject of payment, I understand that the Firm again reluctantly wrote off these fees. (A true copy of the Firm's memorandum communicating its decision to write off these fees is annexed hereto as Exhibit I.)

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge and/or based upon my review of the records of Kelley Drye.

Executed on April 27, 2011



JOHN M. CALLAGY