

ENDORSED ORDER

Mr. D'Ablemont is ordered to produce to defendant the time logs and any other documents pertaining to the services he has rendered to the two clients at issue. These documents were encompassed in defendant's June 2010 subpoena to him and are plainly relevant to issues in this case (and would be so irrespective of the deposition of plaintiff's pending Rule 36 motion. Production is to be made within ten days.

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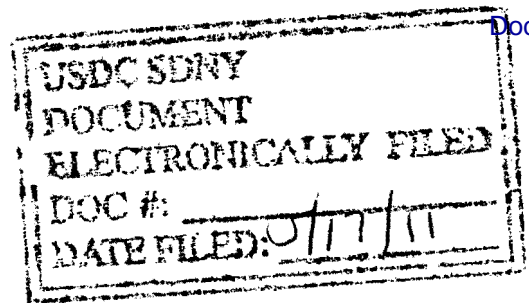
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May 5, 2011

VIA FACSIMILE AND OVERNIGHT MAIL

Hon. Michael H. Dolinger, U.S.M.J.
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

*M/USMJ
5/13/11*



Doc. 56

MAY - 6 2011

Re: Equal Employment Opportunity Commission v. Kelley Drye & Warren LLP
10-CV-0655 (LTS) (MHD)

Dear Judge Dolinger:

On April 13, 2011 your Honor held a hearing and made rulings on eleven discovery issues which the Equal Employment Opportunity Commission ("EEOC") had brought before you. Before the hearing the parties' had exchanged pre-motion correspondence in an effort to resolve the discovery disputes themselves.

As a non-party to the suit, albeit one of Defendant's Life Partners for whom the EEOC initiated this action under the Age Discrimination in Employment Act ("ADEA") seeking victim specific damage relief, in addition to public interest injunctive relief, I was not requested to attend the hearing because none of the issues the EEOC presented to the Court involved me personally.

The EEOC informed me that at the end of the hearing Defendant's counsel, Ms. Plevan, raised an issue that was not on the agenda and involved me personally. Ms. Plevan represented to the Court the following in the colloquy reported in the transcript of the April 13 hearing:

"MS. PLEVAN: We didn't write it, but if we can raise something as long as we are here, we have requested, and I don't think there is any dispute, that we will get document production of Mr. D'Ablemont's records of the work he did for TeleRep and related companies, but it has not - - we've only received partial production, and I thought it might be helpful, it certainly would be helpful to us and maybe to the EEOC if the Court could direct a

specific date by which those should be produced.

THE COURT: Just to clarify, this is a request pursuant to subpoena to Mr. D'Ablemont as opposed to a document request to the EEOC?

MS. PLEVAN: It's, I think, probably covered in both.

THE COURT: Both, all right.

MS. PLEVAN: But I think the EEOC needs to get them from Mr. D'Ablemont, so...

THE COURT: OK. Mr. Burstein, what's the story?

MR. BURSTEIN: Your Honor, the EEOC does not have these documents. We've requested them. Mr. D'Ablemont has not turned them over to us at this point, so I cannot give your Honor an answer that I will have these documents by X date and be able to turn them over.

THE COURT: Is it your understanding that apart from the Rule 34 request to EEOC, that this is also encompassed within a subpoena to Mr. D'Ablemont?

MS. PLEVAN: Clearly, he produced some of the documents. It's just, you know, in a particular year we have months January through May, and we don't have the rest of the year, so...

THE COURT: I'm simply concerned about whether the order technically should be to Mr. D'Ablemont to turn them over or to the EEOC to turn them over or to both. I'm happy to accommodate either way.

MR. BURSTEIN: My understanding of the original subpoena to Mr. D'Ablemont I don't think encompassed - - I may be wrong because I don't have the document in front of me, and I haven't looked at it recently - - I don't think it encompassed the documents Ms. Plevan is referring to. She certainly has made the request of me recently on two occasions, and I have been in touch with Mr. D'Ablemont about it, but I do not believe that the specific documents being requested now are encompassed in the original subpoena.

THE COURT: OK. In any event, what I would do is direct that the plaintiff produce to defendant the balance of these documents by no later than April 27 which is, I believe, two weeks from today. And I will direct that to the extent that Mr. D'Ablemont is cooperating or required to cooperate with the EEOC, that he comply with his obligation to provide EEOC these documents so that EEOC may in turn comply with the Court's order." (Tr. at 58 - 59)

Unfortunately, the Court's direction to me was based on Defendant's counsel's misrepresentation to your Honor. Some background is in order:

CHRONOLOGY

Defendant has served one subpoena on me, a Document Production Demand Subpoena, dated June 22, 2010. I responded to that subpoena by a formal "Objections and Responses", dated July 6, 2010, a copy of the relevant portion which is annexed as Exhibit 1.

Request No. 12 reads:

"All documents concerning services provided by you to Kelley Drye clients or other third parties, including, but not limited to, documents reflecting the terms of all such arrangements, descriptions of the services provided and the amounts paid to you."

My response to Request No. 12 was to incorporate General Objections 1, 2, 3, 4, 6, and 7, a copy of which is annexed as Exhibit 2. General Objection 2 noted that 27 of the 32 Subpoena Demands were duplicative of requests made by Defendant in its document production request to the EEOC. Subpoena Demand No. 12 was duplicative of Defendant's Request No. 21 of the Document Production Request which Defendant had served on the EEOC. General Objection 7 addresses the issue of relevancy supported by legal decisions. The EEOC's response to Request No. 21 was also to object on the basis of relevancy and because "the request seeks documents that are already in the possession of Defendant" (Emphasis added). Exhibit 3 annexed hereto. The EEOC did produce copies of various documents from its investigative file, including the retainer agreements between TeleRep and HRP and me which I had presented to Kelley Drye's then Managing Partner Stone and Executive Member Bickford on February 9, 2000, the terms of which the Firm's Executive Committee formally approved in a Memorandum to me, dated February 22, 2000, later confirmed by Executive Committee Chairman Callagy in a meeting with me in my office on March 14, 2001. The TeleRep retainer agreement, dated February 1, 2000, is annexed as Exhibit 4. It is signed by TeleRep's President and reads in relevant part:

"I envision your continuing to act as you do now in representing us and supervising the other Kelley Drye partners, notably Chris Drewes and Tom Kinzler, who you choose to assist you in working our account. We will pay Kelley Drye for everyone's time, but yours. Effective as of January 1, 2000, your time will be charged directly to TeleRep under an agreed-to retainer agreement. In effect, you will be TeleRep's counsel, with authority to select Kelley Drye or any other firm to assist you.

You also can continue, as now, to service other accounts at Kelley Drye, as long, as now, TeleRep gets you when we need you.”

Contrary to Ms. Plevan’s assertion to your Honor at the April 13 hearing, I have never produced any TeleRep Time Log or HRP Time Log, in whole or in part, at any time to date either prior to or following my July 6, 2010 served Objections and Responses to Defendant’s Subpoena. At no time following Defendant’s receipt of my response to Request No. 12 did Ms. Plevan reject my response and seek to place the issue before your Honor.

THE SUBOENA ISSUES
THAT DEFENDANT PLACED BEFORE THE COURT

On October 19, 2010, Ms. Plevan wrote your Honor asking for rulings on several document production disputes between Defendant and me arising out of Defendant’s June 22, 2010 Subpoena. A copy of the October 19 letter is annexed as Exhibit 5. The letter does not mention the TeleRep Time Logs or the HRP Time Logs or records of the work I did for TeleRep or HRP during the retainer period when I was a Life Partner. Following the EEOC’s subpoena to me and prior to Ms. Plevan’s October 19 letter, Defendant did not ask for or mention, nor did the EEOC ask for or mention, records of work I had performed for “TeleRep and related companies” as a Life Partner. Like the EEOC and me, Defendant obviously did not believe that Subpoena Request No. 12 and the duplicate Request No. 21 served on the EEOC were intended to encompass the Time Logs because of the terms of the TeleRep and HRP retainer agreements which on their face described the services I was to continue to perform for TeleRep and HRP, the “terms of the arrangement”, and that the time I spent would not be Kelley Drye billable time.

Sometime after October 22, 2010, the EEOC forwarded to me a copy of Kelley Drye’s Privilege Log. I noted that Defendant had listed on its Privilege Log, as items 2 and 3, TeleRep and HRP Time Logs. Exhibit 6 annexed hereto. So, it became evident that Defendant had obtained before October 22, 2010 some, if not all of the Time Logs. The question was to become: how did Defendant obtain the Time Logs.

On October 25, the Court held a hearing on Defendant’s request for rulings on its discovery disputes with me. The EEOC informed me that the Court had requested that I be present at the hearing, and I was. At no time during the hearing did Ms. Plevan mention the TeleRep Time Logs or the HRP Time Logs or records of the work I had rendered TeleRep or HRP during the retainer period when I was a Life Partner. Kelley Drye, of course, had in its possession at the time of the October 25 hearing at least some of the Time Logs for a four year period, 2004, 2007, 2008, and 2009.

At the time of the October 25 hearing Kelley Drye also had in its possession the daily billable time entries for each Partner, Of Counsel, Associate, and Paralegal who performed work for TeleRep and HRP during my retainer period and for which, on behalf of Kelley Drye as TeleRep’s and HRP’s lead counsel, I had billed and collected at 100% realization over \$5 million

in cash receipts for Defendant. In addition, Kelley Drye had in its possession the daily billable time entries for each Partner, including me, Of Counsel, Associate, and Paralegal who performed work for TeleRep and HRP during all years prior to the beginning of the retainer period in 2000.

On February 23, 2011, Defendant fleshed out for the first time items 2 and 3 on its Privilege Log by listing the bate-stamped numbers that Defendant had given to the TeleRep and HRP Time Logs which Defendant then produced to the EEOC, with multiple redactions which Defendant had unilaterally made. Exhibit 7 annexed hereto.

Therefore, it is not true that in response to Defendant's June 22, 2010 Subpoena Document Demand I had produced records of the work I did for TeleRep and related companies, other than the EEOC's producing the TeleRep and HRP retainer agreements which Kelley Drye had in its possession since February 2000. Those retainer agreements made crystal clear the services I was to perform as the quid pro quo for TeleRep and HRP keeping their accounts at Kelley Drye and the terms under which I would perform those services.

I did not produce my personal non-billable time records for three reasons (i) I did not, and do not believe that Subpoena Request No. 12 was intended to encompass within its scope my personal time records as lead counsel for TeleRep and HRP which were expressly excluded from Defendant's right to bill to the same extent as the exclusions found in the 1998, 2000, and 2007 Kelley Drye third party payment agreements with younger Partners Insel, Epstein and Barry, copies of which are annexed hereto as Exhibits 8, 9 and 10;¹ (ii) for over nine (9) months Defendant had not acted as though those time records were included; indeed it acted to the contrary; and (iii) even if they were included, I had objected to their production based on General Objections 1, 2, 3, 4, 6, and 7. Defendant has never rejected those objections or put them in issue before your Honor. It still has not.

THE TIME LOGS

In August 2010 I produced for Defendant the check stubs showing the monthly retainer payments I had received each year from TeleRep and HRP during the retainer period. TeleRep and HRP sent me those monthly checks by separate check, in separate clear window-type envelopes, with each's logo on the envelopes outside and showing through the window-part the top of the check with my name, care of Kelley Drye. The two checks were sent to me each

¹ The Epstein agreement, permitting him to become General Counsel of Firm client KMC, reads in relevant part: "During the period I will devote three days per week [about 20-24 hours] principally at the Company's headquarters in Bedminster *** and the Company will not be charged for my normal hourly billing rate" (Exhibit 9). The Insel agreement, permitting him to become an executive of the Kopf Family Entities, notes that: "Insel anticipates that the services required of him in connection with the Kopf Family Entities will require approximately half of his working time [a loss to Kelley Drye of approximately 1000 billable hours a year]; and "so long as Insel remains an employee of the Kopf Family Entities, Insel shall not be required to bill his time to the Estate of R.C. Kopf or to any Kopf Family Entities". (Exhibit 8).

month at Kelley Drye, beginning in March 2000. In October 2010, I produced for Defendant the K-1s which further confirmed those monthly payment amounts. Those records established that my retainer payments each month were the same flat amounts each year during the period 2000 through 2004 and were the same, albeit slightly higher, flat monthly amounts each year during the period 2005 through 2010. Those records also showed that my flat amount retainer payments were unrelated to the amount of time I spent each month in performing services as TeleRep's and HRP's lead counsel.

The TeleRep and HRP "Time Logs" are my personal records which TeleRep and HRP did not ask that I keep; that I have never presented to them; nor has TeleRep or HRP ever asked me whether such time records exist, let alone request that I send them any such time records. My secretary keeps my personal time logs at my request which I have maintained in the event that TeleRep's and/or HRP's inside or outside auditors should ask for substantiation of the services I rendered justifying the retainer payments. These personal time logs are not part of my billing folders or chron files.²

RELEVANCY

Kelley Drye has been party to third party payment agreements with Life Partners, Partners-in-Transition, and Partners prior to and subsequent to the 2000 TeleRep/HRP retainer agreements with me. As noted above, in August 1998 Defendant entered into an agreement with then Equity Partner Insel which permitted him to retain third party payments that he would start to receive in August 1998 from Kelley Drye client Kopf. (Exhibit 8 annexed hereto). The agreement makes clear that the time Insel spent performing services for Kopf would not be recorded as billable time for Kelley Drye or billed out by Kelley Drye. In 1997, Insel had recorded 2,093 billable hours; in 1996 he recorded 2,140 billable hours; in 1995, he recorded 2083 billable hours; in 1999, Insel's billable time on Kelley Drye matters dropped to 969; in 2000 it was 1071; in 2001 it was 1035; and in 2002 it was 1032. Notwithstanding the 50% drop in Insel's billable time to enable him to work for, and receive compensation from Kopf, Kelley Drye has paid Insel as a part-time Partner \$300,000 in 2000; \$547,930 in 2001; \$612,643 in 2002; and higher amounts each year to date. So, obviously Kelley Drye did not believe, and still does not believe that the loss to Kelley Drye of 1000 billable hours each year and the annual compensation which Kopf pays Insel are relevant to Kelley Drye's determining each year the dollar value of his contributions to the Firm.

² This gives rise to the ethics question: how did Kelley Drye obtain possession of them. Even if they inadvertently had become part of my chron file or billing folders, and I do not believe they had, Defendant's counsel did not review my chron files and billing folders until November 2010, a month after the TeleRep and HRP Time Logs appeared on Defendant's Privilege Log. This is the same Kelley Drye which, after 99 months over more than eight (8) years of TeleRep and HRP checks arriving for me at Kelley Drye, "accidentally" opened my HRP check envelope in July 2008, four (4) months after I filed my ADEA charge with the EEOC, to dig out the monthly HRP retainer check payment (item 4 on Kelley Drye's Privilege Log).

In October 2007, effective October 1, 2008, Kelley Drye entered into an agreement with then Equity Partner David Barry ("Barry") which permitted Barry to retain third party payments he would start to receive in 2008 from Kelley Drye client Donerail Corporation ("Donerail"). (Exhibit 10). The agreement made clear that the time Barry spent performing services for Donerail would not be recorded as billable time for Kelley Drye or billed out by Kelley Drye. Prior to 2008, Barry had spent on the average each year more than a thousand (1000) billable hours. In 2008, 2009, 2010, Barry's billable time dropped each such year on the average to below 70 billable hours - - a drop of more than ninety (90%) percent. Notwithstanding that drop in billable hours to enable Barry to perform non-billable hours for Firm client Donerail and to receive compensation from Donerail for that work, Kelley Drye paid Barry as a part-time Partner of the Firm, with all Partner benefits and perquisites, \$375,000 in 2008 and \$250,000 each year in 2009 and 2010.

In the EEOC's Second Document Request, Request No. 13, the EEOC asked for the following production and Kelley Drye gave the following response (Exhibit 11):

Document Request No. 13: All documents reflecting billable hours by client for the years 2007, 2008, 2009 and 2010 for the following Kelley Drye partners; John Callagy; Robert Bickford; David Barry; Michael Insel; Robert Adams; Merrill Stone; John Kiley; Jon Cooperman; William MacLeod; and Paul Hoffman.

Response:

Defendant objects to this Document Request on the grounds that it seeks production of personal, confidential, and private information concerning non-parties to this action and documents that contain or constitute confidential and/or proprietary business or client information; and seeks documents that are neither relevant to the claims or defenses of any party nor reasonably calculated to lead to the discovery of admissible evidence."

If the billable time records of "non-party" Partners Insel and Barry maintained by Defendant for the years 2007, 2008, 2009, and 2010 are neither relevant to the claims or defenses of any party nor reasonably calculated to lead to the discovery of admissible evidence, a fortiori so are non-party D'Ablemont's personal, non-billable, time records as a Life Partner pursuant to a Firm-approved retainer agreement with a Firm client in all material respects no different from the Firm approved third party client payment agreements between the Defendant and Partners Insel and Barry and former Partners Brady, Berson, and Epstein. Not only has Kelley Drye refused to produce these time record documents on the basis of relevancy, but it has refused to produce any documents, which the Firm claims it does not have in its possession or under its control, that reflect the dollar amounts that Insel has received from Kopf and Barry from Donerail. It is inconceivable that Kelley Drye would have paid Insel annual payments in excess

of a half-million dollars each year since 2000 as a half-time Partner, without knowing what Kopf has been paying him. It is just as inconceivable that the Firm would pay Barry \$375,000 in 2008 and \$250,000 in 2009 and 2010 for having reduced his billable time for Kelley Drye during those years by 90%, without knowing what Donerail has been paying Barry.

THE EEOC'S MARCH 30, 2011
MOTION FOR PARTIAL SUMMARY JUDGMENT

On March 30, the EEOC filed and served its motion for partial summary judgment, supported by a Declaration, documentary exhibits, and a memorandum of law. The motion asks the Court to dismiss Kelley Drye's Nineteenth Affirmative Defense. The EEOC attorney, Mr. Burstein, made reference to this motion during the April 13, 2011 hearing before your Honor. Kelley Drye's Nineteenth Affirmative, *inter alia*, sought an offset against any damages the jury may award me for the retainer payments which TeleRep and HRP have paid me pursuant to the retainer agreements. The EEOC relies on Supreme Court and Federal Circuit Court decisions to the effect that, in an EEOC initiated action seeking victim specific damage relief for compensation discrimination, private disputes between the Defendant and the victim concerning payments the victim received from a third party may not be heard in the EEOC suit; that the employer may raise such claims in an action against the employee in state court where the employee would be a party, with a right to assert affirmative defenses and counterclaims. Kelley Drye has never done so.

Some of the same arguments the EEOC has raised in its pending motion are found in my General Objection 7 to Defendant's Subpoena Document Request No. 12, and, by duplication, to Defendant's Document Production Request No. 21 to the EEOC. Kelley Drye's opposing papers were due to be filed and served by the end of April, and they were. Those papers specifically reference the TeleRep and HRP Time Logs in contending for the first time that the time I spent acting as TeleRep's and HRP's lead counsel pursuant to the terms of the retainer agreement deprived Kelley Drye of that time as Kelley Drye billable time.

Between March 30, when the EEOC moved to dismiss the Nineteenth Affirmative Defense, and April 29, when Defendant's opposing papers were due, Ms. Plevan resurrected Defendant's June 22, 2010 Subpoena Request No. 12 at the very end of the April 13 hearing. She did so, through a misrepresentation to your Honor, presumably to attempt to obtain before the due date for Defendant's opposing papers additional years of my personal TeleRep and HRP Time Logs. The relevancy of those Time Logs are directly in issue before Judge Swain on the EEOC's motion to dismiss Defendant's Nineteenth Affirmative Defense.

In view of all the foregoing, I submit that the propriety of Defendant's demand for the TeleRep and HRP Time Logs should await Judge Swain's decision on the EEOC's pending motion. Fact discovery does not end until August 31, 2011.

Hon. Michael H. Dolinger, U.S.M.J.
May 5, 2011
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PRIVILEGE

The Defendant has listed on its Privilege Log as item 6 all my daily time entries (billable time) during the period 1992 – 2010 which detail the work I performed on behalf of all Kelley Drye clients. Kelley Drye has redacted from those time entries all descriptions of services I rendered, with only the total hours billed and total billable value shown for each year during that period. Those total hours are not broken down by client.

The TeleRep and HRP personal Time Logs, which Kelley Drye somehow obtained, appear on Defendant's Privilege Log with Kelley Drye imposed redactions. The description of services I rendered which appear on those Time Logs are no less privileged than the descriptions of the billable time entries I rendered during the same period, all of which Kelley Drye has redacted. In the event Judge Swain should determine the relevancy issue adverse to the EEOC's position, then I submit that the TeleRep and HRP Time Logs should be produced with the same extent of redaction as Defendant has applied to my billable time entries during the same retainer period of 2000 through 2010.

Thank you for your consideration of this non-party's opposition to Defendant's Subpoena Request No. 12.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Eugene T. D'Ablemont', with a large, stylized initial 'E' and 'D'.

Eugene T. D'Ablemont

ETD'A:pnr
Enclosures

cc: Bettina B. Plevan, Esq. (via email)
Jeffrey Burstein, Esq. (via email)

FAX Cover Sheet

Date: May 13, 2011

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Re: EEOC v. Kelley Drye & Warren, LLP
10 Civ. 655 (LTS) (MHD)

Text of enclosed endorsed order: "Mr. D'Ablemont is ordered to produce to defendant the time logs and any other documents pertaining to the services he has rendered to the two clients at issue. These documents were encompassed in defendants' June 2010 subpoena to him and are plainly relevant to issues in this case (and would be so irrespective of the disposition of plaintiff's pending Rule 56 motion). Production is to be made within ten days."

From: Magistrate Judge Michael H. Dolinger
United States District Court
Southern District of New York
500 Pearl Street, Room 1670
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This document contains 2 pages, including this cover sheet.