UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	**ECF Case**
	:	**Civil Action No. 10-cv-0655 (LTS) (MHD)**
Plaintiff,	:	
	:	
v.	:	
	:	
KELLEY DRYE & WARREN, LLP,	:	
	:	
	:	
Defendant.	:	

PLAINTIFF EEOC'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS DEFENDANT'S NINETEENTH AFFIRMATIVE DEFENSE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Jeffrey Burstein
Senior Trial Attorney
One Newark Center, 21st Floor
Newark, NJ 07102
Email: jeffrey.burstein@eeoc.gov
Tel: (973) 645-2267
Fax: (973) 645-4524

PRELIMINARY STATEMENT

The Memorandum of Law and supporting Declarations of Defendant Kelley Drye & Warren, LLP ("Defendant" or "Kelley Drye") in opposition to EEOC's motion for partial summary judgment on the Nineteenth Affirmative Defense only serve to underscore the improper consequences if EEOC's motion is not granted: turning EEOC's ADEA claim into mini-trials of stale, previously resolved, personalized issues unrelated to the allegations of systemic discrimination asserted in the Complaint. And its legal argument as to why such transformation of this governmental enforcement action is appropriate rests on a fundamentally erroneous premise: that when EEOC seeks individual relief for victims of discriminatory practices, it is only enforcing a private right, and thus in this case is a "proxy" for the Charging Party, Eugene T. D'Ablemont ("D'Ablemont"). But the Supreme Court in EEOC v. Waffle House, Inc., 534 U.S. 279 (2002), flatly rejected this premise, holding that EEOC seeks to "vindicate a public interest…even when it pursues entirely victim-specific relief." Id. at 296. Moreover, contrary to Kelley Drye's claim, granting EEOC's motion in no sense would enable D'Ablemont to obtain an impermissible "double recovery." Rather, it would insure that this governmental action is not improperly transformed into a trial of artificially resurrected disputes between Kelley Drye and D'Ablemont (an attorney in good standing at Kelley Drye for over 50 years) that have no bearing on whether or not D'Ablemont, and other Kelley Drye attorneys affected by the age-based policy, were discriminated against in violation of the ADEA.

COUNTER-STATEMENT OF FACTS

As stated in the initial Memorandum, the facts underlying Kelley Drye's setoff claims were not presented by EEOC for the purpose of having this Court determine their merits; rather, they were intended to show the general nature of the components of the Nineteenth Affirmative

Defense in order to demonstrate why such setoff claims are improper in this EEOC enforcement action. For that reason, while as described in detail in the accompanying D'Ablemont Reply Declaration many of Kelley Drye's factual assertions are clearly contradicted by the documentary record, EEOC's focus in this Memorandum is not on the particular details of the setoff claims; instead, it is on what Kelley Drye's own submissions reveal are their overall nature, as well as on the nature of EEOC's claims for damages (mischaracterized by Kelley Drye in its Memorandum).

First, D'Ablemont's third party retainer agreements, approved by Kelley Drye back in 2000, provide that any work D'Ablemont performed for these third parties would not be charged by Kelley Drye to such third parties (though legal services of other Kelley Drye attorneys, selected by D'Ablemont under the retainer agreements, would be billed to these entities) (D'Ablemont Declaration ("Dec.") ¶4, Exh. B). For this reason, as has been clear from the outset of this case, EEOC in no sense is basing its discriminatory undercompensation claim on work D'Ablemont performed for these third parties. Rather, EEOC's allegation that D'Ablemont was undercompensated involves only his contributions to Kelley Drye itself, not any of the work he performed under the Kelley Drye-approved retainer agreements. Indeed, in not one of his annual requests for compensation for his contributions to Kelley Drye since becoming a Life Partner did D'Ablemont ever rely on work he performed for these third parties; nor did D'Ablemont, pursuant to the Kelley Drye-approved retainers, ever bill these third parties for his time (D'Ablemont Dec. ¶4; D'Ablemont Reply Dec. ¶66). Thus, contrary to Kelley Drye's assertion, a setoff for these retainer payments is not necessary to prevent D'Ablemont from obtaining an impermissible double-recovery, as no liability or damage claim is based on work D'Ablemont performed under these retainer agreements.

For the remaining components of Kelley Drye's setoff claims (receipt of "free legal services," receipt of "excessive" client development allowances), what is critical is that Kelley Drye fully admits that these matters were resolved with seeming finality years ago, only to resurface in this litigation. With regard to "free legal services" D'Ablemont received, Kelley Drye admits that it wrote off the work on the patent application in 2008 (Def. Brf. at 5; Callagy Dec. ¶12; see also D'Ablemont Dec. ¶12, Exh. L; D'Ablemont Reply Dec. ¶62); and wrote off the time spent on D'Ablemont's legal fee litigation arising out of a real estate matter (Callagy Dec. ¶ 11; D'Ablemont Reply Dec. ¶61) (which write off, according to D'Ablemont and not disputed by Kelley Drye, occurred in June 2007) (D'Ablemont Dec. ¶11)). And regarding the client development allowances, Kelley Drye freely recognizes that it now seeks to recoup these allowances from 2001 through 2010 that it had voluntarily paid D'Ablemont on an annual basis (Def. Brf. at 6; Carty Dec. ¶ 5; see also D'Ablemont Reply Dec. ¶26-¶31).

The above discussion shows that it is undisputed that Kelley Drye's setoff claims involve matters that arose as far back as ten years ago, all of which seemingly were resolved with finality until revived in this matter.

ARGUMENT

1. THE TYPE OF SETOFFS ASSERTED BY DEFENDANT ARE NOT PROPERLY PART OF THIS GOVERNMENTAL ENFORCEMENT ACTION

A. An EEOC action, including one seeking victim-specific relief, is fundamentally different than a private ADEA suit.

Kelley Drye's arguments rest on the erroneous premise that EEOC's action "seeks only private relief" and "not the vindication of some public right" (Def. Brf. at 8-9). This proposition is flatly contradicted by Supreme Court and other decisions, most notably EEOC v. Waffle House, supra, in which the Court stated:

> …whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress….
>
> 534 U.S. at 296 (emphasis added)

This unique nature of EEOC actions was first discussed by the Court in General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980), where it stated that "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it also acts to vindicate the public interest in preventing employment discrimination." Id. at 326. Further, in an ADEA case where defendant raised similar arguments about EEOC actions to those raised by Defendant here, EEOC v. Bd. of Regents of Univ. of Wisconsin Sys., 288 F.3d 296 (7th Cir. 2002), the Seventh Circuit flatly rejected defendant's proposition that when EEOC seeks relief for individuals, it "is simply standing in the shoes of the individual and is acting in privity with them as their representative." The court observed that an EEOC action is not "just a private suit dressed in fancy clothes." Id. at 299-300.

Thus, Kelley Drye's assertion that "EEOC is a proxy for D'Ablemont" (Def. Brf. at 8, emphasis in original) is simply wrong.[1] And to the extent Kelley Drye relies on EEOC v. United States Steel Corp., 921 F.2d 489 (3rd Cir. 1980), for this proposition (Def. Brf. at 8), that aspect of the Third Circuit decision in United States Steel Corp. is inconsistent with the subsequent

[1] Also, as is clear from the plain language of EEOC's Complaint, EEOC is seeking relief not just for D'Ablemont but other similarly-situated Kelley Drye attorneys negatively affected by the age-based policy.

Supreme Court decision in Waffle House, in which the Court clearly stated that in actions it brings, "the EEOC does not stand in the employee's shoes." Id., 534 U.S. at 766.[2]

B. Particularly because of the unique nature of EEOC actions, personalized disputes unrelated to the allegations in the Complaint should not be part of this litigation

Kelley Drye attempts to make much of EEOC's recognition in its initial Memorandum that there is no blanket, per se rule prohibiting a defendant from asserting any type of setoff claims in EEOC actions under the ADEA or in other government-initiated actions enforcing cognate statutes such as the FLSA and NLRA (Def. Brf. at 10-14). But the principle stemming from the cases relied upon by EEOC, Waffle House, supra, Donovan v. Pointon, 717 F.2d 1320 (10th Cir. 1983), Martin v. Pepsiamericas, Inc., 628 F.3d 738 (5th Cir. 2010), and NLRB v. Mooney Aircraft, Inc., 366 F.2d 809 (5th Cir. 1966), is that setoffs that have no nexus to the allegations in the complaint and instead concern unrelated "purely private controversies," Mooney, supra, 366 F.2d at 811, would "delay and even subvert" the governmental enforcement action, Donovan, supra, 717 F.2d at 1323, and thus should not be part of such lawsuits. While a defendant in this setting assuredly has every right to seek any remedy available to it in state court, see Donovan, supra, and Mooney, supra, governmental enforcement actions like this matter simply are not the appropriate forum for litigation of an employer's unrelated, tertiary setoff claims. Id.

[2] The lack of viability as a result of Waffle House of the aspect of United States Steel Corp. implying that EEOC is a proxy for the charging party is seen in the post-Waffle House decisions holding that an individual claimant's settlement with the defendant-employer does not preclude EEOC from seeking victim-specific relief for such individual. See Senich v. American-Republican, Inc., 215 F.R.D. 40, 45 (D. Conn. 2003) (allowing EEOC ADEA action to proceed despite charging party's earlier settlement); *see also* EEOC v. Int'l Profit Associates, Inc., 01-L-4427, 2008 WL 485130 at *2 (N.D. Ill. 2008) (same holding in Title VII sex discrimination claim); EEOC v. LA Weight Loss, 509 F. Supp. 2d 527, 536 (D. Md. 2007) (same); EEOC v. Continental Airlines, 04-C-3055, 2006 WL 3505485, at *2 (N.D. Ill. 2006) (same).

Kelley Drye asserts that the setoffs it seeks are "distinguishable…both factually and legally" (Def. Brf. at 12) from the rejected setoffs in the above-noted cases because they involve "alternative forms of compensation from Kelley Drye" to D'Ablemont. (Id. at 13.) But this is not the case. First, the third party payments for which Kelley Drye seeks a setoff obviously were not made by Kelley Drye; and as previously noted, services rendered to such third parties by D'Ablemont are in no sense part of EEOC's allegation of undercompensation for contributions D'Ablemont made to Kelley Drye (nor was such work for third parties ever a component of his annual requests for compensation from Kelley Drye throughout the damage period, D'Ablemont Reply Dec. ¶65). Second, the limited assistance to D'Ablemont from Kelley Drye attorneys for personal legal services hardly can be characterized as involving "compensation," particularly given the undisputed fact that these services were written off by Kelley Drye years ago. Finally, the client development allowances, awarded to D'Ablemont and all other Kelley Drye attorneys under a mathematical formula, were not used by D'Ablemont as any form of "compensation"; rather, these allowances, expenditures of which were audited by Kelley Drye, only go to expenses incurred in developing business from existing and prospective Kelley Drye clients, not for personal use; and such allowances are not treated by the Firm as "compensation" for tax purposes (D'Ablemont Reply Dec. ¶26-¶32, Exh. 6). Indeed, this only highlights the meritless nature of the setoff claims. Kelley Drye fully admits that it seeks recovery for ten years of these voluntary payments that it now claims were awarded only because it "acceded to [D'Ablemont's] requests" (Def. Brf. at 6; Carty Dec. ¶5). Apart from unnecessarily expanding this litigation with irrelevant mini-trials, Kelley Drye does not explain how as a matter of law such voluntary payments, going back to 2001, can now be recouped merely because they involved "acceding" to D'Ablemont's requests.

II. THE REQUIREMENT TO MITIGATE DAMAGES DOES NOT SUPPORT THE OFFSET CLAIM FOR THE THIRD PARTY PAYMENTS TO D'ABLEMONT

In Point IV of its Memorandum, Kelley Drye argues that the third party payments to D'Ablemont should be considered to be "*successful* mitigation" (Def. Brf. at 17, emphasis in original) and thus offset just as if they were post-termination earnings deducted from a back pay award in a discharge case. Apart from the obvious distinction between the cases relied upon by Kelley Drye and this matter--i.e., that this is not a setting where D'Ablemont had a duty to mitigate because his damages accrued not after termination but rather while employed by Kelley Drye--under well-established case law, earnings from third parties are not deducted from damage awards where the employee could have obtained the supplemental earnings and continued working for the defendant employer (what actually occurred here).

Federal courts have routinely followed the principle set forth in Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973), concerning whether or not earnings from a third party are deducted from a discrimination victim's damage award. The Fifth Circuit ruled that if such job could not have been performed simultaneously with the desired position with the defendant-employer, the earnings are deducted from the award; but if the plaintiff could have held the supplemental position with the third party simultaneously with the desired position with defendant, then his/her earnings from the third party are not subtracted from the damage award as "interim earnings" (or, as characterized by Kelley Drye, "successful mitigation"). Id. at 454. See also Hance v. Norfolk Southern Railway Co., 571 F.3d 511, 520 (6th Cir. 2009) (in employment discrimination case, earnings from part-time position that plaintiff could have held if retained by employer not deducted from back pay award); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1111-1112 (8th Cir. 1994) (in ADEA case, earnings from freelance work that could have been earned if plaintiff had continued employment with defendant not deducted

from back pay award); Lilly v. City of Beckley, W. Va., 797 F.2d 191, 196 (4th Cir. 1986) ("if the plaintiff could have held both the supplemental job and the job [plaintiff lost], the earnings from the supplemental job will not be used to reduce the back pay award"). Similarly, in an ADEA case involving an age-based refusal to promote plaintiff, DeFries v. Haarhues, 488 F. Supp. 1037 (D.C. Ill. 1980), the district court refused to subtract overtime compensation from a back pay award, reasoning that "plaintiff should not be punished for additional earnings if she could earn them while holding the desired position." Id. at 1043.

So too in this matter should D'Ablemont not be punished, through Kelley Drye's setoff claim, for his earnings from the third-party entities. Not only did Kelley Drye approve these arrangements, they are the same in nature to Firm-approved arrangements of other Kelley Drye attorneys; and such work could be (and in fact was) performed simultaneously with D'Ablemont's work for Kelley Drye (as also is the case for the other Kelley Drye attorneys with similar arrangements). Therefore, these third party earnings are not subject to any setoff.

CONCLUSION

For the foregoing reasons and those in EEOC's initial Memorandum of Law, EEOC respectfully requests that the Court grant partial summary judgment in EEOC's favor and dismiss Defendant's Nineteenth Affirmative Defense.

Dated: May 19, 2011

Respectfully Submitted
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

s/ *Jeffrey Burstein*

Jeffrey Burstein
Senior Trial Attorney
One Newark Center, 21st Floor
Newark, New Jersey 07102
Phone: (973) 645-2267
jeffrey.burstein@eeoc.gov