

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. :
-----X

**PLAINTIFF EEOC'S MEMORANDUM OF LAW IN SUPPORT OF ITS
OBJECTIONS UNDER FED. R. CIV. P. 72(a) TO MAGISTRATE JUDGE
DOLINGER'S JULY 15, 2011 ORDER DENYING PLAINTIFF'S
REQUESTS TO COMPEL DISCOVERY**

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I. INTRODUCTION

In this action, Plaintiff Equal Employment Opportunity Commission (“EEOC”) alleges that Defendant Kelley Drye & Warren (“Kelley Drye” or the “Firm”) discriminatorily under-compensated attorneys, including the Charging Party Eugene T. D’Ablemont (“D’Ablemont”), who chose to continue to practice at the Firm past age 70. At that age, the Firm forced these attorneys (“class members”) into “Life Partner” status, whereby they lost all their equity and most of their previous authority in the Firm and were compensated only through wholly discretionary bonuses. EEOC appeals two discovery rulings by Magistrate Judge Dolinger issued July 15, 2011 in this matter: (1) a ruling denying EEOC’s request, in this compensation discrimination case, that Kelley Drye provide unredacted documents reflecting compensation of younger attorneys; and (2) a ruling denying EEOC’s request that Kelley Drye produce comparative information for client receipts on a “billing attorney” versus “participating attorney” basis. EEOC respectfully submits that both rulings are “clearly erroneous” under Fed. R. Civ. P. 72(a).

II. PROCEDURAL AND FACTUAL BACKGROUND

A. The Ruling on Redactions to Compensation Information in Critical Firm Financial Documents

The two most comprehensive sets of financial documents regarding Kelley Drye partner revenues and compensation are its annual audited Consolidated Financial Statements and its annual Points Books. EEOC sought these documents in its First Document Request in order to compare class members’ compensation to compensation of younger attorneys, and also to understand Kelley Drye’s compensation structure, *i.e.* by determining the importance of various aspects of attorney performance in compensation determinations (See Burstein Dec., ¶3, Exh. A, request # 12).¹ After EEOC reviewed Kelley Drye’s initial document production, on January 21, 2011, EEOC notified Kelley Drye that while

¹ While EEOC contended that a request for the full Points Books was encompassed in EEOC’s First Document Request, Defendant disagreed and only produced certain sections thereof; EEOC then issued a Third Document Request squarely seeking the complete Points Books (*Id.*, ¶5, Exh. B, request # 1).

the basic Consolidated Financial Statements had been provided, the Schedules containing partner compensation information² had not (Id., ¶4). While these Schedules were eventually produced on June 3, 2011, Kelley Drye totally redacted the portions listing compensation of partners. Similarly, with regard to the production of the Points Books in response to EEOC's Third Document Request, Kelley Drye provided these documents but again redacted compensation information for partners. (Id., ¶¶6-8.)

EEOC engaged in unsuccessful negotiations to resolve this redaction dispute. Kelley Drye's position was that even though there was no burden whatsoever in producing the requested information (redacted by Kelley Drye from otherwise-produced documents), and even though the Court had issued a Confidentiality Order that would protect this information from public disclosure, because of the sensitive nature of the compensation data, Defendant would only agree to produce such information for an unspecified small group of comparators to D'Ablemont. This stance of Kelley Drye contradicted its earlier actions in discovery. It had previously produced compensation information for partners, including in its production of multiple years of Earnings Allocation Committee reports that contain projected partner compensation, designated as "Confidential" under the Confidentiality Order (without objection by EEOC). But these produced lists, which set forth different compensation amounts based on projections of Firm profits, are not as comprehensive as the Consolidated Financial Statements (which contain actual, not projected, partner compensation) and the Points Books (which contain multiple listings of measures of attorney performance, including client revenue statistics, not contained in the Earnings Allocation Committee reports) (Id., ¶9). Additionally, early in discovery, EEOC produced to Kelley Drye the full Points Book for one of the ten years at issue in the current application, which D'Ablemont had provided to EEOC. (Id., ¶10). These documents were marked "Confidential" and have

² The partners whose compensation information is contained in these documents, by virtue of Kelley Drye's structure challenged in this litigation, all are younger than the Life Partners who continued to practice, including but not limited to D'Ablemont.

been treated as such by EEOC, without any objection by Kelley Drye.³ EEOC rejected Defendant's demand that EEOC identify a very limited list of comparators, leading to EEOC's filing a pre-motion letter with Magistrate Judge Dolinger.

Despite the absence of any burden on Kelley Drye, the privacy protections for such information already in place, and Kelley Drye's production of unredacted compensation documents in prior discovery, Magistrate Judge Dolinger denied EEOC's application to compel Kelley Drye to provide unredacted compensation information in the already-produced Points Books and Consolidated Financial Statements. Based on a suggestion made by Kelley Drye for the first time at argument, the Court ruled that EEOC could obtain the redacted compensation information for five Kelley Drye partners whose dollar amounts of client revenues were immediately above those of D'Ablemont for a given year, and five whose client revenues were immediately below D'Ablemont's, with the possibility of EEOC obtaining additional (though not complete) partner compensation data in a future application (*Id.*, ¶13, Exh. D, transcript of 7/15/11 proceeding before Judge Dolinger, p.22, line 11 through p. 25, line 10).

B. The Ruling on Comparative Information for Client Receipts on a Billing Versus Participating Partner Basis

Kelley Drye has repeatedly claimed that D'Ablemont was not discriminatorily under-compensated because, as stated in the Fifteenth Affirmative Defense listed in its Answer, "for certain of the clients he now purports to claim credit for, he does little, if anything, beyond the ministerial act of

³ EEOC learned in the course of this motion that D'Ablemont possesses Points Books for other years, as well as the audited Consolidated Financial Statements, but he has not yet provided these documents to EEOC. In order to avoid this appeal, EEOC contacted Kelley Drye to determine if it would object, on the same privacy/confidentiality grounds as it raised before Magistrate Dolinger, to D'Ablemont providing such documents to EEOC. Kelley Drye stated that it would oppose this (*Id.*, ¶11). Thus, even if D'Ablemont does give these documents to EEOC, Kelley Drye would then apply to the Court on the same issues that are being raised, and can be addressed, now. Moreover, even if obtained from D'Ablemont, EEOC needs this production from Kelley Drye for purposes of authentication of the documents for evidentiary purposes. (*Id.*, ¶12, Exh. C, p.47, lines 1-12, excerpt of transcript of Judge Dolinger's 10/25/10 ruling relying on this rationale in requiring D'Ablemont to produce certain documents).

preparing and sending them a bill.” (Answer to Amended Complaint, Docket Entry #21; see also Defendant’s portion of the Preliminary Pre-Trial Statement, Docket Entry #9, pp. 13-14; Memorandum of Law in Opposition to EEOC’s Motion for Partial Summary Judgment to dismiss Nineteenth Affirmative Defense, Docket Entry #49, p. 16). Kelley Drye has asserted that because D’Ablemont has not been a “participating partner” for certain clients he has billed, he has improperly claimed credit for such revenues.

In EEOC’s First Document Request, EEOC sought to test this assertion by obtaining documents involving Kelley Drye’s designation of the “Participating Attorney Basis for allocation of cash receipts” for each partner for a ten-year period (*Id.*, ¶3, Exh. A, request #16). Kelley Drye refused to provide such documents on overbreadth grounds; and in an early discovery ruling in this matter, Magistrate Judge Dolinger refused to order such production (*Id.*, ¶12, Exh. C, p. 16, line 14 through p. 21, line 12). Meanwhile, to support its Fifteenth Affirmative Defense that D’Ablemont should not be credited for certain client revenues because he was merely the billing attorney, in discovery Kelley Drye provided documents entitled “Fee Collection Analysis,” created for each year since 2000, designating D’Ablemont’s client receipts on a “billing” or “participating” attorney basis. (*Id.*, ¶14). To test whether the same standards have been applied to client receipts of other Kelley Drye attorneys, EEOC sought the same documents for younger attorneys in its Third Document Request, but, given the Court’s earlier ruling, in a very narrow fashion--neither Firm-wide nor for the full ten-year period covered in the D’Ablemont documents Defendant produced. Rather, EEOC simply sought such documents for a three-year period for ten designated attorneys, from a cross-section of the Firm. (*Id.*, ¶5, Exh. B, request # 4). Kelley Drye refused to produce these documents. At the July 15, 2011 hearing, Magistrate Judge Dolinger refused to require their production on grounds not raised by Kelley Drye until oral argument: that the type of documents provided in discovery about D’Ablemont’s client receipts were not used by

Kelley Drye decision-makers for other attorneys in compensation decisions, and that any such documents would need to be created by Kelley Drye from existing records (Id., Exh. D, p. 22, lines 3-10).

III. ARGUMENT

A. The Ruling Denying EEOC's Request for Unredacted Compensation Information in this Compensation Discrimination Case was Clearly Erroneous

The Court's ruling declining to order Kelley Drye to provide the redacted partner compensation information in the otherwise-produced Kelley Drye Points Books and audited Consolidated Financial Statements was clearly erroneous. Fed. R. Civ. P. 72(a). Plainly, no information comes close to being more relevant to EEOC's claims in this compensation discrimination case than compensation information for younger attorneys. See EEOC v Morgan Stanley & Co., No. 01-CV-8421, 2002 WL 1431685 (S.D.N.Y. July 1, 2002) (in Title VII compensation discrimination case, affirming order compelling discovery of compensation information of large group of employees outside of EEOC's class). Kelley Drye has conceded that there is no burden whatsoever for it to provide this relevant information. Significantly, there are no bona fide privacy concerns regarding production of this redacted compensation information. On August 16, 2010, Magistrate Judge Dolinger entered a comprehensive Confidentiality Order in this case that fully protects confidential information from public disclosure during discovery. The Order covers information that could affect "the legitimate privacy interests of any individual," a provision that both parties have treated for purposes of discovery as including compensation of Kelley Drye attorneys (Docket Entry #26, ¶1.) See also EEOC v. Morgan Stanley & Co., supra, 2002 WL 1431685 at *2 (in Title VII compensation discrimination case, protective order adequately addressed defendant's privacy concerns about disclosure of compensation of other employees to EEOC and its class members); Mercado v. Div. of New York State Police, 989 F. Supp.

521, 523 (S.D.N.Y. 1998) (in national origin discrimination case brought by Hispanic police officer, sensitive personnel files of white officers discoverable due to protective order, rejecting defendant's privacy objections).

The narrow provision of compensation information authorized by Magistrate Judge Dolinger, based on a suggestion made for the first time by Kelley Drye at the oral argument--namely, compensation of ten Kelley Drye partners whose client collections were close in total amount to D'Ablemont's--is far too constrained, and also ignores ongoing disputes that could engender further court applications and delay. First, while only a very small number of attorneys chose to practice after reaching age 70 due to the major disincentives inherent in the structure challenged in this litigation, this is not a case solely about D'Ablemont, the one Charging Party. The Amended Complaint's plain language alleges that Kelley Drye's discriminatory practices harmed D'Ablemont and other class members, namely those who availed themselves of the option in the former Partnership Agreement to continue working after 70 in their diminished "Life Partner" status (See Amended Complaint, Docket Entry # 20, pp. 1, 3, 4.) Kelley Drye's proposal, accepted by Magistrate Judge Dolinger, for the very limited production of compensation information would shed no light on the issue of liability and damages pertaining to the Life Partners who continued to practice other than D'Ablemont. Moreover, as discussed herein, the parties are engaged in a significant dispute about the appropriate measure of D'Ablemont's client revenues. Kelley Drye has repeatedly stated that D'Ablemont's view of his client revenues far exceeds the Firm's. This ongoing dispute obviously would complicate the selection of the ten attorneys with client revenues similar to D'Ablemont's, possibly necessitating additional court intervention. Finally, the parties appear to have different views on the related issue of the importance placed on client revenues in attorney compensation at Kelley Drye generally. The limited disclosures of attorney compensation information authorized by the Magistrate Judge would shed little light on this

issue, which can only be explored by seeing all the partner compensation data to determine the components of attorney performance deemed most significant by Kelley Drye.

For these reasons, EEOC respectfully submits that the Magistrate Judge's decision to allow for the redaction of compensation information from highly relevant, otherwise-produced Firm financial documents and to limit EEOC's ability to obtain compensation information just to ten attorneys is clearly erroneous and should be reversed.

B. The Documents Related to the Designation of Client Revenues on a Billing or Participating Attorney Basis are Directly Relevant to Kelley Drye's Defenses and should be Produced

The Magistrate Judge's second ruling, concerning EEOC's request for documents for ten designated attorneys for a three-year period, breaking down their client revenues on a "participating attorney" versus "billing attorney" basis, also is clearly erroneous. As detailed above, these requested documents are plainly relevant to Kelley Drye's defenses, including but not limited to the Fifteenth Affirmative Defense, in which Kelley Drye asserts that D'Ablemont has greatly overstated his client revenues because he "merely" was the "billing attorney" and not the "participating attorney" for such clients, with compensation allegedly based on a "participating attorney" basis only. As detailed above, EEOC in its First Document Request sought documents showing the "participating attorney basis" for the allocation of client revenues for each partner for a ten-year period; Magistrate Judge Dolinger denied EEOC's application to compel a response on overbreadth grounds. Yet, in response to EEOC's request for documents supporting Kelley Drye's Fifteenth Affirmative Defense, Kelley Drye readily produced a document detailing D'Ablemont's client receipts on a "participating" versus "billing" attorney basis for a ten-year period. Thus, in its Third Document Request, cognizant of the Court's original overbreadth ruling, EEOC simply sought documents for ten partners for a three-year period breaking down client revenues on a "participating" and "billing" partner basis. Despite the plain relevance of such information

to the above-discussed defense, Kelley Drye refused to produce such documents, and the Court did not compel production.

Magistrate Judge Dolinger's rationale in refusing to compel production does not withstand analysis. Essentially, the Magistrate Judge based his ruling on the assertion by Kelley Drye counsel at oral argument that "billing" attorney numbers are not even considered by the Firm in compensation decisions, so such documents would not be reviewed by the relevant decision-makers. (*Id.*, Exh. D, p. 20, line 6 through p. 22, line 10.) But this misses the mark. Given Kelley Drye's repeated defense that D'Ablemont's compensation has been non-discriminatory because his "participating" attorney revenues are far less than what he claims, EEOC must explore how Kelley Drye broke down its designations of client receipts on a "participating" or "billing" basis for a small group of attorneys to determine if the same standards have been applied for other attorneys' client revenues. Moreover, defense counsel's suggestion that these requested documents may need to be created from existing Firm data (*Id.*, Exh. D, p. 21, line 23 through p. 22, line 2) is not a basis to deny EEOC's request. Kelley Drye readily created and produced the comprehensive document detailing D'Ablemont's client receipts that it believes bolsters its defense. And EEOC would be more than willing to accept the underlying documents concerning the designated attorneys' client receipts that show which receipts are credited on a "participating attorney" basis and which are not, rather than a compilation.

Moreover, Kelley Drye routinely accepted D'Ablemont's list of client receipts for purposes of determining his annual Client Development Allowance (See D'Ablemont Reply Declaration in support of Motion for Partial Summary Judgment, Docket Entry #59, ¶¶ 27-31). In fact, in recently partially granting EEOC's motion, this Court rejected Kelley Drye's attempt to avoid, through a setoff, the consequences of what this Court called Kelley Drye's "voluntary" ten-year payment of these Client Development Allowances to D'Ablemont, in amounts based on D'Ablemont's client revenues that

Kelley Drye only now asserts were inflated. (Docket Entry # 70, July 25, 2011 Decision, pp. 6-7.) EEOC plainly is entitled to explore Kelley Drye's assertion that D'Ablemont's client revenues are calculated differently in different circumstances.

For these reasons, EEOC respectfully submits that Magistrate Judge Dolinger's denial of EEOC's application to compel production of documents showing the designation of client revenues for ten attorneys for a three-year period is clearly erroneous and should be reversed.

IV. CONCLUSION

For the above reasons, EEOC respectfully submits that Magistrate Judge Dolinger's denial of EEOC's application to compel Defendant to provide unredacted compensation information in already-produced documents and to provide documents concerning the designation of client revenues for certain younger attorneys be reversed. Kelley Drye should be ordered to produce unredacted compensation information for the younger partners and also produce the requested breakdowns of client revenues on a participating or billing attorney basis.

Dated: July 29, 2011

Respectfully Submitted

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