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)

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE & RULE

PRELIMINARY STATEMENT

In response to document demands served by Plaintiff Equal Employment Opportunity Commission ("EEOC"), Defendant Kelley Drye & Warren LLP ("Kelley Drye" or "the Firm") properly objected to the EEOC's unreasonable demand for boundless disclosure of a decade of information concerning the amount every single Kelley Drye Partner was paid for every year and the creation of documents setting forth irrelevant comparative information concerning the client collections of 10 apparently randomly-selected partners. The EEOC refused the Firm's reasonable offers of compromise and filed a request that the Court compel the Firm to produce all of the requested information. As shown below, Judge Dolinger's conclusion that the EEOC is not entitled to unlimited disclosure of sensitive and irrelevant compensation and financial data was neither "erroneous" nor "contrary to law." The EEOC's objections, pursuant to Fed. R. Civ. P. 72(a), should be rejected.

In addition, the EEOC is not permitted to rely upon information and arguments that it failed to present to Judge Dolinger. The mere fact that the EEOC asserts allegations of pay discrimination does not automatically entitle it to collect information concerning the compensation paid to all of the Firm's Partners. Judge Dolinger properly exercised the Court's discretion to limit discovery in a pay discrimination case to individuals similarly situated to the Charging Party. At the July 15, 2011 Court conference, Judge Dolinger properly accepted Kelley Drye's proposal that the EEOC limit its request to "a peer group." Significantly, Judge Dolinger's ruling was without prejudice. The EEOC is free to renew its requests if, based upon facts it elicits through depositions or otherwise, it subsequently can articulate a legitimate basis for doing so.

The Court should overrule the EEOC's objections.

PROCEDURAL BACKGROUND

The EEOC commenced this age discrimination and retaliation action against Kelley Drye pursuant to the Age Discrimination in Employment Act of 1967, as amended (the "ADEA") in early 2010. The Amended Complaint purports to seek relief on behalf of Eugene T. D'Ablemont, Esq., a Life Partner in the Firm's New York office, and a group of unidentified allegedly similarly situated individuals. The Amended Complaint, in sum, asserts that Kelley Drye discriminatorily compensated Mr. D'Ablemont and other Firm Partners after they became Kelley Drye Life Partners.

The Parties have engaged in extensive written discovery and are scheduled to commence depositions this month. The EEOC's Rule 72(a) objections relate to document requests seeking: (1) the earnings of all Kelley Drye Partners spanning a 10 year period; and (2) irrelevant client collections data concerning 10 Firm Partners[1] over a three year period. (Pl.'s Br. 1.)

In response to specific document requests, the Firm produced its annual Consolidated Financial Statements and its annual "Points Books," documents the EEOC describes as the "two most comprehensive sets of financial documents regarding Kelley Drye partner revenues and compensation" (*Id.*). The Firm properly redacted detailed information regarding Partner compensation because it is highly confidential and sensitive information that is irrelevant to the claims asserted by the EEOC and not reasonably calculated to lead to the discovery of admissible evidence. (*Id.* 2, 4.) The Firm did not redact client collections information from these documents, so the EEOC already possesses client collections data for every Kelley Drye Partner.

[1] According to the EEOC, it "just designated ten younger [P]artners from a cross-section of the Firm . . . ." (Ex. 1: July 1, 2011 Letter to Hon. Michael H. Dolinger, U.S.M.J. from Jeffrey Burstein, Esq.)

The Firm also produced the annual reports of the Firm's Earnings Allocation Committee, which set forth the projected compensation range for each of Kelley Drye's Partners.

The Firm repeatedly proposed that the Parties narrow the scope of the EEOC's requests by agreeing on a group of "similarly situated comparators" of Mr. D'Ablemont. (Ex. 2: June 24, 2011 Letter to Jeffrey Burstein, Esq. from Bettina B. Plevan, Esq.) The EEOC ignored that suggestion. During the July 15, 2011 conference scheduled to resolve the dispute, the Firm suggested that the EEOC limit its first request to "a peer group" of 10 similarly situated Partners – the first five who had greater client collections than Mr. D'Ablemont and the first five who collected less. (Burstein Decl. Ex. D: July 15, 2011 Tr. 9:18-22.) Judge Dolinger concluded that the Firm's proposal was "more reasonable than simply saying we get everything because we haven't yet figured out anything and I'm not prepared to grant unlimited disclosure of compensation." (*Id.* at 24:23-25.) Judge Dolinger stated further:

> What I think is the problem with the way [the] EEOC is talking about is to essentially say, well, there may be, and I don't know how many [P]artners there are at the [F]irm, but I assume it's a fairly substantial number, that we are not, we don't even have a hypothesis as to what the universe is of people who Mr. D'Ablemont would have resembled for the last ten years but for this discrimination, and it doesn't seem to me that in normal Title [VII-]type cases you get as a plaintiff unlimited employee disclosures based upon the fact you don't yet have a theory as to what the relevant universe is.
>
> * * * * *
>
> I'll leave it to you to figure out a universe that makes some sense, based even just on Mr. D'Ablemont's own contentions in this case as to what he would have done during these ten years that would have triggered an assessment of how much he should have earned each year. But I'm not just awarding carte blanche at this point because I don't think that the plaintiff has laid a basis for it. My inclination would be to say for the moment take what the defendant has proposed and if you think there's more that legitimately should be given, ask for it. And I think we're going to leave it at that.

(*Id.* at 24:11-20, 25:1-10.)

Regarding the EEOC's second request for "billing partner" client collections information, Judge Dolinger properly concluded that the EEOC had made no showing that the information was relevant.

> At this point I'm not going to order production for this material. If it turns out that anyone testifies that they use this data in documents that are currently existing that would be referred to by the decision makers reflecting the data, it will have to be produced. If in fact there are such documents and indeed they would have to be created, that in itself suggests that no one is looking at them. So that takes care of that.

(*Id.* at 22:3-10.)

STANDARD OF REVIEW

The Court must uphold Judge Dolinger's discovery ruling unless the EEOC carries the heavy burden of proving that it "is clearly erroneous or is contrary to law." 28 U.S.C.A. § 636 (b)(1)(A) ("[a] judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); Fed. R. Civ. P. 72(a) ("[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law."); *Flaherty v. Filardi*, No. 03-2167, 2009 WL 749570, at *19 (S.D.N.Y. Mar. 20, 2009) (overruling the plaintiff's objections under Fed. R. Civ. P. 72(a) because the Magistrate Judge's decisions were not "clearly erroneous or contrary to law in any respect"); *Reino de Espana v. Am. Bureau of Shipping, Inc.*, No. 03-3573, 2008 WL 3851957, at *1 (S.D.N.Y. Aug. 18, 2008) (overruling the plaintiff's objections pursuant to Fed. R. Civ. P. 72(a) in their entirety because the Magistrate Judge's rulings "were neither clearly erroneous nor contrary to law.").

A Magistrate Judge's decision is clearly erroneous only if "'on the entire evidence,' the [district court] is 'left with the definite and firm conviction that a mistake has been committed.'" *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (quoting *United States v. United States Gypsum*

Co., 333 U.S. 364, 395 (1948)). It is "contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Thompson v. Keave*, No. 95-2442, 1996 WL 229887, at *1 (S.D.N.Y. May 6, 1996) (internal quotations omitted). The clearly erroneous standard is "highly deferential[, and] . . . magistrate judges are afforded broad discretion in resolving non-dispositive disputes and reversal is appropriate only if their discretion is abused." *Derthick v. Bassett-Walker, Inc.*, Nos. 90-5427, 90-7479, 90-3845, 1992 WL 249951, at *8 (S.D.N.Y. Sept. 23, 1992).

In support of its Objections the EEOC improperly submitted factual information through a post-decision declaration by EEOC counsel not presented to Judge Dolinger.[2] Rule 72(a) does not permit consideration of such extraneous information. The Court's review should be limited to information presented to the Magistrate Judge. *See Bell v. Pfizer Inc.*, No. 03-9945, 2006 WL 2529762, at *1 (S.D.N.Y. Aug. 31, 2006) (explaining that a party objecting under Fed. R. Civ. P. 72(a) may not raise new arguments); *State Farm Mut. Auto. Inc. Co. v. CPT Med. Servs., P.C.*, 375 F.Supp.2d 141 (E.D.N.Y. 2005) (explaining that nothing in Fed. R. Civ. P. 72(a) permits a district judge to consider additional evidence not submitted by a party to the magistrate judge); *Roberson v. AlliedSignal, Inc.*, No. 95-0616, 1997 WL 222359 (N.D.N.Y. Mar. 21, 1997) ("[i]n contrast to the *de novo* review undertaken when a party objects to a magistrate's recommended disposition of a dispositive motion, the review of a nondispositive order does not contemplate the receipt of additional evidence by the parties on the issues.") Consequently, the Court should

[2] The declaration of Jeffrey Burstein, Esq., purports to supplement the information and arguments presented before Judge Dolinger to the effect that: (1) after the Order, it revealed to Kelley Drye that Mr. D'Ablemont possessed some of the information that the EEOC is seeking, and the Firm still has refused to produce that information; (2) the Firm did not inform the EEOC "that the type of documents provided in discovery about [Mr.] 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." These statements, with which the Firm does not agree, should be disregarded.

disregard arguments and information the EEOC has made, for the first time, in its memorandum of law in support of its objections to the discovery ruling and the accompanying declaration of Jeffrey Burstein, Esq.

ARGUMENT

The EEOC has fallen far short of demonstrating the Judge Dolinger's discovery ruling was "clearly erroneous" or "contrary to law." First, as shown below, in cases alleging compensation discrimination courts have routinely limited discovery to similarly situated comparators as Judge Dolinger did here. Second, the client collections information the EEOC seeks is completely irrelevant to the claims asserted because it is not the type of data the Firm uses in compensation decisions. The EEOC has also failed to establish that its alleged need for the requested compensation and collections information outweighs the Firm's legitimate interest in protecting the highly sensitive and confidential information from disclosure.

A. PREVAILING LAW LIMITS DISCLOSURE OF COMPENSATION INFORMATION TO SIMILARLY SITUATED COMPARATORS.

The central allegation in this case is a claim of compensation discrimination. The EEOC contends that Mr. D'Ablemont has been undercompensated for his efforts since he became a Life Partner. The EEOC's request for the production of compensation information for every Partner goes far beyond the scope of relevant information which should be limited to similarly situated individuals. Judge Dolinger properly rejected the EEOC's request that the Firm be compelled to produce 10 years of compensation information for well over 100 partners during that period.

Courts routinely limit discovery in pay discrimination cases to compensation information concerning only those individuals who are similarly situated to the plaintiff. *See, e.g., Wright-Jackson v. HIP Health Plan*, No. 07-1819, 2009 U.S. Dist LEXIS 31935, at *16 (S.D.N.Y. Apr. 15, 2009) (denying plaintiff's motion to compel production of personnel information of

employees who were not relevant comparators); *Esterquest v. Booz Allen & Hamilton, Inc.*, No. 97-6957, 2003 WL 21673630, at *3 (S.D.N.Y. July 17, 2003) (limiting the plaintiff's request for compensation information in an age discrimination case based upon the plaintiff's comparators); *Goodman v. N.Y. City Off-Track Betting Corp.*, No. 97-4708, 1999 U.S. Dist. LEXIS 6291, at *36-37 (S.D.N.Y. May 4, 1999) (individual who held different position in different department not a relevant comparator in Equal Pay Act claim); *Arters v. Univision Radio Broadcasting TX, L.P.*, No. 07-0957, 2009 WL 131285, at *3 (N.D. Tex. May 12, 2009) (upholding the magistrate's decision to limit discovery of pay information to the plaintiff's comparators); *see also Tennenbaum Capital Partners LLC v. Kennedy*, No. 07-9695, 2009 WL 2913679, at *5 (S.D.N.Y. Sept. 11, 2009) (denying discovery that would allow "a fishing expedition based on mere speculation.").

The EEOC offers no legitimate basis for its request for compensation information for all Kelley Drye Partners over a 10 year period, other than its bald assertion that such information is relevant. (Pl.'s Br. 5 ("[p]lainly, no information comes close to being more relevant to [the] EEOC's claims in this compensation discrimination case than compensation information for younger attorneys.").) Merely stating (and restating) that information is relevant does not make it so. The Firm has repeatedly asked the EEOC to articulate its theory of damages and/or narrow its request to individuals similarly situated to Mr. D'Ablemont. The EEOC has refused. (Ex. 3: July 6, 2011 Letter to Hon Michael H. Dolinger, U.S.M.J. from Bettina B. Plevan, Esq.) In fact, the EEOC has admitted that many of the Firm Partners whose earnings information it seeks may not be similarly situated to Mr. D'Ablemont. (Burstein Decl. Ex. D at 18:25-19-2, 9 (" . . . I don't think there is any requirement for us to have similarly identically [sic] situated individuals to get the information. . . . they may not be similarly situated at all . . . .").). And the EEOC's

description of Mr. D'Ablemont as "unique" in its July 1 letter to Judge Dolinger serves to further highlight the overbreadth of its request. (Ex. 1.)

Notably, Kelley Drye already has exceeded its discovery obligations with regard to this request by providing the EEOC with the Firm's annual Earnings Allocation Committee Reports that project the earnings of each of the Firm Partners based on different total profit projections for the Firm as a whole. (Burstein Decl. Ex. D at 12:17-13:18.) Even with this information, the EEOC has been unable to articulate why the additional information they seek for every Partner is relevant. Judge Dolinger's ruling, without prejudice to renewal, that the EEOC is not entitled to compensation information concerning all of Kelley Drye's Partners should not be vacated as it is neither clearly erroneous nor contrary to law.

B. THE DEMANDED "BILLING PARTNER" CLIENT COLLECTIONS DATA IS NOT RELEVANT TO THE EEOC'S CLAIMS.

The EEOC's request for a printout of "participating and billing partner" client collections data for 10 randomly-selected Partners should also be rejected. "Billing Partner" client collections have no bearing on compensation decisions and are simply the collections from clients that a Partner happens to be responsible for sending the bill to. (*Id.* at 15:9-10.) The Firm has produced "participating partner" client collections data for every Partner. "Participating partner" client collections data is the only collections information that is used for purposes of determining Partner compensation. (*Id.* 14:21-15:6.) There are no existing documents that compare "billing v. participating partner" client collections information for the 10 Partners identified by the EEOC, or for any other Partners. In order to produce the requested documents the Firm would need to generate them.

Even assuming this information was relevant because it was used in compensating Firm Partners – which it is not – the EEOC has failed to provide any explanation as to why the 10

Kelley Drye Partners whose information it seeks are similarly situated comparators to Mr. D'Ablemont. Initially, the EEOC argued that it selected them because "some . . . are generally similar to [Mr.] D'Ablemont insofar as they also have arrangements to work for third parties . . . or insofar as their billable hours (like [Mr.] D'Ablemont's) are relatively low . . . yet who (unlike [Mr.] D'Ablemont) have been highly compensated." (Ex. 1.) The Firm questioned this rationale because "[m]ost of the identified individuals billed between 1,000 and 2,000 hours in each of the years requested, whereas the most hours Mr. D'Abelmont billed was 386 in 2008." (Ex. 3) Now, the EEOC does not even attempt to argue that the 10 are similarly situated. Instead, it presents a new alleged basis for the request – that it simply seeks this information to "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." (Pl. Br. at 8.) However, the EEOC fails to explain (presumably because it cannot explain) how the information could be used for the EEOC's hypothetical exploration of how the Firm "broke down its designations of client receipts." Judge Dolinger properly denied the EEOC's demand for documents containing this information. The EEOC's objection should be overruled.

C. THE INFORMATION SOUGHT BY THE EEOC IS HIGHLY CONFIDENTIAL AND SENSITIVE.

Finally, the EEOC's discovery requests seek highly confidential and sensitive information concerning third parties (clients and individual partners) that also constitutes confidential and/or proprietary business information. Indeed, compensation of partners at a law firm is among the most sensitive personal information that exists. Kelley Drye works to limit the dissemination of this information. The EEOC is not entitled to wholesale discovery of such information on the whim that such information may be relevant to the case. *Gavenda v. Orleans*

County, 182 F.R.D. 17, 29 (W.D.N.Y. 1997) (stating that "the bald assertion of a disparate treatment claim does not by itself entitle a plaintiff to disclosure of confidential personnel information regarding all employees" and denying motion to compel production of such information because it was not limited to those employees similarly situated to plaintiff). Further, the EEOC's suggestion that the production of projected compensation somehow undermines the Firm's position that the data is confidential is simply wrong. Actual compensation is far more confidential and sensitive than a prediction about what a Partner might be paid. Finally, contrary to the EEOC's claim, the existence of a protective order does not resolve the issue because some of it may become public at a trial or on summary judgment.

D. JUDGE DOLINGER'S RULING WAS WITHOUT PREJUDICE, AND THE EEOC IS FREE TO RENEW THE REQUEST IF IT ELICITS SUPPORTING FACTS DURING DEPOSITIONS.

Significantly, the challenged ruling explicitly states that it is without prejudice; the EEOC may renew its requests if it subsequently can establish a basis for the request. (Burstein Decl. Ex. D at 25:5-9, 22:4-7 (stating ". . . I'm not just awarding carte blanche at this point because I don't think the plaintiff has laid a basis for it. My inclination would be to say for the moment take what the defendant has proposed and if you think there's more that legitimately should be given, ask for it," and "[i]f it turns out that anyone testifies that they use this data in documents that are currently existing that would be referred to by the decision makers reflecting the data, it will have to be produced.").) There is nothing in Judge Dolinger's Order that would prevent the EEOC from asking witnesses at deposition how Firm compensation decisions are made and what data is relied on. If the EEOC elicits information during depositions that shed further light upon the criteria the Firm applies to Partner compensation decisions, or elsewhere, that provides a basis for its request of some, or all, of the information it seeks here, it can renew its request.

CONCLUSION

The EEOC has failed to meet its burden in support of its Rule 72(a) objections. For these reasons, the Court should overrule the EEOC's objections to Judge Dolinger's discovery ruling.

Respectfully submitted,

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