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 ITS OBJECTIONS TO MAGISTRATE DOLINGER'S JULY 15, 2011 ORDER DENYING PLAINTIFF'S REQUESTS TO COMPEL DISCOVERY

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

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PRELIMINARY STATEMENT

As Kelley Drye notes on pages 4-5 its brief (hereafter "KD brf."), the "clearly erroneous" standard of review of a magistrate's decision is a deferential one. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." Samad Brothers, Inc. v. Bokara Rug Co., Inc., No. 09-5843, 2010 WL 5095356 at *1 (Dec. 13, 2010), quoting Nikkal Indus., Ltd. v. Salton, Inc., 689 F. Supp. 187, 189 (S.D.N.Y. 1988). But just as in applying this standard in Samad Brothers, the district court nevertheless reversed a magistrate's discovery order, id. at *4, so too is it clear "that a mistake has been committed" by Magistrate Judge Dolinger in denying enforcement of the two EEOC discovery requests at issue.

Kelley Drye's brief supporting this decision is tellingly silent on crucial facts. With regard to compensation, unmentioned by Kelley Drye are that (1) unlike the cases it relies on that rejected discovery demands in part due to burdensomeness, EEOC is simply seeking the unredaction of information contained in documents that Kelley Drye already provided in discovery; (2) the limited compensation information that Judge Dolinger ordered Kelley Drye to provide based on Kelley Drye's suggestion (ten partners with client revenues close to those of Charging Party Eugene T. D'Ablemont) ignores the fact that EEOC is seeking relief for other Life Partners who continued to practice law after age 70, and (3) the measure of D'Ablemont's client revenues itself is in dispute between the parties. With regard to EEOC's requested documents for ten partners on the crediting of client collections, left unmentioned by Kelley Drye is that it produced this very type of document regarding D'Ablemont's client collections to support its Fifteenth Affirmative Defense that D'Ablemont improperly has claimed credit for revenues where he "merely" billed the client. EEOC is entitled to the same information for this small group of other attorneys to test the bona fides of this affirmative defense.

In short, the Magistrate Judge's decision is "clearly erroneous" and should be reversed.

ARGUMENT

A. EEOC is Entitled to Full Compensation Information of Partners

Kelley Drye's essential argument concerning EEOC's request for partner compensation information is that this involves an overbroad "fishing expedition." (KD brf. at 7, quoting Tennenbaum Capital Partners LLC v. Kennedy, 2009 WL 2913679, at *5 (S.D.N.Y. Sept. 11, 2009). But this is plainly not so. First and foremost, the "fish" have already been caught. That is, the information EEOC requested is contained in plainly relevant documents that Kelley Drye has already produced. EEOC is simply seeking unredaction of this compensation information in this compensation discrimination case. And this setting is distinguishable from the case law relied upon by Kelley Drye (KD brf. at 6-7) that in part was based on the court's view that plaintiff's discovery requests were overly "broad and oppressive." See, e.g., Arters v. Univision Radio Broadcasting TX, 2009 WL 1313285, at *3 (N.D. Tex. May 12, 2009).

Second, D'Ablemont and the other Kelley Drye Life Partners who chose to work past the age of 70 all had previously been equity partners (D'Ablemont for over 30 years). While at 70 they lost their equity interest and other authority at the Firm, the work they continued to perform at Kelley Drye was akin to the work performed when they had been equity partners. (See D'Ablemont Reply Declaration in support of EEOC's motion for partial summary judgment, docket entry #59, ¶10 and ¶38.) Clearly then, of the various classes of Kelley Drye attorneys (and its non-attorney employees), D'Ablemont and the other Life Partners who continued to practice law after 70 most closely resemble Kelley Drye partners, the subject of EEOC's document request. The mere fact that compensation information is sought from a relatively sizeable group is not a basis to deny such a plainly relevant discovery request in a discrimination case. See Lyons v. Anheuser Busch Companies, Inc., 164 F.R.D. 62, 67 (E.D. Mo. 1995) (in ADEA case, plaintiff's discovery demands for compensation and other personnel information for a large group of employees enforced by court).

Third, the suggestion of Kelley Drye, made for the first time at oral argument and adopted by Judge Dolinger--namely, that Kelley Drye only provide compensation information for a total of 10 partners whose client receipts were immediately above and below those of D'Ablemont--is insufficient and unworkable. As noted above, this information would shed no light on EEOC's claims of under-compensation of other Kelley Drye attorneys who continued to practice past the age of 70 (two of whom EEOC identified early on in this matter). Further, as evidenced by the second component of EEOC's Objections, how to calculate D'Ablemont's client receipts is very much in dispute, meaning that Kelley Drye's suggested limitation to EEOC's request (compensation information for just ten particular partners), adopted by the Magistrate Judge, readily could lead to additional disputes necessitating Court intervention. And precisely because of the open issues of the crediting of client revenues and the effect such revenues have on attorney compensation (and what other factors the Firm values in awarding compensation), EEOC's request for full partner compensation information is warranted. For only with such information can EEOC determine how Kelley Drye's compensation system operates.

Finally, Kelley Drye's argument that the denial of EEOC's motion to compel was appropriate because compensation information "is among the most sensitive personal information that exists" makes little sense here.[1] It is fundamental that despite its sensitive nature, compensation information is discoverable in a compensation discrimination case. See EEOC v. Morgan Stanley & Co., No. 01-CV-8421, 2002 WL 1431685 at *2 (S.D.N.Y. July 1, 2002); Lyons v. Anheuser Busch Companies, Inc., supra, 164 F.R.D. at 67 (rejecting privacy objections in discrimination cases to plaintiffs' discovery of compensation information). Moreover, Kelley Drye's newly-raised concerns are contradicted by its prior actions in discovery, having previously provided EEOC with compensation information for certain individual attorneys and also having provided complete Firm Earnings Allocation Committee reports containing annual projected (though not actual) compensation for all Kelley Drye partners (Burstein Declaration, submitted with Objections, docket entry #73, ¶ 9).

For these reasons, EEOC is plainly entitled to the fundamental information it seeks: the unredacted partner compensation information from documents Kelley Drye already produced.

B. EEOC Is Entitled to Documents Concerning Client Collections of a Small Group of Specified Atttorneys

As expressly set forth in its Fifteenth Affirmative Defense (Kelley Drye Answer to Amended Complaint and Affirmative Defenses, docket entry # 21), and as reiterated throughout this matter (Preliminary Pre-Trial Statement, docket entry # 9, pp. 13-14), Kelley Drye has asserted that D'Ablemont has taken credit for client revenues where he merely sent bills to the client but was not the "participating partner" who in fact should be credited for such receipts. To bolster this defense, Kelley Drye submitted a document in discovery supporting its view of D'Ablemont's alleged overstatement of client revenues, which document Kelley Drye stated at oral argument was created for purposes of this litigation (Burstein Dec., Exh. D, p. 16, lines 7-

[1] In this section of its brief, Kelley Drye refers to its partners as "third parties" (KD brf at 9), obviously erroneous as Kelley Drye is a partnership owned and operated by its partners.

21). Because in an earlier ruling, Judge Dolinger had rejected as overbroad EEOC's request for documents that would reveal how client revenues were credited for all partners (Burstein Dec., Exh. C, pp. 19-21), in its Third Document Request, EEOC simply sought the same documents for ten designated partners on credit for client billing that Kelley Drye had created for D'Ablemont.

In its brief, Kelly Drye argues that the denial of EEOC's motions was appropriate because it "would need to generate" the requested documents from Firm records (KD brf. at 8). But Kelly Drye is silent on the obvious anomaly of its position, accepted by Judge Dolinger: that it can create documents from Firm records for use in this litigation that support its affirmative defenses yet refuse to provide the same type of documents for a small group of partners, so that EEOC can test the legitimacy of this affirmative defense. This striking, fundamental unfairness of Kelley Drye's selective production of documents, accepted by the Magistrate Judge, warrants reversal of the second challenged ruling of Judge Dolinger.

C. <u>EEOC Has Been Harmed by Judge Dolinger's Denial of Its Motion to Compel</u>

Kelley Drye also argues that there is no reason to reverse Judge Dolinger's rulings because they were "without prejudice," thus allowing EEOC to depose Kelley Drye officials about "the criteria the Firm applies to Partner compensation decisions" and thereafter renew its document request if such documents are shown to be relevant (KD brf. at 10). However, the "without prejudice" nature of Judge Dolinger's rulings does not eliminate the harm to EEOC. EEOC should not be put in a position whereby it can only obtain certain documents <u>after</u> depositions have occurred; for this would lead to the cumbersome, unworkable situation whereby EEOC would have to make a post-deposition document request and then likely recall already-deposed witnesses. Obviously, such a process would be squarely contrary to the mandate that the

Federal Rules should be construed in a manner promoting "speedy" and "inexpensive" determinations in federal litigation. Fed. R. Civ. P. 1.

CONCLUSION

For the foregoing reasons and those set forth in EEOC's initial brief, EEOC respectfully requests that the Court reverse Magistrate Judge Dolinger's July 15, 2011 rulings and order Kelley Drye to produce the requested documents at issue.

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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