

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 EQUAL EMPLOYMENT OPPORTUNITY :
 COMMISSION, :
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 Plaintiff, :
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 v. :
 :
 KELLEY DRYE & WARREN LLP, :
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 Defendant. :
 :
 -----X

10-CIV-0655 (LTS)
 ECF CASE
 PRELIMINARY PRE-TRIAL
 STATEMENT

Pursuant to this Court's Initial Conference Order dated February 2, 2010, Plaintiff Equal Employment Opportunity Commission ("Plaintiff" or "EEOC") and Defendant Kelley Drye & Warren LLP ("Defendant" or "Kelley Drye") file this Preliminary Pre-Trial Statement. The individuals identified below participated in the meeting required by Fed. R. Civ. P. 26(f) via telephone on April 7, 2010, and subsequently prepared the following report.

The pre-trial conference in this matter is scheduled for May 7, 2010 at 11:45 a.m. before United States District Judge Laura Taylor Swain in Courtroom No. 17C, 500 Pearl Street, New York, New York 10007.

a. Statement of the Nature of this Action

The EEOC submits that this is an action under the Age Discrimination in Employment Act ("ADEA") and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of age, as well as retaliation, by Defendant Kelley Drye & Warren, LLP (hereafter "Kelley Drye" or the "Firm"), and to make whole Eugene T. D'Ablemont, Esq.

(“D’Ablemont”) and other similarly situated employees of Kelley Drye affected by its discriminatory practices. Plaintiff Equal Employment Opportunity Commission (“EEOC”) alleges that Kelley Drye subjected D’Ablemont and other similarly situated employees at the Firm to discrimination on the basis of age that included, but was not limited to, creating a compensation system whereby D’Ablemont and other attorneys who chose to continue to work once they reach the age of 70 have been and continue to be significantly under-compensated for work they performed solely on the basis of their age. Further, EEOC alleges that Kelley Drye retaliated against D’Ablemont for complaining about such practices and filing a discrimination charge with the EEOC.

Defendant denies that D’Ablemont and/or any other Life Partner was an “employee” entitled to the protections of the ADEA, denies each and every claim of wrongdoing asserted by Plaintiff, and asserts that Plaintiff is not entitled to relief on its own behalf, or on behalf of others, on any claim. Defendant further asserts that Plaintiff should be required to clarify the nature and scope of the action. To the extent Plaintiff purports to seek relief on behalf of Life Partners other than D’Ablemont, Plaintiff should be required to identify each such Life Partner.

b. Statement of Each Party’s Position as to the Basis of this Court’s Jurisdiction

The EEOC submits that this Court has jurisdiction pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is brought under Section 7(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(b) (the “ADEA”), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938 (the “FLSA”), as amended, 29 U.S.C. §§ 216(c) and 217.

Defendant maintains that this Court lacks subject matter jurisdiction over the claims asserted because Kelley Drye Life Partners are not covered by the protections and remedial provisions of the ADEA, and because every individual who has been approached by the EEOC to participate in this action has specifically rejected the EEOC's invitation to seek relief on their behalf, and any such individual(s) failed to satisfy the statutory and/or administrative prerequisites to assertion of a claim under ADEA.

c. Statement of all Material Uncontested or Admitted Facts

The parties have made a good faith attempt to determine whether there are any material facts that are not in dispute. The parties state that the following material facts are undisputed:

1. Kelley Drye operates as a New York registered limited liability partnership, within the meaning of the New York Partnership Law ("NYPL") §§121-1500 et. seq.
2. Kelley Drye's Partnership operates pursuant to the terms of a Partnership Agreement.
3. D'Ablemont began working at the Firm in 1959.
4. D'Ablemont is 79 years of age.
5. D'Ablemont became a Partner at the Firm in 1969.
6. Mr. D'Ablemont became a Life Partner (as "Life Partner" is defined in Kelley Drye's Partnership Agreement) effective January 1, 2000.
7. Once Partners attain Life Partner status they receive an Annual Life Partner Payment whether or not they continue to practice law at the Firm.
8. In Mr. D'Ablemont's case the Annual Life Partner Payment is \$112,500.

9. Mr. D'Ablemont has also received annual bonus compensation from Kelley Drye. For each of the years 2001 through 2006, the bonus payments were in the amount of \$75,000. For each of 2007 and 2008, the bonus payments to D'Ablemont were \$25,000.
10. D'Ablemont filed a charge alleging violations of the ADEA with the EEOC on February 29, 2008.
11. EEOC issued its Letter of Determination on March 20, 2009 finding cause that Kelley Drye violated the ADEA by its age-based compensation policy for partners and retaliated against D'Ablemont.
12. On March 20, 2009, EEOC also served a conciliation proposal accompanying such Letter of Determination.

d. Statement of all Uncontested Legal Issues

1. Kelley Drye is an "employer" within the meaning of the ADEA.

e. Statement of all Contested Legal Issues¹

1. Are Kelley Drye Life Partners Kelley Drye "employees"?
2. Are Kelley Drye Life Partners "employers"?
3. Are Kelley Drye Life Partners covered by the protections and remedial provisions of the ADEA?
4. Are Kelley Drye Partners who became Life Partners "bona fide executive[s] or high policymaking employee[s]," under 29 U.S.C. § 631(c)?
5. Did the EEOC satisfy its obligation to make reasonable efforts to conciliate with the Defendant before instituting this action?

¹ Kelley Drye and the EEOC believe that some of the issues listed below are mixed legal and factual issues.

6. Can the EEOC recover compensatory damages in connection with a claim alleging retaliation arising under ADEA?
7. Can the EEOC recover punitive damages in connection with a claim alleging retaliation arising under ADEA?
8. Can the EEOC seek and obtain relief and damages for individuals affected by the policy at issue who have not affirmatively participated in EEOC's investigation and/or litigation of this matter?
9. Is D'Ablemont an employee of Kelley Drye?
10. Has D'Ablemont been retaliated against by Kelley Drye?
11. Did Kelley Drye discriminate against D'Ablemont or any other Life Partner on the basis of age?
12. Were bonus monies paid to all Life Partners who received such payments reduced due to economic conditions and/or was there a nexus between the amount of bonus monies paid to D'Ablemont in 2008 and his filing of a Charge of Discrimination with the EEOC and/or other complaints of alleged discrimination, if any, made by D'Ablemont at the Firm?

EEOC Submits the Following Additional Contested Legal Issues

13. Are Kelley Drye's Affirmative Defenses 4, 9, 10, 11, 13, 15, 16, 17 and 18 without any legal basis and/or are immaterial, impertinent and scandalous and should be stricken pursuant to EEOC's forthcoming Motion under Federal Rule 12(f) to strike, namely striking Kelley Drye's Affirmative Defenses of (1) a purported statute of limitations bar; (2) that the Complaint contains claims not in the administrative charge;

(3) the purported failure to satisfy prerequisites to an ADEA action; (4) that in bringing this suit in the public interest, EEOC cannot seek relief on behalf of Kelley Drye attorneys who did not file charges with the agency; (5) that the suit is allegedly barred by the doctrines of waiver, estoppel, laches and unclean hands; (6) that the action is allegedly barred due to unspecified purported “objectionable behavior” of the Charging Party; and (7) that compensatory and/or punitive damages cannot be recovered for an ADEA retaliation claim?

14. Was Kelley Drye’s conduct in discriminating against attorneys who reached the age of 70 and continued to practice law at the Firm by requiring them to relinquish any equity interest they had in the Firm and to be compensated for their work solely through the payment of a discretionary bonus, which policy resulted in significant under-compensation solely on the basis of age paid to Mr. D’Ablemont and other similarly situated attorneys at the Firm who became active Life Partners, “willful” so as to warrant the imposition of liquidated damages, in addition to other legal and equitable relief under the ADEA?

15. Was Kelley Drye’s \$50,000 reduction in 2008 and 2009 in its payment to Mr. D’Ablemont for work performed in 2007 and 2008 respectively in retaliation for Mr. D’Ablemont’s filing of an ADEA charge with the EEOC and complaining internally about the age-based discriminatory compensation system done with malice or reckless indifference to federally protected rights so as to warrant the imposition of punitive damages?

16. If liability is found, should the Court order reinstatement of Mr. D'Ablemont and the other current Kelley Drye Life Partners adversely affected by the discriminatory policy back into full equity partner status at the Firm, with all the rights and benefits Kelley Drye equity partners possess?

Kelley Drye Submits the Following Additional Contested Legal Issues

17. Can the EEOC bring suit on behalf of law firm partners who have voluntarily agreed to the terms of a partnership agreement requiring transition to Life Partner status and who have accepted the benefits of that status including the acceptance of Life Partner payments?

18. Can and should the Court apply the ADEA statute of limitations to the claims asserted or the relief sought by the EEOC?

19. Did the individuals, on whose behalf the EEOC is allegedly seeking relief, fail to satisfy the statutory and administrative prerequisites to assertion of claims under the ADEA, due to: a) their failure to file any charge of discrimination, b) failure to assert certain matters in a charge of discrimination, and/or c) failure to satisfy other jurisdictional prerequisites; and do these failures bar the claims and or damages asserted on behalf of such individual(s) in whole or in part?

20. Can the EEOC seek relief and damages on behalf of individuals who have indicated that they do not want to participate in this action and/or do not want the EEOC to seek relief and damages on their behalf?

21. Can and should equitable relief and/or damages sought by the EEOC be precluded by the doctrine of laches because of undue delay in pursuing the claims set forth in the Complaint?

22. Can and should equitable relief and/or damages sought by the EEOC be precluded by the doctrine of waiver because of, *inter alia*, the ratification of provisions contained in the Kelley Drye Partnership Agreement, and acceptance of services, benefits, and compensation offered by Kelley Drye?

23. Can and should equitable relief and/or damages sought by the EEOC for D'Ablemont be precluded by the doctrine of "unclean hands" because of, *inter alia*, D'Ablemont's receipt of free legal services from the Firm, which he represented would be paid for and then objected to paying, his acceptance of direct compensation from third parties while also soliciting and receiving from the Firm an annual bonus, in violation of the Firm's Partnership Agreement and directive of the Executive Committee, and/or other violations of Kelley Drye policies and procedures?

24. Is Kelley Drye entitled to offset from any sums claimed on behalf of D'Ablemont, or others, monetary amounts owed to Kelley Drye based upon the conduct of the EEOC, D'Ablemont, and/or any individual, including, but not limited to, the conduct referenced above in paragraphs 21-23?

f. The EEOC's Statement of Material Disputed Facts

1. The Firm's Partnership Agreement required partners who turn 70 to relinquish any and all equity interest they have in the Firm and otherwise no longer share in the Firm's profits. Under this Agreement, once 70 years of age, partners became "Life

Partners”, entitled to an annual “Life Partner Payment” whether the attorney continued to work or not. Attorneys past the age of 70 who chose to continue working at the Firm, as the Agreement allowed them to do, were compensated for such work, if at all, through a discretionary annual bonus payment determined by the Firm’s Executive Committee.

(Portions of the above-referred Agreement were amended in mid-March 2010; the references herein to the Agreement concern its operation prior to this recent amendment).

2. Under the Agreement, unlike equity partners, Life Partners at the Firm cannot vote on revisions to the Partnership Agreement, with the sole exception of the right to vote on amendments to the Agreement that affect their rights as Life Partners; cannot vote on admission or exclusion of partners to the Firm; and cannot vote on proposed mergers of the Firm.

3. Pursuant to the above-referred provisions of the Agreement, D’Ablemont became a Life Partner in the year 2000, fully relinquishing his equity interest in the Firm and otherwise no longer sharing in the Firm’s profits.

4. D’Ablemont and other Life Partners who continued to practice law at the Firm since turning 70 years of age have been significantly under-compensated for their work solely on the basis of their age, when compared to the compensation of partners at the Firm under 70 years of age who made similar contributions to the Firm.

5. D’Ablemont’s productivity in 2007 and 2008 was at least as good as in previous years, yet his annual bonus payment (paid in early 2008 and early 2009 respectively) was significantly reduced from that awarded in previous years.

6. In 2008, subsequent to D'Ablemont's internal complaints about the age-based compensation policy and his February 2008 filing of his ADEA charge with EEOC, Kelley Drye reduced his bonus payment in 2008 and 2009 in reprisal for such complaints.

7. At various times in 2007 and thereafter, D'Ablemont communicated to the Firm's Executive Committee his claims that his bonus payments did not properly compensate him for work he performed, that the bonus payments made to two other Life Partners who continued to practice at the Firm did not properly compensate them for their work performed, and that the compensation system for Life Partners who continued to work at the Firm was discriminatory based on age.

8. During the time that D'Ablemont has been a Life Partner at the Firm, at least two other former equity partners became Life Partners at the age of 70 and continued to work at the Firm, Robert Ehrenbard and Bud Holman, who, like D'Ablemont, were required to fully relinquish their equity interest in the Firm, who were no longer allowed in the Firm's profits, and who were compensated for their work, if at all, through annual bonus payments determined by the Firm's Executive Committee.

9. Mr. D'Ablemont's acceptance of a retainer from a client while a Life Partner that Kelley Drye notes in its Fifteenth Affirmative Defense was permitted by Kelley Drye and has resulted in very substantial revenues from this client paid to Kelley Drye over many years.

10. Kelley Drye has allowed partners to enter into retainer agreements with clients similar to the retainer agreement of Mr. D'Ablemont that Kelley Drye notes in its Fifteenth Affirmative Defense.

11. The issue of Mr. D'Ablemont's retainer noted in the Fifteenth Affirmative Defense only arose after Mr. D'Albement filed his charge with the EEOC, even though this arrangement had been in place, with Kelley Drye's consent, for many years prior thereto.

12. Mr. D'Ablemont in 2007 sought to have Kelley Drye revise its discriminatory policy short of litigation by providing the Firm with a legal opinion from a law firm specializing in partnership matters, which opinion concluded that the policy at issue violated federal and state law. Despite this, the Firm refused to alter its age-based policy.

13. Since he became a Life Partner in 2000, Mr. D'Ablemont has remained the billing partner, with collection responsibility, for many clients he brought into the Firm for which the Executive Committee had given him full credit for purposes of calculating his annual Client Development Account. For such calculation and determination of the Client Development Account, the Firm credited him with \$2.7 million in fee collections in 2009.

14. The Firm historically has provided partners, Life Partners, of counsel attorneys, and certain associates and staff members with free real estate, estate planning, tax preparation, employment law advice, and litigation support services for themselves and their immediate family performed by Firm attorneys and tax accountants. Mr. D'Ablemont received those benefits to no greater extent than members of the Executive Committee or other partners. The accusation on this issue set forth in Kelley Drye's Fifteenth Affirmative Defense was never raised until after Mr. D'Ablemont had raised the age discrimination issue with the Firm. The accusation on this issue involved a single

real estate matter for which the Firm had been providing free legal services for many years consistent with Firm policy and practice, which went to litigation in 2006, but in which the Firm did not appear as counsel. The Firm never billed Mr. D'Ablemont, consistent with the Firm policy and practice.

15. The Client Development Allowances awarded to Mr. D'Ablemont were based on the standard formula utilized by the Firm to equity partners, of counsel attorneys, and other Life Partners and were not, as asserted in the Fifteenth Affirmative Defense, the result of any inappropriate demands by Mr. D'Ablemont.

16. During his years as an equity partner, Mr. D'Ablemont served five times on the Firm's Points Committee, served on the Attorneys Committee more than eight times and as its Chairman two times, served on the Recruitment Committee four times, and headed up to Client and Billing Committee on two occasions.

17. Mr. D'Ablemont never has been disciplined by the Firm in his over 50 years of service.

18. Mr. D'Ablemont was consistently among the most highly compensated partners when he was an equity partner.

g. Kelley Drye's Statement of Material Disputed Facts

1. D'Ablemont and each of the other Life Partners are parties to and have ratified the provisions of the Kelley Drye Partnership Agreement.

2. In 1973, the Partners amended the then existing partnership agreement to include a provision providing that Partners would, upon their 65th birthday, begin transitioning to Life Partner status.

3. The Partnership Agreement provides for the continued involvement of Life Partners in the management and operation of the Firm including, *inter alia*, participation in the election of the Firm's Executive Committee, access to financial records of the Firm, autonomous work and independent handling of all aspects of client matters, the right to open new matters and to handle client billing, supervision and evaluation of associates and staff, and the right to veto any proposed amendment to the Partnership Agreement which could adversely affect their rights.
4. Mr. D'Ablemont was a Partner when the Life Partner provision was first added to the Partnership Agreement.
5. Mr. D'Ablemont participated in discussions concerning that provision and had an opportunity to review the provision prior to its adoption.
6. According to Mr. D'Ablemont the transition concept established by the Life Partner provision of the Partnership Agreement was "a negotiated deal: the Firm would grant partners, in essence, a lifetime pension in recognition of their long service to the Firm and, in exchange, the partners would agree to give up their points over a four year period of time, pursuant to an automatic formula, and assist in passing on Firm clients to younger partners."
7. Shortly after Mr. D'Ablemont became a Life Partner, he directed the Firm's Executive Director to transfer to other Partners billing credit for all of his matters and billing responsibility for most of his matters.
8. For certain of the clients D'Ablemont claims credit for, he does little, if anything, beyond the ministerial act of preparing and sending them a bill.

9. During the last five years D'Ablemont's billable hours have ranged from 195.4 to 324.2 hours per year, which is an average of 7 to 10 times less, annually, than the hours he billed prior to becoming a Life Partner.
10. On an annual basis since 2000 D'Ablemont has been granted a client development allowance which in recent years has been in the amount of \$25,000.
11. The client development allowance granted to Mr. D'Ablemont greatly exceeds what is provided under the formula used for other Partners. Mr. D'Ablemont has utilized the client development account for significant expenses which he has submitted as business related. These expenses include country club dues, travel, entertainment, and charitable contributions.
12. Mr. D'Ablemont has utilized Firm resources to provide legal services to members of his family, for which the Firm has not received payment.
13. The Firm incurred fees and charges exceeding \$160,000 for handling a lawsuit on behalf of Mr. D'Ablemont's son for which no payment has been made.
14. The Firm incurred fees and charges exceeding \$18,000 for handling a patent matter for D'Ablemont's son-in-law which have not been paid.
15. In a February, 2000 memorandum to Mr. D'Ablemont from the Firm's Chairman and Managing Partner, Mr. D'Ablemont was told that he could either receive a direct monetary retainer from a certain Firm client, or be eligible to be considered by the Firm's Executive Committee for an annual bonus, but he could not have both. Yet in multiple years thereafter, Mr. D'Ablemont solicited and received from the Firm an annual bonus,

without notifying the Firm's Executive Committee that he was also receiving one or more third party retainers that year.

16. D'Ablemont is provided with office space, all necessary office equipment, full time secretarial support and other clerical and administrative support.

17. No other Kelley Drye Life Partner has filed a charge of discrimination with the EEOC.

18. D'Ablemont and other Life Partners have made representations within Kelley Drye, to third parties, and to federal and state governmental authorities, that he is/they are [a] Kelley Drye Partner(s).

19. D'Ablemont has affirmatively stated that Life Partners should not be compensated in the same manner and amounts as other Partners.

20. While a Life Partner, D'Ablemont stated in a December, 2000 memorandum to the Chairman and Managing Partner of the Firm that: "I appreciate that the Executive Committee ought not to assume the role of a 'Points Committee' for Life Partners. I am not suggesting that productive Life Partners be compensated on the basis of measuring economic and other contributions to the Firm comparable to what is done for equity and stipulated payment partners."

21. While a Life Partner, D'Ablemont stated in a March, 2001 memorandum to the Chairman and Managing Partner of the Firm that: "I am not asking that I be evaluated and rewarded on some sort of points analysis basis or on the same basis as [another named partner], I am asking that I be rewarded with a bonus ('honorarium' to use John's word) consistent with what the Firm has done in the past for productive life partners."

22. While a Life Partner, D'Ablemont stated in an October, 2004 memorandum to the Chairman of the Firm that compensation of Life Partners should "not [be] for the same amount of money," as received by active partners who are not Life Partners.
23. In April of 2007, the Firm's Managing Partner told D'Ablemont that he would be receiving a bonus of \$75,000 that year, but in the future he should not expect to receive bonuses that large, if at all.
24. D'Ablemont has a history of objectionable behavior inconsistent with the expectations for a Kelley Drye Partner; and the Firm's existing and anticipated level of business.
25. D'Ablemont has failed and refused to answer the Firm's questions as to the precise services provided to, and amounts received from, third parties.
26. Kelley Drye's decisions regarding the bonus compensation for Life Partners were based on legitimate, non-discriminatory and non-retaliatory reasons.
27. In March 2010 the Firm amended the Partnership Agreement to eliminate the provisions requiring the election of Life Partner status at age 70. In connection therewith all Life Partners who had mandatorily become Life Partners at age 70 were given the opportunity to remain a Partner, but relinquish their rights as Life Partners and become a Partner subject to the Firm's Earnings Allocation Committee. None has chosen to relinquish their Life Partner status and become a Partner subject to the Firm's Earnings Allocation Committee.
28. In February 2010, the EEOC sent a letter to each Kelley Drye Life Partner who had mandatorily become a Life Partner at age 70, asking the Life Partner if he was

interested in participating as a claimant in this case. No Life Partner, other than Mr. D'Ablemont, has elected to participate in this lawsuit as a claimant.

h. The EEOC's Statement of the Legal Basis of Each Cause of Action Asserted

The EEOC submits that ADEA makes it unlawful for an employer to "...discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 28 U.S.C. §623(a). Kelley Drye violated the ADEA by enforcing its policy of requiring partners to relinquish their equity interest in the Firm at the age of 70 and instead be compensated through a discretionary bonus determined by the Firm's Executive Committee, resulting in significant under-compensation of attorneys working at the Firm after the age of 70 solely on the basis of age. The ADEA also prohibits retaliation against an individual opposing any practice which violates the ADEA and prohibits retaliation against anyone filing a charge of discrimination. 28 U.S.C. §623(d). Kelley Drye violated the anti-retaliation provisions of the ADEA by reducing D'Ablemont's bonus payments in 2008 and 2009 after he made internal complaints to Kelley Drye in 2007 about age discrimination and filed a charge with EEOC in 2008.

i. Kelley Drye's Statement of the Legal Basis of Each Defense Asserted

The Court lacks subject matter jurisdiction over the claims asserted because Eugene D'Ablemont is not and was not an "employee" of Kelley Drye, and is not and was not covered or protected by the statutes under which the claims are asserted by the EEOC. The ADEA defines "employee" as "an individual employed by an employer." 29 U.S.C. §630(f). The ADEA applies only to decisions involving "employees" of an "employer."

The EEOC has failed to specify the nature and scope of the cause of action, in that it has failed to identify which Life Partners, other than D'Ablemont, it purports to represent. Each Life Partner other than D'Ablemont has specifically rejected the EEOC's invitation to participate in this action and the EEOC is not entitled to seek relief on behalf of any such individuals.

Because there are no "similarly situated employees of Kelley Drye," and there are no "similarly situated attorneys," as those phrases are used in the Complaint, there is no "class of similarly situated employees," and the EEOC may not seek relief on behalf of such non-existent persons. In fact, every individual who has been approached by the EEOC to participate in this action has specifically rejected the EEOC's overtures.

Defendant asserts that D'Ablemont failed to bring claims under ADEA within the 300 day statute of limitations established by the ADEA. *See 29 U.S.C. § 626(d)*.

Defendant denies that D'Ablemont is or was an employee entitled to the protections of the ADEA. *See 29 U.S.C. § 630(f)*.

To the extent D'Ablemont is or was a Kelley Drye employee, he is or was a "bona fide executive[s] or high policymaking employee[s]," and therefore exempt from the provisions of ADEA under 29 U.S.C. § 631(c).

D'Ablemont cannot prove that he was subjected to discrimination because he has suffered no adverse actions and he has received rights, privileges, benefits and compensation in accordance with the Partnership Agreement and which accurately reflect his contribution;

D'Ablemont cannot prove that he was subjected to retaliation because he has suffered no adverse actions and because there is no connection between any action of the Firm and any complaint he may have made.

The individual(s) on whose behalf the EEOC allegedly seeks relief is/are barred from relief due to each such individual's failure to satisfy statutory and administrative prerequisites to the bringing of claims under ADEA, including failure to file a charge of discrimination.

The EEOC's claims on behalf of Eugene D'Ablemont are barred, in whole or in part, by the doctrines of waiver, estoppel, laches, and unclean hands, due to the actions and/or inactions of the EEOC and/or Eugene D'Ablemont including, without limitation: a) failure to raise the allegations set forth in the complaint in a timely fashion; b) ratification of the provisions of the Kelley Drye Partnership Agreement; c) representations within Kelley Drye, to third parties, and to federal and state governmental authorities that he is a Kelley Drye Partner; d) D'Ablemont's representations within Kelley Drye that Life Partners should not be compensated in the same manner and amounts as other Partners; e) acceptance of Life Partner Payments and bonus payments; f) acceptance of support services and office space; g) acceptance of client development allowances; h) acceptance of payments from third party income sources, while also soliciting and receiving bonuses from the Firm, contrary to the Firm's Partnership Agreement and directive of the Executive Committee; i) failing to answer the Firm's questions as to the precise services provided to, and amounts received from, these third parties; and/or j) acceptance of the various benefits and compliance with the requirements established by the Life Partner provisions of the Kelley Drye Partnership Agreement.

D'Ablemont's compensation as a Life Partner has been entirely non-discriminatory, non-retaliatory and fair considering, *inter alia*: a) shortly after he became a Life Partner, he transferred to other Partners the billing credit for all of his matters and the billing responsibility for most of his matters; b) for certain of the clients he now purports to claim credit for, he does

little, if anything, beyond the ministerial act of preparing and sending them a bill; c) during the last five years his billable hours have ranged from 195.4 to 324.2 hours per year, which is an average of 7 to 10 times less, annually, than the hours he billed prior to becoming a Life Partner; d) he has demanded and received tens of thousands of dollars of free legal services from Firm attorneys for himself and his relatives that he was not entitled to, representing that he and/or the relative would pay for these services and then objected to doing so; e) he has demanded and received client development allowances far in excess of what he is entitled to under the formula used for other Partners; f) he has received direct monetary payments from third parties, while also soliciting and receiving a bonus from the Firm, contrary to the Firm's Partnership Agreement and the directive of the Firm's Executive Committee, g) he has a history of objectionable behavior inconsistent with the expectations for a Kelley Drye Partner; and h) the Firm's existing and anticipated level of business.

Further, D'Ablemont cannot recover compensatory and/or punitive damages. The ADEA does not permit recovery of punitive damages or damages for pain and suffering, emotional distress, humiliation, or injury to professional reputation. *See Commissioner v. Schleier*, 515 U.S. 323, 326 (1995) ("The ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress"); *Wray v. Edward Blank Assocs.*, 924 F. Supp. 498, 501 (S.D.N.Y. 1996) ("Plaintiffs may recover neither emotional nor punitive damages under the ADEA"). In addition Plaintiff cannot recover punitive damages because Defendant has engaged in good faith efforts to comply with all laws prohibiting discrimination.

To the extent D'Ablemont is successful in recovering any damages, Kelley Drye is entitled to a setoff of, *inter alia*, the total amounts D'Ablemont has received from third parties

for legal services he has provided to those third parties, as well as amounts D'Ablemont has received from the Firm, or owes the Firm, and all debts of D'Ablemont forgiven by the Firm.

j. Statement of the Measure of Proof

The burden of proof is on Plaintiff, and Plaintiff must prove the discrimination claims by a preponderance of the evidence. Defendant bears the burden of proof of those of its defenses constituting affirmative defenses, and Defendant must prove such defenses by a preponderance of the evidence.

k. Amendments to Pleadings and/or the Addition or Substitution of Parties

At this time, the parties do not anticipate the addition or substitution of additional parties.

The EEOC submits that it may move to amend its complaint to specifically name additional individuals EEOC believes are entitled to certain relief as a result of harm from Defendant's policy at issue in this matter. If this litigation is bifurcated as EEOC suggests, EEOC would seek a one month period after any liability finding by the Court with regard to Defendant's policy at issue to so amend the Complaint. If the Court does not agree to the bifurcation proposed, EEOC would seek a deadline of six months from the issuance of the Scheduling Order by the Court for any pleading amendment.

Kelley Drye objects to the delay proposed by the EEOC and suggests that the deadline for any such amendments or additions be two months from the issuance of the Scheduling Order by this Court.

l. Trial of the Case by a Magistrate Judge

The parties do not consent to trial of the case by Magistrate Judge.

m. Fed. R. Civ. P. 26(a) Disclosures

The parties agree to exchange initial disclosures on or before May 21, 2010.

n. Discovery

EEOC requests that discovery in this matter be bifurcated so the Court first address the issue raised by Kelley Drye's First Affirmative Defense, i.e. that D'Ablemont and other Life Partners who worked at the Firm after turning 70 years of age are "employers" not subject to the ADEA; and also address the issue of whether the Firm's challenged policy violates the ADEA. EEOC suggests that there be a four month discovery period on these threshold issues, concluding September 7, 2010; that there then be a four month fact discovery period on damages, concluding January 7, 2011.

Kelley Drye objects to bifurcation and believes that bifurcation will serve no useful purpose and would be contrary to the interests of judicial economy because there is substantial overlap in the witnesses and facts related to the EEOC's claims, Kelley Drye's First Affirmative Defense, all of the remaining Affirmative Defenses, and the alleged damages. In addition, the EEOC's "bifurcation" proposal is unclear and could create confusion regarding the order of discovery. The EEOC's proposal also does not allow for a period of discovery regarding all issues of liability (such as the basis for Kelley Drye's compensation decisions and with respect to the EEOC's retaliation claims). Finally, bifurcation would result in duplication of witnesses and other discovery efforts and could result in separate consideration of, and multiple motions

concerning so called “threshold issues,” unnecessarily prolonging this proceeding. Defendant proposes that fact discovery close on May 7, 2011.

o. Expert Discovery

The EEOC proposes that following the fact discovery schedule proposed by the EEOC above there be a two month expert discovery period, concluding March 7, 2011.

Kelley Drye proposes the following:

1. Plaintiff shall identify any expert witnesses who may be used at trial and provide reports pursuant to Fed. R. Civ. P. 26(a)(2)(B) by May 6, 2011.
2. Defendant shall identify any expert witnesses who may be used at trial and provide reports pursuant to Fed. R. Civ. P. 26(a)(2)(B) by July 6, 2011.
3. All expert depositions shall be completed no later than August 6, 2011.

p. Limitations on Discovery

EEOC requests modifying the 25 interrogatory limit under the Federal Rules to allow for 40 interrogatories.

Kelley Drye does not believe any such modification is warranted at this time and requests that discovery proceed as provided for in the Federal Rules of Civil Procedure.

q. Settlement Discussions

The parties participated in the EEOC conciliation process and also in several mediation sessions before JAMS mediator Michael Young before the initiation of this action. No settlement was reached.

r. Trial

The parties wish to try this case before a jury. Plaintiff anticipates the need for 5 days to present its case. Defendant anticipates the need for 5 days to present its case, except states that the trial could be longer depending upon the scope of the EEOC's case, which is not yet clear.

s. Other Court Orders

The parties anticipate that responses to discovery requests and the initial disclosures pursuant to Fed. R. Civ. P. 26(a), will require the entry of a Stipulation and Order of Confidentiality. The parties are presently in the process of negotiating a protective order for discovery material.

The EEOC states that will be moving on May 3, 2010 under Federal Rule 12(f) for an Order striking Kelley Drye's Fourth, Ninth, Tenth, Eleventh, Thirteenth, and Fifteenth through Eighteenth Affirmative Defenses as having no basis in law and/or involving immaterial, impertinent or scandalous matters.

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Dated: April 30, 2010

/s/ Jeffrey Burstein
Jeffrey Burstein, Senior Trial Attorney
1 Newark Center, 21st Floor
Newark, NJ 07102
Phone: (973) 645-2267
Fax: (973) 645-4524
jeffrey.burstein@eeoc.gov
Attorneys for Plaintiff

PROSKAUER ROSE LLP

Dated: April 30, 2010

/s/ Bettina B. Plevan
Bettina B. Plevan
1585 Broadway,
New York, New York
Phone: (212) 969-3000
Fax: (212) 969-2900
bplevan@proskauer.com
Attorneys for Defendant