UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. SIDLEY AUSTIN BROWN & WOOD LLP., Defendant.	No. 05 C 0208 Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

In July 2000, the Equal Employment Opportunity Commission ("EEOC") opened a direct investigation into Defendant Sidley Austin Brown & Wood's ("Sidley") compliance with the Age Discrimination in Employment Act ("ADEA") in connection with a downgrading of 32 of its partners and a change in its mandatory retirement age. Specifically, Sidley told 32 partners that they had to either accept a downgrade in their status from partner to counsel or senior counsel, or leave the firm. At the same time, Sidley reduced its mandatory retirement age from 65 to a sliding scale between 60-65.

The EEOC commenced its work after it was widely reported by the media in late 1999 that the status of Sidley's older partners had been changed to create opportunity for younger lawyers at the firm and after the EEOC received a confidential complaint from one of the affected partners. On July 5, 2000, the EEOC notified Sidley of the investigation in a letter that included a designated charge number and was accompanied by a Request For Information. After receiving only partial responses from Sidley, the EEOC served it with a subpoena. This ultimately led to an enforcement action before Judge Lefkow and an appeal to the Seventh Circuit. After receiving documents provided in accordance with the courts' orders and after completion of its investigation, the EEOC issued a Letter of Determination finding reasonable cause to believe that Sidley had violated the ADEA by downgrading certain partners on account of their age and by maintaining a mandatory retirement age. On September 29, 2004, after conciliation discussions between the parties proved unsuccessful, the EEOC issued to Sidley a Notice of Failure of Conciliation, and on January 13, 2005, filed this lawsuit seeking monetary damages and injunctive relief.

Sidley is now seeking partial summary judgment on the EEOC's claims involving individual relief. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). The question presented in Sidley's motion – whether the EEOC may pursue individual relief for persons who failed to file charges under the ADEA and are now barred from bringing their own individual suits – is a purely legal one, requiring that I determine whether *EEOC v. North Gibson Sch. Corp.,* 266 F.3d 607 (7th Cir. 2001) was overruled by *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002).

In *North Gibson,* the Seventh Circuit held that the EEOC could not recover individual relief under the ADEA if none of the alleged victims had filed timely charges of discrimination. 266 F.3d at 619-20. In that case, five of the seven claimants represented by the EEOC had not filed any ADEA charges and the remaining two had made untimely filings. The *North Gibson* decision was based on the premise that when the EEOC pursues an individual claim under the ADEA, it "steps into the shoes of the individual" and becomes that individual's representative.

Id. at 615. This privity, as the courts have put it, is created by the ADEA's distinctive enforcement scheme wherein the right of the individual to bring an ADEA action is terminated upon the commencement of such an action by the EEOC. *Id.* The Court of Appeals reasoned that since the EEOC was acting in a representative capacity, it should not be able to seek monetary relief on behalf of an individual who had no right to relief, as there were no "shoes" into which the EEOC could step. *Id.* at 615. Because each of the seven suits would have been procedurally barred, the Court of Appeals held that the EEOC could not seek monetary relief on behalf of those individuals. *Id.* at 616. In its opinion, the Court of Appeals explicitly differentiated the EEOC's right to seek such individual relief from the EEOC's right to seek injunctive relief, stating that "[w]hen the EEOC sues on its own behalf to obtain an injunction that prohibits discrimination, it promotes the public interest because its 'interests are broader than those of the individuals injured by discrimination.'" *Id.* (*quoting EEOC v. Harris Chernin, Inc.,* 10 F.3d 1286, 1291 (7th Cir. 1993)).

If there were no question concerning the ongoing validity of *North Gibson,* the individual relief sought by the EEOC in this case would certainly be barred. Here, the EEOC received a confidential request for an investigation but never an ADEA charge. Since the time for such charges has long since expired, none of the 32 Sidley partners affected by the change in retirement policies would be entitled to seek relief from this or any other court, and I would be compelled to grant Sidley's motion.

There is, however, the Supreme Court's decision in *Waffle House.* In that case, the Supreme Court held that the EEOC could seek monetary relief for individuals whose claims were barred because each had signed a mandatory arbitration agreement with his or her employer.

Waffle House, 534 U.S. at 295. The Court found that the Americans With Disabilities Act ("ADA") made "the EEOC the master of its own case" and "confer[red] on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291. The Court further found that "it is the public agency's province – not that of the court – to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-92. The Court emphasized that the EEOC may seek "to vindicate a public interest...even when it pursues entirely victim-specific relief." *Id.* at 296. With this reasoning, the Court put an end to the distinction recognized in earlier cases, like *North Gibson,* between the EEOC's ability to seek individual monetary relief and its ability to seek injunctive relief. In this way, the Court makes it clear that the EEOC's right to bring suit seeking individual monetary relief goes beyond that of the individual and reaches the territory of public interest, thereby allowing the EEOC to seek relief for individuals, like the affected Sidley partners in this case, who could not, for any variety of reasons, do so themselves.

Sidley, of course, argues that the *Waffle House* decision is applicable to only those cases in which the EEOC is seeking monetary relief on behalf of individuals who are subject to arbitration agreements.[1] This notion is dispelled by the Seventh Circuit's decision in *EEOC v.*

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[1] Sidley also contends that *Waffle House* does not apply to the ADEA because its enforcement scheme is distinct from that of the ADA. I find this reading of *Waffle House* to be particularly strained in light of the Seventh Circuit's decision in *EEOC v. Bd. of Regents of the Univ. of Wis.,* 288 F.3d 296 (7th Cir. 2002). As discussed herein, in *BOR,* the Court of Appeals applied *Waffle House* to a case brought by the EEOC under the ADEA, clearly demonstrating that the rationale is applicable to ADEA cases. *BOR,* 288 F.3d at 300. The language in the *Waffle House* decision also indicates that it would be applicable to the ADEA. *Waffle House* discusses the province of the EEOC over discrimination cases during the first 180 days after a complaint is filed with the agency. The Court notes that during this 180-day period, the EEOC has full control of the complaint's litigation. *Waffle House,* 534 U.S. at 292. Within that period, an employee must obtain a right-to-sue letter before bringing a complaint in court and if, during

Bd. of Regents of the Univ. of Wis., 288 F.3d 296 (7^{th} Cir. 2002). In *BOR,* the Court of Appeals applied the reasoning developed in *Waffle House* to a case involving sovereign immunity – an area of law wholly unrelated to arbitration agreements. In determining the EEOC had an independent right to sue the state of Wisconsin (and therefore the board of regents of the University of Wisconsin), the Court of Appeals relied heavily on the language from *Waffle House* stating that the EEOC was "the master of its own case" and could seek "to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *Id.* at 300 (*quoting Waffle House,* 534 U.S. at 296). The Court of Appeals found this reasoning to forestall any argument that the EEOC was merely "standing in the shoes of the individuals" or was "acting in privity with them as their representative." *Id.* at 299-300.

Yet, Sidley urges me to base my opinion on exactly the same kind of privity logic that failed to persuade the courts in *Waffle House* and *BOR*. Sidley argues that I should deny the EEOC the right to seek individual monetary relief on behalf of the affected Sidley partners because the partners themselves have no right to sue. I disagree. *Waffle House* makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right. I find it clear enough from the holdings in both *Waffle House* and *BOR* that the privity arguments seen in *North Gibson* are no longer applicable and that *Waffle House* does in fact overrule that decision.

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that time, the EEOC decides to pursue its own suit, the individual has no independent cause of action. *Id.* This period creates an enforcement scheme much like that of the ADEA in which the EEOC's ADEA suit trumps any suit filed by an individual.

In *BOR,* the Seventh Circuit did contemplate curtailing the EEOC's public interest based rights when there is another compelling, countervailing interest at issue. 288 F.3d at 300. As the Court notes, it would have to be more important than the right to arbitration or sovereign immunity. *Id.* Sidley contends that allowing the EEOC to seek monetary relief for individuals who are barred from doing so themselves because they have failed to file charges within the statutorily allowed period contravenes an employer's interest in reasonably speedy resolution of discrimination claims, an interest that underlies all of our discrimination statutes. Sidley claims that allowing the EEOC to revive untimely claims obliterates the otherwise strictly enforced statutes of limitations associated with Title VII, ADA, and ADEA cases. While, in the abstract, Sidley's argument does carry some weight, in the context of this case, it does not have much force. The EEOC began investigating Sidley's retirement practices approximately seven months after the changes to its policies, brought about in late 1999, were widely broadcast in the media and after receiving a confidential complaint. On July 5, 2000, the EEOC notified Sidley of the investigation with a letter that was accompanied by a document request. Over the next two years, the EEOC and Sidley battled over that document production. In July 2004, the EEOC completed its investigation and sent a Letter of Determination to Sidley stating that it had found reasonable cause to believe Sidley's retirement policies violated the ADEA. After engaging in unsuccessful conciliation discussions, the EEOC filed this suit on January 13, 2005.

Throughout, these proceedings have been of great interest not only to Sidley but also to most other large law firms across the country. It would be difficult for Sidley to argue that the EEOC's suit has come as a surprise or that the EEOC's claims concerning their new retirement policy are somehow stale or that it had no reasonable opportunity for a speedy resolution of this matter. This is almost certainly why Sidley focuses on the possibility that the EEOC might bring their retirement policies dating back to 1978 into the suit. This argument, however, should really be directed toward determining the relevant class of individuals who may be properly represented by the EEOC in this suit. There may come a time when it is appropriate for me to set some temporal limits on the class of persons who may be represented in this case. But, that time is not now. The possibility that the individual claims of some partners affected by Sidley's longstanding retirement policies may be too remote for this case does not justify throwing out all the individual claims of partners affected by Sidley's newly implemented retirement plan. Accordingly, I find that concerns over bringing stale claims do not override the EEOC's right to advance the interests of the public by seeking individual relief for at least some individuals in this case.

Sidley's Motion for Summary Judgment is DENIED.

ENTER:

James B. Zagel

James B. Zagel
United States District Judge

DATE: June 9, 2005