BUTLER & HARRIS
ATTORNEYS

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MARGARET A. HARRIS
PARTNER

Fellow, College of Labor and Employment Lawyers

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John K. Rabiej
Administrative Office of the
United States Courts
Washington, D.C. 20554

Re: Summary of Comments on Proposed Rule 56

Dear Mr. Rabiej:

I present here a brief summary of the remarks I will offer the morning of January 14, 2008. I apologize to you and the Members of the Committee for not providing these remarks sooner, and regret the inconvenience that this delay has no doubt caused. The suggestions we offer on the proposed rule are presented in the order in which they appear.

To put my comments in perspective, I am an employment law practitioner, and most of the litigation work I do is in the federal courts. I have been practicing almost exclusively in this field for 25 years. Most of my clients are individual employees.

1. Subpart (a).

"Material Facts," But What About Inferences?. The rule is silent as to the role played by inferences. Inferences, however, are often the crux of the case in employment discrimination disputes. Employment discrimination cases turn on intent, and rarely does the evidence present specific "material facts" that demonstrate an individual's animus. *See, e.g.*, *Amrhein v. Health Care Service Corp.*, 546 F. 3d 854, 858 (7th Cir. 2008) ("direct evidence of discriminatory intent is rare"); *Holcomb v Iona College*, 521 F. 3d 130, 140 (2d Cir. 2008) ("[d]irect evidence of discrimination, 'a smoking gun,' is typically unavailable"); *Hardeman v City of Albuquerque*, 377 F 3d 1106, 1117 (10th Cir. 2004) ("direct evidence of discriminatory intent or purpose usually is unavailable"); *Erwin v Potter*, 79 Fed. Appx. 893, 896 (6th Cir. 2003) ("[d]irect evidence of discrimination is rare because employers generally do not announce that they are acting on prohibited grounds"); *Aragon v Republic Silver State Disposal, Inc* , 292 F. 3d 654, 662 (9th Cir. 2002) ("[p]articularly because employers now know better, direct evidence of employment discrimination is rare"); *Spain v Mecklenburg County School Bd* , 54 Fed. Appx. 129, 132 (4th Cir. 2002) ("it is often difficult for a plaintiff to provide direct evidence of discriminatory intent"); *Fernandes v Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare"); *Dillon v Coles*, 746 F. 2d 998, 1002-03 (3d Cir. 1984) ("in most employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire").

1007 HEIGHTS BOULEVARD HOUSTON, TEXAS 77008
VOICE 713 526 5677 FAX 713 526 5691

We would urge the Rules Committee to acknowledge the importance of considering inferences before ruling on such a motion within the text of the new rule. Proposed language would be:

> ... A party may move for summary judgment on all or part of a claim or defense. The court should grant summary judgment if, after resolving all factual disputes and drawing all inferences in favor of the non-movant, there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law....

What Are "Material Facts"? The need to specifically state that all inferences must be construed in favor of the non-movant is also revealed by the fact that case law in the employment field as to what facts are "material" is not clear. Until *Ash v Tyson Foods, Inc* , 126 S. Ct. 1195 (2006), for example, lower courts found irrelevant the fact that a manager had referred to the two African-American employees as "boy" because it was not preceded by a word such as "black." As the Supreme Court noted, however, the lack of an adjective cannot be dispositive; instead, "The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." 126 S.Ct. at 1057. While this utterance was not considered a "material fact" in the lower courts, the Supreme Court's ruling made it clear that it was. Similarly, the lower courts in Ash had wrongly weighed the significance of the differences between one plaintiff's qualifications and that of a successful applicant for the position denied the plaintiff. The lower courts found those differences to be irrelevant – unless "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." Id.

Subpart (b)(3)

In cases in which the non-movant has the burden of proof, it should have the final say. If a lower court allows the movant to file a reply brief, the non-movant should be provided an equal amount of time to file a sur-reply.

The proposed language change is to add a subpart (b)(4):

> (4) if the movant files a reply, the non-movant may file a sur-reply, which must be filed within 14 days after the reply is served

Subpart (c).

The Committee is considering the adoption of a special rule requiring a separate, numbered statement by the movant of "material facts," which are considered undisputed unless the non-movant disputes each or all (in similarly numbered paragraphs), with the non-movant

allowed to generate a separate, numbered statement of his/her own, thus resulting in the movant having to file yet another separate, numbered document. In one case with which I am familiar, responding to the separate, numbered statement of so-called "material facts" resulted in non-movant's counsel spending an additional six and one-half hours on the Rule 56 motion.

The proposed Rule is unwieldy and would result in an inordinate increase in the amount of time spent by counsel – both the movant and the non-movant – and, more importantly, result in the district court receiving, at minimum, four additional (and lengthy) documents that must be checked and cross-checked against one another. This additional expense to the parties is simply not warranted, and does not serve the ends of justice.

In the Southern District of Texas, which is where most of my cases are litigated, we have no such local rule. And, the lack of that rule does not seem to have an adverse impact on the number of cases that are disposed of through the Rule 56 process.

If the Committee nonetheless chooses to add this new process to Rule 56, additional language would be required to prevent misuse of the tool by movants. The changes we suggest to subpart (c)(2)(A)(ii) are as follows:

> (ii) a separate statement that concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed, may not contain any inferences from any fact, and must be supported, wherever possible and in large part, by reference to the non-movant's testimony or admissions.

An additional provision is required to emphasize the importance of limiting the "material facts" to only those that are outcome-determinative. This would be one way to save time. We thus propose an additional subsection, Subpart (c)(2)(A)(iv):

> (iv) If the non-movant establishes that any one or more of the identified material facts is disputed, the motion may not be granted as to that claim.

As to subpart (B), the language should state:

> (i) ... or, as appropriate, state inferences from the facts that preclude summary judgment.
>
> (ii) may in the response concisely identify in separately numbered paragraphs additional material facts or inferences from the facts that preclude summary judgment.

Similarly, in subpart (C), we propose the following language·

> (i) . a reply to any additional facts or inferences stated by the non-movant and show that no jury could reach the stated inference and rule in favor of the non-movant

Subpart (d):

The problem non-movants now experience with seeking relief through Rule 56(f) is that there is no clear mechanism by which they may obtain a ruling on that motion before having to file a response to the Rule 56 motion itself, which may be incomplete. And when there is a response on file, lower courts often see that as sufficient and thus deny the 56(f) motion – leaving the non-movant with a less-than otherwise available record should summary judgment be granted.

I appreciate the opportunity to address the Committee and would be happy to respond to any questions

Very truly yours,

Margaret A. Harris