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08-CV-016

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VIA FEDERAL EXPRESS
and E-MAIL: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Rule Amendments - Rule 56

Dear Mr. McCabe:

I write with comments relating to two parts of proposed rule 56. For more than 30 years, I have concentrated my practice on representation of employees in various areas of employment law. Much of my litigation has been in the federal court. Although I do not speak on behalf of these organizations, but rather am submitting my comments as an individual, I have been honored to be a past President of the College of Labor and Employment Lawyers and the National Employment Lawyers Association. I am also a Fellow of the American College of Trial Lawyers.

1. No Method to Challenge 56(c)(2)(A)(ii) Statements Which Are Abusive.

I believe that the significant majority of lawyers representing employees in federal civil cases are in offices of three lawyers or less. Many are solo practitioners. They are, of course, not exempt from the requirements of Rule 56. But, they as well as the rest of us should have a way, without guessing at our peril, to confront motions which (as the present comments note) "come in boxes."

With respect, it is no answer for the lawyer to know that "... courts have general approaches to dealing with defective motions of all kinds." The responding lawyer needs and deserves guidance. The Rule or at least the commentary should provide the guidance.

Here are examples over the last year, in federal cases, which I submit went far afield of "concisely identi[fying]... only those material facts that cannot be genuinely disputed...". In an individual age discrimination case, defendant submitted 246 allegedly material facts. In another individual age discrimination case, defendant submitted 107 allegedly material facts. In a race discrimination case with eight individual plaintiffs, defendant submitted 237 allegedly material facts. In an individual national origin discrimination case, defendant submitted 292 allegedly material facts. Finally, in a breach of contract/promissory estoppel individual case, defendant submitted 92 allegedly material facts. In each case, as required, reference was made (sometimes correctly, sometimes not) to evidence of record or accompanying documents. In each case, responding took the time of at least two lawyers and at least one paralegal. The costs of response are substantial to our clients.

These are examples only from my office. We have seven lawyers and three paralegals.

I suggest that the Rule should provide for a Motion to Strike an abusive submission. I can understand a concern that such a motion will lead to collateral litigation. It probably will, but only for a short time. Once each District has made it clear that submissions such as the above will not be tolerated, those offices which routinely represent management in the federal court will take heed and conform their practices to what should be the process. The Motion to Strike allows for case-by-case flexibility and avoids the problem that a rigid numerical requirement presented. It allows for distinctions to be made between garden-variety individual cases, and complex cases. While the Motion is pending, time limits for response would be tolled.

I would not argue for the imposition of sanctions, including but not limited to attorney's fees for opposing an abusive submission. My individual belief is that sanctions are generally counterproductive. It should be enough that the lawyer who submits an abusive submission, which clearly would have cost his or her client as much if not more than it costs to respond, would have to confront that client with the need to do it over.

I referred to small office practitioners at the beginning of this suggestion, and I conclude by observing that those practitioners will be well served by a procedural device which would, fairly, level the playing field.

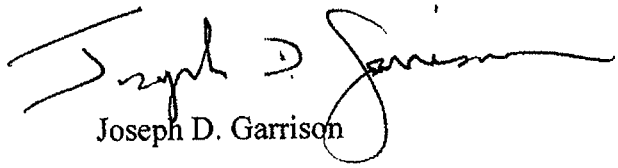
2. "Must" versus "should."

I have often had the privilege of speaking to federal judges at the New York University annual seminar covering employment law. My panel's topic always included summary judgment procedure. I enjoyed asking the judges to raise their hands whether they had ever encountered situations where testimony at trial differed from that presented in summary judgment affidavits. It was the rare judge who did not raise his or her hand. This is the major reason why I believe judges

should preserve their discretion to deny summary judgment in those circumstances where, for whatever reason, the judge is unwilling to credit a material affidavit. Those circumstances should be unusual, but the experience all judges have had at trials may well confirm that they do exist.

Thank you for the opportunity to submit these comments.

Sincerely,



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