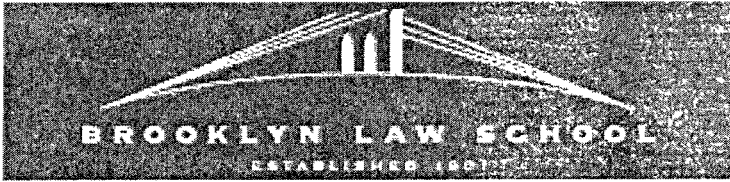


ELIZABETH M. SCHNEIDER
ROSE L. HOFFER PROFESSOR OF LAW



08-CV-049

November 12, 2008

SENT VIA EMAIL (RULES_COMMENTS@AO.USCOURTS.GOV)
PETER G. McCABE, SECRETARY
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, DC 20544

RE COMMENT ON THE PROPOSED AMENDMENTS TO CIVIL RULE 56

DEAR MR. McCABE:

I write to provide a brief outline of the testimony that I plan to present to the Advisory Committee on Civil Rules at the Hearing next Monday, November 17 in Washington, D.C.

1. The Proposed Rule 56 (c) “structured format” approach should be rejected

I have several concerns with this new approach. First, I believe that this will not make judicial decision making on summary judgment more effective. For reasons that numerous others have identified, I believe that the process will create a great deal of additional and unnecessary work for judges and additional transaction costs for lawyers. These would be reasons enough to oppose these amendments. But the Federal Judicial Center empirical studies that have been done in conjunction with the Advisory Committee process also suggest a potential impact on the resolution of civil rights and employment discrimination cases by summary judgment in federal courts that is troubling. Although the Civil Rules Committee states that the revisions are proposed in order to change the procedural aspects of submission of a summary judgment (and not change the legal standard for summary judgment that the movant must show that there are no “genuine issues of material fact and that they are entitled to judgment as a matter of law”), they could have a substantive impact on civil rights and employment discrimination cases in the federal courts.

In November 2007, the Advisory Committee on the Civil Rules held a Mini-Conference on Rule 56. Several invited participants, individuals, representatives of organizations, and federal judges expressed considerable concern about the way in which this proposed “structured format” could operate. Scholars and judges have highlighted the “slice and dice” tendencies of federal judicial decision making on summary judgment, particularly with respect to civil rights and employment discrimination claims and have underscored “the dangers of summary judgment”.¹ Judicial opinions on summary judgment are often so mechanistic that they become “sliced and diced,” a process that, as Stephen Burbank puts it “sees less in the parts by subjecting the non-movant’s ‘evidence’ to piece-by-piece analysis and is not analyzed contextually.”² These are cases in which judges often have to consider whether there are genuine issues of material fact in a holistic way and consider disparate aspects of evidence and discovery together in the context of legal claims.

Yet, consistently in these cases, judges are not doing this. There is good reason to be concerned about whether this new “structured format” would simply exacerbate these problematic tendencies in judicial decision making. In addition, there is a considerable risk of added expense and litigation costs, particularly for plaintiffs and their lawyers in this requirement which adds a whole level of filing papers back and forth.

Several of the Comments that have already been submitted support these views and suggest these are not just issues of how the new “structured format” would work in theory but do actually work in practice. The Comments of the federal judges with dual-jurisdiction experience are compelling. The Chief Judge of the District of Alaska, John Sedwick, who has judicial experience both in Arizona, a jurisdiction that has local rules similar to the proposed “structured format” amendments, and Alaska, a jurisdiction that does not, writes in opposition to the proposed “structured format”. He states that “his experience indicates that the requirement to submit lengthy enumerated statements of fact supported by citations to the record wastes the time of counsel and the court without providing any perceptible benefit”. He details the enormous time spent on summary judgment motions in Arizona as opposed to Alaska and argues that the proposed Rule “will likely shift more responsibility for civil litigation from district judges to magistrate judges”³ Several of his colleagues on the bench who also have the same dual-jurisdiction experience and several other District Judges have written letters that agree with him.⁴ Although the argument has been made that the new “structured format” is to discipline lawyers who do a shoddy job on summary judgment, these judges do not seem to agree.

A Comment from a partner in a plaintiff’s employment discrimination firm emphasizes how these proposed Rules will deleteriously impact on their practice and the small firms that generally represent employment discrimination plaintiffs. He also details his very costly and ineffective experience with analogous local rules and argues that the proposed Rule and will create even greater disparities in the litigation playing field between plaintiffs and defendants in employment cases in federal courts.⁵

As the Advisory Committee was developing its proposals, it asked the Federal Judicial Center to examine summary judgment practice across federal district courts as a means of assessing the potential impact of the proposed amendments to Rule 56. The Federal Judicial Center Report compared summary judgment practice across districts with three different types of local rules, as well as types of cases including both employment discrimination and other civil rights cases. ⁶ While we found few differences among the three different types of local rules in employment discrimination cases, the prominent role of summary judgment in such cases is striking. Summary judgment motions by defendants are more common in such cases, . . . are more likely to be granted . . . and more likely to terminate the litigation. This is true without regard to the nature of the local rules regarding summary judgment.⁷

This strong conclusion does not fully capture the tremendous disparities that are presented in the Federal Judicial Center most recent data on summary judgment in employment discrimination cases described earlier- such as a 15% termination rate by summary judgment as opposed to 3% for torts.⁸ New data on the treatment of employment discrimination in the federal courts that has received national attention confirm these concerns.⁹ These articles undercut some of the traditional arguments concerning employment discrimination cases in the federal courts – that they are “weak” cases and there are problems with lawyer selection of cases.¹⁰ They also suggest that the operation of many “neutral” rules in federal court, especially at pleading and

summary judgment, are now discouraging employment discrimination and civil rights litigants from filing cases in federal court.

One could fairly ask the question, if employment cases are already “hammered” by summary judgment, why will the new “structured format” make any difference? My argument that it could is based on a combination of factors: the disparate impact on civil rights and employment discrimination cases already discussed and the “slice and dice” tendency in summary judgment decision making that is even more problematic in these cases. In addition, there is the additional cost and expense, the burden for plaintiffs’ lawyers and the fact that there is no real reason to do this. Only 20 districts now require the full “structured format” proposed in these amendments, while 71 do not. It will be a much bigger adjustment for those districts that do not use this format to implement this additional work. I suggest that the questions that Judge Sedwick asked in his Comment concerning “why do this?” are very salient.

2. “Should” v. “Must”

I believe that there are many close cases on summary judgment. It is important to recognize that there are some cases where there are no disputed issues of material fact where summary judgment should still be denied. Keeping the language of “should” preserves this possibility. Thank you for the opportunity to submit this letter. I look forward to discussing these matters with the Advisory Committee on November 17.

Sincerely,



Elizabeth M. Schneider
Rose L. Hoffer Professor of Law
Brooklyn Law School
Fall 2008
Visiting Professor of Law
Columbia Law School

1 Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591 (2004); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 Rutgers L. Rev. 705 (2007).

2 Schneider at 13.

3 Letter from Chief Judge John W. Sedwick, United States District Court for the District of Alaska, Letter to Peter McCabe, Secretary, Committee on Rules of Practice and Procedure, October 15, 2008 available at http://www.uscourts.gov.rules/2008_Civil_Rules_Comments_Chart.htm.

4 http://www.uscourts.gov.rules/2008_Civil_Rules_Comments_Chart.htm.

5 Letter from Joseph D. Garrison, Garrison, Levin-Epstein, Chimes, Richardson and Fitzgerald to Peter G. MacCabe, Secretary, Committee on Rules of Practice and Procedure, Oct. 15, 2008, available at http://www.uscourts.gov.rules/2008_Civil_Rules_Comments_Chart.htm.

6 Joe Cecil & George Cort, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules*, August 13, 2008 (submitted to the Advisory Committee on the Civil Rules).

7 *Id.* at 3.

8 See *Summary Judgment Local Rules Study*, Table 12, Aug. 13, 2008, *supra* note 6 at 17.

9 See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empir. L. Stud. 429 (2004) (hereinafter *Employment Discrimination Plaintiffs*); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, __ Harv. L. & Pol'y Rev. __ (forthcoming 2009) (hereinafter *From Bad to Worse*); Mary Pat Gallagher, *Where Have All the Employment Cases Gone?*, Nat'l L. J., Oct. 6, 2008 at S.19.

10 Clermont & Schwab, *From Bad to Worse*, *Id.*; Gallagher, *Id.*