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Subject Comments on Proposed Changes to Rule 56

08-CV-100

Comments to Post on Summary Judgment Comment Board

As a past President of the National Employment Lawyers Association (NELA), a 3500 member national organization of plaintiff's employment attorneys, I am submitting the following comments on the proposed changes to Rule 56.

In Illinois, we practice in a district where they already have a "point-counterpoint" summary judgment system that the proposed amendments to Rule 56 would institutionalize. It doesn't work and unfairly favors the defendants.

First, the sheer length of the statement of facts allegedly not-in-dispute material generally overwhelms plaintiffs and their lawyers In Illinois, moving-party defendants routinely state scores of "facts" that aren't even accurate In a recent case, we had a defendant file 250 statements of alleged facts not in dispute Addressing each of these "facts" and researching record cites adequate created an enormous waste of time and extreme burden on us as the plaintiff's representative Most plaintiff's firms represent individuals and typically do not charge on an hourly basis for these cases.

Second, the methodology you are choosing is biased against plaintiffs and their lawyers in civil rights cases. The proposed rule allows the responding party only one mode of responding to the movant's list of material facts compiling opposing facts. But this methodm ignores the reality that there are many other reasons legitimately to dispute asserted facts in a movant's statement of material facts. Disputes in civil rights cases may be based on any of the following issues and facts depending on the case.

1 Facts that contradict the asserted facts This is the only method of dispute that the proposed rule would permit.

2. Facts that may be accurate, but that are misleadingly or are stated disingenuously (Example, that the employer has a written policy that prohibits discriminatory behavior While this may be technically accurate, it may also be true that the employees are unaware of the rule or that it has not been enforced. It may also be the policy of the employer to ignore its policy against discrimination. Yet none of these facts which would be key to disputing the movant's assertion would be deemed to be in "dispute." The non-movant could be sanctioned for putting this fact in context

3. The asserted fact may be factually correct, but irrelevant to any legitimate summary judgment purpose. For example, if an employee was terminated from a previous job for the same reason or if the employee filed a discrimination charge against another, prior employer The proposed rule leaves no room for dealing with these facts.

4. The asserted fact may be factually accurate, but the inference the movant wants the court to draw from it is unwarranted. For example we had a recent case where the defendant claimed that the employee was fired for certain conduct. The problem was that while the conduct was against company policy, everyone engaged in the same policy violation. He was directed to

engage in this violation by his supervisor, and yet he was the only one in an age discrimination case, who was fired for it. The younger employees who also did the same thing were not disciplined for engaging in the same conduct. The fact that the employee engaged in that behavior prior to his termination is accurate but the proposed rule does not easily permit a "dispute" on this ground.

5. The asserted fact's accuracy turns on the credibility of witnesses whom the jury is entitled not to believe at trial, and thus is not a proper basis for granting summary judgment. As such, it cannot be meaningfully disputed Example: in a race case, the manager is black, and therefore, the defendant claims the manager couldn't have discriminated against another black employee based on race.

6. The asserted fact is based on inadmissible evidence. Under the proposed rule, the non-movant must nevertheless consume valuable time and resources in responding fully to inadmissible evidence, since the non-movant cannot be certain that the court will agree that it is inadmissible, and the risk of not responding is enormous.

7. The asserted fact may be factually accurate, but would have a different significance if considered in conjunction with other facts that are not listed. For example, if the employee admits that her supervisor never openly propositioned her, while it may be true, it is not significant, or at least not as significant as it appears, because other employee-witnesses testified that the supervisor took numerous other actions that openly sexualized his dealings with the plaintiff and made evident his expectation of engaging in sex with her. The nuances of this kind of analysis is lost in the proposed rule, which treats individual facts in atomized fashion, stripping them of the context on which their significance turns.

Third, the proposed rule is one-sided in providing a reply opportunity for the movant as of right but no corresponding surreply opportunity for the non-movant. In practice, movants' reply briefs virtually always raise central points that require a response, and it would be fundamentally unfair not to permit the non-movant to answer them That is especially true in light of the growing practice on the part of some movants of saving major points for reply briefs to which non-movants are not permitted to respond. The Committee may believe that since the movant has the burden of proving that their motion should be granted, this process of letting them get the last word is okay It is not because in practice the courts are treating the plaintiff as still having the burden of proof in opposing summary judgment motions and the courts improperly take the inferences in favor of the moving party instead of the non moving party The only way to counter this common practice which violates Rule 56, is to allow plaintiffs or the non-moving party the last word

Fourth and most importantly, the Committee should move in the direction of limiting the one-sidedness (i.e., favoring the moving party) of the current rule. A considerable body of research shows that summary judgment and other procedural devices disproportionately limit the access to justice by plaintiffs in civil rights cases. See, e.g., Federal Judicial Center, Estimates of Summary Judgment Activity in Fiscal Year 2006 (April 12, 2007) http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf (study of federal court cases found that employment discrimination plaintiffs lost 73-75% of summary judgment motions, vs. a 60% rate for all cases, in 2006). The rule should discourage the current, overly aggressive use of summary-judgment practice, and especially should discourage judges from granting this motions improperly because they have such crowded dockets. One means to do so, would be a rule providing that summary judgment should be denied if any of the movant's

"material facts not in dispute" are, in fact, disputed or otherwise (for any of the reasons inventoried above) not a legitimate basis to rely on for summary judgment purposes.
We strongly urge the Committee to carefully consider the amendments proposed to Rule 56.