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01/28/2009 01 58 PM

To <Rules_Comments@ao uscourts.gov>

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Subject Comment on Proposed Amendment to FRCP 56

08-CV-146

Dear Sir or Madam:

I am writing to submit a comment regarding the proposed change to Rule 56, which would require a "point-counterpoint" format, which would require only "facts," without the opportunity to submit statements that are inferences.

As an attorney who has practiced for more than 15 years in the area of employment discrimination law, I strongly oppose this proposed amendment. I believe the procedure would be nothing more than abusive, in that it allows the defendant to select the theme of the motion, and prevents the plaintiff, who ordinarily has the burden of proof, from submitting reasonable inferences from the facts.

This would prevent an intelligent and thorough briefing of the issues. For example, in a sexual harassment case, would the plaintiff be prevented from pointing out that the weight of the harassment accumulated over time? Is this an "inference," or is it a fact? Obviously, it's based on how the victim felt, i.e., her subjective feelings, which is a necessary element of proving that the conduct was unwelcome. But, under the proposed restrictive rule, an employer Defendant would move to strike this testimony, claiming it was not a "fact," but an inference! This would spawn motions to strike, and an entire cottage industry to make new law restricting what evidence can be used to support summary judgment briefing.

The district courts and their excellent law clerks are fully capable of separating the wheat from the chaff, without a restrictive rule that would engender more work than it is ostensibly designed to prevent.

The federal rule of evidence do not restrict testimony to only facts. Why, on earth, should the federal rules of civil procedure? I strongly oppose the adoption of this admit, which would subvert its own purpose, and lead to further abuse by employer-defendants of summary judgment in federal courts.

Thank you for your consideration. Best wishes.

HS Holman Schiavone

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