TRIAL BY JURY OR TRIAL BY MOTION? SUMMARY JUDGMENT, *IQBAL*, AND EMPLOYMENT DISCRIMINATION

A View From the Bench – The Judges' Perspective on Summary Judgment In Employment Discrimination Cases

New York Law School
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CLE MATERIALS

ted no error, much less plain error, in failing to suppress evidence on the grounds that the police visit to Clayton's home was pretextual.[4]

[5] Clayton also presents several arguments in support of his contention that, even if the subjective motivation of the officers who visited his home is irrelevant, the evidence against him nonetheless should have been suppressed. Each of these arguments was considered and rejected by the district court. "We examine the factual findings underlying the district court's denial of the motion to suppress for clear error and review de novo the ultimate question of whether the Fourth Amendment has been violated." *United States v. Neumann,* 183 F.3d 753, 755 (8th Cir.1999). We find Clayton's arguments to be without merit.

[6–8] We need not address Clayton's contention that Russell was not authorized to consent to Cook's entry because such consent is not required to execute a valid arrest warrant. *See Kain,* 156 F.3d at 673 (officer who reasonably believed suspect was inside did not need permission from person answering door to execute warrant); *United States v. Shurn,* 852 F.2d 366, 367 (8th Cir.1988) (per curiam) (arrest warrant authorizes forcible entry). Once inside the house, Cook quickly developed probable cause for a search based on his immediate perception of an odor associated with methamphetamine production, *see United States v. McCoy,* 200 F.3d 582, 584 (8th Cir.2000) (per curiam) ("plain smell" rule), his visual observation of the pickle jar, *see United States v. Risse,* 83 F.3d 212, 217–18 (8th Cir.1996) ("plain view" rule); *United States v. Boettger,* 71 F.3d 1410, 1416–17 (8th Cir.1995) (presence of potentially explosive chemicals justifies warrantless search of premises), and Clayton's suspicious motion of reaching into the couch. In addition, the DEA agents' protective sweep of the house following Clayton's arrest appears to have been fully justified as a cautionary measure designed to discover additional persons who may have been hiding in other rooms. *See Maryland v. Buie,* 494 U.S. 325, 327, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990); *Boyd,* 180 F.3d at 975. Nor has Clayton pointed to any circumstances indicating that his subsequent consent to the search of his home was involuntary. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (court must look to totality of the circumstances to determine whether consent to search was given voluntarily and without coercion); *United States v. Dennis,* 625 F.2d 782, 793 (8th Cir.1980) ("[W]here law enforcement officers indicate only that they will attempt to obtain or are getting a warrant such a statement cannot serve to vitiate an otherwise consensual search.") (citation and internal quotation marks omitted).

Finally, because we find that all aspects of the search were valid, Clayton's argument that his later confession was tainted as a result of illegality of the search must fail.

The judgment is affirmed.

Louis KAMPOURIS, Appellant,

v.

The ST. LOUIS SYMPHONY SOCIETY, Appellee.

No. 99–2704.

United States Court of Appeals, Eighth Circuit.

Submitted: March 13, 2000.

Filed: April 28, 2000.

Violinist brought action against symphony orchestra society under Americans

4. Thus, although we decline to address the claim, *see Christians,* 200 F.3d at 1126 (ineffective assistance of counsel claims should be pursued in 28 U.S.C. § 2255 proceedings), Clayton's contention that his appointed trial counsel was ineffective for failing to pursue this argument would likely fail.

with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA). The United States District Court for the Eastern District of Missouri, Donald J. Stohr, J., 52 F.Supp.2d 1096, entered summary judgment for society. Violinist appealed. The Court of Appeals held that: (1) society did not violate ADA in refusing to let violinist take his seat, and (2) society did not violate ADEA in refusing to let violinist take his seat.

Affirmed.

Bennett, Chief District Judge, dissented and filed opinion.

1. Civil Rights ⇨173.1

Symphony orchestra society did not violate ADA in refusing to allow violinist, who was suffering from neurological problem, to take his seat, inasmuch as society did not perceive him to be disabled, he failed to establish he was capable of performing his job without accommodation, and he failed to show the adverse action was discriminatory. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

2. Civil Rights ⇨168.1

Symphony orchestra society did not violate ADEA in refusing to allow 68-year-old violinist to take his seat, inasmuch as society's decision was based on legitimate nondiscriminatory reason and was not age-based. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Eli Karsh, Clayton, MO, argued (Stanley E. Goldstein, on the brief), for appellant.

Hope K. Abramov, St. Louis, MO, argued (Richard E. Jaudes and Jordan B. Cherrick, on the brief), for appellee.

Before MORRIS SHEPPARD ARNOLD and FAGG, Circuit Judges, and BENNETT,* District Judge.

PER CURIAM.

[1, 2] Louis Kampouris appeals from the district court's grant of summary judgment to Kampouris's employer, The St. Louis Symphony Society, in his employment-related action asserting disability and age discrimination claims. In granting the symphony orchestra summary judgment, the district court concluded Kampouris failed to establish the symphony orchestra perceived him to be disabled, failed to establish he was capable of performing the job without accommodation, and failed to show the adverse action was discriminatory. The district court also concluded the symphony orchestra's decision was based on a legitimate nondiscriminatory reason and was not age-based. Having considered the record, the parties' submissions, and the district court's thorough order, we believe the district court's judgment was correct. Because the parties' submissions show they are thoroughly familiar with the issues before the court and the controlling law that informs our review, we also believe an extended discussion would serve no useful precedential purpose in a fact-intensive case that is unique to these parties. We thus affirm on the basis of the district court's ruling without a comprehensive opinion. *See* 8th Cir. R. 47B.

BENNETT, Chief District Judge, dissenting.

I whole-heartedly agree with the majority that the decision of the district court in this case is thorough, and, I would add, well-written. Indeed, that decision undoubtedly states the conclusion I would have reached on the record presented, had I been the trier of fact. However, this case was not before the district court as the trier of fact. Rather, it was before the

* The Honorable Mark W. Bennett, Chief Judge, United States District Judge for the Northern District of Iowa, sitting by designation.

district court on a motion for summary judgment. Contrary to the conclusions of the district court and the majority, I believe that the summary judgment record amply presented genuine issues of material fact. These factual disputes are for the jury, not the court, to decide, however convinced the district judge, the majority, and indeed, I myself, may be as to the correct outcome of the case. Because summary judgment was improvidently granted, and thus Mr. Kampouris was deprived of his right to trial by jury, I respectfully dissent.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Therefore, we must not lose sight of the proper function of the courts, both appellate and trial, when presented with a motion for summary judgment: Our function is not to weigh the evidence in the summary judgment record, decide credibility questions, or determine the truth of any factual issue; instead, we perform only a gatekeeper function of determining whether there is evidence in the summary judgment record generating a genuine issue of material fact for trial on each essential element of a claim. *See, e.g., Bell v. Conopco, Inc.,* 186 F.3d 1099, 1101 (8th Cir.1999); *Do v. Wal–Mart Stores,* 162 F.3d 1010, 1012 (8th Cir.1998); *Peter v. Wedl,* 155 F.3d 992, 996 (8th Cir. 1998); *Bryan v. Norfolk & Western Ry. Co.,* 154 F.3d 899, 902 (8th Cir.1998), *cert. dismissed,* 525 U.S. 1119, 119 S.Ct. 921, 142 L.Ed.2d 899 (1999); *Quick v. Donaldson, Co.,* 90 F.3d 1372, 1376–77 (8th Cir. 1996). This has been our function at the summary judgment stage of the proceedings at least since the triumvirate of cases on summary judgment standards handed down by the Supreme Court in 1986. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249–51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Moreover, this court has repeatedly stated that, "[b]ecause employment discrimination cases frequently turn on inferences rather than direct evidence, the court must be particularly deferential to the party opposing summary judgment." *Bell,* 186 F.3d at 1101; *accord Snow v. Ridgeview Med. Ctr.,* 128 F.3d 1201, 1205 (8th Cir.1997); *Webb v. Garelick Mfg. Co.,* 94 F.3d 484, 486 (8th Cir.1996); *Crawford v. Runyon,* 37 F.3d 1338, 1341 (8th Cir. 1994). The deference due the opposing party in such cases has been expressed in strongly cautionary terms: " 'This court has repeatedly cautioned that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based.' " *Keathley v. Ameritech Corp.,* 187 F.3d 915, 919 (8th Cir.1999) (quoting *Hindman v. Transkrit Corp.,* 145 F.3d 986, 990 (8th Cir.1998) (citing cases)); *Lynn v. Deaconess Med. Center–West Campus,* 160 F.3d 484, 487 (8th Cir.1998). Reinforcing the point, this court has said that summary judgment should not be granted in employment discrimination cases "unless the evidence could not support any reasonable inference" for the nonmovant. *Keathley,* 187 F.3d at 919; *Breeding v. Arthur J. Gallagher & Co.,* 164 F.3d 1151, 1156 (8th Cir.1999); *Lynn,* 160 F.3d at 486–87.

I believe that these principles will be undermined by affirming the decision below, because I find that there are genuine issues of material fact in the record. These factual disputes affect not only Mr. Kampouris's *prima facie* case, but the issue of whether the St. Louis Symphony Society's purportedly legitimate, non-discriminatory reason for refusing to renew Mr. Kampouris's contract was pretextual. *See, e.g., Floyd v. Missouri, Dep't of Social Servs.,* 188 F.3d 932, 936–37 (8th Cir.1999) (describing the burden-shifting analysis for

a disability discrimination case under the ADA as consisting of the plaintiff's burden to establish a *prima facie* case of disability discrimination, the defendant's burden to articulate a legitimate, nondiscriminatory reason for its action, and the plaintiff's renewed burden to show that the proffered reason is a pretext for discrimination).

As to his *prima facie* case of perceived disability discrimination under the ADA, Mr. Kampouris must show that the St. Louis Symphony Society regarded him as having an impairment that substantially limits a major life activity. *Roberts v. Unidynamics Corp.,* 126 F.3d 1088, 1092 (8th Cir.1997), *cert. denied,* 523 U.S. 1106, 118 S.Ct. 1676, 140 L.Ed.2d 814 (1998). An individual is regarded as having a substantially limiting impairment when others treat that individual as having such an impairment. *Id.* Additionally, Mr. Kampouris must show that he was able to perform the essential functions of his job, and that he suffered adverse employment action because of his perceived disability. *See Treanor v. MCI Telecommunications Corp.,* 200 F.3d 570, 574 (8th Cir.2000) (actual disability case defining the "qualification" element in terms of ability to perform the essential functions of the claimant's job, either with or without reasonable accommodation); *and compare Weber v. Strippit, Inc.,* 186 F.3d 907, 916–17 (8th Cir.1999) (finding that a perceived disability claimant is not entitled to reasonable accommodation, but not otherwise altering the elements of the *prima facie* case for a perceived disability claim), *cert. denied,* —— U.S. ——, 120 S.Ct. 794, 145 L.Ed.2d 670 (2000).

My conclusion that genuine issues of material fact are generated on this record concerning the first element of Mr. Kampouris's *prima facie* case—the defendant's perception of Mr. Kampouris as disabled, *see Roberts,* 126 F.3d at 1092—centers on the deposition testimony of Mr. Neville, the Symphony's Director of Orchestra Personnel. Mr. Neville initially testified that it was his belief that Mr. Kampouris was disabled from any occupation, then later corrected his testimony to indicate that he merely understood that the disability insurer had so designated Mr. Kampouris. *See* Deposition of Mr. Neville, p. 84, ll. 20–25 (App. at p. 84) & p. 102, ll. 5–10 (App. at p. 90); *and compare* Deposition Correction Sheet, Deposition of Mr. Neville, App. at 183. Although Mr. Neville's corrections to his deposition testimony are permitted by Rule 30(e) of the Federal Rules of Civil Procedure, I find that his corrections themselves raise genuine issues of material fact as to Mr. Neville's perception of Mr. Kampouris's impairments. That is, they raise genuine issues of material fact as to whether Mr. Neville actually perceived Mr. Kampouris to be disabled, only believed that the insurer had so designated Mr. Kampouris, or perceived Mr. Kampouris to be disabled *because* the insurer had so designated him. Not only do the original and corrected versions of the deposition testimony, taken together, give rise to all three of these inferences, but I believe that each version separately generates the same possible inferences. I think, therefore, that it is for the jury to decide whether Mr. Neville's reasons for making corrections were reasonable and which testimony accurately reflects his actual perception of Mr. Kampouris's impairments. *See, e.g., Thorn v. Sundstrand Aerospace Corp.,* 207 F.3d 383, 389 (7th Cir.2000) (recognizing that FED. R. CIV. P. 30(e) permits alteration of deposition testimony, but finding that the alterations in that case raised a question for the jury as to the accuracy and reasonableness of the changes, and stating that a deponent "could not remove [an] issue from the jury by altering the transcript of his deposition").

As to the remainder of the *prima facie* case, *see Treanor,* 200 F.3d at 574; *Weber,* 186 F.3d at 916–17, the district court concluded that Mr. Kampouris had generated a genuine issue of material fact as to whether or not he could perform the essential functions of his job, and I agree.

However, I part company with the district court on the third element of the *prima facie* case, adverse action because of the plaintiff's disability. *See id.; Weber,* 186 F.3d at 916–17. I conclude that Mr. Neville's deposition testimony and corrections to it generate genuine issues of material fact as to whether the Symphony Society took employment action toward Mr. Kampouris *because of* Mr. Neville's perception that Mr. Kampouris was disabled within the meaning of the ADA.

Similarly, Mr. Neville's deposition testimony and corrections to it generate genuine issues of material fact as to whether the Symphony Society's proffered reasons for its actions regarding Mr. Kampouris were pretextual. Although Mr. Kampouris must show both that the Symphony Society's proffered reason is false and that perceived disability discrimination was the real reason, *see Floyd,* 188 F.3d at 937 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), and *Hill v. St. Louis Univ.,* 123 F.3d 1114, 1119–20 (8th Cir.1997)), Mr. Kampouris has presented enough evidence to defeat summary judgment on the issue of pretext. The record undoubtedly generates a genuine issue of material fact as to Mr. Kampouris's ability to play to the required standards—based on his participation in part of the Symphony's spring and summer seasons, even if the performance schedule during that period was not as rigorous as it would be during the fall/winter season, and other evidence regarding the quality of his performance—thus generating a factual dispute on the truth of the Symphony's proffered reason, and Mr. Neville's deposition testimony generates a genuine issue of material fact as to the real reason—whether or not that reason was disability discrimination—for the Symphony's action. *See Floyd,* 188 F.3d at 937 (to establish pretext, the plaintiff must prove that the proffered reason is false and that the real reason is discrimination).

I conclude that the record before the district court shows that there *are* genuine issues as to material facts in this case, and that the moving party was *not* entitled to a judgment as a matter of law, *see* FED. R. CIV. P. 56(c), and the district court was not entitled to disregard or decide those factual issues by rendering an ultimate decision on the merits. *See, e.g., Bell,* 186 F.3d at 1101; *Do,* 162 F.3d at 1012; *Peter,* 155 F.3d at 996; *Bryan,* 154 F.3d at 902; *Quick,* 90 F.3d at 1376–77. Instead, the district court should have shown the plaintiff in this employment discrimination case the deference he was due. *Bell,* 186 F.3d at 1101; *Snow,* 128 F.3d at 1205; *Webb,* 94 F.3d at 486; *Crawford,* 37 F.3d at 1341. This is precisely the kind of case in which the district court should have exercised caution in granting summary judgment, because the evidence could indeed support reasonable inferences for the nonmovant. *Keathley,* 187 F.3d at 919; *Breeding,* 164 F.3d at 1156; *Lynn,* 160 F.3d at 486–87.

Furthermore, as the Supreme Court said in *Jacob v. New York,* 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942), "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob,* 315 U.S. at 752–753, 62 S.Ct. 854. The district court's grant of summary judgment in this case failed to guard jealously Mr. Kampouris's statutory right to trial by jury under the ADA. *See* 42 U.S.C. § 1981a.

The First Congress's passage of the Seventh Amendment in 1789 and the 102nd Congress's passage of 42 U.S.C. § 1981a in 1991 reflect two centuries of deep and abiding faith in trial by jury. More than that, constitutional and statutory mandates for trial by jury reflect an immutable preference that certain matters, such as Mr. Kampouris's rights under the

ADA, be left to the collective judgment of a jury of peers, rather than reposed in a single, albeit industrious and well-meaning, district court judge.

The federal courts' daily ritual of trial court grants and appellate court affirmances of summary judgment in employment discrimination cases across the land is increasingly troubling to me. I worry that the expanding use of summary judgment, particularly in federal employment discrimination litigation, raises the ominous specter of serious erosion of the "fundamental and sacred" right of trial by jury. *See Jacob,* 315 U.S. at 753, 62 S.Ct. 854.

Affirmance of the grant of summary judgment in this case will contribute to the erosion of the right to trial by jury. As Justice George Sutherland observed, "[T]he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." *Associated Press v. NLRB,* 301 U.S. 103, 141, 57 S.Ct. 650, 81 L.Ed. 953 (1937) (Sutherland, J., dissenting). There is yet time to forestall erosion of the right in this case. I would reverse the district court's grant of summary judgment and remand this matter for trial to a jury of Mr. Kampouris's perceived disability claim under the ADA. In all other respects, however, I would affirm the district court's well-written and well-reasoned decision.

Sandella S. SPEARS, Appellant,

v.

MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, Appellee.

No. 99–2239.

United States Court of Appeals, Eighth Circuit.

Submitted: Feb. 18, 2000.

Filed: April 28, 2000.

Rehearing and Rehearing En Banc Denied June 2, 2000.

Former state corrections officer brought retaliation and constructive discharge claims against Missouri Department of Corrections under Title VII. The United States District Court for the Western District of Missouri, Dean Whipple, J., entered summary judgment in favor of Department. Former officer appealed. The Court of Appeals, Wollman, Chief Judge, held that: (1) officer was barred from asserting claims based on retaliatory acts alleged in Equal Employment Opportunity Commission (EEOC) charge that she had not timely sued upon; (2) officer's transfer was not adverse employment action; (3) lowering officer's performance evaluation was not adverse employment action; and (4) officer was not constructively discharged.

Affirmed.

1. Master and Servant ⚿30(6.10)

To establish a prima facie case of retaliation under Title VII, an employee must show, among other things, that he or she suffered an adverse employment action at the hands of the employer. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ⚿141

An "adverse employment action" upon which a Title VII claim may be based is a tangible change in working conditions that produces a material employment disadvan-

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Washington, D.C.

Do judges treat our cases differently? Seven thought experiments a/k/a preaching to the choir.

It's no news to NELA lawyers that the bane of employment litigation – from our point of view, at least – is summary judgment. It's extremely rare for an employment case to reach the close of discovery and not have a summary-judgment motion filed. And, again and again, cases that are strong enough to win before a jury get knocked out by such motions. One cannot be cognizant of the enormity of summary-judgment in employment litigation and not come to a simple conclusion: the courts treat our cases different than they treat cases in other areas of the law.

The conclusion that the courts treat our cases differently may be obvious to NELA attorneys, but, because few things are more fun than preaching to the choir, here are seven thought experiments that I hope establish that that conclusion is true:

- Thought experiment #1: How prevalent are summary-judgment motions in our cases, compared to in traditional contract, p.i., etc. cases pre-1985?

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[1] Some of the material in this article previously appeared in "The Compleat Legal Writer: Requests for Admissions", May 1997 CBA Record 68; "Summary Judgment: The Intersection of Legal Writing and Trial Practice", April 1998 CBA Record 16; "Creative Uses of Requests for Admissions for Plaintiffs' Employment Lawyers", The Illinois Advocate, vol. 6 #1 (March 2002); "Creative Uses of Requests for Admissions for Plaintiffs' Employment Lawyers", Fall 2002 The Employee Advocate 37; "Creative Uses of Requests for Admissions for Plaintiffs' Employment Lawyers – revised and expanded" (NELA 2004 annual convention), "Summary Judgment in Employment Cases – the Plaintiff's Perspective" (Illinois Institute of Continuing Legal Education 2006), and earlier versions of this article presented at various NELA conferences and conventions.

In preparing a talk on summary judgment for NELA's 7th Circuit Conference in 2007, I reviewed four leading trial-ad books that happened to be in my law library – two of which I've had since law school and the other two of which date from approximately 10 - 15 years after I graduated law school.[2] Not one of these four books has a chapter on summary judgment – hell, not one of these four books has a index entry on summary judgment. And it's not like summary judgment's absence is an artifact of the books being on "trial advocacy": three of the four books (Mauet is the exception) go heavily into pre-trial litigation, depositions, etc. Thus, our litigation practice is built around something – summary judgment – that was totally absent from major books on litigation as recently as 20 years ago. In short, the critical procedural hurdle for our cases is something that a lawyer circa 1965 -1985 would have considered a procedural backwater!

- Thought experiment #2: Do we bring "no-evidence" cases?

In Kathryn Render's presentation on Desert Palace at the 2004 NELA Annual Convention,[3] Kathryn observed that many judges, in opinions granting summary judgment in employment cases, would write that the plaintiff had "no evidence". Kathryn's keen observation forms the second thought experiment: Do we really bring "no-evidence" cases?

Economically, our bringing "no evidence" cases would make no sense. Choosing good cases is the be-all-and-end-all of financial viability for a plaintiff's employment lawyer, especially if the lawyer's only hope of getting paid is a contingency and/or a court-awarded (or negotiated) fee. Bringing "no-evidence" cases is financial suicide.[4] So, I think, the answer to this thought experiment is clearly, "No, we do not bring 'no-evidence' cases."

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[2] I realize this is dating myself, but, in order from oldest to newest, the four books are: Keeton, Trial Tactics and Methods, Little, Brown & Co. 1973; Jeans, Trial Advocacy, West student ed. 1975; McElhaney, Trial Notebook, ABA 2nd ed. 1987; and Mauet, Fundamentals of Trial Technique, Little, Brown & Co. 1992.

[3] "Desert Palace, Inc. v. Costa: A Guide to its Impact on Summary Judgment and Jury Instructions", 2004 NELA Annual Convention materials, Vol. I, p. 721.

[4] Frequent attendees at NELA seminars know that "case selection" is often touted as the most important skill a plaintiff's employment lawyer can have. No matter what the topic, somebody on the seminar panel is sure to say "It all comes back to case selection". In fact, I fully expect to some day attend a NELA panel on "Petitioning for Rehearing in the Supreme Court of the United States" only to hear one of the speakers say, "it all comes back to case selection"!

Yet, Kathryn's observation rings true – haven't we all read many, many summary-judgment opinions in employment cases in which the judge wrote that the plaintiff had "no evidence". How can that be? The answer is that judges really do treat our cases differently, in ways that will be further explored in the subsequent thought experiments.

- Thought experiment #3: Which is the better case: discrimination or retaliation?

For this thought experiment, assume that you've received the following initial telephone contact from a potential client:

> "Recently, I was fired from my sales job. My results have always been good – maybe not the best in my region, but close to the best. And even though my results were close to the best in my region, my regional manager always found something to criticize about my performance – I could have made the sales quicker or smoother or done the paperwork more clearly or something. White sales reps never got the type of criticism I got. (Did I mention that I was African-American?) Also, my regional manager would treat African Americans and other minorities worse than he treated the white employees – remarks and facial expressions and stuff. I complained to Human Resources a few times about the remarks and stuff, but nothing happened. I finally got fed up and went to the EEOC to complain. The day after I went to the EEOC, my regional manager asked me where I had been the day before, and I told him the truth – I had gone to the EEOC and filed a Charge of Discrimination about the way I was treated. The next day, I was called into a meeting with my regional manager and somebody from HR, who told that there had been 'some problems' with my performance and fired me."

Based on this initial telephone contact, which is probably like many that you receive in your practice, is your assessment of the comparative strengths of the discrimination and retaliation cases that:

A) the discrimination case is clearly stronger.

B) the retaliation case is clearly stronger.

C) the discrimination and retaliation cases are of approximately equal strength.

Virtually every single NELA lawyer I've tried this thought experiment with has assessed the retaliation case as being obviously stronger – an assessment I agree with and think is clearly correct. By why

do we all think so? If you go back through the hypothetical and tally the evidence in favor of race discrimination and the evidence in favor of retaliation, it's not at all clear that there's "more" or "stronger" evidence of retaliation. The point, I think, is that we consider the retaliation case stronger because judges "get" retaliation in a way that they don't get discrimination. In the telling phrase of Tom Newkirk, a NELA lawyer from Des Moines, Iowa, judges have "inference blindness" about discrimination.

- Thought experiment #4: Under the black-letter law, we should get the benefit of "all reasonable inferences". Do we?

  I think we all know the answer to this thought experiment, but, to give this discussion some concrete context, consider some recent opinions from my home Circuit: the Seventh.

  - Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487 (7th Cir. 2007) (Kanne, J., for himself, Flaum, and Evans, JJ).

    Hemsworth was an age-discrimination case in which one of the plaintiff's pieces of evidence was that defendant's HR Director, who had been given a list containing the ages of the employees being laid off in a RIF, told defendant's General Counsel that the RIF's eliminating a large percentage of the employees over age forty "was a problem". The Seventh Circuit noted this conversation in its recitation of the facts (id. at 489), and, of course, stated that "all justifiable inferences must be drawn in the nonmovant's favor" (id. at 490), but, later in the opinion, analyzed as follows the significance of this conversation:

    > "the comment by the Quotesmith employee about laying off a large number of employees over forty years old was not made by a Quotesmith decision maker (and also demonstrates that Quotesmith was aware of its legal obligation under the ADEA)...." Id. at 491.

  - Coolidge v. Consolidated City of Indianapolis, 505 F.3d 731 (7th Cir. 2007) (Williams, J., for herself, Posner, and Flaum, JJ.).

    Coolidge was a sexual-harassment and retaliation case in which the plaintiff, a crime-lab employee, had won a prior sexual-harassment case against her employer. After that prior trial victory, plaintiff continued to work at the crime lab, where one of her job duties was cataloging materials as possible evidence. Among the materials left for her to catalog was a videotape that "depicted necrophilia as well as other violent and disturbing

images". Id. at 733. Plaintiff started viewing the video, became nauseous, turned the video off, and reported what she had seen. Id. In a subsequent lawsuit, plaintiff alleged that this videotape had been deliberately left for her to catalog as retaliation and as further sexual harassment.

In upholding summary judgment for the employer, the Seventh Circuit stated:

> "Crime Lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones there as it would in another setting." Id. at 734.

- Townsend-Taylor v. Ameritech Services, Inc., 523 F.3d 815 (7th Cir. 2008) (Posner, J, for himself, Kanne, and Williams, JJ).

Townsend-Taylor was an FMLA case, in which the defendant had fired the plaintiff because it allegedly had not timely received the FMLA certification forms for the illness of the plaintiff's child. The pediatrician testified that he had "filled out FMLA papers for this occurrence on at least 3 separate occasions and either faxed them to the [Ameritech] office or gave them directly to the parents." Id. at 816-17.

In upholding summary judgment for the employer, the Seventh Circuit stated:

> "Although the doctor said not that he had faxed the form but that he had either faxed it or given it to Mr. Taylor, it is hardly likely that he handed the same form to the parents three times. So why was a copy of the completed form never found in FPU's files? And did the doctor really fax the same form three times? Why would he do that? Was his fax machine broken? Was the fax line at FPU continuously busy? No explanation is suggested for the miscommunication. It is a great mystery; but Taylor does not contend that he complied with Ameritech's procedures for applying for FMLA leave within the 15-day period. For he gave the doctor the wrong form, and the doctor's 'three faxes' letter did not explain or justify the delay." Id. at 817.

- Nagle v. Village of Calumet Park, 554 F.3d 1106 (7th Cir. 2009) (Williams, J., for herself, Flaum, and Evans, JJ).

Nagle was a discrimination and retaliation case. The plaintiff was a police officer, and part of his retaliation case was that shortly after he filed an EEOC Charge, the Police Chief took an adverse action against him.

In upholding summary judgment for the employer, the Seventh Circuit stated:

> "The EEOC charge was mailed to the department on January 27, 2005, and the correspondence indicated that it should be given to 'Chief David' rather than Chief Davis. Additionally, the envelope was addressed to 'Personnel Manager, Human Resources Department, Village of Calumet Park.' The district court surmised from this evidence that no jury could reasonably conclude that Chief Davis was aware of the EEOC charge at the time of the February 2005 suspension. We agree." Id. at 1122.

Another part of Nagle's case was that he had been retaliated against by being assigned to less favorable duties. The Seventh Circuit analyzed as follows the evidence for that claim:

> "While one can imagine situations in which reassignment to less desirable details or positions would dissuade a reasonable worker from making a charge of discrimination, here the senior liaison position was posted for other officers to apply, and after no one applied, Nagle was assigned to the position. This fact arguably cuts both ways: the senior liaison position had to be filled by some-one and an employer is entitled to fill the position. In the alternative, an employer is not entitled to be punitive in his assignments-he cannot assign an employee to a less favored position because that employee has exercised his statutory rights." Id. at 1120 (emphasis added).

Despite observing that "[t]his fact arguably cuts both ways", the 7th Circuit affirmed summary judgment for the employer.

- Staub v. Proctor Hospital, 560 F.3d 647 (7th Cir. 2009) (Evans, J., for himself, Manion, and Tinder, JJ), cert. granted #09-400 (4/19/2010).

Staub was a USERRA case in which the employee, an Army reservist who had been fired had won a jury trial against his former

employer.[5] The evidence showed that the second-in-command of the Hospital department for which the employee had worked had "called military duties 'bullshit'" and had said she had assigned the employee extra shifts as a "way of paying back the department for everyone else having to bend over backwards to cover his schedule for the Reserves." Id. at 652. The head of the Hospital department for which the employee worked had "characterized drill weekends as 'Army Reserve bullshit' and 'a bunch of smoking and joking and a waste of taxpayers' money.'" Id. Upon the employee's return from a tour of duty in 2003, the head of the department had said that the second-in-command of the department was "out to get" the employee, and the second-in-command of the department had told one of the employee's co-workers that the employee's "military duty had been a strain on the[ ] department" and that "she did not like him as an employee", whereupon the second-in-command asked the co-worker "to help her get rid of [the employee]". Id. In January 2004, the employee received another order to report for active duty and deployment. Id. In response, the second-in-command of the Hospital department called the employee's Commanding Officer and asked if the employee could be excused from some of his military duties. (!!) Id. at 653. Summing up this evidence, the Seventh Circuit stated, "After all this, there can be little dispute that [the second-in-command of the department] didn't like [the employee] and that part of this animus flowed from [the employee's] membership in the military." Id.

Despite this evidence and despite concluding that the jury had been properly instructed (id. at 657-58), the Seventh Circuit reversed the jury verdict in favor of the employee and ordered that judgment be entered for the hospital, because "[t]he story told by the evidence is really quite plain":

> "Apart from the friction caused by his military service, the evidence suggests that [the employee], although technically competent, was prone to attitude problems.....So, when [the employee] ran into trouble in the winter and spring of 2004, he didn't have the safety net of a good reputation. Even if [the employee] behaved reasonably on the day of his discharge and the January 27 write-up was exaggerated by

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[5] Although Staub concerns a Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50 rather than a Motion for Summary Judgment under Rule 56, the two motions are governed by the same standard. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 at 150 (2000).

> [the second-in-command of the department], his track record nonetheless supported [the alleged decision-maker]'s action. .... We admit that [the alleged decision-maker]'s investigation could have been more robust, e.g., she failed to pursue [the employee]'s theory that [the second-in-command of the department] fabricated the write-up; had [the alleged decision-maker] done this, she may have discovered that [the second-in-command of the department] indeed bore a great deal of anti-military animus. .... Although [the second-in-command of the department] may have enjoyed seeing [the employee] fired due to his association with the military, this was not the reason he was fired. Viewing the evidence reasonably, it simply cannot be said that [the alleged decision-maker] did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that [the employee] was not a team player. We do not mean to suggest by all this that we agree with [the alleged decision-maker]'s decision – it seems a bit harsh given [the employee]'s upsides and tenure – but that is not the issue. The question for us is whether a reasonable jury could have concluded that [the employee] was fired because he was a member of the military. To that question, the answer is no." Id. at p. 659.

> The Supreme Court has granted certiorari in this case. The Petition for Certiorari was drafted by Professor Eric Schnapper, NELA's go-to guy on Supreme Court matters. Here's a link to Eric's Petition for Cert: plaintiff's petition for cert. The Supreme Court invited the Solicitor General to state the views of the United States on granting certiorari, and, in reply, the SG supported the grant of certiorari. Here's a link to the SG's brief supporting cert.: SG's amicus brief supporting cert.

Now, let's review this: In Hemsworth, the company's General Counsel gives the company's HR Director a list of the ages of the employees the company is laying off in its RIF, the HR Director reports back that there's "a problem", and the company ignores it. And what does all this show (apparently as a matter of law) – that the company "was aware of its legal obligation under the ADEA"! In Coolidge, the plaintiff has to catalog a videotape that "depicted necrophilia as well as other violent and disturbing images" and, upon viewing it, becomes nauseous. And what does all this show (also apparently as a matter of law) – nothing, because "Crime Lab employees frequently worked with corpses". In Townsend-Taylor, the doctor's testimony that he had faxed the FMLA form three times did not create an issue of fact. Why, because there were questions (like "was the fax

line at FPU continuously busy?") that pose "a great mystery". So, of course, if the facts are a "mystery", then summary judgment is affirmed. In Nagle, the court held, as a matter of law, that a jury could not infer that an addressee had received an official government notice from the EEOC when the address contained a minor typo in the last letter of the recipient's last name. Apparently, the court felt the jury was required as a matter of law to infer that the mail-clerk at the Police Department reacted as follows upon receiving an envelope from the EEOC:

> "Wow, this is a letter from the EEOC. That's a government agency! This could be really important! I better get it right to who it's going to! Oh, wait, the letter's addressed to Chief 'David'. Now, that's a poser: we have a Chief 'Davis', and if the letter was addressed to him, I'd get the letter right up to him. But this letter is addressed to Chief 'David'. I have no clue who that is! I guess I should just throw this official notice from the EEOC into the garbage!"

Finally, in Staub, the court was willing to overturn the verdict of a properly-instructed jury as to how to weigh the evidence of anti-military bias against the self-serving statements of the defendant as to how much of the biased subordinates' information was taken into account in the decision to fire the plaintiff.

Well, that's how too many courts view drawing "all reasonable inferences" in the nonmovant's favor!

Nor were these cases instances of poor argumentation by the plaintiff's lawyers: most of the plaintiff's lawyers in these cases were veteran NELA members – including some very big names in our field – who went through the NELA/Illinois brainstorming program for their briefing and the NELA/Illinois moot-court program for their oral arguments. Rather, these three cases were unfortunately all too typical: judges deciding summary judgment in employment cases have an incredible ability to ignore the black-letter law on inferences that they stated just one or two pages earlier in their opinion. In fact, in my home district, many judges' format for summary-judgment decisions in employment cases seems to be:

- Pages 1 - 5: State facts (somewhat slanted towards defendant).
- Page 6: State summary-judgment standard, including that plaintiff, as the opponent of summary judgment, is entitled to the benefit of all reasonable inferences.

- Pages 7 - 12: Draw all inferences against the plaintiff, ignoring the black-letter law the judge wrote on p. 6!

- Thought experiment #5: Are juries in our cases permitted to draw the same types of inferences as are juries in other areas of the law?

Closely related to the previous thought experiment is a thought experiment comparing the types of inferences that judges permit juries to opportunity to draw in our cases compared to the types of inferences that judges permit juries to draw in cases in other areas of the law.

Take Nagle, above – the case in which the court held that no reasonable jury could find that the police chief had received notice when the EEOC's letter was addressed to "Chief David" rather than to "Chief Davis". Had that case been a criminal case – had, for example, Chief Davis been accused of stealing for his own use drugs seized by his police department – and the mis-addressed letter had been mailed by the DEA or the U.S. Attorney rather than by the EEOC, is there any doubt that the court would have permitted a jury to infer receipt of the mis-addressed letter?

Tom Newkirk, in his brilliant paper from the 2006 NELA Annual Convention, points out that juries are permitted to draw inferences of criminal guilt from facts that could have a very innocent explanation:

> "What is it about purchasing an insurance policy for example that would provide a basis to assign motive to kill in that simple act? ... A court will [let a jury infer] motive for murder from the very innocent and common event of purchasing an insurance policy on the deceased. The court simply trusts a jury to wend its way through actions that are on their face legitimate or actions that are entirely within the rights of a person to choose to engage in or not engage in and to place weight on those actions where appropriate. The court is not going to second guess the jury on whether they felt that 'purchasing an insurance policy on your wife over one million dollars is a good idea.'"

See, Newkirk, "Modern Discrimination Cases: Identifying the Problem and Finding the Solution", 2006 NELA Annual Convention, Vol. II, p. 1340 at 1346 (emphasis in original).

Tom's comparison to a criminal jury's being permitted to draw an inference of murder from the quite legal and commonplace act of

purchasing an insurance policy on a spouse is no mere idle speculation from detective fiction. In fact, many cases in many different jurisdictions have this fact pattern. See generally, "Annotation: Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary", 28 A.L.R.2d 857 (1953).

Perhaps the most instructive (depressing?) comparison I found between the inferences judges prohibit juries from drawing in our cases and the inferences of murder that juries are permitted to draw from the purchase of an insurance policy was Rhodes v State, 676 So 2d 275 (Miss. 1996), a murder case in which the most important evidence was wife's purchase of a $100,000 insurance policy on her husband's life. The insurance policy had a suicide exclusion, the husband had apparently committed suicide, and the wife had never made a claim against insurance policy, but the jury was allowed to infer the wife's intent to murder from her purchase of the insurance policy because defense counsel could and did argue to the jury that the wife's profit motive was obviated by the suicide exclusion and that she therefore had no motive at all to kill her husband in the manner alleged. Id. at 284. (The prosecution's theory was that the wife had intended to kill her husband for the insurance benefits and, when that failed, she killed him and made his death appear to be a suicide.)

Nor is the purchase of insurance the only type of innocent and commonplace fact from which a jury is permitted to draw an inference of murder:

- a jury can infer premeditation from the victim's having encroached upon the "home turf" of a motorcycle gang and defendant's association with that gang. State v. Ruof, 296 N.C. 623 at 630, 252 S.E.2d 720 at 725 (1979).

- a jury can infer malice aforethought from the accused's having "had a difficulty with ... a near relative of [the victim] immediately before the killing". Turner v. Commonwealth, 167 Ky. 365 at _____, 180 S.W. 768 at 774 (Ky.App. 1915).

- a jury is permitted to infer premeditation from such matters as "(1) previous difficulties between the parties, (2) the manner in which the homicide was committed, and (3) the nature and manner of the wounds inflicted." Phippen v. State, 389 So.2d 991 at 993 (Fla. 1980).

In other areas of the law, judges routinely permit juries are to draw inferences about such matters as "agreements" and "knowledge" from

evidence that seems extremely thin compared to the amount of evidence that is typically required in our cases before a jury is permitted to draw such inferences. For example, the 11th Circuit seemingly won't approve any inference in an employment case, but that same court permitted a jury to draw an inference that each and every member of a boat's crew were participants in a conspiracy to import marijuana into United States from the following evidence: the boat's cargo hold contained a volume of marijuana that had a high street value (millions of dollars), the marijuana odor was noticeable from the boat's aft deck even when the cargo hatch was closed, and the boat's crew consisted of eight people. The 11th Circuit permitted the jury (apparently without any evidence on these points) to assume in drawing the inference of membership in a conspiracy that drug smugglers are unlikely to employ outsiders to work a boat carrying millions of dollars worth of marijuana and that the crew must have had close relationship with each other given that there were only eight of them. See, U.S. v. Gonzalez, 810 F.2d 1538 at 1543 (11th Cir. 1987).

Similarly, in the recent en banc 9th Circuit case U.S. v. Heredia, 483 F.3d 913 (9th Cir. en banc), cert. denied ___ U.S. ___ (2007), the defendant was the driver of a borrowed car that had "a very strong perfume odor" that, upon a search, was discovered to be coming from dryer sheets wrapped around almost 350 pounds of marijuana in the trunk. The driver was prosecuted for possessing a controlled substance with intent to distribute, and the defense was that the car wasn't the defendant's and she didn't know what was in the trunk. The en banc 9th Circuit analyzed as follows the possible jury inferences:

> "Taking the evidence in the light most favorable to the government, a reasonable jury could certainly have found that Heredia actually knew about the drugs. Not only was she driving a car with several hundred pounds of marijuana in the trunk, but everyone else who might have put the drugs there – her mother, her aunt, her husband – had a close personal relationship with Heredia. Moreover, there was evidence that Heredia and her husband had sole possession of the car for about an hour prior to setting out on the trip to Tucson. Based on this evidence, a jury could easily have inferred that Heredia actually knew about the drugs in the car because she was involved in putting them there."

Id. at 923.

Nevertheless, covering all its bases, the prosecution had requested the "deliberate ignorance" jury instruction, which was given, as follows:

> "You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless."

Id. at 917. The en banc decision's approval of this instruction led to a discussion between the majority and the concurrence that was very enlightening on how our cases are viewed compared to how cases in other areas of the law are viewed. The concurrence objected to the majority's approval of this instruction on the grounds that, among other things, it could turn FedEx into a criminal for being "deliberately ignorant" of the contents of its packages. Id. at 928-29 (concurrence). The majority responded to that point as follows:

> "Of course, if a particular package leaks a white powder or gives any other particularized and unmistakable indication that it contains contraband, and [FedEx] fails to investigate, it may be held liable – and properly so".

Id. at 920, n.10. Thus, in the view of the en banc 9th Circuit, a jury is entitled to infer that FedEx had sufficient knowledge that it possessed drugs if FedEx (i.e., some low-level underling at a loading dock) ignored a "package leak[ing] white powder". Compare that inference that the en banc 9th Circuit would let jury draw in the area of criminal law to the amount of evidence needed before a jury could draw a similar inference as to knowledge in one of our cases!

In short, this thought experiment establishes that juries in our cases are simply not permitted to draw the same types of inferences as are juries in other areas of the law, meaning that our cases are treated differently.

- Thought experiment #6: What governs the litigation of our cases – the Federal Rules or ad hoc rules?

The next thought experiment showing that our cases are treated differently is that the litigation of our cases are often governed by ad hoc rules made up by judges rather than by the Federal Rules of Civil Procedure and/or the Federal Rules of Evidence.

For example, twice within ten years the Supreme Court had to remind the lower courts that pleadings in our cases are governed by the Federal Rules of Civil Procedure, not by some ad hoc rule the Judge made up. See, e.g., Leatherman v. Tarrant County, 507 U.S. 163 (1993) (pleading of a complaint for municipal liability under §1983, not by some made-up requirements); Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002) (pleading of a complaint under Title VII is governed by Federal Rules of Civil Procedure 8 & 9, not by some made-up requirements). It's even more amazing that after the Supreme Court decided Leatherman the same doctrine grew up about Title VII cases to the point that the Court had to decide Swierkiewicz less than a decade later![6]

Things may be even worse under the Federal Rules of Evidence. As Fred Gittes and Professor Lou Jacobs have taught us at many Annual Conventions, admissibility of evidence in federal court should be governed by the Federal Rules of Evidence. Relevant evidence under those Rules is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". Federal Rule of Evidence 401. Compare, Sprint/United Management Co. v. Mendelsohn, __ U.S. __, 128 S.Ct. 1140 (2008).

Our cases, however, are all too often not governed by that definition in the Rules of Evidence but by ad hoc doctrines like "stray remarks" and the like. How often, for example, will a summary-judgment decision in an employment case discount evidence of a hostile remark, etc., because it was made six months or a year in the past and, thus, in the judge's view, "too old"? Yet, as Rick Seymour is fond of pointing out, in the jury-discrimination cases Miller-El v. Dretke, 545 U.S. 231 (2005), and Miller-El v. Cockrell, 537 U.S. 322 (2003), the Supreme Court used evidence of discrimination going back almost 50 years, which was probably before any alleged discriminator in these cases had been born. See, Dretke, 545 U.S. at 264-66; Cockrell, 537 U.S. at 334-35.

- Thought experiment #7: Can private arbitration agreements oust the government of the power to obtain individual relief?

A final thought experiment is to look at the question of whether an arbitration agreement between private parties can preclude a government agency from obtaining relief for one of the parties to that agreement. That question was, of course, decided in our favor in EEOC v. Waffle House, Inc.,

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[6] Alas, for the Supreme Court, it may be a matter of "do as we say, not as we do". Compare, Leatherman and Swierkiewicz to Raytheon Company v. Hernandez, 540 U.S. 44 (2003).

534 U.S. 279 (2002), in which the Supreme Court, reversing the 4th Circuit, ruled 6-3 that a Complainant's having agreed to arbitration with the Respondent did not preclude the EEOC from seeking in court relief specific to that Complainant. But in what other area of the law would the theory be taken seriously that a government agency was prohibited from seeking relief for an individual claimant because of a private arbitration agreement that claimant had signed? Would the Court take seriously the argument that the SEC was prevented from seeking restitution or disgorgement in court because the brokerage house's agreement with its customers had a form arbitration clause (which they all do)? Would a form arbitration clause between a business and its customers prevent the Department of Justice from seeking restitution or disgorgement in court in an anti-trust case? Microsoft mounted a vigorous defense to the government's anti-trust prosecution, but I don't recall it claiming that the Anti-Trust Division of the Department of Justice couldn't seek victim-specific relief because its software licenses have an arbitration clause (which they all do). Is a judge's power to order restitution in certain criminal cases abrogated if the criminal and the victim had a private arbitration agreement (as could happen in a criminal anti-trust case, a criminal RICO case, a criminal securities case, etc.)? But, in Waffle House, the analogous position received three votes on the Supreme Court (Justice Thomas, dissenting, with Justice Scalia and the late Chief Justice Rehnquist joining him).

Further, look at the illogic: the Court justifies arbitration of statutory employment-discrimination claims on the grounds that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 at 26 (1991), quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 at 628 (1985). Arbitration was thus just a choice of forum, and contracts to arbitrate were no different than contract picking a forum. It's hard to believe that Waffle House's argument would have been taken seriously, however, had the arbitration clause actually been a choice-of-forum clause. If the contract between Waffle House and the Complainant had said, for example, that all cases growing out of the parties' employment relationship had to be heard in a particular federal district court, would the Court have taken seriously the argument that the EEOC would be precluded from seeking Complainant-specific relief because it had sued in the District of South Carolina rather than in the District of Guam?

In my humble opinion, these seven thought experiments show the unique disdain with which our cases are so often treated.

The problem this different treatment of our cases creates for summary judgment and some potential solutions.

This differential treatment of our cases means that, for us, pre-trial litigation is about a struggle for the judge's mind in the inevitable motion for summary judgment, not really about the law or the facts, because:

1. It doesn't matter what the law or the facts are if "inference blindness" keeps the judge from seeing the connections that the jury could draw.

2. It doesn't matter what the law or the facts are if the judge doesn't see issues of fact and/or credibility.

3. It doesn't matter what the law or the facts are if the judge enables summary-judgment traps.

These characteristics are the great differentiation between pre-trial litigation in our cases and pre-trial litigation in "traditional" cases.[7] The "rules of good practice" in traditional pre-trial litigation, drawn mostly from p.i. litigation, with some roots in criminal and commercial litigation, are well-known to us: use pre-trial procedures to prepare for trial and, maybe, to encourage settlement, don't cross-examine your own witness at deposition, save inferences for closing argument, etc. These are what Professor Rich Gonzalez, a NELA members from Chicago, refers to as "the old rules".

Well, these "old rules" are probably still valid for p.i./criminal/commercial litigation. Unfortunately, these old rules are fairly worthless when what we're fighting is the judge's inference blindness, inability to see issues of facts or credibility, and propensity to approve summary-judgment traps. To fight for the judge's mind on these issues, we need what Rich Gonzalez calls "the new rules" – rules of good practice specifically designed to combat the judge's inference blindness, inability to see issues of fact or credibility, and propensity to approve summary judgment traps – to prepare us to defeat the inevitable summary-judgment motion. These "new rules" combine litigating innovatively to make ridiculously obvious the inferences we want and the issues of fact and credibility, while avoiding summary-judgment traps, while expressly arguing facts, credibility, inferences, and other areas of the law.

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[7] I spent a lot of time pondering whether these were "causes" or "effects" of the differential treatment of our cases, only to decide that that was a theoretical question that made no practical difference for purposes of this article.

Litigating innovatively to fight inference blindness.

Probably every written summary-judgment decision in the history of American jurisprudence states the black-letter-law that the opponent of summary judgment is entitled to the benefit of all reasonable inferences. Yet, as we noted above, those statements of the "benefit-of-all-reasonable-inferences" rule often do nothing to prevent the judge from refusing to draw an inference – or to acknowledge that a reasonable jury could draw an inference – in favor of employment plaintiffs.

To repeat Tom Newkirk's memorable phrase, the judge has "inference blindness". Often this inference blindness seems to be that "they just don't get it", growing out of a fundamental misunderstanding of the modern American workplace. Because of that, the evidence needed to overcome inference blindness often has a "no shit Sherlock" quality to it. But introducing such "no shit Sherlock" evidence into the record usually requires litigating innovatively and using your imagination.[8] Here are some ideas on sparking your imagination and litigating innovatively to fight such inference blindness:

- **Research your judge to determine if he or she suffers from "they-just-don't-get-it" inference blindness**. Read a sampling of the judge's opinion on PACER/RACER, Westlaw, or Lexis; see how the judge fares on appeal, talk to your NELA colleagues, etc.

- **Determine what "more" evidence is needed to overcome "they-just-don't-get-it" inference blindness by thinking about the case, using your imagination, brainstorming with your NELA colleagues, talking to laymen, focus-grouping, etc**. Seek out opportunities for informal conversations with non-lawyer friends, acquaintances, relatives, etc. You might also consider an actual focus group with hostile or semi-hostile laymen.

  One fruitful technique that facilitators use with focus groups is to lay out a incomplete skeletal statement of your case and then ask the focus-group members what more they would want to know. The facilitator then truthfully answers the questions while doling out information as slowly as possible and continues to ask what "more" the focus group members might want. A focus group in which the facilitator used this technique might go like this in a garden-variety retaliation case:

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[8] To me, the imagination involved here has always seemed similar to the imagination involved in planning a trial cross-examination from which we can argue inferences in closing (and from which we hope the jurors will draw the desired inferences on their own). For some wonderful examples of such imagination at work and a source of great ideas, see, Dennis E. Egan, "No-Lose Cross", 1997 NELA Annual Convention materials at p. 855.

Facilitator I want to discuss a case in which an employee complained and was fired. If you were on a jury, what more would you like to know about the case?

Group member 1: What did they complain about?

Facilitator: The employee complained that she was being sexually harassed. If you were on a jury, what more would you like to know about the case?

Group member 2: Who was the complaint to?

Facilitator: The complaint was to a government agency. If you were on a jury, what more would you like to know about the case?

Eventually, you're hoping to discover the types of "more" evidence that somebody with "they-just-don't-get-it" inference blindness needs, like this:

* * * * * * * * * * *

Group member 7: I'd like to know if the Charge of Discrimination was causing the HR person any problems.

Facilitator: What do you mean by "problems"?

Group member 7: Like, did she have to stay late at work because of the Charge of Discrimination?

Facilitator: Let's say the HR person had to work late. If you were on a jury, what more would you like to know about the case?

Group member 5: I'd like to know if the company had to spend a lot of money because of the Charge of Discrimination.

Facilitator: The company had to hire a lawyer. If you were on a jury, what more would you like to know about the case?

Etc., etc.

Even if you don't use a focus group, you can use similar techniques informally with your non-lawyer friends, relatives, etc. Of course, you should also continue to use your imagination and to have moot-court/brainstorming sessions with your NELA colleagues.

- **<u>Use Requests for Admissions to narrow the inferential gap</u>**. (Thanks to Lisa G. Williams, Esq., of the Illinois Attorney General's Civil Rights Bureau for phrasing and helping develop this idea.) This technique can be especially helpful for judges whose inference blindness seems to grow out of a lack-of-imagination. For example, say that in a garden-variety retaliation case, you need to leap the inferential gap from the fact that plaintiff had a pending Charge to the conclusion that defendant took an adverse action because of that pending Charge. Graphically, the inferential gaps are something like:

Pending Charge ➜ defendant's theoretical access to pending Charge ➜ defendant's actual knowledge of pending Charge ➜ defendant's motive to act on pending Charge ➜ adverse action.

These inferential gaps can be bridged, or at least narrowed, by Requests for Admissions. Some of the Requests for Admission you can use to narrow the inferential gaps will be pretty straightforwardly evidentiary, like this:

<u>Requests for Admissions</u>

1. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she knew that plaintiff had filed a Charge of Discrimination with the EEOC against defendant.

2. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she had received from the EEOC a letter dated 5/1/05 (Exhibit B hereto) scheduling a fact-finding conference to be held in plaintiff's Charge.

3. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she anticipated that the fact-finding conference to be held in plaintiff's Charge would be attended by plaintiff.

4. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she anticipated that the fact-finding conference to be held in plaintiff's Charge would be attended by her.

5. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she anticipated that the fact-finding conference to be held in plaintiff's Charge would be attended by one or more of her subordinates.

Etc., etc.

Other of the Requests for Admissions you can use to narrow these inferential gaps will have the "duh, no shit Sherlock" quality that is characteristic of creating record evidence to fight "they-just-don't-get-it" inference blindness, like this:

Requests for Admissions

* * * * *

41. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she was doing more work than she would have been doing had plaintiff not filed a Charge of Discrimination with the EEOC against defendant.

42. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she knew or reasonably suspected that defendant would be hiring an outside counsel to help defendant prepare for the 6/1/05 EEOC fact-finding conference in plaintiff's Charge against defendant.

43. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she knew or reasonably suspected that defendant would be hiring an outside counsel to attend the 6/1/05 EEOC fact-finding conference.

44. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she knew or reasonably suspected that any outside counsel that defendant would be hiring concerning plaintiff's EEOC Charge against defendant would charge defendant for his or her services.

45. When defendant's Director of HR wrote the 5/14/05 letter (Exhibit A hereto), she knew that retaliating against an employee for participating in an EEOC investigation was illegal.

Etc., etc.

For another example of using Requests for Admissions to narrow inferential gaps and create the "duh, no shit Sherlock" record evidence needed to fight "they-just-don't-get-it" inference blindness, consider again Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487 (7th Cir. 2007), the ADEA RIF case discussed in Thought Experiment #4, supra p. 4. As you recall, in Hemsworth the 7th Circuit not only refused to draw an inference against the company from the Company's General Counsel's giving the HR Director a list of the ages of the employees the company is laying off in its RIF, the HR Director's reporting back that there's "a problem", and the Company's ignoring that report and going forward with the RIF, but actually said that these facts showed that the Company "was aware of its legal obligation under the ADEA". How to combat such "they-just-don't-get-it" inference blindness? Well, because such inference blindness grows out of the need for "more" evidence due to an inability to grasp how the modern American workplace functions, my suggestion, had I been handling the case and been struck by a sudden attack of foresight, would have been a set of Requests for Admissions on the functioning of the workplace, like this:

Requests for Admissions

1. Part of the function of defendant's HR Department was to insure that defendant's employment practices did not violate the law.

2. The list (Exhibit A hereto) of the ages of employees that defendant was laying-off in the RIF was considered by defendant to be a confidential document.

3. Access to the list (Exhibit A hereto) of the ages of employees that defendant was laying-off in the RIF was limited by defendant to officers and employees who needed to know.

4. The list (Exhibit A hereto) of the ages of employees that defendant was laying-off in the RIF was given to defendant's Director of HR in the scope of his employment duties at defendant.

5. When defendant's Director of HR said that the percentage of employees on the list (Exhibit A hereto) that were over age 40 "was a problem", he meant that that was evidence of a possible violation of law.

6. Despite the statement of defendant's Director of HR that the percentage of employees on the list (Exhibit A hereto) that were over age 40 "was a problem", defendant continued with its RIF as planned.

Etc., etc.

Perhaps a set of Requests for Admissions could have cured the "they-just-don't-get-it" inference blindness evidenced by the court's turning the HR Director's remark into support for the company's good intentions.

Of course, if the defendant denies any of the requested admissions (like, "we deny that part of the function of our HR Department was to insure that our employment practices did not violate the law"!) then you have a roadmap to disputed issues of fact and/or reasonable inferences that should be drawn in your favor.

Thus, through integrating the results of your imagination, brainstorming, and focus-grouping with various procedural techniques, you can litigate innovatively to fight inference blindness and help to make your case summary-judgment resistant.

Litigating innovatively to fight the judge's inability to see issues of fact and/or credibility.

In their summary-judgment motions, defense counsel claim that there are no issues of fact and/or credibility, and judges who grant those summary-judgment motions are expressly or impliedly agreeing with that. What's strange about this claimed lack of issues of fact and/or credibility is that most lawsuits are teeming with such issues. Indeed, litigation is filled with procedural tools whose whole purpose is to identify issues of fact and credibility. A large part of making your case summary-judgment resistant is to use these procedural tools to highlight the issues of fact and credibility, as follows:

- **Draft a detailed Complaint**. By "a detailed Complaint", I mean a Complaint that contains facts that your client has personal knowledge of and that you anticipate you might use in opposition to an eventual Motion for Summary Judgment. Don't draft legal conclusions; rather draft evidentiary statements – the Complaint should read as if your client were a very good story-teller telling the liability facts of his or her story from his or her point of view. The point here is that you are tying the defendant down at the very start of the case to admitting, denying, or claiming a lack of knowledge as to the basic evidentiary elements of your client's story. And if the defendant fools around with its Answer, other techniques discussed below will turn that to your advantage.

  Caution: Do **not** plead things the defendant would want to introduce into evidence, like its alleged non-discriminatory business reason, and do **not** anticipate the defendant's defenses. Not pleading defenses in anticipation is particularly important for those defenses that are affirmative defenses under Federal Rule of Civil Procedure 8©, which must be pled by the defendant on pain of being waived, such as the affirmative defenses listed in that Rule ["accord and satisfaction, … estoppel, … fraud,

..., laches, ... statute of limitations, ...waiver, and any other matter constituting an avoidance ..."], exemptions under the Fair Labor Standards Act [see, e.g., Magana v. Northern Mariana Islands, 107 F.3d 1436 at 1445 (9th Cir. 1997); Rotondo v. City of Georgetown, 869 F.Supp. 369 at 374 (D.S.C. 1994)], the Farragher/Ellerth affirmative defense, etc. Also, with statutes that have been victimized by incredibly hostile judicial construction, like the pre-Amendments Act ADA and ERISA, I would be very careful about the detail that I put into my Complaint.

- **Very early in discovery, send a detailed and extensive set of Requests for Admissions**. Those Requests should do at least the following:

  > Request admission of the genuineness of any document that might conceivably be used in the case as evidence or impeachment. In doing this, go through the EEOC and/or state agency file, the documents that you obtained through your informal, pre-litigation investigation (including any pages of the defendant's website that you printed out), the documents your client received in response to his or her request (if any) for the personnel file, and any other documents that you and/or your client may have. The EEOC or state agency file is often very fruitful, especially when the company's position statement was prepared by HR or by the company's owner or president or even by the supervisor in question and is shockingly different from the position that defense counsel (now that the company woke up and retained one) will be presenting in court. (Be sure to have the defendant admit the genuineness of any such position statement!)

  > Request admission of any collateral facts about the documents that are of evidentiary, foundational, or doctrinal significance. For any document of which you requested an admission of genuineness, you should also request admission of collateral facts. In the above example of the EEOC position statement, you should request admission not only of the genuineness of the statement, but also that defendant intended the EEOC to rely on it, that defendant did a thorough investigation before drafting it, etc. With all documents, you should also request admission of all those little things that are obvious but that, when the time comes, you say to yourself "How do I prove that?": mailing, receipt, agency, handwriting, scope of employment, sequence of events, etc. For example, if an exchange of letters could be important in your case, you should not only request admission of the genuineness of the letters but also of the collateral facts, like this:

Requests for Admissions

1. Each of the following attached as an Exhibit to these Requests for Admissions is a true copy (except for a possible change in size or color) of a genuine original:

Exhibit	Description
A	1/10/05 letter from plaintiff to defendant.
B	1/30/05 letter from Ms. X to plaintiff on letterhead of defendant's HR Department.

2. Defendant received the letter dated 1/10/05 (Exhibit A) in the normal course of U.S. Mail delivery.

3. The letter dated 1/30/05 (Exhibit B) was written in response to the letter dated 1/10/05 (Exhibit A).

4. The signature on the bottom of the letter dated 1/30/05 (Exhibit B) is that of Ms. X.

5. Ms. X composed the letter dated 1/30/05 (Exhibit B) in the scope of her employment as defendant's HR Director.

6. Ms. X had access to plaintiff's personnel file when she composed the letter dated 1/30/05 (Exhibit B).

Drafting hints: Although drafting Requests for Admissions like these looks difficult, it's actually very easy! The best way I've found to draft Requests for Admissions is to make the first Request one for the genuineness of documents. Go through the documents you have on a document-by-document basis and decide if you want an admission of the genuineness of that document. If you do, list it as an exhibit in Request to Admit # 1, with a straightforward description in the description column, e.g., "Letter dated 1/10/05 from plaintiff to defendant". Then, imagine any foundational or collateral points that are probably true and that you would want admitted – signature, receipt, mailing, distribution, time-sequence, authority of author, author acting within scope of employment, etc. – and draft Requests for Admissions on these foundational or collateral points. In fact, if you're lucky enough to have an associate, paralegal, or law clerk to help you, you can just stick a Post-It Note® to the documents you want to be exhibits, scribble comments like "signature, scope of employment, mailing" on the Post-It Note®, and give the pile of documents to your associate, paralegal, or law clerk to create the Requests for Admissions based on your notes.

Sometimes the most important collateral admissions for purposes of defeating a Motion for Summary Judgment are "obvious" facts about documents. For example, suppose you request an admission that your opponent's organizational chart is genuine. If the reporting relationships shown in that chart are good for you, you should pair the request to admit the genuineness of the chart with a request to admit that the reporting relationships shown in the chart truly and accurately reflect the reporting relationships as they existed at the relevant time. That way, your opponent can't try to weasel out of any admission that the chart was genuine by later stating something like, "Well, the chart was genuine, but didn't reflect reality!". Therefore, if the content of a document is good for you, you should always pair the Request for Admission of the genuineness of the document with a Request for Admission of the underlying facts related in the document to prevent your opponent from weaseling out of the admission by arguing that the document was genuine, but the underlying fact was not true.

One caution about drafting Requests for Admissions: because an admitted Request "conclusively establishes" a fact, make sure that you can live with the Request if it is admitted. Phrase your Requests carefully, using terms like "at least", "at most", "approximately", "on or about", "substantially similar", etc., to achieve the maximum of tying down your opponent combined with the minimum of tying down yourself.

- **Use Steve Chertkof's techniques to discover evidence of bias and interest**. Of course, it is black-letter law that a court in ruling on summary judgment or judgment as a matter of law "must disregard all evidence favorable to the moving party that the jury is not required to believe" and should give credence to evidence supporting the moving party only if it is uncontradicted, unimpeached, and comes from disinterested witnesses. See, Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 at 151 (2000). Nevertheless, we rarely get the benefit of that black-letter law; indeed, quite the contrary, courts all too often simply accept any guff an employer or supervisor hands out. Indeed, shortly after Reeves, my home circuit basically gutted the portion of Reeves that judgments as a matter of law "must disregard all evidence favorable to the moving party that the jury is not required to believe". See, Massey v. Blue Cross-Blue Shield of Illinois, 226 F.3d 922 at 926 (7th Cir. 2000).

Steve Chertkof, a NELA member in Washington, D.C., had the brilliant idea that since the courts weren't following the law as enunciated in Reeves, we should actually go after bias and interest evidence in discovery. Finding evidence of "bias and interest" shouldn't be too hard –

it's pretty much inherent in every case we litigate! Just think of the ways in which the typical employer summary-judgment affiant has a bias or interest in the outcome of the case:

> The affiant may know about a company policy that "discrimination and retaliation are not tolerated" and that employees (including supervisors and managers) who engage in discrimination and/or retaliation are subject to discipline "up to and including termination". In that situation, the affiant has an interest in being found not to have discriminated lest he or she be disciplined or even terminated.

> The affiant may have received a personal, financial benefit from your client having been fired. This is often true, for example, if your client was in sales and the commissions your client would have received had he or she not been fired were re-distributed, in whole or in part, to the affiant. Or the affiant may receive a bonus for coming in under budget (or his or her compensation may be based in part on coming in under budget), which could have been a result of the affiant having fired your client. Or the affiant may be a partner in a partnership, in which case any savings go directly to the affiant's bottom line.

> Even if the affiant had no financial interest in the outcome of the case, there is still always a reputational interest in not being found to have discriminated and/or retaliated.

Here are some ideas for going after bias and interest evidence in discovery:

>> Check the employee handbook (and other sources) for the defendant's bullshit anti-discrimination and anti-retaliation policies. In the detailed and extensive set of Requests for Admissions that you send early in discovery, request the defendant to admit: that the document memorializing that policy is genuine, that that policy was disseminated to the employees generally, that that policy was disseminated specifically to the supervisors/managers in question, that the supervisors/managers in question signed an acknowledgment that they had received the policy (or the handbook in which the policy appeared), etc. Also send a "paired" Request for Admission that the defendant habitually did/did not take disciplinary actions under that policy against managers and/or supervisors who were found by a court to have illegally discriminated against and/or illegally retaliated against employees. (If the defendant admits that they

habitually took action against managers and supervisors who were found by a court to have discriminated, then you have conclusively established evidence from which a reasonable jury could infer bias; if the defendant denies that, then use the denial for other purposes, like supporting punitive damages!)

>> Put in your 30(b)(6) Notice of Deposition of the defendant the topic "Defendant's policies, procedures, and practices, if any, with respect to any actions defendant takes against managers, supervisors, or human-resources personnel who are found to have violated federal law in their decisions with regard to employees, and defendant's dissemination of any such policies, procedures, and practices to its managers, supervisors, or human-resources personnel."

>> In any depositions of the managers and supervisors who are likely to be defendant's summary-judgment affiants, inquire about their pay structure, how dependant they and their families are on the income produced by their employment with the defendant, how they would feel if they were found by a court to have discriminated/retaliated against the plaintiff, etc.

- **Use Rich Gonzalez's deposition techniques to have the defendant expressly admit the existence of disputed issues of fact**. NELA member Richard Gonzalez, a Clinical Professor at Chicago-Kent College of Law, has been a leader in developing deposition techniques to help make your case summary-judgment resistant. Perhaps Rich's most important technique is to get the bad guys in their depositions to explicitly admit that various issues in the case are contested issue of material facts between them and the plaintiff, for example:

"Q: Earlier, you said that you had read the plaintiff's deposition in preparation for your deposition?

A: Yes.

Q: And, in reading the plaintiff's deposition, did you read where the plaintiff said that he had informed you that the way the company was expensing its inventory was illegal?

A: Yes, I read that.

Q: A few moments ago, you said that the plaintiff had never told you that, correct?

A: That's right.

Q: So, you and the plaintiff disagree on whether or not he told you that the way the company was expensing its inventory was illegal?

A: Yeah, we sure do disagree on that.

Q: So, whether or not the plaintiff told you that the way the company was expensing its inventory was illegal is a contested issue between you and the plaintiff, right?

A: Yeah, I guess so."

The same technique can be used with the Charge of Discrimination and the Complaint, which is another reason that drafting detailed Charges and Complaints can be an effective anti-summary-judgment weapon.

- **Review the responses to your detailed Charge, your detailed Complaint, and your detailed and extensive Requests for Admissions not just for *admissions* that show the existence of facts in your favor but also for *denials* that show the existence of disputed issues of fact**. The denials can become your – and the judge's! – roadmap to the contested issues of fact. Typically, of course, defense counsel look for ways to deny Requests for Admissions, statements in the Charge, allegations in the Complaint, etc. Once the defense counsel has done this, resulting in myriad denials of various facts, all the plaintiff needs to do is to persuade the judge that some or all of the facts defendant denied were material. The "contested" part of "contested issues of material fact" were admitted by the defendant in denying the allegations and/or the Requests! Indeed, sometimes nothing is as devastating to a Motion for Summary Judgment as page after page of the defendant's denial of Requests for Admissions combined with the argument, "Look, judge, at the facts that defendant itself says are contested".[9]

- **Also review the responses to your detailed Charge, your detailed Complaint, your detailed and extensive Requests for Admissions, and any other discovery responses for "clever" or "legalistic" denials and "lack of knowledge" answers that could**

[9] Of course, the plaintiff also needs evidence or inferences to establish what was denied, because it's black-letter law that a plaintiff can't rely merely on a contested allegation in the Complaint to create an issue of fact. But the denial establishes the "contested" part.

go to credibility. The Rules of Civil Procedure are clear about the good-faith duties that the Answer to the Complaint or the Response to Requests for Admissions must meet. See, e.g., Federal Rules of Civil Procedure 8(b)(2) ("A denial must fairly respond to the substance of the allegation"), 8(b)(4) ("A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest") and 36(a)(4) ("A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.") Other discovery devices carry similar good-faith requirements. See, generally, Federal Rule of Civil Procedure 26(g).

Defense counsel is usually trying to avoid admitting averments of the Complaint, the Requests for Admissions, etc. This is particularly true if you have pled a detailed Complaint and asked extensive and detailed Requests for Admissions. Further, in the attempt to avoid admission, defense counsel often seizes on some perceived or imagined technical flaw in the allegation or Request, totally violating the good faith duties.

In my home circuit, there's clear law that "clever" or "legalistic" responses like these can go to credibility. For example, in Emmel v. Coca-Cola Bottling Co., 95 F.3d 627 (7th Cir. 1996), a failure-to-promote case, defendant responded to an Interrogatory asking why plaintiff had been denied promotions with what the 7th Circuit characterized as "legalistic" objections. Id. at 634-35. Defendant then went on to answer:

> "Without waiving such objections, defendant states that because plaintiff did not seek promotion, she was not denied promotion. Thus, defendant's response to Interrogatory No. 4(a) is no."

The 7th Circuit (through Judge Mannion!) said that the jury could have held against the defendant this "clever" and "legalistic" objection and answer to the Interrogatory:

> "Although this response may have seemed clever at the time, a jury could see it as an attempt to stonewall. Not only did it refuse to answer the question, which it would later be forced to address at trial, it did so by way of questionable objections. ****
>
> Answers to interrogatories are evidence. In this instance, they were admissions by a party opponent. Attorneys must anticipate that such an answer might find its way to the jury. And while attorneys may appreciate legalistic

> responses to interrogatories, juries may not. Employing this discovery tactic has risks, evident in this case. The interrogatory and Coca-Cola's response were presented to the jury, both in written form and through the testimony of one of the Coca-Cola employees responsible for providing the answers. The jury apparently concluded from the total absence earlier of the justification Coca-Cola would later offer at trial that the justification had been concocted in preparation for trial to fit the available facts. In other words that it was pretextual."

Id. at 635.

- **Notice a 30(b)(6) deposition on the topics of any denials, any claimed insufficient knowledge, or other "clever and legalistic" responses to the Complaint, the Requests for Admissions, or other discovery, and, at the 30(b)(6) deposition, question the defendant's designee on why the defendant denied (or claimed lack of knowledge about) obvious and/or true facts or made other "clever" or "legalistic" responses**.

Here's a form Notice of 30(b)(6) deposition to use:

Notice of Rule 30(b)(6) Deposition

Pursuant to Federal Rule of Civil Procedure 30(b)(6), defendant shall designate to testify on the following matters one or more officers, directors, managing agents, or others persons who consent to testify on its behalf:

- All facts or opinions bearing on the accuracy or inaccuracy of defendant's denials, in its Answer to the Complaint, of the averments of paragraphs aa, bb, cc, dd, ... of the Complaint and the identity of and/or content of all documents constituting or memorializing each such fact or opinion.

- All facts or opinions bearing on the accuracy or inaccuracy of defendant's statements, in its Answer to the Complaint, that it had insufficient knowledge or information to form a belief as to the truth of the averments of paragraphs xx, yy, zz, ... of the Complaint, the identity of and/or content of all documents constituting or memorializing each such fact or opinion, and the details of all inquiries and investigations the defendant conducted that led to these claims of insufficient knowledge or information.

[Have similar topics for defendant's Responses to the Requests for Admissions, for any of defendant's discovery responses that were "clever" or "legalistic", etc.]

- Defendant's policies, procedures, and practices, if any, with respect to any actions defendant takes against managers or supervisors who are found by a court to have illegally discriminated against and/or illegally retaliated against employees.

[See, pp. 22 & 23 of this paper, above.]

Then, at the 30(b)(6) deposition, politely, but firmly, press the deponent on these topics to expose the credibility issues. For example:

"Q: Please turn to Exhibit 3, which is the Answer to the Complaint in this case.

A: Ok.

Q: Now, earlier when we were reviewing the topics listed in Exhibit 1, the Notice of 30(b)(6) Deposition in this case, you said that you were going to testify for defendant about defendant's denial of paragraph 7, right?

A: Yeah, I guess.

Q: Please look at paragraph 7 of Exhibit 3, the Answer to the Complaint. For the record, paragraph 7 states:

> 'Allegations: Throughout plaintiff's employment with defendant, she received compliments on her work from her supervisors, her fellow employees, and her clients and generally met and/or exceeded defendant's legitimate job-performance expectations.
>
> Answer: Defendant denies each and every allegation of paragraph 7 of the Complaint and demands strict proof thereof.'

Did I read that correctly?

A: Yeah.

Q: Ok. On what facts did defendant base the denial of paragraph 7 of the Complaint?

A: I don't know what you mean.

Q: Well, during plaintiff's career at defendant, did she sometimes receive compliments on her work from her supervisors?

A: Yeah.

Q: So why did defendant deny that?

A: I don't know.

Q: And you're the person defendant picked to testify for it on that point, right?

A: I guess so.

Q: And let me show you what the court-reporter's marked as Exhibit 4, plaintiff's 2005 Performance Review. Does the last page of that say that plaintiff had an overall grade of 'meets expectations'?

A: Yeah, that's what it says.

Q: So why in paragraph 7 of Exhibit 3, the Answer to the Complaint, did the defendant deny that plaintiff generally met defendant's legitimate job-performance expectations?

A: Well, she worked there other years.

Q: Do any of plaintiff's annual Performance Reviews grade her overall as having less than 'meets expectations'?

A: No.

Q: So why in paragraph 7 of Exhibit 3, the Answer to the Complaint, did the defendant deny that plaintiff generally met defendant's legitimate job-performance expectations?

D.C. Objection, asked and answered.

Q: Well, it's been asked, but it hasn't been answered. Why in paragraph 7 of Exhibit 3, the Answer to the Complaint, did the defendant deny that plaintiff generally met defendant's legitimate job-performance expectations?

A: Well, she might have been criticized sometimes.

Q: Who made this criticism?

A: I don't know that she was criticized; I just said it was a possibility.

Q: When this criticism made?

D.C. Objection, assumes facts not in evidence.

A: I don't know if she was criticized; I just said it was a possibility.

Q: What was the content of this criticism?

D.C. Same objection.

A: I don't know if she was criticized; I just said it was a possibility.

Q: Was this criticism oral or written?

D.C. Same objection.

A: I told you, I don't know if she was criticized; I just said it was a possibility.

Q: So is the reason that in paragraph 7 of Exhibit 3, the Answer to the Complaint, defendant denied that plaintiff generally met defendant's legitimate job-performance expectations the possibility that plaintiff may have been criticized sometime by someone?

A: Yeah, I guess.

Q: And you don't know if any such criticism was actually made, if any such criticism was written or oral, when any such criticism may have occurred, who might have made any such criticism, or what the content of any such criticism might have been, right?

A: Yeah, that's right.

Q: Any other reasons for defendant's denial in paragraph 7 of Exhibit 3, the Answer to the Complaint, defendant denied that plaintiff generally met defendant's legitimate

job-performance expectations other than the possibility of this unknown criticism?

A: Not that I know of.

Q: And you're the witness defendant chose to testify on that topic, right?

A: Yeah."

- **Use the non-document-request provisions of Rule 34 to show the judge the actual issues of fact**. One area in which we can all do better is the use of the non-document-request provisions of Federal Rule of Civil Procedure 34 to show the Judge issues of fact. We all too often forget that Rule 34 goes not only to documents, but also to:

> "(a) (1) to … permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
>
> *****
>
> (B) any designated tangible things; or
>
> (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it."

Use these non-document parts of Rule 34(a) to actually show the judge the disputed issue. For example, in a case I litigated with Mike Brown, a NELA member in Oshkosh, Wisconsin, the employer's alleged legitimate, non-discriminatory business reason was that it had caught the plaintiff (a truck mechanic) sleeping on the job under a truck that he was supposed to be working on. Of course, Mike's and my client denied that he was sleeping and denied that, given the lighting, the supervisor's angle of vision, etc., the supervisor could have actually seen him sleeping. But how likely are the plaintiff's denials to defeat summary judgment? Unfortunately, as many of us know from sad experience, not very likely.

As the novelists say, don't tell 'em, show 'em. Mike and I sent off the following Request under Rule 34:

Requests to Inspect

1. Access to Defendant's premises at Defendant's 20th Street pre-delivery inspection facility for .... demonstration of (and photographing of and/or videotaping of) a recreation of supervisor Dan DeGreef (or a person of approximately his height and build) and his April 27, 2006, viewing of Mr. Nuetzel on a "creeper" under a M-1120 Hemtt truck in the same condition as was the truck on the day in question under the same lighting conditions as the day in question at the same location as the day in question.

Through the use of innovative techniques like these, throughout the litigation you will be piling up mounds of contested issues of fact and/or credibility.

Litigating innovatively to avoid summary-judgment traps.[10]

Trap #1: Your client said something stupid in deposition

Prevention and cures:

- **Draft a detailed Charge of Discrimination to use as your client's anti-summary-judgment affidavit**. Similar to drafting a detailed Complaint, "drafting a detailed Charge" means setting forth in the Charge – in the form of evidentiary statements, not legal conclusions – facts that your client has personal knowledge of and that you anticipate you might use in opposition to an eventual Motion for Summary Judgment.

  The reason that drafting a detailed Charge of Discrimination can help cure your client's having said something stupid at a deposition is that the Charge, by virtue of being under oath, should be an "affidavit" for purposes of opposing a Motion for Summary Judgment, at least to the extent that the statements in the Charge are made on personal knowledge.[11]

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[10] One trap the summary-judgment rules create for our opponents, for which we should always be on the alert, is that Federal Rule of Civil Procedure 56(c) requires that the summary-judgment motion be served at least ten days before the date of the hearing (which is a longer notice period than the general one for motions), and some courts have held that the motion for summary judgment can be struck if this 10-day period is not strictly observed. See, e.g., Hogan v. Allstate Ins. Co., 361 F.3d 621 at 628 (11th Cir. 2004). Compare, Fillmore v. Page, 358 F.3d 496 at 509 (7th Cir. 2004).

[11] Although I couldn't find a published decision holding that a Charge of Discrimination was an "affidavit" for purposes of opposing a Motion for Summary (continued...)

Further, and very important, the Charge was sworn to long before the plaintiff's deposition was ultimately taken, so the Charge is not a "subsequent" affidavit to the deposition, but a "prior" affidavit that the defense had when it took the plaintiff's deposition. This status as a "prior" affidavit means that the Charge can be submitted in opposition to a stupid statement in the deposition, without running afoul of the "sham affidavit" doctrine.[12]

- **Feed the defense attorney the deposition questions that you want your client to be asked**. One of the subtle beauties of having drafted a detailed Charge of Discrimination and/or a detailed Complaint is that many defense attorneys will simply incorporate your detailed Charge and/or detailed Complaint into their deposition outline. (You know that the defense attorney has done this when the questioning goes, "And then in paragraph 7 of your Complaint, you allege that you always did a good job. Tell me everything that makes you think that was true" followed by "And then in paragraph 8 of your Complaint you allege....", etc.)

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[11] (...continued)
Judgment, I've never had a problem submitting a Charge for that purpose, and both federal and Illinois law have a good analogy to permitting a Charge to be an "affidavit" in holdings that a verified complaint can be an "affidavit" for that purpose so long as it is on personal knowledge, etc. See, e.g., Huckbay v. Moore, 142 F.3d 233 at 240, n.6 (5th Cir. 1998); Williams v. Adams, 935 F.2d 960 at 961 (8th Cir. 1991); In re Estate of Barry, 277 Ill. App. 3d 1088 at 1093 (5th Dist. 1996), Rematt v. Bernadette, 253 Ill. App. 3d 278 at 285-86 (1st Dist. 1992), and Donart v. Board of Governors, 39 Ill. App. 3d 484 at 486 (4th Dist. 1976). Beware of one technicality pointed out by Alice Ballard, a NELA member from Philadelphia – the language of the verification should not contain any reference to being, in whole or in part, on "belief", because swearing on "belief" turns what would otherwise be an affidavit into a non-affidavit. See, e.g., Lackey & Lackey, P.C. v. Prior, 228 Ill.App.3d 397 at 399 (5th Dist. 1992) (affidavit on "information and belief" struck because not evidentiary).

[12] See, e.g., the U.S. Supreme Court's dictum about the "sham affidavit" doctrine:

> "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity."

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 at 806 (1999) (emphasis added). As noted, a Charge of Discrimination submitted as an affidavit would not be "a later affidavit [contradicting an] earlier sworn deposition", but an earlier affidavit.

You can also feed the defense attorney the deposition questions that you want your client to be asked by having your client take into the deposition notes of points that he or she wants to make and, when the defense attorney asks early in the deposition "Did you bring anything with you to this deposition today?" make sure your client answers "Well, I brought these notes". There's a high probability that the defense attorney will use the notes to question your client, thereby asking him or her the very questions that you wanted asked! (If the defense attorney does this, have the notes marked as a deposition exhibit.)

- **Prepare your client intensely for typical defense deposition tricks**: We all have limited time, including limited time to prepare our clients for deposition.[13] For my money, by far the most effective use of your limited deposition-preparation time is to prepare your client for typical defense deposition tricks:

  > Teach your clients to be on the alert for any "wrap–up" or "summarizing" phrases like "is it fair to say", "is what you're trying to say", "just to make sure I understand you", "is what you're saying that", etc. Because we're all lawyers and all go to the same seminars, read the same "trial-ad" columns, etc., we should have a bag of typical phrases that lawyers use when they're trying to put words in the witness's mouth. Impart this knowledge to your clients so they won't fall victim to a summarizing question.

  > Teach your clients how to answer any question asking them for "evidence", "proof", etc. or the infamous "why do you think you were discriminated against" question. I usually drill my clients that if they are asked any question along these lines, they should answer by simply telling their entire story.[14] Alice Ballard of Philadelphia

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[13] Based on presentations and questions at NELA conferences and postings on NELAnet, this is apparently not true, however, for NELA members who practice in California!

[14] Sometimes, your opponent will try to cut off your client when he or she is in the midst of telling the entire story in response to one of these questions. Here, I recommend one of my favorite ju-jitsu moves: pay attention when your opponent gives the lawyer's deposition introduction bullshit speech, even writing down what the lawyer says. If your opponent said something in the introductory bullshit speech like "Only one of us should talk at a time. Please don't interrupt me while I'm asking a question, and I promise that I'll not interrupt you while you're answering", then throw that back in his or her face: "Counsel, almost the very first thing you said in this deposition was that

(continued...)

tells her clients to use the "concentric circles" method – start with the clients in the innermost circle (the client's age, the client's experience, the client's good performance, etc.), then move outward to the next concentric circle of the comparitors and describe how the comparitors were treated, then move further outward to management and describe management comments, attitudes, etc., then move to the outmost concentric circle of the entire company – any relevant history, company attitudes, other victims, informal company demographics, etc.

> Teach your client when and how to use a truthful "I don't know" or "I don't remember".

In my experience, spending your limited deposition-preparation time with your client on these and similar matters will pay much bigger dividends than spending it on reviewing documents, etc.

- **Object to questions that use language with technical, legal meaning**. Questions such as "What is your evidence of discrimination?", "Wasn't that response quick and effective?", "Weren't you an 'at-will' employee?", and the like should always be objected to on the grounds of calling for a legal conclusion from a lay witness.

- **Be alert for areas that need to be cleaned-up**, and clean them up at the deposition on cross. Here, the detailed Charge of Discrimination and/or the detailed Complaint come in handy as your deposition "cross-examination" outline.

Trap #2: You didn't follow the summary-judgment rules

Prevention and cure:

- **Read and obey the Rules (and the local rules) on summary judgment**. The rules on summary judgment date back to the adoption of civil procedure rules. Those rules, therefore, contain some provisions that may seem out of date or unnecessary today, but are still important. For example, some courts interpret the reference in the Rules to summary judgment being based on "pleadings, depositions, answers to interrogatories, and admissions on file" [see, Federal Rule of Civil Procedure 56© (emphasis added)] to mean that the depositions must have

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[14] (...continued)
promised not to interrupt Ms. Smith while she was answering. Now, are you going back on your promise?"

actually been filed with the clerk. See, e.g., Idea Tool and Manufacturing Co. v. One Three Six Inc., 682 N.E. 2d 437 (1st Dist. 1997), relying on Illinois Code of Civil Procedure § 2-1105©, which is the same as FRCP 56©, except it deletes the reference to "answers to interrogatories".

In addition, the local rules are becoming more and more important. In my home district, the requirements of Local Rule 56.1 should be well-known, except the 7th Circuit keeps affirming summary judgments in which the opponent did not file a 56.1 response, thereby admitting that all the facts against him were true. See, e.g., Metropolitan Life Ins. Co. v. Johnson, 297 F.3d 558 at 562 (7th Cir. 2002) (movant failed to follow Northern District of Illinois Local Rule 56.1 on summary judgment), Dade v. Sherwin-Williams Co., 128 F.3d 1135 (7th Cir. 1997). The same is true for the local rules of other federal district courts in the 7th Circuit. See, e.g., Hedrich v. Board of Regents of University of Wisconsin, 274 F.3d 1174 at 1178-79 (7th Cir. 2001) (W.D. Wisconsin local rule on summary judgment).

Trap #3: The judge relied on some "defense" that wasn't really in the record

- **Politely, but firmly, go after any affirmative defenses that are pled in a bare-bones manner**, which is improper even under federal-court notice pleading. The law on this issue is actually very good for plaintiffs. See, e.g., Surface Shields, Inc. v. Poly-Tak Protection Systems, Inc., 213 F.R.D. 307 (N.D. Ill. 2003) (Bucklo, J.); Renalds v. S.R.G. Restaurant Group LLC, 119 F.Supp. 2d 800 (N.D. Ill. 2000) (Alesia, J.); Fleet Business Credit Corp. v. National City Leasing Corp., 191 F.R.D. 568 (N.D. Ill. 1999) (Aspen, C.J.).

- **Use Requests for Admissions to eliminate hypothetical reasons that some judge may dream up**. Unfortunately, my home circuit has an entire jurisprudence devoted to hypothetical reasons as a defense. As the 7th Circuit explained this "hypothetical-reason" jurisprudence:

> "The defendant's failure to persuade the jury that its proffered reason was its real reason .... does not compel [an inference of discrimination]. The true reason for the action of which the plaintiff is complaining might be something embarrassing to the employer, such as nepotism, personal friendship, the plaintiff's being a perceived threat to his superior, a mistaken evaluation, the plaintiff's being a whistleblower, the employer's antipathy to irrelevant but not statutorily protected personal characteristics, a superior officer's desire to shift blame to a hapless subordinate – conceivably a factor here – or even an invidious factor but not one outlawed by the

> statute under which the plaintiff is suing; or the true reason might be unknown to the employer; or there might be no reason."[15]
>
> Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394 at 1399 (7th Cir. 1997).

In your cases, serve Requests for Admission that defendant did not fire the plaintiff (or take whatever the adverse action was) for any of these or other hypothetical reasons. Thus, you should request the defendant to admit that it didn't fire the plaintiff so it could replace him with a hire who was a relative or friend of one of the decisionmakers, that defendant did not fire plaintiff because his superior perceived him as a political threat, that defendant did not fire the plaintiff based on a mistaken evaluation, that defendant did not fire the plaintiff because somebody higher than plaintiff in the corporate hierarchy wanted to shift blame to him, that defendant did not fire plaintiff for no reason at all, that defendant did not fire plaintiff as part of a random process whereby each employee in plaintiff's job classification had an equal chance of having his or her employment terminated (thanks to Lisa Stauff, a NELA/Illinois member in Chicago, for suggesting that last Request for Admission), etc.

By taking these steps to avoid common summary-judgment traps, you can make your case further summary-judgment resistant.

Argue traditionally by going back to basics and making explicit comparisons to "traditional" areas of the law

- **Ask your NELA colleagues to run a "moot court" brainstorming session *before* you begin briefing the summary-judgment motion**. Thanks to Steve Platt, former President of NELA, for this idea, when he pointed out the irony of holding (very valuable) moot courts to prepare for oral argument on appeal, when the record is set, the briefing is done, arguments may have been waived, etc.,

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[15] For what it's worth, I disagree with the 7th Circuit that some of these hypothetical reasons would be defenses. For example, it seems totally incorrect that a confession of or proof of illegality would be a defense so long as the illegality concerned some other law. See, generally, Player "Defining 'Legitimacy' in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis", 36 Mercer L. Rev. 855 at 868-72 (1985) (a "legitimate", non-discriminatory business reason for purposes of McDonnell-Douglas analysis cannot be a reason that is an independent violation of law). In addition, this "hypothetical-reason" doctrine has probably been overruled by Reeves, supra, 533 U.S. at 147-48 (prima facie case plus disbelief of employer's alleged reasons for adverse action permits jury to infer discrimination).

but not having such sessions when we are preparing to brief summary judgment in the trial court, when they could be even more valuable because we can still shape the record, haven't waived any argument, etc. Steve is correct, and we should be "moot courting" before we begin to respond to a summary-judgment motion just as assiduously as we do the day before an appellate oral argument.

- **Make the Statement of Facts primary and write an interesting Statement of Facts that leads the reader to the conclusion that you will – or, at least, could – win at trial**. Summary judgment is a fact motion, and the Statement of Facts is therefore primary. Unless the facts are stipulated, persuading the judge that a reasonable fact-finder could view the facts differently than does the defendant is virtually the whole ballgame. There is, of course, the problem that many judges share the well-known human failing of confusing themselves with all reasonable fact-finders. Therefore, persuading the judge that your view of the facts is right can be an important avenue to persuading the judge to make the leap from his or her own view to the view of the hypothetical reasonable fact-finders. For that reason, don't simply copy the defense attorney's organization, phraseology, etc., thereby letting the defense attorney dictate important elements of your Statement of Facts. Rather, write the facts in an interesting way that best shows that you are going to (or, at least, could) win at trial. Because the facts are primary, I strongly recommend that a plaintiff have at least a one-to-one ratio between the pages devoted to the Statement of Facts and the pages devoted to the Argument. In fact, I'm never more sure of victory than when the defendant's reply memo complains that I've devoted so much of the brief to the facts and so little to legal argument!

- **Draft your affidavits and choose your affiants like you were preparing for trial**. The most important document in opposing a summary judgment motion is usually the affidavit of the plaintiff or, should you be so lucky, a favorable, non-party witness on the crucial point. Drafting such affidavits are really presenting a series of short direct-examinations on paper. With that in mind, remember to:

  > Think about to what extent you need and want this witness to testify. Any time you call a witness at trial, you're putting your head on the block, and the same is true for filing an affidavit opposing a summary judgment motion. You may think that an affidavit would not blow up like a live witness, but that's not totally true. Your drafting the affidavit does, of course, give you some protection, but there are many ways for an affidavit to blow-up on the motion (e.g., the defendant may persuade the judge to let them re-depose the affiant, who may then say something stupid) or at trial (e.g., you may

have created impeachment against yourself). Before you decide to present a witness by affidavit, think carefully, just like at trial, if you really need and want this witness. There may be another, less risky method of presenting the same evidence, such as a document, an admission in a pleading, an admission in response to a Request for Admission, etc.

> If you have a choice of witnesses, think about which ones you want to use. On summary judgment, just as on trial, the choice of witnesses can be crucial. One witness may be impeachable, another witness may be good on one point but poor on another. Choosing one witness may open that witness to a deposition, while another witness may have already been deposed and, therefore, the judge may be less inclined to permit a further deposition of that witness.

> Draft like you were drafting the essence of a direct exam in a bench trial. Because your affidavit is really a short direct-examination, it should be drafted as one. All the skills that make a direct-examination interesting and pointed should be used in the affidavit.

> Try to make your affiants sound like themselves. We all know that the affidavits are drafted by lawyers, but, too often, that fact is simply thrown in our faces. Affidavits from ten witnesses, all in the same words, and affidavits that sound like lawyers, not witnesses, are all too common. The older practitioners did not do it this way. In many autobiographies, collections of war stories, and histories, the practitioners of the 19th century and the first half of the 20th century made clear that they tried to capture the witnesses voices in the affidavits, often drafting and redrafting "because it doesn't sound like Joe". Emulate this approach. Especially if you have a series of affiants, having them all sound exactly the same – and exactly like a lawyer – sends subliminal the message that the affiants cannot speak for themselves. Like using all leading questions on a direct-examination, this creates the impression that the witness is untrustworthy and, if not closely confined by the lawyer, may say something stupid. In addition, if you survive summary judgment, you don't want your affiant to admit before the jury that he or she testified in the case not using his or her own words, but "something my lawyer wrote". Finally, remember the saying about "a foolish consistency". Your affiants do not have to all use the same words. They wouldn't do so at trial, and they shouldn't do so in affidavits opposing summary judgment. Make the affidavits consistent, but do not make them slavish imitations of each other.

> Take care not to create impeachment or impeachment by omission. Here's where an affidavit can really come back to bite you. There's nothing like drafting a great affidavit in opposition to summary judgment, only to have that affidavit used as impeachment against your witness at trial. When that happens, you'll find out that "well, my lawyer wrote that and told me to sign it" is not much of an answer. Creating impeachment against your own case is embarrassing, of course, but can usually be avoided with some thought. Perhaps the more dangerous situation is creating impeachment by omission. Who knows whether some judge or jury sometime in the future may think that your affiant should have also sworn to the truth of something that was not in the affidavit and that the affiant is therefore impeached by omission? Guard against an impeachment by omission by drafting the affidavit to state that there are other examples that are being omitted for the sake of brevity, that the examples are not all-inclusive, that looking at records may show additional instances, etc.

> Use witnesses, not yourself, as your affiants. Believe it or not, in some areas of the country, the custom is for lawyers to draft long affidavits for themselves, rather than using witnesses. Although to lawyers in those areas, this is normal procedure, it is also wrong. Whenever possible, use real witnesses, not yourself as the lawyer.

- **Raise evidentiary objections**. On summary judgment, facts must be such as would be admissible in evidence (except for being presented in a form permitted by the summary-judgment rules, such as by affidavit). See, Federal Rule of Civil Procedure 56(e)(1). Defendant's summary-judgment submissions almost always contain objectionable evidence, such as lack of personal knowledge, lack of foundation, hearsay, etc. Therefore, you should scour defendant's summary-judgment record for such objectionable evidence and make evidentiary objections and/or move to strike when important. Because there is no jury to prejudice, the objection can be more elaborate than at trial – more like a sidebar than a bare objection.

- **Argue credibility**. As we've noted, virtually every summary-judgment decision begins its legal analysis with the boilerplate that matters of credibility are not to be decided on summary judgment. (Of course, as we've also noted, the decision says this and then goes and decides every credibility matter in the case!) The plaintiff can and should take every opportunity to demonstrate that the fact-finder will have to make credibility determinations in order to find the facts. Don't forget to argue general credibility. For example, one old (and almost forgotten) Seventh Circuit opinion reversed summary judgment when a deponent either forgot

or did not know that he was an officer of a party-corporation. American Securit Company v. Hamilton Glass Company, 254 F.2d 889 (7th Cir. 1958). As the Seventh Circuit explained:

> "[M]atters going to the weight to be given the testimony of the various witnesses are peculiarly germane to a trial. At least it could be argued that the testimony of a man, who is a vice-president of a corporation and either does not know it or forgot it, should be weighed in the scales and not perfunctorily given face value." Id. at 894.

You should argue such impeachment to a judge in the paper trial of summary judgment just as you would argue that impeachment to a jury in the real, live trial. Quote jury instructions, and emphasize that the fact-finder would be entitled to disbelieve the testimony.

- **Explicitly rely on other areas of the law in which judges are much more receptive to the types of arguments we make**. For example, as we discussed at length, in our area of the law, judges have "inference blindness" against employment plaintiffs. Want to find a case that would represent "inference love" – go to a different area of the law. For example, take a look at the types of inferences juries are permitted to draw in murder cases, drug-conspiracy cases, etc., that we discussed in Thought Experiment #5, supra at pp. 8 - 11, and that's supposed to be proof beyond a reasonable doubt! Similarly, as Alice Ballard and Rick Seymour often point out, the jury-exclusion cases often have much better examples for us of relevant evidence and the drawing of inferences than do employment-discrimination cases. For example, just compare the "inference blindness" that we usually run into the evidence and inferences that the Court was willing to allow to find discrimination in the jury-exclusion cases of Miller-El v. Dretke, 545 U.S. 231 (2005), and Miller-El v. Cockrell, 537 U.S. 322 (2003), as noted in Thought Experiment #6, supra, at pp. 11 - 12. In addition, citing to other areas of law can bolster principles that we want the court to adopt by showing that the principle is widely acknowledged throughout American jurisprudence. For example, the principle of the movant's self-serving averments of its own good-faith being of no value on summary judgment is well-established in jury-exclusion cases. See, e.g., Alexander v. Louisiana, 405 U.S. 625 at 632 (1972) ("affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion").[16]

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[16] Explicitly relying on other areas of the law means that you should probably keep a research file on good cases, so, when you're reading your local legal newspaper or an (continued...)

- **Avoid arguing McDonnell-Douglas and avoid arguing what type of evidence (direct, circumstantial, etc.) you have – just argue the evidence**. Through years of judicial (mis)-interpretation, McDonnell-Douglas has become a trap for plaintiffs. Therefore, just argue the evidence – don't argue McDonnell-Douglas. In my home circuit (the 7th), the jury isn't even instructed on McDonnell-Douglas. See, www.ilnd.uscourts.gov/Legal/Jury/7thCivInst2005.pdf (7th Circuit Pattern Jury Instruction 3.01 and commentary thereto).

  When you're avoiding arguing McDonnell-Douglas, also avoid arguing what type of evidence (direct, circumstantial, etc.) you have – again, just argue the evidence. As one commentator stated, "The point is that any evidence is fair game – any, at all. Some will be direct, some indirect, some circumstantial, some not." Kearney, Rethinking Employment Discrimination: How Lawyers and Judges Both Can Do Better, 4 Law Rev. M.S.U.D.C.L 1077 at p. 1082 (2001). The 7th Circuit has been moving (albeit fitfully) towards this position that it doesn't matter whether you call the evidence direct, circumstantial, etc.; what matters is what the evidence supports. See, e.g., Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900 (7th Cir. 2006):

  > "The distinction between direct and circumstantial evidence is vague, ... but more important it is irrelevant to assessing the strength of a party's case....From the relevant standpoint – that of probative value – "'direct' and 'circumstantial' evidence are the same in principle."

  Id. at 903 (citations omitted).

  Also, when you're arguing the evidence, remember that "pretext" is not merely a step in a McDonnell-Douglas analysis; pretext is itself circumstantial evidence of discrimination, as the U.S. Supreme Court has twice unanimously and recently stated:

  > "[E]vidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of circumstantial evidence that is probative of intentional discrimination.'"

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[16] (...continued)
on-line advance sheet, don't blip over those cases – stick them in your research file!. Cases on which the headline explanation is something like "Criminal Law – sufficiency of evidence" are pure gold!

Desert Palace, Inc. v. Costa, 539 U.S. 90 at 99-100 (2003) (emphasis in original), quoting Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 at 147 (2000). See also, Griffith v. City of Des Moines, 387 F.3d 733 at 746 (8th Cir. 2004) (Magnuson, J., concurring) ("Of course, pretext is circumstantial evidence that may sufficiently demonstrate that an employer was motivated by an improper consideration").

- **Invoke presumptions and argue them**. The plaintiff, as the opponent of summary judgment, receives the benefit of many presumptions, most notably the presumption that all reasonable inferences run in his or her favor. It is not very persuasive, however, and is often insufficient to simply invoke the presumption. Rather, just like at trial, the presumption should be argued. How does the inference arise? Why is it reasonable? How could a jury use it? To see how to and how not to argue presumptions, read these two Seventh Circuit employment-discrimination cases: Rand v. CF Industries, Inc., 42 F.3d 1139 at 1146 (7th Cir. 1994) (not enough to argue that jury may disbelieve summary-judgment witnesses as liars); Dey v. Colt Const. & Development Co., 28 F.3d 1446 at 1458-59 (7th Cir. 1994) (summary judgment reversed on chain of inferences linking persons with knowledge to decision-maker through presence at same meetings, etc., along with conflict in testimony raising possibility that one witness was lying by his denial of plaintiff's allegation, which led to possibility that jury could disbelieve all of that witness's testimony).

Another very useful presumption to argue (and which ties in well to your arguing the evidence) is that the plaintiff's evidence shouldn't be "balkanized" – the plaintiff has the right to have all his or her evidence considered together, with each piece of evidence reinforcing each other. "[A] holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes." Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 at 675 (7th Cir. 1993), citing Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 at 1524 (M.D. Fla. 1991). As the 3rd Circuit stated:

> "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.....[T]he factfinder in this type of case should not 'necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of

several other related incidents.'"

Andrews v. City of Philadelphia, 895 F.2d 1469 at 1484 (3rd Cir. 1990), quoting Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503 at 1510 (11th Cir. 1989).

In this regard, note that the typical "direct evidence/McDonnell-Douglas" analysis inherently balkanizes our evidence by splitting it between two categories.

- **In combination with arguing the evidence, presumptions, and credibility, remind the court that the ultimate question of motive is itself an issue of fact and that the jury would not have to believe the employer's self-serving "affirmations of good faith"**. "[M]otivation is itself a factual question". Hunt v. Cromartie, 526 U.S. 541 at 549 (1999). Further, the employer's self-serving "affirmations of good faith" are insufficient to rebut a prima-facie case. This principle was well-established in the early days of Title VII, see, e.g., International Brotherhood of Teamsters v. U.S., 431 U.S. 324 at 342, n. 24 (1977) ("affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion"), Loeb v. Textron, Inc., 600 F.2d 1003 at 1011, n. 5 (1st Cir. 1979) (insufficient for employer "to offer vague, general averments of good faith") (ADEA). Admittedly, throughout the 1990's this principle that the employer's self-serving "affirmations of good faith" are insufficient to rebut a prima-facie case was all too often honored in the breach, but now we can support that principle with Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 at 151 (2000). See also, Lust v. Sealy, Inc., 383 F.3d 580 at 582-83 (7th Cir. 2004) ("Sealy's contention that 'the jury cannot be permitted to simply choose to disbelieve the evidence offered by Sealy' is a misleading half-truth. It is true that a plaintiff cannot prevail without offering any evidence of his own, simply by parading the defendant's witnesses before the jury and asking it to disbelieve them. That would be 'a no-evidence case, and [in] such a case a plaintiff must lose, because he has the burden of proof.' .... But if the plaintiff offers evidence of her own, as she did here, the jury is free to disbelieve the defendant's contrary evidence. There is no presumption that witnesses are truthful.") (citations omitted), Dyer v. Community Memorial Hosp., 2006 WL 435721 at *11 (E.D. Mich. 2006) ("self-serving statement by the defendant's representative that no illegal discrimination animated the defendant's actions is insufficient to put the plaintiffs to their proofs at the summary judgment stage of the proceedings") (dictum).

- **Research and argue jury instructions and cases upholding or reinstating jury verdicts**. Because you will be arguing evidence and presumptions, be sure that your legal research looks not only at cases on summary judgment but also at jury instructions and at cases upholding jury verdicts or overturning judgments as a matter of law (or older cases overturning jnov's).

Conclusion

Because of (or as a result of?) our cases being treated differently, summary judgment is the bane of our existence. But by litigating innovatively and arguing traditionally, you can help make your cases summary-judgment resistant.

David L. Lee