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Employment Discrimination Litigation: A Dozen Tips for Obtaining Summary Judgment in Employment Discrimination Cases

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Richard G. Rosenblatt, Esq.

www.morganlewis.com

A DOZEN TIPS FOR OBTAINING SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

I. INTRODUCTION

Summary judgment is a vital tool in an employer's arsenal when it is seeking to dispose of discrimination cases. When successful, summary judgment prevents the disruption, expense, and burden of a trial—where outcomes are less than certain. Even if summary judgment does not dispose of a case entirely, it can narrow the issues for trial, which has obvious benefits to the employer. It also can provide the impetus for settlement as, possibly for the first time, your opposition may have to confront weaknesses in its case.

II. POSITIONING YOUR CASE FOR SUMMARY JUDGMENT

Although motions for summary judgment are commonly filed months or even years after the filing of the complaint, and usually after the exchange of at least some discovery, the process of positioning the case for summary judgment should begin, if you already are engaged, even prior to suit having been filed. Here are 12 tips to use to effectively position your case for dismissal at the summary judgment stage.

1. START EARLY

- Whether an employer achieves summary judgment can be determined prior to its ever taking the adverse employment action at issue; if you are involved in the decisionmaking, make sure that the decision process will withstand later scrutiny. Communications should be consistent with the justification to be articulated; documents and other evidence should be reviewed to make sure that pretext cannot be found. Insofar as the employer must explain rationale, be accurate and be broad (do not overly confine) as to the rationale.

- As we all know, rationales for adverse employment action can evolve and be refined as a case develops. Very few lawyers practicing employment law can say that they have never learned something new about a decision maker's reasoning when preparing that person for deposition. It is just a fact that until confronted with that critical moment, witnesses who otherwise are occupied with having to run a business often do not focus their attention until they are forced to do so. Yet, the rationale for a decision can be set in stone far earlier upon making an administrative agency submission. Accordingly, it is imperative to make as certain as possible that the position statement and any affidavits (if they cannot be avoided) are carefully crafted and do not end up precluding you from refining explanations as more facts are uncovered and honed. Otherwise, the explanations set forth in the position statement essentially can freeze your story.

2. UNDERSTAND YOUR CASE

- This may seem elementary, but the first step in defending any case is learning about the client—the nature of its business or industry; its structure, locations, unique regulatory requirements, etc. Sometimes, a visit to the worksite may be beneficial in understanding the client and the case. The attorney will also want to

learn about the client's recent employment litigation history and the attorney **must** understand the client's document preservation practices and policies.

- Conduct fact gathering and witness interviews AS SOON AS POSSIBLE. Initial assessments are critical for a variety of reasons, and the attorney should speak with individuals with relevant knowledge while the information is fresh in their minds. Personal interviews are recommended, if feasible.

- Gather relevant documents, including, but not limited to, the plaintiff's personnel records, prior complaints, or EEOC charges; internal investigation materials; the company handbook; and the company's policies regarding discrimination, harassment, and retaliation. Also, if the company has not yet sent a "litigation hold" memorandum to all relevant employees, the lawyer should make sure this is done immediately.

3. UNDERSTAND THE LAW

- Understanding the law is also an elementary observation, but this sometimes gets overlooked when a lawyer is working diligently to gather facts and documents.

- Identify the legal basis for the plaintiff's claims. Disparate treatment? Disparate impact? Read the statutes and regulations relating to the plaintiff's claims, and be sensitive to any recent changes in the law.

- Understand the burdens of proof for each of the plaintiff's claims (e.g., *McDonnell Douglas*; *Gross v. FPL)* and the company's defenses (e.g., *Faragher/Ellereth*). Burdens of proof can vary by jurisdiction.

- Consider each element of the claim and defense and how you will prove or disprove each.

- Consider other potential legal issues, such as use of/need for statistical, comparator, or mixed-motive evidence, and how the particular jurisdiction addresses those kinds of issues.

4. IDENTIFY AND DEVELOP CASE THEMES

- The goal for purposes of summary judgment will be to communicate a compelling story to the court.

- Identify the "theme" of the case as soon as possible—it will help you gather information and document, conduct discovery, and take depositions—but do not be afraid to "tweak" the theme as more facts become known. Invoke the theme early and often.

- For example, performance is critical to the success of any business and poor performance is often the basis for adverse employment actions. But context can make all the difference. Courts routinely hear the same story: plaintiff was progressively disciplined about his/her poor performance ➔ did not improve ➔ was put on a performance improvement plan ➔ did not improve ➔ was ultimately terminated. While all that is relevant and helpful, think about other

factors that may influence a court. Perhaps the client is a trauma hospital where poor performance can literally be the difference between life and death; or perhaps the client manufactures life-saving pharmaceuticals or operates in a highly regulated environment (e.g., food products facility) or highly dangerous facility (e.g., a petroleum refinery, explosives manufacturing). Highlighting those concepts in letters to a court, joint discovery plans, discovery, depositions, and summary judgment briefing might make an otherwise routine adverse employment action much more compelling. An unsafe employee working in an oil refinery is much more compelling than an unsafe employee working in a lawyer's office. By contrast, an employee prone to dishonesty may be much more compelling on summary judgment in a law firm setting than in a refinery.

- Identify the relevant decisionmakers(s) and the legitimate, nondiscriminatory, nonretaliatory reason(s) for the adverse employment action. Avoid pretext by making sure the "story" does not change materially.

5. CREATE A COMPREHENSIVE FACT OUTLINE—THE CASE "BIBLE"

- Once the preliminary review is complete, prepare a comprehensive factual summary of the documents reviewed and witnesses interviewed – the "Bible".

- The "Bible" will help the lawyer identify factual discrepancies, further facts needed to support defenses, holes to exploit in the plaintiff's case, additional documents for review, additional individuals to interview, and questions to ask at depositions.

- The "Bible" will give you a good idea of the strengths and weaknesses of the plaintiff's claims and the company's defenses, and will be invaluable when preparing discovery or for depositions or settlement conversations.

- Update the "Bible" as new information becomes available.

6. DEVELOP A DISCOVERY PLAN AND DRAFT TARGETED, RELEVANT DISCOVERY REQUESTS

- As soon as possible, consider potential "informal" sources of information: Internet searches, private investigators, background checks, and FOIA materials.

- Case management submissions are important. Use them as opportunities to frame your theme and pin down the plaintiff's theory.

- As early as possible, send out "formal" discovery requests (interrogatories, document requests, requests for admissions) and a deposition notice. Generally seek "primacy" or "first in line" discovery.

- Consider use of requests for admission.

- Consider the need/benefit of third-party discovery.

- Interrogatories are of limited value, except related to damages. If you serve interrogatories, avoid asking questions that will elicit attorneys' answers for key issues. Get those facts through deposition.

- Serve broad document requests that seek all documents that pertain to material allegations of the complaint.

- Include admonition in discovery requests that failure to answer or produce will be a ground for seeking preclusion in opposition to a dispositive motion.

7. PREPARE DISCOVERY ANSWERS AND RESPONSES THAT ARE FACTUALLY ACCURATE AND CONSISTENT WITH YOUR THEME(S)

- The less you provide/produce, the more constrained your arguments. Resist the temptation to "hide the ball." If you don't explain it in response to an interrogatory, you can't use it on summary judgment.

- Manage client relationships. Sometimes clients do not want to disturb managers and other busy colleagues in the discovery process. More often than not, this is a mistake. Make your clients' lives easier by making a comprehensive request for information and documents; try to avoid piece-mealing so as not to have to bother operational personnel multiple times.

- Assert valid objections but respond with as much information/documentation as required by applicable rules.

- Make sure that answers that require significant detail are presented as summaries, if possible.

- Be truthful and true to your theme.

- Sometimes discovery and additional fact gathering reveal new facts that had not surfaced in the initial investigation. Accordingly, routinely review your discovery responses and amend as necessary as discovery reveals necessary changes. You don't want your discovery responses to contradict your deposition testimony.

8. PLAINTIFF'S DEPOSITION—MAKE IT COUNT

- The plaintiff's deposition is the key event in the case. There is no substitute for thorough preparation.

- Refer back to the "Bible" to determine what facts are essential to obtain from the plaintiff.

- Think not only about the specific questions you want to ask, but the order in which you will ask them.

- The goal is to have the plaintiff admit the facts that you will be using to support your summary judgment motion. The ultimate goal is to avoid having to rely on

any defense affidavits other than as to the most rudimentary and objective facts (e.g., authentication of documents).

- Use favorable case law to your advantage. For example, it is well established that courts should not sit as "super-personnel" departments second-guessing valid business decisions. *Brewer v. Quaker State Oil Ref. Corp*., 72 F.3d 326, 332 (3d Cir 1995). Attempt to establish, through the plaintiff, that the business had legitimate reasons for taking the action it did and that the plaintiff just would have made a different decision. If the plaintiff was a poor performer, use negative performance evaluations to your advantage. Address areas or examples of poor performance and seek admissions that the plaintiff did not perform well or could have done better.

- Likewise, establishing pretext is difficult for a plaintiff to do. He or she must demonstrate not that an employer's proffered reason is wrong, but that "it is so plainly wrong that it cannot have been the employer's real reason." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1998). The plaintiff must show "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the proffered reason such that a reasonable factfinder could find the proffered reason unworthy of credence. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994).

- Have the plaintiff identify all decisionmakers and all facts supporting the plaintiff's belief that the decisionmakers targeted the plaintiff based upon his or her protected characteristic.

- Have the plaintiff identify all comparators and explain the complete factual basis for the belief that the comparators were given preferential treatment.

- Have the plaintiff describe all of the steps he or she took to notify the company of the alleged discrimination and what response the company took.

- Pin the plaintiff down. Ask for all evidence that supports material assertions. Always ask if there is anything else.

9. IDENTIFY AND PREPARE DEFENSE WITNESSES—KEEP THE STORY STRAIGHT!

- Think critically about how the plaintiff will attempt to use defense testimony. How will the plaintiff attempt to prove pretext?

- Anticipate areas of testimony or documents that will be the subject of questioning. The best source of the plaintiff's counsel's mental impressions are found in correspondence (even early demand letters), initial disclosures, case management submissions, arguments in connection with discovery disputes, interrogatories, and the plaintiff's testimony. Your witnesses should be prepared on all issues presented.

- It is one thing to know the questions, but work with witnesses to understand their answers. Sometimes witnesses do not even fully understand their rationales until recollections are refreshed and their thought processes are played back as if on instant replay.

- Many witnesses have not been deposed before—spend some time, in an informal, comfortable environment, explaining the process, the role of all involved, and the importance of the witnesses' role in the case.

- Tell witnesses to be TRUTHFUL! Some witnesses, for whatever reason, may think they are helping you by telling you what you want to hear. Be very clear to all witnesses that the truth is paramount.

- Make sure you understand what each witness knows, and, importantly, what he or she does not know. AVOID SURPRISES!

- Go over discovery responses with defense witnesses –ESPECIALLY IF THE WITNESSES HAVE CERTIFIED THE ANSWERS.

- Witnesses should avoid the temptation to over-use the "I don't remember" mantra. If your side does not remember, you can bet the other side will.

- Do your best to ensure defense witnesses provide consistent (but truthful) testimony related to the relevant decisionmakers and the reason for adverse employment action. Pretext is far easier to show when the story changes from witness to witness.

10. IDENTIFY INADMISSIBLE EVIDENCE

- Think about the evidence you intend to offer in support of the motion and make sure it is admissible. Anticipate potential evidentiary objections to evidence submitted in support of a motion for summary judgment.

- Anticipate what the evidence plaintiff will offer in opposition to summary judgment and consider whether such evidence is admissible.

- If the plaintiff offers inadmissible evidence, consider the options: Move to strike? Address in a memorandum of law? Sham affidavit doctrine?

- Agency records (EEOC and other FEP agencies)—how does the particular jurisdiction view admissibility of these records?

11. WRITE A WINNING SUMMARY JUDGMENT MOTION

- Get organized. Gather all relevant and helpful deposition testimony, documents, and other discovery and organize it as it relates to each item of proof needed. If you have an updated case "Bible", this should be easy.

- Familiarize yourself with the summary judgment rules and timeframes. Is there a scheduling order setting forth the briefing dates? Check the local rules and

judge's individual rules (if any). Is there a page limit? How does the court handle out-of-state affidavits?

- Remember your audience: a busy judge with a stack of motions to decide. Make your motion stand out from the crowd.
- Keep it short; less is far more.
- Shorter is also harder, so you will have to spend time revising and editing.
- Remember your theme and incorporate it into your planning and briefing.
- Although it is easier said than done, tell a compelling story. Give the judge a reason to want to enter judgment in your favor.
- Draft a powerful statement of facts that incorporates the theme and tells the story in a concise, logical, and compelling way. As much as you can, use the plaintiff's own testimony in the statement of facts. It is much harder for a plaintiff to argue that there are disputed issues of fact when you are citing his or her testimony.
- Short statements of fact are harder to dispute. The longer they are, the more opportunity there is for a factual issue to be raised.
- The statement of undisputed facts should be the material facts you really need for summary judgment. If it is not material, leave it out.
- Begin the brief with a short (one page or less) introductory section. Capture the court's interest and attention immediately—the first few sentences should explain the company's compelling story/theme. Do not begin the brief with a recitation of the counts of the complaint. It is boring, and the court's first information about the case should be the company's side of the story—not the plaintiff's.
- Establish credibility with the reader. Use the power of the facts (with specific record cites); avoid cliches, feigned outrage, and exaggeration; and use other tools of emphasis. Avoid ad hominem attacks on the plaintiff or his or her counsel—they damage your credibility. Let the court draw its own conclusions.
- As much as possible, cite cases affirming or granting summary judgment. Conversely, avoid citing a case where the employer lost unless it is truly a critical case (*McDonnell Douglas*), or the employer lost for reasons wholly unrelated to your case.
- Avoid string cites if possible, and try to include parentheticals with most cites.
- If a case cite is compelling and on all fours with your case, it is worth its own paragraph.
- Attempt to limit the size of the exhibits. Do not attach entire deposition transcripts when only relevant excerpts are needed. Do not make the court search for the evidence supporting the motion for summary judgment. Every factual statement should have a record cite.
- Contemplate your oral argument before submitting the brief. Does your brief hit the key points that you would want to hit if you had only 10 minutes of oral argument?

- On reply, can you assert that "X out of Y" number of paragraphs of a statement of undisputed facts are admitted or deemed admitted?
- Distinguish between "speculation" and "inference." The former is the product of a strong imagination, while the latter is the product of a logical progression of facts.

12. ORAL ARGUMENT — GET TO THE POINT

- Don't retread arguments; the longer you argue, the more it looks like there are facts in dispute.
- Can you affirmatively state that you are willing to accept all facts as asserted by the plaintiff?
- Focus on the key facts admitted by the plaintiff.
- Ask the court if it has questions and, if not, sit down and prepare for rebuttal.
- On rebuttal, don't feel the need to address everything. Remember, you can tell the court that all of the issues already have been addressed in your briefs, but you just want to highlight a key point "if the court might find it helpful."

III. CONCLUSION

Think about summary judgment from the inception of the case—and before. It is a powerful tool that, when used appropriately, can end or limit litigation. It also can be expensive and time-consuming and, when unsuccessful, serve to educate the plaintiff about the company's strategy, witnesses, and evidence. Summary judgment is often a calculated risk (one usually worth taking), and these tips can help an employer prevail and avoid a costly and burdensome trial or position itself for a favorable settlement.