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Employment Litigation: Pursuing and Defeating Pre-Trial Motions to Dismiss

Leveraging Iqbal Pleadings Requirements and Summary Judgment Standards

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Today's faculty features:

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Is Summary Judgment in employment cases a myth?

This article will discuss the current state of summary judgment motions in employment cases and whether the company can still achieve dismissal using this tool, especially in state court, where the standards seem to be changing. Is there a developing legal trend leaning against summary judgment? What can employers do to ensure they can obtain a dismissal or good outcome in the case? What are the true "costs" of summary judgment? Are there times the employer should just roll the dice and go to trial? At the end of the article, HR professionals will hopefully have a better idea of the litigation strategies they need to use to overcome these hurdles.

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Is Summary Judgment in employment cases a myth?

Companies these days usually realize the importance of summary judgment in employment litigation. In fact, some employers call the summary judgment stage the real "trial," since if they lose at that stage, they most often will settle the case before it is tried before a jury. But is summary judgment winnable any more? It sometimes feels like it is not – especially in the state court system, where judges are often not educated about employment law and seem generally reluctant to dismiss cases at preliminary stages. But is this trend in the state courts getting worse? And is it leaking into the federal court system? Although sometimes it "feels" the decline is true, we thought we would examine the facts and see if this is reality or fiction.

I. What Is Summary Judgment?

Of course, summary judgment is a decision made by the court without a trial that may resolve all or a part of the legal issues in a case. Parties, particularly defendants, seek summary judgment in an attempt to avoid the ongoing costs of litigation and trial. Traditionally, a party seeking summary judgment (the "moving party") must establish that there are no genuine issues of "material fact," or that the key facts in the case are not in dispute. Then, the moving party must show that applying the law to these facts, there can be no other outcome but one in their favor. This basic description covers the general analytical framework utilized in both state and federal courts, but the devil is, as they say, in the details.

There is a marked difference between the approach taken by federal and state courts on the issue of summary judgment. Generally, federal courts are more prone to reading the standard as favoring disposition of cases on summary judgment. State courts, by contrast, can and have established their own benchmarks describing when a moving party is entitled to summary judgment. While some states follow the federal standard, other states have specifically declined to follow the federal model and have adopted a different, and usually more rigorous, standard. Thus, whether a lawsuit is pending in a state or federal venue can drastically impact the likelihood of success on summary judgment, and consequently, can inform the business decision faced by many employers as to whether or not filing summary judgment is worthwhile.

In the employment context, summary judgment is particularly important, as most employers rely on this procedure to quickly dispense of their cases. Juries are unpredictable in the best of circumstances, but in employment cases, where every juror has been an employee at some point in their lives and therefore believes they have an industrial expertise, the ante is upped. Combined with the problem that every employee has likely had or knows of someone who has had a bad boss or bad employment experience, the prospect of bringing an employment case to a jury can be daunting.

II. The Way It Used to Be – Summary Judgment Decisions in the Past

Summary judgment was not always as frequently utilized as it is today. In the past, the law tended to favor trials and disfavor decisions made solely "on paper." Today, however, it is commonly estimated that only one to two percent of civil cases actually proceed to trial. Blame crowded dockets, an increasingly litigious populace, or heightened awareness of the

costs of litigation and the economic benefits of settlement, but the reality is that the once-disfavored vehicle of summary judgment has seen a major surge in recent decades.

The federal judicial approach to summary judgment changed drastically in the mid-1980s with the Supreme Court's decision in three key cases, the so-called "summary judgment trilogy."[1] Among other things, these decisions made it much easier for defendants in federal cases to win on summary judgment and placed more significant burdens on plaintiffs who opposed summary judgment. In the decades following these decisions, the disparities between federal and state practice with respect to summary judgment have widened dramatically, with summary judgment relatively easier to obtain under the new federal standards, but with some state courts still clinging to the old practice of pushing cases towards trial. The conventional wisdom holds that state courts make life harder for defendants seeking summary judgment by either raising the bar for defendants or by lowering the bar for a plaintiff's response in opposition.

III. Is There a Trend Toward Denial of Summary Judgment in State Courts?

Perhaps in part as a reaction to the relative frequency that cases may be disposed of on summary judgment in federal court, and perhaps partially a continuation of the former traditional preference for trials, the wording and judicial interpretation of some state court standards has evolved to differentiate the method and types of proof required to obtain summary judgment in those courts.

A representative example of this type of vocal departure from the federal standard is the state of Tennessee's recent restatement of its summary judgment standard. Tennessee courts have long maintained that they do not ascribe to the federal standard. A series of recent decisions, however, has further limited the standard to be applied to cases pending in Tennessee state courts. Under the new standard, a moving party must either (1) negate an essential element of the other party's case or (2) show that the other party will be unable to prove its case at trial.[2] As one might imagine, the new standard has caused no small amount of concern among defendants contemplating their prospects of winning on summary judgment. Perhaps not surprisingly, this recent change merely brings Tennessee in line with at least seven other states that have rejected the federal standard and place higher burdens on parties seeking summary judgment.[3] Moreover, many argue that it is not so much that the standard itself has changed, but that the official wording has been brought in line with the realities of state court summary judgment practice.

It might even be said that in changing the official standard, the Tennessee Supreme Court merely blessed the current practice with more appropriate wording. Between 1993 and 2008, approximately 70% of cases decided at the summary judgment phase (the

[1] These cases include *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986).

[2] The first of the cases establishing the new standard is *Hannan v. Alltel Publishing Co*., 270 S.W.3d 1 (Tenn. 2008).

[3] Other examples include Indiana, Florida, Oklahoma, Kentucky, Alaska, Utah, and New Mexico. According to Judy Cornett, a professor at the University of Tennessee School of Law who has conducted extensive research in this area, no one has ever undertaken a comprehensive survey of the fifty states to determine exactly which states have elected to follow the federal standard.

majority of these representing victories for defendants) were affirmed on appeal. Early glimpses of the data from Tennessee of cases that have been decided after the change in the wording of the standard in 2008 suggest that cases are being decided in much the same way with much the same results. The likelihood of success on summary judgment is greatest in cases where the only questions are those of *law*, and not of *fact*. Merely changing the wording of the standard is not likely to have any impact on a case in which the facts are largely undisputed and the only relevant issues are those of law. In such cases, summary judgment is almost always appropriate and remains likely to be granted.

In the context of employment cases pending in state courts, summary judgment can be difficult to obtain no matter the wording of the standard because the law is simply more complicated. State court judges are often reluctant to grant summary judgment for several reasons: (1) judges may be inexperienced in the area of employment law, and the complicated burden-shifting standards may cause them to simply "punt" the case to the jurors; (2) state court judges may not believe in the summary judgment process, no matter how strongly the state court rules are worded; or (3) they simply have nothing to lose because summary judgment decisions are typically not appealable, and thus, not reversible.

IV. Benefit and Cost of Summary Judgment

Because of these trends, employers must analyze each case closely to determine whether the old notion of filing for summary judgment in every case is appropriate. If an employer is not going to obtain summary judgment no matter the facts and no matter the law, the employer may need to be prepared to either settle up or roll the dice and go to trial.

Of course, the first thing an employer must analyze is the benefit of filing a summary judgment motion. Is there a benefit to filing a summary judgment motion, even if the employer knows it is going to be denied? Perhaps surprisingly, the answer often is yes.

First, while an employer will incur legal fees to draft the summary judgment motion (typically around $10,000 to $15,000 in fees for a quality motion in a single-plaintiff/ single-defendant case), the reality is, much of that time will be spent eventually anyway. The analysis and arguments which are made on summary judgment *must* be done by the attorneys either at the summary judgment stage or the trial stage. The depositions must be culled to pull out the best (and worst) admissions at either stage, and the legal research to support the defendant's arguments must be done regardless of whether it is in preparation to file a summary judgment motion or to take a case to trial.

Summary judgment motions may also provide the benefit of fleshing out your adversary's arguments, positions, and view of the facts. In most cases, the other side must respond to your summary judgment brief, and more often than not, this process will focus the issues and arguments, sometimes causing your opponent to drop or narrow some of its claims as they realize there are no viable legal arguments to be made in response. Thus, for example, in a recent case in which we filed summary judgment, the plaintiff dropped her disability and FMLA claims, and focused only on her sexual harassment claims. As a result, trial took three days instead of five, and we ultimately won on the remaining sexual harassment claims – which might not have happened with all the claims combined.

Summary judgment can also have important, but less tangible, strategic benefits. It can, for example, simply make the plaintiff's attorney nervous. Many plaintiff's attorneys take employment cases on a contingency fee basis. The attorney may not want to spend time or energy drafting a response or arguing in court. And despite their blustering, they may be nervous that the motion will be granted (even in state court), and their entire case (and all their fees) will go away. As a result, settlement may come more quickly and cheaply. Thus, even if you do not want to pay the legal fees for summary judgment because you are planning on settling, the legal fees spent in drafting a summary judgment motion may be worth their weight in gold.

V. So What's an Employer to Do?

At this point, you employers may be scratching your heads, saying, "you're telling us we're not going to get summary judgment granted, but we should pay the costs and file it anyway?" And you are also secretly noting that this article is written by attorneys – what else are those darn attorneys going to say?

So once again, the lawyers have left us with no good choices – right?

And unfortunately, sometimes, the answer is yes. There are no good choices. Employment litigation can sometimes feel like pure, unadulterated blackmail, and the bleak news presented in this article about the state of summary judgment dismissals provides only one more arsenal in the war against employers.

But the reality is in employment litigation, a good offense is the best defense. An employer who has proper policies and procedures in place, makes reasoned and fair decisions, and who makes significant efforts to follow the law will be a much better position to defend against employment litigation *and* will have a much better shot at being "that case" that even a state court judge will dismiss on summary judgment. While it is true that even frivolous lawsuits will make it to court, an employer must then analyze how to contain its costs and minimize its risks. By at least knowing the venue, the potential for summary judgment in that jurisdiction, and the chances of success, the employer can at least analyze whether the best course of action is to file the summary judgment motion, settle, or go to trial.

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Kate Summers is an Associate at Constangy, also in its Nashville, Tennessee office. She also represents employers in a variety of employment cases, including Title VII, ADA, and ADEA. A former clerk in the U.S. District Court, she has seen first-hand the summary judgment analysis made within the court system.