INTRODUCTION

This submission addresses, briefly, some of the challenges facing plaintiffs, especially in light of the increasingly important role that summary judgment motions play in employment litigation. The first section explores recent statistics on summary judgments, including potential bias in the granting of such motions in favor of defendants, and suggests steps a plaintiff may take to prevent a defendant from filing summary judgment in her case or, at a minimum, to get the court’s attention so that she stands a better chance at defeating the inevitable Rule 56 motion. The second section addresses when a plaintiff should consider affirmatively moving for summary judgment – using the fact pattern and complaint prepared by the ABA Labor & Employment Division for this conference as a reference point.

I. PRE-FILING HEARINGS – A WAY FOR PLAINTIFFS TO TAKE SOME OF THE AIR OUT OF DEFENDANT’S MOTIONS FOR SUMMARY JUDGMENT

It is fair to say that in virtually every case involving labor and employment issues filed in Federal District Court, defendant seeks to file a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 at the close of discovery. There is little downside in filing a motion for summary judgment from the defendant’s point of view. If the defendant prevails,
there is no need for a trial. If defendant loses, it has a better understanding of the plaintiff’s case (and can better prepare for trial or evaluate settlement). In essence, a defendant gets two shots at winning the case – something that a plaintiff does not have in any practical sense. And most Federal District Courts welcome such motions, allowing defendant to file a motion for summary judgment without making any prior showing that it will be able to meet the high burden of proof required for a court to grant such a motion.

Recent statistics support empirically what has become evident to all practitioners in recent years: that defendants are increasingly using summary judgment as a tool to dispose of a case, pushing back the possibility of settlement until after all discovery is complete and a court evaluates the evidence on dispositive motions. According to statistics cited in “Against Summary Judgment” an article written by John Bronsteen, an Associate Professor at Loyola University of Chicago School of Law, the rate of a case termination by summary judgment in federal civil cases nationwide increased substantially in the period 1960 to 2000. 75 GEORGE WASHINGTON L. REV. 522, 523, n. 7 (2007). Some Federal District Court judges have recognized that summary judgment is being used excessively by defendants – who have nothing to lose and everything to gain by filing the motion. See Denlow, Summary Judgment: Boon or Burden?, 37 No. 3 JUDGES’ J. 26, 26 (1998) (“Summary judgments are excessively used and delay resolution of cases that would otherwise be tried or settled.”); Milton I. Shadur, An Old Judge’s Thoughts, 18 CBA Rec. 27, 27 (2004) (“From my perspective that trend has gone much too far, to the benefit of no one involved in the justice system . . .“)

*Reid v. Google, Inc.*, 50 Cal. 4th 512, 235 P.3d 988, 1004-1011 (S. Ct. CA 2010), a recent decision from the California Supreme Court, upheld the appellate court’s reversal of the district court’s grant of summary judgment in favor of the defendant in an age discrimination case. In
the opinion, which summarizes the state of the law on the “stray remarks doctrine” as it applies
to employment discrimination cases, the court warned that district courts should not use
summary judgment as a tool for getting rid of weak cases but, instead, must weigh the totality of
the evidence in favor of the non-movant and with the recognition that a plaintiff is entitled to a
jury trial if there are any material issues in dispute. The tenor of this opinion is consistent with
the recognition that lower courts tend to abuse summary judgment (perhaps as a method of
clearing their docket), preventing employees from getting their cases to a jury. See Bronsteen, *Against Summary Judgment*” 75 GEORGE WASHINGTON L. REV. at 539-543 (arguing that
evidence of judicial bias in favor of granting motions for summary judgment for defendants may
suggest that courts feel pressure to clear their docket and/or avoid lengthy trials).

Also not surprising is the fact that courts appear to be granting motions filed by
defendants at a disproportionate rate compared to motions for summary judgment filed by
plaintiffs. See Bronsteen, *Against Summary Judgment*, GEORGE WASHINGTON L. REV. at
523-524, n.9 (citing statistics showing that in 2000 the Eastern District of Pennsylvania granted
293 motions for summary judgment (87 for plaintiffs and 206 for defendants). It is unclear
whether these statistics simply reflect the fact that plaintiffs do not move for summary judgment
at the same rate as defendants or that, indeed, defendants are more likely to prevail on their Rule
56 motions compared to plaintiffs.

This increased use of Rule 56 delays the possibility of settlement and substantially
increases the costs of litigation on both sides due to the labor intensive nature of summary
judgment filings and the increasing costs of discovery (especially electronic discovery).
Summary judgment further burdens the district courts, who must wade the though substantial
paperwork required by Rule 56 including a detailed statements of undisputed material facts and
responses, supported by the record, and lengthy memorandum even in cases where defendants know there is a very low probability of summary judgment being granted.

In the employment/labor area, summary judgment places a particularly heavy burden on plaintiff’s counsel (where contingency fee arrangements are common) because the costs associated with properly preparing these cases for the inevitable summary judgment motions are higher than many other types of civil cases. More often than not employment claims require an expensive analysis of workforce data, often done by an expert, voluminous electronic and document production and extensive written and oral discovery. The increased costs associated with litigating these cases through summary judgment can discourage competent counsel from taking on these cases in the first place – regardless of the merit. Some judicial commentators, like Bronsteen, question whether the increased dependence on summary judgment by defendants and the courts to dispose of cases is fair to the plaintiffs or even whether the process is constitutional (i.e. denying plaintiffs the right to a jury under the Fifth and Seventh Amendment). See Bronsteen, Against Summary Judgment, GEORGE WASHINGTON L. REV. at 525-26, 551; Paul W. Mollica, Federal Summary Judgment of High Tide, 84 MARQ. L. REV. 141, 141-42 (2000) (“[T]he increase in summary judgment dispositions of civil cases stirs fear that, in the haste to resolve weak cases, courts risk overriding the constitutional imperatives of due process and the right to a civil jury trial under the Fifth and Seventh Amendment.”).

How then can the plaintiff get the attention of a district court prior to summary judgment and/or prevent defendant from filing a Rule 56 motion. Some judges, like Judge Shira A. Scheindlin in the Southern District of New York, require the moving party to write chambers with a request for a pre-motion conference before bringing any motions, including summary judgment motions. The letter, which is limited to three pages, must explain the grounds for the
motion - including the factual and legal support for the motion. The non-movant has three business days to file a response to the letter, again filed with chambers, explaining why the moving party should not be allowed to file the motion. The non-movant’s response is limited to three pages.

After the letters are submitted, Judge Scheindlin holds a hearing in which defendant has an opportunity to convince the court that there are no disputed issues of material facts and that summary judgment is likely to be granted as a matter of law. The non-moving party similarly has the opportunity to demonstrate that the record is disputed, the summary judgment motion hinges on credibility determinations that must be made by a jury or that the law is sufficiently unclear in light of the facts that summary judgment is not warranted. The court uses this hearing to remind the parties that summary judgment is a difficult standard to meet and that all factual inferences must be drawn in favor of the non-moving party. During the hearing, Judge Scheindlin either strongly encourages the party to file (on some or all of the claims) or urges the moving party to think long and hard before moving for summary judgment.

This process if very effective in focusing the parties, prior to extensive briefing on summary judgment, on the true disputed issues in a case and whether there are credibility issues that cannot be resolved at trial. It also helps the parties narrow the claims. In a recent case, after an hour long hearing on defendant’s request for leave to file a motion for summary judgment, the plaintiff agreed to drop the retaliation claim that she was asserting against the employer because defendant effectively convinced the court that plaintiff would be unable to demonstrate that the individual who she claimed retaliated against her was aware at the time of the alleged adverse action that the plaintiff had filed a complaint of discrimination with the company – one of the legal elements of a retaliation claim. The court made it very clear to plaintiff during the hearing
that it was likely to grant defendant’s motion for summary judgment on the retaliation claim
unless plaintiff could find factual support in the record that the alleged retaliator had knowledge
of the complaint prior to the adverse action.

As for plaintiff’s remaining claims, the court made it clear to defendant that it faced an
uphill battle on summary judgment since there appeared to be many disputed material facts
which would have to be viewed in a light most favorable to the non-moving party and that the
court would be required to make credibility determinations (something the court reminded
defendant it could not do at the summary judgment stage). Not surprising, defendant decided not
to file summary judgment motion after the hearing but, instead, to attempt to resolve the matter
through a meditated settlement.

Judge Scheindlin’s pre-hearing motion practice not only save the court substantial
judicial resources and time but helped to quickly narrow the issues in the case, allowing the
parties for resolve the matter without having to expend the time and resources needed to properly
litigate a summary judgment motion. In the end, it is a “win-win-win” for the court, the plaintiff
and the defendant.

While Judge Scheindlin’s process is effective, most courts do not have such a pre-motion
hearing mechanism in place. This, however, should not deter plaintiff’s counsel from asking the
court for a pre-motion hearing on summary judgment before the court sets a briefing schedule.
The best way to accomplish this is to ask the court during the initial pre-trial conference for a
status at the close of fact discovery so that the parties can discuss dispositive motions prior to
filing. Plaintiff’s counsel might inform that court at this early stage of the litigation that she
believes it would be helpful to the court to hold a short hearing at the close of discovery but
before dispositive motions are filed, to address whether summary judgment is appropriate given
the particular factual circumstances of the case. Plaintiffs have nothing to lose by asking the court for this hearing. At worst, the court says no. But at best, the plaintiff gets a chance to get her case affirmatively in front of the court prior to the filing of the summary judgment briefs – focusing the court on the facts that the plaintiff deems essential to her case, pushing defendant to defend the summary judgment motion upfront and, perhaps, moving the case towards an earlier resolution.

II. WHEN SHOULD PLAINTIFFS MOVE FOR SUMMARY JUDGMENT

At the close of discovery, it is assumed that defendant will move for summary judgment in an employment case on all of the claims asserted by plaintiff. For the reasons addressed briefly above, defendant does not have much to lose by filing a Rule 56 motion. It is not as clear, however, when, if ever, a plaintiff should move for summary judgment. Clearly, where the material facts are not in dispute and the only issue before the court is one of law, cross-motions for summary judgment are appropriate. For instance, there may be a question of law relating to the availability of damages under a particular statute or factual scenario, or whether, under ERISA for instance, a certain party is considered to be a fiduciary or not. These questions can and should be resolved at the summary judgment stage.

A more difficult decision is whether to move on a claim that turns on the facts developed during discovery. Plaintiffs must assume that defendant will file summary judgment. Thus, any motion a plaintiff brings will likely be in the form of a cross-motion for summary judgment. Cross-motions often cancel each other out – leaving a judge with no choice but to deny them both. However, courts often feel compelled to rule for one party or the other. When a plaintiff moves for summary judgment, the burden of proof is greater because all inferences are drawn in favor of the defendant. Because the burden is greater on a plaintiff on summary judgment, she
might have better shot at getting a trial, and ultimately a win, by simply opposing defendant’s motion for summary judgment – where all inferences would be drawn in her favor. Whether to bring the cross motion as opposed to simply filing an opposition to summary judgment is, of course, a judgment call made by counsel based on the strength of the record.

Now, let’s take a look at the complaint filed by Ida Allison against Leaky Roof Insurance Company, Inc., the fictitious lawsuit prepared by the ABA for purposes of this conference. Ida Allison, who has Crohn’s Disease, filed a complaint against her former employer, Leaky Roof, asserting a direct violation of the requirements of the ADA, retaliation, intentional and/or negligent infliction of emotional distress and punitive damages.

The evidence in the record suggest that Ida’s manager, Sam, knew that she had Crohn’s Disease – even if he wrongly believed it was not a serious illness. At least on one occasion, when Ida was out of work for a hysterectomy, she submitted a medical certification supporting her need for the medical leave to her manager. On other occasions, she informed Sam that work related stress, particularly her interactions with him, caused her to get sick to her stomach, forcing her to double over in pain or spend time in the bathroom. However, she never told Sam that these incidents were caused by or related to her Crohn’s Disease. When Ida’s manager announced that he would be reorganizing the territories and reassigning employees, Ida wrote Sam a letter asking that she be given a territory in Topeka, as opposed to the more rural areas. In the letter to her manager, Ida noted that her Crohn’s Disease necessitated that she be in areas where public restrooms were readily available. Other managers recommended that Ida stay in the Topeka area as well, however, there is no indication in the record that these recommendations made any reference to Ida’s Crohn’s Disease or the need to accommodate Ida’s illness by placing her in a territory where public restrooms were available.
Ida has a shot at prevailing on a motion for summary judgment on the ADA claim – for failure to make a reasonable accommodation for plaintiff’s disability. The material facts necessary to support her claim are not really disputed. Ida’s manager was on notice that Ida had Crohn’s Disease. She requested that he make an accommodation for her illness by assigning her to a territory in Topeka as opposed to a rural area where public restrooms were not readily available. He refused to make the accommodation even though there is evidence that the accommodation was reasonable (i.e. other managers supported it) and there were other employees who could cover the rural territories for Leaky Roof. There is some argument that defendant can make that the request for an accommodation was not formal and direct enough under the ADA or that Ida was the only one who could work in the rural territory (perhaps due to performance rankings, seniority, etc.). However, the reasons that Sam provided to HR for his initial assignment are not in the record and there is no basis for a court to conclude on this record that defendant had no other options when making the territory assignments other than placing Ida in a rural community. In fact, there is record support that Sam placed her in the rural territory despite her disability because he either did not like her or thought she was faking her illness.

Ida should not move for summary judgment on her retaliation claim because there are clear disputed issues of material facts on the retaliation claim. Arguably, Sam’s treatment of Ida after she complained of discrimination could be characterized as retaliation. Ida received a number of questionable write-ups in the weeks after she filed a grievance over the company’s failure to accommodate her Crohn’s Disease and he otherwise treated her in a demeaning manner. Sam also harassed her when she was out of the office with a hand injury, forced her to come back from work before she was released by her doctor and berated her in front of her co-workers.
It is unclear from the record, however, whether Sam’s hostile behavior towards Ida is motivated by her illness and the fact that she filed a discrimination complaint based on her reassignment or his dislike of her in general. The record makes it clear that Sam was unhappy with Ida’s performance before he learned of her Crohn’s Disease, before she missed work as a result of complications from the disease and before Ida complained to the Union Steward about Sam’s treatment and the failure to make an accommodation for her illness. Sam also gave Ida unfavorable write-ups relating to her work performance (whether substantiated or not) both before and after she filed her complaint. Moreover, an argument can be made (albeit not that persuasive) that these actions, while harassing, do not constitute adverse employment actions sufficient to support a retaliation claim since she did not get demoted or lose any income as a result of the write-ups at that time.

Ultimately, in March 2006, after she was absent for another Crohn’s related surgery, she was asked to resign. When she refused, she was terminated. While the termination is clearly an adverse action, there is an argument that the termination was for poor performance and not because of her complaint, particularly given the time that elapsed between the complaint and the termination. That being said, Sam’s post termination comment that Ida “got what she deserved” helps support Ida’s claim that he retaliated against her for filing the complaint. On this record, Ida would be better off opposing defendant’s summary judgment rather than filing her own motion.

Claims for intentional/negligent infliction of emotional distress and punitive damages are inherently fact intensive and require judgments as to the severity of the injury and the intentional nature of the conduct that is best left to the judgment of a jury unless the evidence, when viewed in the light most favorable to the non-movant, clearly is insufficient as a matter of law. In this
case, Ida may consider moving on the punitive damage claim. The record demonstrates that Sam intentionally ignored Ida’s request for an accommodation at the time he was assigning territories because he thought she was “faking” her illness and that she “got what she deserved.” These statements by the decision maker arguably support a finding that defendant acted in a flagrant disregard for the law at the time Ida was assigned to the rural territory. However, the record is a little thin.

Defendant, on the other hand, may take a shot at the intentional infliction of emotion distress claim because there is evidence in the record that Ida’s injuries were not sufficiently severe to support a claim for emotional distress (i.e. she did not seek professional help even when it was offered for free) or that defendant’s conduct was not extreme and outrageous – difficult standards for a plaintiff to meet under the case law. There is scant evidence that Ida suffered extreme emotional distress, although a jury could find the fact that she defecated on herself on more than one occasion as a direct result of the rural assignment sufficient on this point. Likewise, a jury could find the fact that Sam knew by assigning Ida to a rural area, there was a high probability that she would be unable to find a public restroom when her Crohn’s Disease flared up, was sufficiently outrageous to meet the standard under the tort. Again, the plaintiff is better off focusing on these facts in an attempt to thwart defendant’s summary judgment on this claim as opposed to moving on the claim herself.

CONCLUSION

In short, defendant has little to lose and a lot to gain by delaying consideration of settlement until after dispositive motions have been resolved by the court. Defendant is in a better position than the plaintiff to bear the cost of the litigation and is increasingly succeeding in getting the case terminated prior to a trial. While the stakes for settling the case go up
substantially when a plaintiff wins summary judgment, this risk is outweighed by the potential benefits to the defendant of prevailing at the summary judgment stage. Plaintiffs need to be aggressive on both discovery and with a request for a pre-filing hearing if they want avoid the expense and risk of summary judgment and position the case for settlement.