

SUMMARY JUDGMENT IN EMPLOYMENT LITIGATION

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I. Introduction*

Since the Supreme Court's revival of the motion for summary judgment through the 1986 trilogy of cases, *Celotex Corp. v. Catrett*,¹ *Anderson v. Liberty Lobby, Inc.*,² and *Matsushita Electric Industry Co. v. Zenith Radio Corp.*,³ summary judgment motions have played an integral part in the litigation of employment discrimination lawsuits.⁴ Indeed, from the perspective of a defendant/employer, summary judgment is often the most crucial stage of the case.⁵

Accordingly, employment law attorneys must be well versed in the practice of summary judgment motions if he/she is to be a successful advocate. Successful summary judgment practice depends upon a thorough understanding of the procedural and substantive standards governing employment cases. In addition, litigators must begin preparations for a successful summary judgment motion, or a successful defense to such a motion, at the earliest stage in the litigation. In this regard, advocates must be cognizant of the effect their pleadings and discovery efforts will have upon the outcome of a later-filed summary judgment motion.

II. Procedural and Substantive Framework Governing Summary Judgment

A. The Fundamental Summary Judgment Framework

Rule 56 of the Federal Rules of Civil Procedure sets forth the familiar framework governing motions for summary judgment in federal courts.⁶ In pertinent part, Rule 56 provides:

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment

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sought shall be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

As set forth herein, the court is obligated to grant summary judgment if the record evidence submitted by the parties demonstrates that: (1) there is no genuine issue as to any material fact; and, (2) the moving party is entitled to a judgment as a matter of law.

Prior to the Supreme Court's pronouncements in *Celotex*, *Liberty Lobby* and *Matsushita Electric Industry*, courts often viewed summary judgment as disfavored.⁷ As such, many courts limited the availability of summary judgment to a select class of cases.⁸ However, the Supreme Court found such an approach inconsistent with the plain language of Rule 56.⁹ As a consequence, the Supreme Court endorsed a more liberal view with regard to the availability of summary judgment.

Specifically, the Court, in *Celotex*, expressed its view as follows:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.¹⁰

Notably, while the Court did stress that Rule 56 requires the moving party to demonstrate the absence of a genuine issue of material fact, it expressly rejected the notion that the moving party, in order to prevail, had to come forward with evidence negating the opponent's claim.¹¹ Rather, in such situations where the moving party has met his/her initial burden, the opposing party is obligated to demonstrate, through competent evidence, that a genuine issue of material fact exists or that the moving party is not entitled to judgment as a matter of law. In this regard, the Court held:

[A]s we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions,

answers to interrogatories, and admissions on file.” Such a motion, whether or not accompanied by affidavits, will be “made and supported as provided in this rule,” and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial.”

* * *

Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.¹²

With regard to the actual substantive standard that there be “no genuine issue of material fact,” the Court, in *Liberty Lobby*, stressed that the inquiry on a motion for summary judgment is not simply whether an issue of “fact” exists, but rather whether an issue of “material fact” exists.¹³ Thus, it is not enough for a litigant opposing summary judgment to demonstrate that factual disputes exist. Rather, the litigant must demonstrate not only that factual disputes exist but that those factual disputes are “material” to the outcome of the case. Commenting on this prong of the standard, the Court stated:

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.¹⁴

Moreover, as set forth in Rule 56(c), any disputed issue of material fact must also be “genuine.” Describing this concept, the Court in *Liberty Lobby* stated:

[S]ummary judgment will not lie if the dispute about a material fact is “genuine,” that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.¹⁵

Similarly, the Court, in *Matsushita Electric Industrial Co.*, held:

[T]he issue of fact must be “genuine.” When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.¹⁶

As the Court’s 1986 trilogy makes clear, Rule 56 motions can, in appropriate cases, be an effective tool for both sides involved in employment litigation. As noted above, defendant/employers now enjoy increased success with such motions. In addition, with respect to plaintiffs, surviving a defendant’s summary judgment attempt can be an

effective means for reaching a lucrative settlement, in lieu of a full-blown trial of the matter. Unfortunately for many plaintiffs, history demonstrates that summary judgment motions granted in their favor, as opposed to the successful thwarting of a defense motion, are few and far between.¹⁷

B. Summary Judgment in Employment Discrimination Cases

Summary judgment in the context of employment discrimination cases requires the litigants to do more than simply apply the basic framework set forth herein to the allegations which are the subject of the dispute. Rather, through extensive evolution, the courts have delineated a variety of tests and frameworks which have been developed specifically for use in employment cases. Moreover, these frameworks vary according to the type of claims alleged and, in some cases, the jurisdiction in which the case is pending. As a consequence, the practitioner must be careful to analyze the allegations of the dispute at the earliest stage in the litigation to ascertain the elements necessary to gain, or defend against, summary judgment.

The evolution of the standards governing summary judgment in employment discrimination cases commenced with the Supreme Court case of *McDonnell Douglas Corp. v. Green*.¹⁸ Recognizing that discrimination cases involving claims of disparate treatment require proof of intent, of which there is seldom any direct proof, the Court, in *McDonnell Douglas* and its progeny, held that a plaintiff can satisfy its burden by utilizing circumstantial evidence to establish a *prima facie* case of discrimination.¹⁹

Under the framework set forth in *McDonnell Douglas*, *Texas Dep't of Community Affairs v. Burdine*²⁰ and *St. Mary's Honor Center v. Hicks*,²¹ the plaintiff bears the initial burden of establishing his or her *prima facie* case.²² If successful, the burden then shifts to the defendant to articulate a non-discriminatory reason for its actions.²³ Once the defendant has articulated such a reason, the burden shifts to the plaintiff to prove that the defendant's articulated reason is merely a "pretext" for intentional discrimination.²⁴ Significantly, the plaintiff does not necessarily prevail simply by demonstrating pretext at this stage since, ultimately, the plaintiff must demonstrate that the adverse action was a result of impermissible discrimination.²⁵

1. Direct Evidence Approach

As set forth herein, employment discrimination plaintiffs may utilize a direct evidence approach or the indirect, burden-shifting approach set forth in *McDonnell Douglas and Burdine* to establish a case of impermissible disparate treatment. Although direct evidence is rarely available in employment discrimination cases, it is definitely preferable if available.

In this regard, the plaintiff need not bother with the *McDonnell Douglas and Burdine prima facie* showing. Rather, all that a plaintiff need prove under the direct method of proof is evidence which establishes that it was more likely than not that the

defendant based its personnel decision upon improper discrimination (i.e., direct evidence of discriminatory motive).²⁶

In many cases, the plaintiff will attempt to establish his/her case by introducing discriminatory statements. In this regard, advocates must be cognizant of the evidentiary value of allegedly discriminatory statements if they are to prevail on, or defend against, summary judgment. The Eleventh Circuit recently opined at length on the differences between statements which constitute direct evidence of discrimination and those which only constitute circumstantial evidence of discrimination (which, by itself, cannot form the basis for summary judgment under the direct evidence approach).²⁷ In pertinent part, the Eleventh Circuit stated:

The proper legal analysis in employment discrimination cases—which, as outlined above, is fairly complex—has been further complicated by the indiscriminate use of the “direct evidence.” . . . In this section, we cut through this confusion and explain that “direct evidence,” in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic.

The importance of properly defining “direct evidence” arises from our repeated statements that when a plaintiff has direct evidence of illegal discrimination, he need not make use of the *McDonnell Douglas* presumption and conversely, when he does not have such direct evidence, he is required to rely on the *McDonnell Douglas* presumption.²⁸

The court, analyzing its long line of cases on this issue, opined that statements which constituted direct evidence involve statements about the employment action at issue in the case which were made by the decision-maker. Conversely, discriminatory statements made by non-decision makers or not involving the personnel action at issue typically rise only to the level of circumstantial evidence.²⁹

Accordingly, in preparing for summary judgment, the defendant employer will need to consider whether the plaintiff can present evidence of the type noted above, i.e., direct evidence. The defendant employer will need to establish that no genuine issue of material fact exists with regard to direct evidence. Conversely, the plaintiff, if he/she has evidence which can be construed as direct evidence of discrimination, will want to rely heavily upon such evidence to demonstrate the existence of a genuine issue of material fact as to the defendant’s discriminatory intent.

2. Circumstantial Evidence Approach – *McDonnell Douglas* and *Burdine*

In the typical disparate treatment employment discrimination case, direct evidence is unavailable to the plaintiff. Accordingly, the burden-shifting approach set forth in *McDonnell Douglas* and its progeny must be utilized.

As noted herein, the *McDonnell Douglas* approach mandates that the plaintiff first establish his/her *prima facie* case of discrimination. Generally, to establish a *prima facie* case, the plaintiff must present evidence establishing that:

- (1) He or she is a member of a protected group and suffered an adverse employment action;
- (2) He or she was qualified for the job in question; and,
- (3) Different treatment was given to someone outside of the protected class.³⁰

At this stage, careful attention must be paid by both the defendant and the plaintiff to the actual formulation of the *prima facie* showing. Although the general framework outlined herein is typically followed, courts have tailored the *prima facie* showing and developed several nuances to fit the facts of various types of discriminatory conduct.³¹ For example, in a case involving an alleged discriminatory failure to promote, the Eleventh Circuit has held that a plaintiff must demonstrate that:

- (1) He or she is a member of a protected group and was passed over for the promotion;
- (2) He or she was qualified for the promotion; and,
- (3) An individual of a different race (or gender, etc.) was given the promotion.³²

In contrast, in a reduction-in-force case, the Eleventh Circuit has slightly modified the *prima facie* showing such that a plaintiff must demonstrate that:

- (1) He or she is a member of a protected group and was adversely affected by an employment decision;
- (2) He or she was qualified for his or her current position or another position at the time of discharge; and,
- (3) There is evidence from which a reasonable factfinder could conclude that the employer intended to discriminate on the basis of the protected class in making its employment decision.³³

As you can see, while the essential purpose of the *prima facie* showing remains the same, the courts have tailored the showing to fit the challenged employment decision at issue in each case. Accordingly, when pursuing, or defending summary judgment, litigants must be cognizant of the proper *prima facie* showing required. Moreover, litigants must be cautious with regard to the characterization of the challenged employment action in their pleadings and throughout discovery, as this may impact upon

the particular framework utilized. For example, whether a challenged action is considered a reduction-in-force versus an ordinary termination can trigger slightly different *prima facie* burdens which may or may not have an impact upon the outcome of a summary judgment motion, or even trial. Similarly, as reduction-in-force cases often arise in the context of a merger or a sale of a business, counsel must be careful to characterize the case correctly. In this regard, an alleged discriminatory discharge based upon a reduction-in-force entails a different *prima facie* showing than is required of a similar failure-to-rehire (after a merger or sale).³⁴

The *prima facie* stage of the *McDonnell Douglas and Burdine* framework presents the first potential arguments which defendants may utilize in a motion for summary judgment. That is, defendants can attack the inability of the plaintiff to establish a genuine issue of material fact as to one of the criteria comprising plaintiff's *prima facie* case. If successful in establishing the absence of a material fact with regard to plaintiff's inability to establish his/her *prima facie* case, summary judgment is proper for the defendant. In this regard, summary judgment motions typically center around whether the plaintiff was qualified for his/her position (or, in the case of a failure to promote, the position sought), as the other prongs of the *prima facie* case are often undisputed (whether plaintiff is a member of the protected class, whether plaintiff suffered adverse employment action and whether someone outside the protected class received different treatment).³⁵

If the plaintiff is able to establish his/her *prima facie* case (or at least a genuine issue of material fact as to each element), the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. At this stage, the Supreme Court has held that the defendant's burden, being only one of "production," is relatively light.³⁶ Given the relative ease of satisfying this burden, summary judgment in favor of the plaintiff is unusual at this stage. However, defendants must be careful not to create genuine issues of material fact at this stage by introducing evidence of a non-discriminatory reason which changes over time or is improbable.³⁷

The third stage of the *McDonnell Douglas and Burdine* framework mandates that once an employer articulates a legitimate, non-discriminatory reason for its actions, the plaintiff must prove that the defendant's reason is merely a pretext for intentional discrimination.³⁸

Generally, plaintiffs attempt to demonstrate pretext at the summary judgment stage through a combination of approaches. Specifically, plaintiffs often rely upon the strength of their *prima facie* case, the weakness or obviously-contrived characteristic of the defendant's legitimate reason, and any other additional evidence of pretext or discrimination (such as evidence of favorable treatment given to employees outside the protected class or discriminatory remarks which do not constitute direct evidence but nonetheless are probative on the issue).³⁹

Employment counsel at this stage must be cognizant of several pitfalls. First, unsupported assertions of fact, subjective beliefs and personal opinions may not be

utilized to create a genuine issue of material fact.⁴⁰ In this regard, plaintiff's counsel must be careful not to rely solely upon his client's subjective beliefs and opinions as to the claims. Rather, the plaintiff must produce evidence based upon personal knowledge or observation, whether from the plaintiff directly or through witnesses.

Secondly, stray remarks made by non-decision makers, or statements made by decision-makers which are unrelated to the employment decision at issue, are generally held insufficient to create a genuine issue of material fact.⁴¹

Third, as noted herein, plaintiffs in employment discrimination cases often utilize evidence indicating that employees outside of the protected class are treated more favorably. If these employees are similarly situated, such evidence may well be probative of discrimination. However, litigants must be cautious not to compare themselves with employees who are not "similarly situated." Such comparisons have been deemed insufficient to create a genuine issue of material fact.⁴²

Finally, in employment termination cases, defendants may preclude the establishment of a genuine issue of material fact as to pretext if it can establish that the same individual who hired the plaintiff also made the decision to terminate the plaintiff.⁴³

B. Summary Judgment in Sexual Harassment Cases

As with general discrimination cases, sexual harassment (itself a form of gender discrimination) cases are also routinely the subject of a motion for summary judgment. As with discrimination cases, plaintiffs pursuing a claim of sexual harassment must establish a *prima facie* case. Plaintiffs may demonstrate such a *prima facie* showing by demonstrating:

1. That he/she belongs to a protected group;
2. That he/she was subject to unwelcome sex harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature;
3. That the harassment was based on his/her sex;
4. The harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and to create a discriminatorily abusive working environment; and,
5. A basis for holding the employer liable (such as *respondeat superior* in the case of co-worker harassment).⁴⁴

As with discrimination claims, each of the prongs in the sexual harassment *prima facie* case can form the basis for a motion for summary judgment. In this regard, motions for summary judgment filed by defendants will typically attempt to demonstrate that the undisputed material facts establish that the plaintiff cannot meet his/her *prima facie*

showing. Conversely, the plaintiff will attempt to demonstrate the existence of genuine issues of material fact as to these elements (if defending a motion for summary judgment) or that the undisputed material facts conclusively establishes these elements (if moving for summary judgment).

Litigants must also bear in mind that the Supreme Court, in *Faragher v. City of Boca Raton*⁴⁵ and *Burlington Industries, Inc. v. Ellerth*,⁴⁶ recently established an affirmative defense for employers who are subject to claims of intangible (i.e., hostile environment) sexual harassment perpetrated by a supervisory employee. The affirmative defense consists of two prongs: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.⁴⁷

As with the plaintiff's *prima facie* showing, defendants may also move for summary judgment by attempting to demonstrate that the plaintiff cannot establish a genuine issue of material fact which precludes the establishment of the affirmative defense.

III. Practical Tips and Strategies for Gaining, and Defending Against, Summary Judgment

A. Form of Motion and Statement of Facts

Although no particular form is prescribed for a motion for summary judgment, it is ordinarily useful to include a concise statement of the undisputed facts which shows that the movant is entitled to the relief requested. Litigants should also review the local rules of the court which will decide the motion, as many courts have specific requirements with regard to summary judgment motions. Typically, courts require a motion which sets forth clearly and concisely the basis for the relief requested and a memorandum of law containing the legal argument in support of the motion.

With regard to the statement of facts, counsel should present a clear and concise statement of the "material" facts which are undisputed. Counsel should avoid presenting an exhaustive statement of facts which are not germane to the issues. Such facts will only serve to confuse the issues. In addition, counsel must be cautious not to inject legal argument into his/her statement of undisputed facts, as this will surely become the basis for an argument by opposing counsel that the "fact" in question is disputed. Once a concise statement of undisputed facts is presented, counsel should incorporate those facts, and only those facts, in his/her legal arguments.

Obviously, counsel seeking summary judgment in his/her favor will want to avoid utilization of any facts which are in dispute, while counsel opposing summary judgment will want to demonstrate that material facts are in dispute, thereby precluding summary judgment on any issue in which the determination of that fact is relevant. Significantly, although a fact may be disputed in actuality, proponents of summary judgment may

nonetheless be able to argue in their motions for summary judgment that *even assuming, for purposes of the motion only, that the non-movant's facts are established*, the motion must still be granted. This is often the case where the non-movant is relying upon facts which are not “material” to the outcome of the issue.

B. Discovery and Supporting Evidence

As set forth in Rule 56, motions for summary judgment may be filed “with or without supporting affidavits.” In deciding the motion, the court may consider the “pleadings, depositions, answers to interrogatories, admissions on file . . . and affidavits.” Accordingly, counsel for the parties will want to utilize the discovery process to maximize his/her chance at success at the summary judgment stage.

For plaintiffs, this means accumulating evidence which, at the very least, establishes a genuine question of material fact as to each element of his/her claim. Conversely, defendants will want to accumulate record evidence demonstrating the absence of such a genuine issue of material fact. In this regard, the depositions of the plaintiff and the defendant’s decision-maker are usually the most critical. As to the plaintiff’s deposition, defendant’s counsel will want to elicit testimony as to the basis for the plaintiff’s claims. In this manner, if the plaintiff testifies that his/her sole basis for claiming discrimination is an isolated remark made by a non-decision maker, for example, then the defendant will utilize this as the basis for its summary judgment motion.

Significantly, courts have held that witnesses, including the parties, may not contradict or undermine their deposition testimony through the use of a subsequent affidavit.⁴⁸ Accordingly, litigants cannot rely upon affidavits in support of, or in defense to, a motion for summary judgment if the litigant previously testified to the contrary.

In addition, as set forth in Rule 56, affidavits must be based upon personal knowledge and must set forth facts as would be admissible in evidence. Thus, counsel must be cautious not to rely upon affidavits which contain hearsay or other inadmissible evidence. Such affidavits are properly subject to a motion to strike.⁴⁹ In this regard, Rule 56(e) provides:

Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by

affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the party.⁵⁰

Moreover, counsel for the parties must also be cautious not to submit affidavits solely for reason of delay or in bad faith as Rule 56(g) specifically authorizes the court to sanction the litigant by ordering payment of the expenses incurred by the adverse party.

As can be surmised from the discussion above, the probabilities of success at the summary judgment stage is usually determined during the discovery stage of the case. Depositions, responses to interrogatories and admissions are all critical in terms of establishing the existence, or absence, of a genuine issue of material fact in employment cases. While affidavits are certainly useful to fill in holes or to provide testimony where depositions have not been taken, their usefulness is greatly diminished if the witness has been comprehensively deposed by the adverse party. As such, one of the most critical actions an advocate can undertake in preparation for summary judgment is to outline his/her arguments *at the outset* of the case, prior to discovery commencing. In this manner, the advocate will be better equipped to accumulate the requisite record evidence supporting his/her summary judgment positions.

C. Timing

As set forth in Rule 56, defendants may serve a motion for summary judgment at any time, while plaintiffs ordinarily must wait until the expiration of 20 days from commencement of the action (unless the defendant first serves a motion for summary judgment, in which case the plaintiff may immediately file his or her motion). However, in most cases, it is usually not advantageous to file a motion for summary judgment that soon, as the discovery period will still be on-going. In the majority of cases, if the motion is filed prior to the end of the discovery period, the adverse party will have a clear outline as to what evidence he/she needs to accumulate to rebut summary judgment. Moreover, the adverse party may contend that the motion is premature, as discovery is still needed to establish whether there are any genuine issues of material facts in dispute.

However, on occasion, it may be preferable to file a motion for summary judgment early in the case. For example, in cases where the evidence supporting summary judgment cannot seriously be disputed, no matter how much discovery is conducted by the adverse party, a successful early summary judgment motion may serve to limit the costs of litigation.

IV. Conclusion

Successful summary judgment motions in the realm of employment law begins with a comprehensive understanding of the substantive employment law and the burdens associated with the type of case at issue. As detailed herein, the courts have developed several different frameworks available to litigants attempting to prove an employment

law violation. Accordingly, thorough understanding of the framework(s) involved in the case at issue is necessary prerequisite to a successful summary judgment motion.

In addition, counsel must become adept at applying Rule 56's procedural framework, as interpreted by the Supreme Court in *Celotex*, *Liberty Lobby* and *Matsushita Electric Industrial Co.*, to the competent record evidence developed during the discovery phase of the case. In this manner, counsels' preparations prior to the discovery process and the evidence gleaned from that process will likely play a substantial part in the success or failure of a motion for summary judgment.

¹ 477 U.S. 317 (1986).

² 477 U.S. 242 (1986).

³ 475 U.S. 574 (1986).

⁴ See e.g., Eichhorn, Lisa, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans With Disabilities Act of 1990*, 77 N.C. L. Rev. 1405 (Apr. 1999) (Citing study by the ABA Commission on the Mentally Disabled finding that a significant portion of ADA cases filed between 1992 and 1998 resulted in summary judgment in favor of the defendant); *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 Creighton L. Rev. 9 (Dec. 1997) (citing a judicial survey in which judges reported that summary judgments in employment cases were granted much more frequently to defendants than to plaintiffs).

⁵ *Id.*; See also Charny, David and G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination for "High-Level" Jobs*, 33 Harv. C. R.-C.L. L. Rev. 57, 98 (Winter 1998) (Noting that plaintiffs often have an advantage if they are able to get past summary judgment).

⁶ Rule 56 is used as a guide throughout this article since most employment discrimination cases are brought under federal statutes and, as such, are usually brought in, or removed to, federal courts. In addition, most state court civil procedure rules utilize a similar summary judgment framework as is set forth in Rule 56.

⁷ Macklin, Major James E., *Summary Judgment Motions in Discrimination Litigation: A Useful Tool or a Waste of Good Trees*, 1995 Army Law. 12 (Nov. 1995) (quoting *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993)).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Celotex*, 477 U.S. at 322-323.

¹¹ *Id.* at 324.

¹² *Id.*

¹³ *Liberty Lobby*, 477 U.S. at 247-248.

¹⁴ *Id.* at 248.

¹⁵ *Id.* at 248.

¹⁶ *Matsushita Electric Industrial Co.*, 475 U.S. at 586.

¹⁷ *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 Creighton L. Rev. 9 (Dec. 1997).

¹⁸ 411 U.S. 792 (1973).

¹⁹ *Id.*; *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

²⁰ 450 U.S. 248 (1981).

²¹ 509 U.S. 502 (1993).

²² *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-253; *Hicks*, 509 U.S. at 506.

²³ *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254; *Hicks*, 509 U.S. at 506.

²⁴ *McDonnell Douglas*, 411 U.S. at 807; *Burdine*, 450 U.S. at 256; *Hicks*, 509 U.S. at 508-509.

²⁵ *Hicks*, 509 U.S. 502.

²⁶ *Wright v. Southland Corp.*, 197 F.3d 1287, 1292-1293 (11th Cir. 1999).

²⁷ *Id.*

²⁸ *Id.* at 1293 (internal citations omitted).

²⁹ *Id.* at 1294-1298.

³⁰ *Id.* (citing *McDonnell Douglas Corp.*).

³¹ Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251 (Fall 1999).

³² *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1333 (11th Cir. 1998).

³³ *Mitchell v. USBI Co.*, 186 F.3d 1352, 1354 (11th Cir. 1999).

³⁴ *See Fernandes v. Costa Bros. Masonry, Inc.*, 1999 U.S. App. LEXIS 34283 (1st Cir. Dec. 29, 1999) (slip opinion).

³⁵ Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251, 254-255 (Fall 1999).

³⁶ *Hicks*, 509 U.S. at 509.

³⁷ Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251, 257 (Fall 1999).

³⁸ *Hicks*, 509 U.S. at 509.

³⁹ For a more thorough discussion of these approaches, see Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251 (Fall 1999).

⁴⁰ See *Doe v. Dekalb County School District*, 145 F.3d 1441, 1447 (11th Cir. 1998); *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 945 (8th Cir. 1994).

⁴¹ *Price Waterhouse v. Hopkins*, 490 U.S. 277 (1989) (O'Connor, J., concurring); See also Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251, 262 (Fall 1999).

⁴² Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251, 262-263 (Fall 1999).

⁴³ Seyferth, Paul D., *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 *The Labor Lawyer* 251, 263 (Fall 1999).

⁴⁴ *Mendoza v. Borden, Inc.*, 1999 U.S. App. LEXIS 30400 (11th Cir. Nov. 16, 1999).

⁴⁵ 118 S. Ct. 2275 (1998).

⁴⁶ 118 S. Ct. 2257 (1998).

⁴⁷ *Faragher*, 118 S. Ct. 2275.

⁴⁸ *Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc.*, 736 F.2d 656 (11th Cir. 1984); *Buckner v. Sam's Club, Inc.*, 75 F.3d 290 (7th Cir. 1996); *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984).

⁴⁹ *Id.*

⁵⁰ See also Ramin, Jeff, *Attacking Errors in Affidavits Used as Summary Judgment Proof*, 46 *Baylor L. Rev.* 789 (Summer 1994) (reviewing Texas law).