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EMPLOYMENT LAW

Time to Abolish Summary Judgment in Employment Law Cases?

By Jeffrey Campolongo All Articles

The Legal Intelligencer July 26, 2013


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One of the benefits of this column is that for the last five years, once a month, I get to review, analyze and (sometimes) critique a recent employment law decision. Reviewing court decisions and case summaries affords me the opportunity to wrestle with logic and reason and apply it to real-life scenarios. While I usually get to write about plaintiffs and defendants, and lawyers and facts, it is not often that I get to write about the judges who make those decisions. To date, that was by design. Our judiciary deserves the respect to decide matters independently and without outside influence, including influence from those who happen to have a monthly column on employment law.

This month was different. I happened to come across a law review article written by U.S. District Judge Mark W. Bennett of the Northern District of Iowa titled: "Essay: From the 'No Spittin', No Cussin' and No Summary Judgment' Days of Employment Discrimination Litigation to the 'Defendant's Summary Judgment Affirmed Without Comment' Days: One Judge's Four-Decade Perspective," published in Volume 57, Issue 4 of the *New York Law School Law Review* (2012-13). Right out of the gate, from the title alone, I knew this was going to be an interesting piece. For those who do not know him, Bennett has been a U.S. district judge in the U.S. District Court for the Northern District of Iowa since 1994. Lest there be any doubt, the article's preamble makes it clear that the Northern District of Iowa has led the 94 districts throughout the nation in trials per judge per year more often than any other district over the past decade. It is indeed a busy court.

To fully understand and appreciate Bennett's "essay," as he dubbed it, it is important to have some background on the author himself. Bennett had aspirations of being a civil rights lawyer since he was in junior high school. In law school, he was inspired by his employment discrimination professor, Mimi Winslow, and later went on to become a prominent employment lawyer, representing plaintiffs and employers. In fact, his first case out of law school was an age discrimination case that eventually ended up before the U.S. Supreme Court, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

After four decades of observing, litigating, deciding and commenting on employment law cases as one of the nation's most-sought-after keynote speakers (or, as he calls it "laboring in the cotton rows of employment discrimination litigation"), Bennett's "essay" on summary judgment candidly reveals: "In hindsight, I see that, in my haste to have a current docket, I was way too aggressive and overused summary judgment. Unfortunately, not one of those decisions was overturned on appeal." It is this unique, and perhaps unparalleled, experience as both an employment law litigator and jurist that lend credibility to Bennett's ultimate conclusion — the time has come to "throw out the baby with the bathwater" and "eliminate summary

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judgment altogether." Bennett believes that summary judgment abuse and overuse occurs in all types of?cases, but is especially magnified in employment discrimination cases. He further claims this?problem is exacerbated by the daily ritual of appellate courts affirming?summary judgment grants to employers, often without comment, at a rate?that far exceeds any other substantive area of federal law. Bennett believes there are six primary reasons for?this "unfriendliness," or what many scholars have observed as "hostility": (1)?too many frivolous employment discrimination lawsuits; (2) an overworked?federal judiciary; (3) increased sophistication of employers; (4) increasingly?subtle discrimination; (5) implicit bias in judicial decisions; and (6) a shift?among judges from trial-judging to case-managing.

Not surprisingly, Bennett is not alone in his contempt for the abuse of summary judgment in the federal court system; nor is it new. In fact, Bennett notes that English common law did not permit a trial judge to withdraw claims from a jury without the parties' agreement. For nearly 20 years, commentators have expressed concern that the "increased use of summary judgment to dispose of civil rights actions has deprived plaintiffs of the fairer, more accurate decision-making assured by a fact-finder's decision at trial." On the issue of the greater sophistication of employers, Bennett points out that: "As federal trial court judges, we have to work extra hard to recognize that, while there may be less overt discrimination than in the past, we cannot become jaundiced to employment discrimination claims. ... 'Judges may be under the misapprehension that society has somehow transcended the problem of unlawful bias, and thus the problem of discrimination in employment.' Federal judges need to be aware of and avoid this pitfall."

According to Bennett, the time has come to recognize that summary judgment has become too?expensive, too time-consuming for the parties and the judiciary, and too likely?to unfairly deprive parties — usually plaintiffs — of their constitutional and?statutory rights to trial by jury. So what does he propose?

If anointed "Grand Poobah" of the Federal Rules of Civil Procedure for a day, Bennett's first edict would be to eliminate summary judgment altogether. He suggests eliminating use of the summary judgment industry for a five- to 10-year period to evaluate the pros and cons of our federal civil justice system without summary judgment. Once new data emerged as a result of the ban, "judges, lawyers, litigants, jurors, the legal academy, and other stakeholders could weigh in, and we could have a vigorous national debate on the merits of summary judgment."

Alternatively, Bennett proposes to amend Rule 56 to alter the American rule on attorney fees. Award the party who successfully defeats a summary judgment motion its actual attorney fees plus the fees spent by its adversary, he said, and frivolous and nonmeritorious summary judgment motions would all but disappear overnight. Or, Rule 56 could be amended to abrogate its use in certain kinds of cases, such as low-dollar cases and cases that could be tried in less time than preparing, resisting and ruling on a typical summary judgment motion.

Interestingly, Bennett does not believe that the alternative suggestions would even eliminate the main issue of courts inappropriately granting summary judgment and routinely invading the province of the trial jury as to weighing evidence, determining credibility of witnesses, determining the legitimacy of the employers' articulated nondiscriminatory justifications, and weighing the plaintiff's evidence of pretext. Failing? elimination of summary judgment, Bennett does believe that dramatic modifications to Rule 56 should be made to help eliminate its "disparate?and unfair impact."

As refreshing as it may be to read Bennett's essay, it is all too unrealistic that any significant changes will happen any time in the foreseeable future. The vestiges of summary judgment are too deeply rooted in federal jurisprudence and the stakes too high for the constituents and users of Rule 56. Bennett is savvy enough to know that Rule 56 will not be abolished but he makes a very compelling case for more careful use by practitioners, and more thoughtful disposition by his colleagues on the bench. Like him, I share his cynicism but at the same time believe, as he does, that "no one would [ever] pay for bottled water or radio" either.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.*

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