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7 Jan 2009

08-CV-119

John J. Rabiej  
Administrative Office of the  
United States Courts  
Washington, D.C. 2054

Re: Summary of Comments on proposed changes to Rule 56

Dear Mr. Rabiej:

I wish to present this testimony to the Committee regarding these proposed changes. I am strongly opposed to making the grant of summary judgment mandatory in certain cases. I have practiced in Federal court in San Antonio, Texas since 1992. Prior to 2003, I practiced employment law for some fourteen (14) years. Starting in 2004, I have worked for a non-profit agency representing persons with disabilities. Since 1992, I have seen summary judgment more and more become a docket clearing device.

In ADA cases, today, 92-97% of reported ADA Title I cases are dismissed by summary judgment or judgment as a matter of law. *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disability L.Rptr. 403 (1998); A. Albright, *Survey Update: 2003 Employer-Employee Wins Under ADA Title I*, 28 Mental & Physical Disability L.Rptr. 319, 495 (corrections for statistics) (2004); A. Albright, *2000 Employment Decisions Under the ADA Title I – Survey Update*, 25 Mental & Physical Disability L.Rptr. 508-10 (2001); A. Albright, *Survey Update: 2001 Employer-Employee Wins Under ADA Title I*, Mental & Physical Disability L. Rptr. 394 (2002); J. Parry, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disability L. Rptr. 403-07 (1998); J. Parry, *Employment Decisions Under ADA Title I – Survey Update*, 23 Mental & Physical Disability L. Rptr. 293-98 (1999); J. Parry, *1999 Employment Decisions Under the ADA Title I – Survey Update*, 24 Mental & Physical Disability L. Rptr. 348-50 (2000).

The reality is that motions for summary judgment have become common and expected in employment cases. Summary judgment is already granted frequently and even routinely. In my experience, deserving cases are too often dismissed through summary judgment. In 2001, I represented the female victim of sex harassment. The employer made repulsive sexual noises and innuendoes regarding my client frequently. A female co-worker corroborated the male manager's unabashed, open sexual harassment. During sexual harassment prevention training, the manager and other males joked about there being no such thing as sexual harassment. Its just a female who says no, they joked. Yet, this case did not get to trial. Summary judgment was granted. The employer did present issues

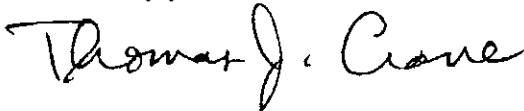
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regarding alleged discipline for other offenses. But, the case was close. It should have gone to trial.

My client at the time had very few assets. She lived in the country on a few acres on which she kept several sick and lame horses and mules. When we lost on appeal to the Fifth Circuit, the Defendant attempted to seize her sick animals to pay for the award of costs against her.

In my years doing employment cases in federal court, I can recall only perhaps 5% in which summary judgment was not sought. Summary judgment, these days, is where cases are won or lost in federal court. There is no need to make summary judgment more prevalent. It is already over-used in my experience.

Sincerely yours,

A handwritten signature in cursive script that reads "Thomas J. Crane". The signature is written in black ink and is positioned to the right of the typed name.

Thomas J. Crane