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08-CV-179

VIA ELECTRONIC TRANSMISSION
Peter G. McCabe, Secretary
Committee on rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Opposition to proposed changes to Rule 56

Greetings:

I strongly oppose your changes to Rule 56 for three reasons, (1) the rule does not work for indirect, circumstantial evidence, (2) the committee is adopting a rule that most federal districts and federal judges have decided not to adopt, and (3) the rule does nothing to address the known deficiencies of modern summary judgment practice.

The rule that you have proposed contemplates that cases will be decided on direct evidence. With direct evidence, one set of facts directly contradicts another set of facts. If cases were built only with direct evidence, a tit-for-tat comparison would work very well. However, circumstantial evidence is indirect evidence. With indirect evidence, four or five facts taken together may raise an inference that contradicts another fact. In my experience, most non-FLSA employment law cases turn on circumstantial evidence. In such cases, the effect of the proposed rule will be to prevent the court from seeing the forest for the trees.

As I understand it, the proposed rule has been available for adoption as a local district rule or individual court rule. Those judges who believe the rule to be beneficial are free to adopt it. Importantly, the vast and overwhelming majority have not. It is not the role of the committee to step on the hands of the bench. While courts can currently adopt the rule (as it does not contradict the existing Rule 56), I do not see how a court can opt out of the rule once adopted. In other words, now judges are able to choose from themselves the best practice, given regional and other variances. If the proposed rule is adopted, there is no such discretion to revert to the current rule if a court or district believes it to be better suited.

Finally, the proposed rule does nothing to address the real problems of summary judgment. First, the order is usually backwards to how it is at trial. At trial a plaintiff goes first; with summary judgment the defendant usually is the movant. To correct this, plaintiffs should be allowed to file a surreply as a matter of course. Second, discovery usually ends prior to the filing of the summary judgment motion. This encourages defendants to hide the ball and litigate by surprise. Affidavits prepared by lawyers and signed by witnesses are lousy evidence, but are common in summary judgment motions The opportunity to depose a witness after the affidavit

has been revealed serves the interests of truth and justice. Thus I believe that a better "fix" to Rule 56 would be to allow a surreply as a matter of course and to have summary judgment motions be due not less than forty-five days before the close of discovery (with a corresponding forty-five day response deadline).

Sincerely yours,
ROB WILEY, P.C.

/s/ Robert J Wiley