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STATEMENT OF RICHARD T. SEYMOUR ON RULE 56, FED. R. CIV. PRO., BEFORE THE ADVISORY COMMITTEE ON THE CIVIL RULES

Thank you for providing this opportunity to speak on the proposed amendments to Rule 56.

It is clear that some cases or defenses are filed without an adequate basis or that their lack of a basis becomes clear in discovery. Rule 56 is an essential tool for striking untenable claims and defenses. I have used it in employment discrimination cases in seeking and obtaining partial summary judgment on questions of liability and of remedy.

The focus of my statement is on why it seems to me that the Committee should reject the recommendations of some that the use of summary judgment should be increased by making the grant of summary judgment mandatory in some circumstances.

A. Summary Judgment is Being Granted in Close Cases

Yesterday evening, I looked at all of the summary judgment decisions in employment discrimination cases handed down from September 1, 2008, through November 16, 2008. Of the 145 cases produced by my search term, 122 involved grants of summary judgment solely to employers in cases brought by individual employees or the EEOC.[1] There were 98 affirmances, 9 reversals or vacaturs of the grant of summary judgment, and 15 cases in which the grant of summary judgment was affirmed in part and reversed in part. Thus, 24 of the 122 cases—19.7% of the total—involved at least a partial reversal.

When nearly a fifth of summary judgment decisions are reversed at least in part, it is difficult to conclude that summary judgment is not being granted in close cases. Changing the language of the rule to make summary judgment mandatory will increase the number of grants of summary judgment in close cases.

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[1] The search terms run on November 16, 2008, were ("SUMMARY JUDGMENT" "RULE 56") & ("TITLE VII" "AGE DISCRIMINATION IN EMPLOYMENT ACT" "AMERICANS WITH DISABILITIES ACT" WHISTLEBLOWER WHISTLE-BLOWER) & DA (AFT 08/31/2008). I excluded cases not involving employment discrimination, cases that were tried, cases involving remands to state court, and one case in which summary judgment had been granted to the plaintiff on one claim, and to the employer on another claim.

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The possibility of appellate reversals is not a good reason to exacerbate the current problems of abuse of Rule 56 by making grants of summary judgment mandatory. Even with an appellate reversal, an improper grant of summary judgment delays the case by a year or more while memories fade. It adds a great deal to the expense of litigation. And many plaintiffs do not have the resources to appeal an improper grant of summary judgment, or cannot obtain counsel. For them, grants of summary judgment in close cases means the ends of their cases despite the possibility that a jury might legitimately find in their favor.

B. Observations of Some Courts of Appeals that Summary Judgment Is Being Used as a Docket-Clearing Device

A further window on the abuse of summary judgment is shown by decisions of the First, Second, and Third Circuits that have criticized the tendency of district courts to use summary judgment as a device to clear their dockets rather than to identify and dispose of hopelessly unmeritorious cases. *Delgado-Biaggi v. Air Transport Local 501*, 112 F.3d 565, 567 (1st Cir. 1997) ("As we previously have admonished, the '[ten day] notice requirement is not merely window dressing' and the 'proper province' of summary judgment is 'to weed out claims that do not warrant trial rather than simply to clear a court's docket.'"); *Stella v. Town of Tewksbury*, 4 F.3d 53, 55 (1st Cir. 1993) ("Although summary judgment is a useful shortcut leading to final adjudication on the merits in a relatively small class of cases, its proper province is to weed out claims that do not warrant trial rather than simply to clear a court's docket."); *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998) ("The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases."); *McMullen v. Bay Ship Management*, 335 F.3d 215, 219 (3d Cir. 2003) ("The only virtue in dismissing the case here was clearing the court's docket. Although promptness in judicial administration is highly desirable, delay may sometimes be necessary to the mission of doing justice. We are all too often reminded that 'justice delayed is justice denied.' But, it is equally true that in some situations 'justice rushed is justice crushed.'")

C. The Failure of Rule 56 to Deal with Inferences is a Structural Problem Helping to Explain the Grant of Summary Judgment in Close Cases

Rule 56 does not contain any requirement that the moving party show its position does not rely on inferences in its favor, and that no reasonable inference from the record could be drawn to support the nonmoving party with respect to the contention at issue. This omission, and the omission of a requirement that the nonmoving party address the question of inferences, means that the court does not have a developed perspective as to the possible inferences in the case, and can result in the court's inadvertent drawing of inferences in favor of the moving party.

The examples discussed in Part E below are a demonstration of the ease with which the district courts can slip into the adoption of inferences favoring the moving

party when Rule 56 does not require a developed discussion of inferences.

D. Two Case Examples of Highly Improper Grants of Summary Judgment

It is important to put a human face on the abuse of summary judgment. The two illustrative examples discussed below were chosen from many possible examples. Because these cases were both reported, there was enough description of the facts to see that the grant of summary judgment by the lower court was a miscarriage of justice. In the first case, the court of appeals recognized the problem and corrected the error. In the second, the court of appeals failed to recognize the problem and replicated the error.

Many appellate rulings on summary judgment are contained in unreported summary opinions that do not discuss the facts, making it impossible to analyze the true rate at which the dismissals of potentially meritorious cases are being affirmed.

The one certain result of adopting the suggestion that lower courts be mandated to grant summary judgment is that the existing rate of miscarriages of justice, whatever its number, will be increased.

1. A Case in Which the Court of Appeals Saved the Plaintiff's Claim

Robinson v. Sappington, 351 F.3d 317 (7th Cir. 2003), involved Ms. Robinson's claim that an Illinois State-court judge with whom she worked had sexually harassed her. The district court granted summary judgment to defendants, holding that plaintiff had failed to meet the objective test for summary judgment. The court of appeals quoted its ruling:

> In context, it is clear that although Sappington's comments and controlling behavior were undoubtedly inappropriate and sometimes offensive, they did not rise to the level of being pervasive or severe. Sappington did not proposition Plaintiff and he did not initiate uninvited physical contact of a sexual nature. He never made advances toward her. He did not attempt to kiss her or touch her in a sexual way.... Sappington's conduct was not threatening. Nor can it be said that the workplace was permeated with "discriminatory intimidation, ridicule, and insult." ... Thus the Court concludes that the sum total of the evidence ..., however offensive one might consider it, falls short of creating the kind of "hellish" environment that the Seventh Circuit has established as a standard for liability under Title VII.

Id. at 327, *quoting* the lower court's opinion at 20. The Seventh Circuit reversed the grant of summary judgment to defendants, held that plaintiff had met the objective test for sexual harassment, and set forth the facts that would have made it clear to any reasonable jury that this was not remotely a close case as to the objective test:

> First, we note that there were several overtly sexual comments made by Judge Sappington to Ms. Robinson including Judge Sappington's offer to purchase Ms. Robinson a sexual device . . .; Judge Sappington's comment that the attorneys were only speaking to her because she was wearing revealing clothing . . . and the twice-repeated comment that Judge Sappington would like Ms. Robinson to "sit on his face" . . . . In addition to these comments, there is strong evidence that Judge Sappington took an inappropriate interest in Ms. Robinson's relationships with men, first inquiring as to the status of her marriage and later, on two occasions, expressing outrage at the possibility of her romantic involvement with anyone else.
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> Second, we believe that much of Judge Sappington's conduct reasonably could be construed as intimidating and threatening. Judge Sappington monitored Ms. Robinson's actions both within the courthouse and after hours, going so far as to fly an aircraft over the farm of Ms. Robinson's mother when he knew Ms. Robinson was visiting there. Judge Sappington exhibited anger when he believed other men showed interest in Ms. Robinson. He also subjected Ms. Robinson to hearing the details of a gruesome murder and suggested that she might face a similar fate. Finally, on one occasion, Judge Sappington grabbed Ms. Robinson's face and told her point-blank that, if she "shacked up" with anyone else, he would kill her.
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> Finally, Ms. Robinson was the recipient of other gestures that, although innocuous in themselves, when put in the larger context, served as constant reminders of Judge Sappington's interest in her and in exercising control over her. Specifically, Judge Sappington called her beautiful, a "blonde Demi Moore" or a golden goddess on a daily basis. He took her to lunch and became angry if Ms. Robinson did not eat lunch with him. Additionally, for a period of several weeks, he shook Ms. Robinson's hand on a daily basis to experience physical contact with her.

Id. at 330. The court also relied on the fact that, as Judge Sappington's secretary and court clerk, plaintiff had to work closely with him. *Id.* at 331.

2. A Case in Which the Court of Appeals Replicated the Lower Court's Plain Mistake

Fitzgerald v. Action, Inc., 521 F.3d 867, 876-77, 103 FEP Cases 30, 44 EB Cases 1096 (**8th Cir.** 2008), affirmed the grant of summary judgment to the ADEA defendant despite discriminatory remarks. "According to Fitzgerald, during the course of his employment, Easley told him they were getting 'too old for that type of work' and 'needed to retire.'" . . . Fitzgerald claims after the incident with Yandell, Easley's 'mood changed.' . . . Instead of referring to both of them, Easley began to comment Fitzgerald

was getting 'too old for the job' and 'needed to retire.' . . . In addition, when asked who Action hired to replace Fitzgerald, Easley stated he could not remember exactly who, but he 'usually [didn't] hire older guys ... because [younger guys] are cheaper to work, cheaper labor.'" *Id.* at 876. The court continued:

> "Stray remarks" standing alone do not give rise to an inference of discrimination. . . . But, neither are they irrelevant. . . . "[S]uch comments are 'surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury.'" . . . When combined with other evidence, stray remarks "constitute circumstantial evidence that ... may give rise to a reasonable inference of age discrimination." . . .

Id. at 876-77. The court held that no inference of age discrimination could be drawn because plaintiff's ERISA comparator, an employee three years younger with far worse conduct who had no pending surgery and was retained, was in the protected age group, and because of a "same company" extension of the "same decisionmaker" rule. "Further, Action hired Fitzgerald when he was fifty and terminated him when he was fifty-two. We have noted it is unlikely a supervisor would hire an older employee and then discriminate on the basis of age, and such evidence creates a presumption against discrimination." (Citation omitted) The court concluded: "Under different circumstances, the remarks attributed to Easley might create an inference of discrimination. In this instance, however, they are insufficient to overcome the presumption created by the fact Action hired Fitzgerald at age fifty." *Id.* at 877.

It seems to me that the court clearly went off the rails on the age discrimination claim. The derailment was in several steps. *First*, it classified the clear indications of age bias as "stray," without ever identifying any facts or law that would bar the remarks from being considered as direct evidence of discrimination. *Second*, the court never addressed the fact that Easley seems to have been speaking to plaintiff within the scope of his employment, making his remarks admissions of discrimination. *Third*, the court never analyzed the permissibility of its rejection of probative evidence in light of *Reeves*. Its one cited decision that mentioned *Reeves* found that it was unnecessary to consider the permissibility of drawing the inference of discrimination based only on discriminatory remarks because there was other evidence suggesting discrimination. *Fourth*, the court never analyzed the fact that plaintiff's comparator was three years younger than plaintiff. *Fifth*, the court never considered the claim as a combined age-plus-ERISA discrimination claim. *Sixth*, the court's extension of the "same-actor" inference to a "same company" inference was unsupported by any analysis. *Seventh*, the court sat as a jury without even realizing it.

E. The Excessive Use of Summary Judgment Has Distorted the Law

When one steps back from the details of individual cases and looks at the rules of decision that have come into being in order to take close cases away from juries, it is

difficult to avoid the conclusion that defendants have offered to the courts as rules of thumb concepts that would be perfectly proper in jury arguments, and that the courts have fairly routinely accepted the jury arguments and hardened them into "no reasonable jury could disagree" rules of law. The rule of thumb concepts are then relied upon to destroy countless close cases until the Supreme Court disapproves them.

It is important to bear in mind that the disapproved concepts/rules of law are not simply substantive developments in the law that were ultimately disapproved; they were developed and accepted in order to allow evidence to be discarded. Discarded evidence cannot create a genuine dispute of material fact, and thus cannot stand in the way of granting summary judgment. Thus, these concepts/rules of law enable summary judgment to be granted in ever more close cases, depriving jurors of the opportunity to use common sense in weighing such concepts or rules of thumb against all the evidence in the case, and giving judges a standard that is then too often used indiscriminately.

There are numerous examples:

- The rulings that calling an adult African American man "boy" is not probative of racial discrimination unless it is accompanied by a derogatory adjective. This was disapproved in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (*per curiam*) ("Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.")

- The rulings that comparing the qualifications of the plaintiff and the successful candidate is not probative of discrimination unless the difference is extreme. This was disapproved in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) (*per curiam*) ("Under this Court's decisions, qualifications evidence may suffice, at least in some circumstances, to show pretext.")

- The rulings that comparators must be virtually identical to the plaintiffs before the comparison can be probative of discrimination. This was disapproved in *Miller-El v. Dretke*, 545 U.S. 231 (2005), which reversed the denial of *habeas corpus* and held that petitioner had shown racial discrimination in the prosecutor's peremptory challenges by clear and convincing evidence. The Court cited *Reeves v. Sanderson Plumbing Products*, *id.* at 241, underscoring the relevance of this decision to employment law. The Court stated: "None of our cases announces a rule that no comparison is probative unless the situation of the

individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Id.* at 247 n.6.

- The rulings that biased remarks are not probative of discrimination unless they are made by the decisionmaker, about the plaintiff, at the same time as the challenged employment action, and with specific reference to the challenged employment action. This was disapproved in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151–53 (2000). The Court held that the following remarks, as well as more favorable treatment of a younger employee, were probative of "age-based animus" by Chesnut, a key decisionmaker: "Petitioner testified that Chesnut had told him that he 'was so old [he] must have come over on the Mayflower' and, on one occasion when petitioner was having difficulty starting a machine, that he 'was too damn old to do [his] job.'" *Id.* at 151. The Court disapproved of the Fifth Circuit's holding that these remarks were stray remarks that were not probative of discrimination:

  > In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. Again, the court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner's *prima facie* case and undermining respondent's nondiscriminatory explanation. . . . The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination."

  Id. at 152 (citation omitted.)

- The rulings that there is a strong presumption against discrimination if the plaintiff was hired or promoted by the same person who later fired or demoted the plaintiff. This is the strong form of the rule, exemplified in *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991).

- The rulings that no plaintiff can claim sexual harassment unless the harassment was so severe that it would be expected to affect seriously the plaintiff's psychological well-being. This was disapproved in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) ("But Title VII comes

into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.").

- The rulings that after-acquired evidence of the plaintiff's wrongdoing automatically bars all relief and requires dismissal of the case, in a sort of trespasser-in-the-workplace approach. This was disapproved in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

These distortions in the law injure countless numbers of plaintiffs with meritorious claims, and it can take years or decades before such jury arguments/concepts are dethroned from their positions as no-reasonable-jury rules of law.

These distortions will only increase if the grant of summary judgment is made mandatory in any circumstances.

F. <u>The Abuse of Summary Judgment Threatens Respect for the Courts</u>

The courts are the branch of government most respected by the people of our country, and are important in maintaining a strong shared sense of the legitimacy of all of our institutions.

The image of the courts is thus important to the country as a whole. Much of the high regard in which the courts are held stems from the basic concept that every person is entitled to his or her day in court, where they can testify in the sight of all, present evidence, and stand on the same footing as even the most powerful of defendants.

Bureaucrats who toil out of sight, and hand down their decisions based on the papers presented to them, enjoy no such respect.

When a major part of the business for which our judicial system was established is no longer done in open court, where all can hear the witnesses and see the evidence presented, and is instead done in bureaucratic fashion without live testimony in open proceedings, there may be a major price to pay, in terms of diminished respect for the courts and their rulings, and diminished retention of judges. The nation as a whole would suffer from such a result, and it is important to keep in mind the price to be paid when we abandon jury trials open to all for resolutions arrived in chambers closed to the public.