Misuse of summary judgment could threaten the relatively small residue of civil trials that remain.

-- *Patricia M. Wald, Judge (ret.),*
Federal Appeals Court

Employment Bar Debates Summary-Judgment Trend

Practice Criticized by U.S. District Court Judge Gertner

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Employer-side attorneys are refuting a federal judge's claim that a rise in summary-judgment decisions in employment cases is threatening the system of judicial protections for civil rights.

The keynote speaker at the Massachusetts Bar Association's annual labor and employment law conference last month, U.S. District Court Judge Nancy Gertner told the audience she was troubled by the rise in summary judgments in federal court.

Gertner said the tool should be used as a "last resort" but is now "the procedure of choice in areas of law where it should be just the opposite."

She further stated that employment discrimination law is being "reduced to a series of tests," and quoted from a 1998 law journal article by retired federal Appeals Court Judge Patricia M. Wald, who called summary judgment a "potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain."

While lawyers were split on whether more summary judgment motions were being granted, defense lawyers who spoke with *Lawyers Weekly* were unanimous in defending the practice as one that avoids expensive, unnecessary trials for their clients.

Neil V. McKittrick of Boston, a management-side attorney, said he has noticed many of his employment cases being resolved by successful summary-judgment requests.

But, he said the rulings were appropriate because in each case "there were no disputed material facts. The disputes were legal issues, and those legal issues are specifically the issues that judges should rule on. Clients shouldn't be forced to go to trial at great expense of money and time when [the case] should be decided by the judge based on the law."

However, Gertner is not alone in her observations, as some, like Boston plaintiffs' lawyer Ellen J. Messing, who introduced Gertner at the MBA conference, agreed that there is an increase in summary judgments in federal court employment cases. And she also agreed that for judges to determine that so many cases cannot proceed to trial is "very much inconsistent with the history of civil rights laws and their intended purpose."

Messing cited as an example a federal judge who issued summary judgment in a case in which a white manager had called an African-American employee a "porch monkey." The judge reportedly found that the comment was not related to the employee's termination.

"That was a decision which struck me as completely outrageous," Messing said.

'Appropriate and even obligatory'

Not all employment lawyers agree that summary-judgment requests are on the rise.

"Our firm has not increased our use of Rule 56 summary-judgment motions, and we have not seen a significant change in the numbers of employment cases in which summary-judgment motions have been granted," Daniel S. Field, a Boston management-side lawyer, said in an e-mail.

"In many cases, filing a motion for summary judgment is appropriate and even obligatory since prompt disposition of a case will spare our clients from the unnecessary expense and uncertainty associated with litigation — particularly where a plaintiff or a class of plaintiffs has asserted claims that are unsupported or lack merit," Field said.

He added that his firm has found "that when there are disputed issues of material fact in a lawsuit, courts are unwilling to grant summary-judgment motions."

Management-side attorney Patrick J. Bannon agreed.

"I can't say I've noticed a change at the federal level, and I don't think they are generated too often at the federal level," Bannon said. "Federal judges have the luxury of time and staff, and they do a good job of digging into cases. Usually, when they grant summary judgment, it is appropriate."

Summary-judgment motions offer crucial protection to defendants against runaway jury verdicts, the Boston lawyer added.

"They play an important role in protecting employers from having to roll the dice and pay multi-million-dollar jury verdicts if they lose in cases where the allegations just don't merit a trial," he said. "Without summary judgment, any former employee could take a case to the jury. ... That would be profoundly unfair."

One area in which employment lawyers seem to be in agreement is that federal judges are more likely to grant summary-judgment motions than Massachusetts trial court judges.

"There's a tradition in Massachusetts state courts of giving thoughtful deference to juries ... [which is] not as powerful on the federal side," said Messing.

She also pointed out that federal judges preside over cases from start to finish, meaning that judges "may develop ideas about that case, whereas in the state court system the judges keep changing and don't develop a body of opinion about a particular case."

Messing described a case in which a state court judge pointed to a "20-inch stack of filings in a case, and asked the defense attorney, 'Do you mean to tell me there isn't a single disputed issue of material fact in here?' Federal judges will perhaps not start from that level of skepticism about foreclosing the plaintiff's opportunity for a jury trial."

Impact on settlements?

Messing said that the practice of granting summary judgments could discourage the possibility of cases being settled before they take up a large amount of court resources.

"If you don't settle immediately before or after a filing, you are unlikely to settle until after the summary-judgment ruling because of the perceived or actual view of the defense counsel that they have a good shot at [winning] at summary judgment," said Messing.

But McKittrick said he doubts that an increase in summary judgments has an impact on settlement talks or on clients using ADR methods. He pointed out that, by most accounts, the number of cases that get resolved before trial has steadily been increasing.

"It's still pretty expensive to get to the summary-judgment stage," he said. "Some clients are willing to litigate regardless of the cost, and some are looking to settle for business reasons."

McKittrick said he has not seen a change in settlement talks across the board.

"Only if a case has gotten to a point where discovery has taken place, and you can't resolve it along the lines that the client would accept, and you have a good shot at getting summary judgment, then your client [should probably] take that shot."

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AN EXAMPLE OF SUMMARY JUDGMENT ABUSE

Close

SIGN THE PETITION

— CRITIQUES OF THE JUDICIARY —

Becoming a Judge, Part 1
The Greylord Affair
Revolting Judges
Buying Judges
Reggie and Scholarships
Trips for Judges
Gifts and Bribes

Judicial Misconduct
Jailed for Petitioning
Curtailing Petition
The Dream of Justice
A Call for Reform
Learning the Ropes
Evading Public Scrutiny

The Finest Judges...
The Litigation Vortex
Without Merit...
The Demise of Justice
Judicial Practices
Secret Courts
Military Style Justice