

How to Write a Good Summary Judgment Motion or Opposition

Prepared for the
2014 EXCEL Conference
San Diego, California

Presented by

Patrick A. Kokenge, Chief Administrative Judge, EEOC, Miami District

Mary E. Cupp, Associate Chief Counsel, Los Angeles, U.S. Customs
and Border Protection

Ernest C. Hadley, President, Federal Employment Law Training Group

Some Thoughts on Writing

- “Easy reading is damn hard writing.”

Nathaniel Hawthorne

- “The difference between the almost right word and the right word is really a large matter – it’s the difference between the lightning bug and the lightning.

Mark Twain

Some Thoughts on Writing

- “A synonym is a word you use when you can’t spell the other one.”

Baltasar Gracián

- “Most editors are failed writers -- but so are most writers.”

T.S. Eliot

- “The road to hell is paved with adverbs.”

Stephen King

Some Thoughts on Writing

- “Books aren’t written, they’re rewritten. Including your own. It is one of the hardest things to accept, especially after the seventh rewrite hasn't quite done it ...”

Michael Crichton

- “It is perfectly okay to write garbage -- as long as you edit brilliantly.”

C. J. Cherryh

Some Thoughts on Writing

- “Half my life is an act of revision.”

John Irving

- “I can’t write five words but that I change seven.”

Dorothy Parker

- “Not that the story need be long, but it will take a long while to make it short.”

Henry David Thoreau

Legal Writer's Toolbox

- Some handy things to have:
 - A good dictionary
 - A thesaurus
 - *Fowler's A Guide to Modern English*
 - *Merriam-Webster Dictionary of English Usage*
 - *Legal Writing in Plain English-A Text with Exercises*, Garner
 - *How to Write a Sentence & How to Read One*, Fish.



Common Elements

BASIC WRITING MECHANICS

Copyright FELTG 2014

Writing for the EEOC

Winning Through Summary Judgment

Copyright FELTG 2014

Summary Judgment -- Purpose

- Principal purpose of the hearing is to present evidence on disputed facts. Parties are given an opportunity to present legal argument, but that is not purpose of hearing.
- Principal purpose of summary judgment is to dispose of cases without a hearing where there are no facts in dispute.

Summary Judgment Procedures

- EEOC regulation 29 CFR § 1614.109(g) is patterned after Fed.R.Civ.P. 56.
- Administrative judges can look to FRCP for guidance, but they are not binding.

Summary Judgment Procedures

- Motion must be filed 15 days before hearing.
- Opposing party has 15 days to respond.
29 CFR § 1614.109(g)(1)-(2)
- Acknowledgment Order often sets deadline for dispositive motions.
 - Motion itself does not stay discovery.

Summary Judgment Procedures

- AJ can issue notice of intent to issue summary judgment *sua sponte*.
- Must give both parties 15 days to respond.

29 CFR § 1614.109(g)(3)

Summary Judgment Procedures

- Under *Petty v. Secretary of Defense*, EEOC Appeal No. 01A24206 (2003), AJ must in *sua sponte* notice:
 - Give ample notice of intent
 - Give a comprehensive statement of material facts he/she believes are not in dispute
 - Give the parties an opportunity to respond
 - Permit discovery, if necessary

Summary Judgment Standards

- Moving party must establish:
 - No genuine disputes of material fact.
 - Requires, in some form, a statement of uncontested facts with specific reference to the existing record or exhibits attached to the motion.
 - Party is entitled to judgment as a matter of law.

29 CFR § 1614.109(g); FRCP 56

Summary Judgment Standards

- Law that is referred to is the substantive law that governs the case.
 - Substantive law establishes which facts are material in a given case.



Summary Judgment Standards

- Administrative judge can order oral argument on summary judgment motion.
- Parties can request oral argument.

Appellate Standards

- OFO reviews summary judgments decisions *de novo*.

Kaprive v. National Security Administration,
EEOC Appeal No. 10986151 (2000)

- Particular scrutiny is given to cases involving *pro se* appellants.

Disputes of Material Fact

- A fact is material if it has potential to affect outcome of case.
- A factual dispute is genuine if evidence is such that reasonable fact-finder could find for nonmoving party.

See Yaccarino v. Postmaster General,
EEOC Appeal No. 01A05735 (2001)

Disputes of Material Fact

- Facts must be interpreted in light most favorable to nonmoving party.
- Reasonable inferences must be drawn in favor of nonmoving party.

Anderson v. Liberty Lobby,
477 U.S. 242 (1986)

Disputes of Material Fact

- EEOC views hearing as extension of investigation process. Cautions against “trial by affidavit.”

See Bang v. Postmaster General,
EEOC Appeal No. 01961575 (1998)

Summary Judgment Evidence

- The Report of Investigation (ROI) is part of the case record.
- There is no need to introduce the ROI, or portions of it, as exhibits to SJ motion.
- If an ROI exhibit is particularly important, may want to consider attaching as exhibit.

Summary Judgment Evidence

- “A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.”

FRCP 56(e)(1)

Summary Judgment Evidence

- Evidence outside the record should be attached as exhibit:
 - May need to authenticate
 - Tab and paginate
- It is not necessary to introduce entire deposition transcript:
 - Prepare excerpts

Opposing Summary Judgment

- Must come forward with some evidence of genuine dispute of material fact; sufficient evidence that fact-finder could reasonably conclude agency's is not true.
- Problem of pending discovery. Summary judgment is not inappropriate simply because discovery is pending.
 - Must identify specific discovery requests that are relevant to material facts in dispute and explain how responses could create a dispute of material fact.

Practical Considerations

- It is not necessary to demonstrate that a complainant has failed on all elements of a claim.
- All that is required is to break one link in the chain. For example:
 - No need to argue that conduct didn't occur where evidence is disputed if:
 - No evidence conduct was based on protected category.

Practical Considerations

- In fiscal year 2005, the EEOC had 136 administrative judges handling a load of 5,896 cases.
- By fiscal year 2008, the inventory of cases had climbed to 6,488 and the number of administrative judges had declined to 118.

Practical Considerations

- The average EEO hearing lasts less than one day.
- AJs can issue a bench decision.
- OFO applies less scrutiny to factual findings if there has been a hearing.

Writing Summary Judgment Motions

- Introduction. Tell AJ the basis(es) on which summary judgment is sought. Don't just chant mantra that there are no material disputes of fact and agency is entitled to judgment as a matter of law. Be specific.

Writing Summary Judgment Motions

- Statement of undisputed material facts.
Most important part of motion:
 - Goal: set forth your client's case in a persuasive manner that is factual and avoid hyperbole and characterization of evidence.

“Just the facts, Ma’am”*



- Statement of facts should be:
 - Neutral: Avoid any characterization of the facts.
 - Accurate: Accept that sometimes the facts are not what you would like them to be.
 - Concise: Always ask yourself why is the fact included? What is its significance?
- Many cases are won or lost on the statement of facts.

*Sgt. Joe Friday, *Dragnet*

Writing Summary Judgment Motions

- Three kinds of facts to be included. Limit statement of facts to:
 - Those facts material to resolution of motion. Avoid all facts that are not material or are in dispute no matter how unflattering to the opposing party.
 - Background facts necessary to understand material facts.
 - Those facts necessary to understand procedural posture of case.

Writing Summary Judgment Motions

- Do not include argument, contentions or interpretations of fact.
- Draft statement of facts before legal argument. When argument is finished, review statement of facts and include any facts relied on in argument.
 - Eliminate from statement all facts not relied upon in argument unless they are background or procedural process facts.

Writing the Factual Narrative

- To write a good, concise factual narrative, you must:
 - Identify the claims, defenses and issues presented.
 - This will tell you what facts are material and, equally important, what facts are not.

Writing the Factual Narrative

- You've just spent the last several days, weeks, whatever, collecting information/evidence.
- You may have:
 - Transcripts
 - Affidavits
 - Notes of interviews
 - Interrogatory responses
 - Documents, documents, documents, and
 - Maybe even physical evidence

Writing the Factual Narrative

- Your office:



Writing the Factual Narrative

- Some organizational suggestions:
 - Make a working copy of each document so you can make notes on them
 - Arrange all documents in chronological order
 - Use the documents begin creating a chronology of events

Writing the Factual Narrative

- Some organizational suggestions:
 - Arrange all testimonial evidence -- statements, affidavits, notes of interviews, transcripts, etc. -- based on the importance of the witness' testimony
 - Use the testimonial evidence to fill in the gaps in the chronology of events

Writing the Factual Narrative

- Some additional suggestions that may make life easier:
 - Use Post-it notes to give each document a number as you place them in chronological order.
 - It's easy to create new exhibit numbers or move exhibit numbers as you find documents that go in between previously numbered exhibits.

Writing the Factual Narrative

- Some additional suggestions:
 - Create an exhibit list as you go:

No.	Description	Date	Pages
1	Notice of Proposed Removal	4/15/10	6
2	Decision to Remove	5/25/10	5

Writing the Factual Narrative

- You should now have a working chronology of events that can serve as the basis for the factual narrative of your response.
- In more complex cases, you may want to make the chronology of events part of your response to assist readers in keeping the timeline straight.

Writing the Factual Narrative

- Some simple rules:
 - Every statement of fact should be followed by a citation to the record.
 - Do not embellish or mischaracterize facts.
 - Write in simple sentences.
 - Set the facts forth in chronological order unless there is a compelling reason to do otherwise.

Writing the Factual Narrative

- Use the active voice. Fail-safe test:
 - If you see a *be* verb (such as *is*, *are*, *was*, or *were*) followed by a past participle (usually a verb ending in *-ed*), you have a passive-voice construction.

Garner

Working Words vs. Glue Words

- Working words
 - Carry the meaning of the sentence
- Glue words
 - Hold the sentence together
- The objective
 - Have more working words than glue words

Working vs. Glue Example

- More glue than working example
 - A hearing before MSPB was requested by the appellant.
- Underline the working words, then count ratio
 - A hearing before EEOC was requested by the complainant.
 - Ratio = 5 glue, 4 working
- Rewrite to reduce ratio
 - The complainant requested an EEOC hearing.

Writing the Factual Narrative

- Long block quotes should be avoided, but people talking is a very effective way to tell a story.
- Examples:
 - In an obscenity-laced diatribe, the appellant stated to his supervisor that he should not obstruct his path to the door.
 - The appellant told his supervisor, “Get the fuck out of my fucking way. I’m headed for the fucking door.”

Writing the Factual Narrative

- Clauses can be a way to pack information into an otherwise simple sentence.
- Short chunks of information help a sentence move along to its conclusion.

Writing the Factual Narrative

- Example No. 1:
 - The appellant suffers from depression and, as a result, was taking a new medication. On June 4, 2012, the appellant sent his supervisor an email. In that email, the appellant asked his supervisor for a flexible starting time. The appellant was subsequently removed on a charge of Absence with Leave (AWOL).

Writing the Factual Narrative

- Example No. 2:
 - Before his removal for AWOL, the appellant, who suffers from depression and was adjusting to new medication, asked his supervisor, in an email dated June 4, 2012, for a flexible starting time.

Writing Summary Judgment Motions

- Summary of argument (optional).
- May want to include where there are multiple arguments, or argument is lengthy and multi-faceted.
- Can be written after motion is complete and, at the least, should be carefully edited then.

Writing Summary Judgment Motions

- Recitation of summary judgment standards.
 - Can be boilerplate, as long as reviewed for any changes necessary for particular motion.
 - Should give AJ: standards and citations for any relevant minor points of summary judgment law that are specific to motion.
 - Do not belabor!

Writing Summary Judgment Motions

- Argument: break argument into points and sub-points as appropriate.
 - State the governing law with relevant citations.
 - Discuss the facts of the case in light of the relevant law.
 - Bring in citations of cases that support your argument and discuss how they support.

Writing Summary Judgment Motions

- Identify any cases that support contrary position and:
 - Distinguish cases; or
 - Explain why those cases are in error.

Writing Summary Judgment Motions

- Conclusion:
 - No need to recap arguments, but
 - Do set forth specifically what relief is requested.

Writing Summary Judgment Motions

- Edit, edit, edit.
 - Proofreading is not editing.
 - Eliminate unnecessary adjectives and adverbs, *e.g.*, “clearly,” “obviously.”
 - If you have to read a sentence more than once, it is unclear.