NELA/NY

National Employment Lawyers Association / New York

11 Broadway, Suite 2150
New York, New York 10004
(212) 317-2291

E-MAIL nelany@nelany.com
WEBSITE www.nelany.com
NELA Referral Service (212) 819-9450

By E-Mail

February 26, 2013

Honorable David G. Campbell
Chair, Advisory Committee on Civil Rules
David_Campbell@azd.uscourts.gov

Honorable John G. Koeltl
Chair, Duke Subcommittee on Civil Rules &
Member, Advisory Committee on Civil Rules
John_G_Koeltl@nysd.uscourts.gov

Honorable Paul W. Grimm
Member, Advisory Committee on Civil Rules
Judge_Grimm@mdd.uscourts.gov

Re: Comments of NELA/NY to Proposed Changes in Federal Rules of Civil Procedure

Dear Judges Campbell, Koeltl, and Grimm:

We write on behalf of NELA/NY, the New York affiliate of the National Employment Lawyers Association (NELA). We appreciate the opportunity to offer comments on proposed changes to the Federal Rules that would reduce the presumptive limits on depositions and the time per deposition, reduce the number of interrogatories, limit Rule 34 requests for production, and limit requests for admission. These changes would impose significant, unreasonable and unnecessary burdens, particularly on plaintiffs in employment discrimination cases.

1. Alleged improvements in case administration sacrifice the administration of justice.

Employment discrimination cases are typically fact-intensive and difficult to prove.[1] Information relevant to the case is asymmetrically distributed between the two sides. While the employee maintains the ultimate burden of

[1] NELA/NY attorneys litigate a range of employment cases, not only employment discrimination matters. While employment discrimination cases are the quintessential illustration of the limitations of the proposed rules, we note that the proposed rules are problematic for all employment cases given the typical fact-intensive nature of these disputes.

persuasion, it is the employer that retains almost exclusive control of the relevant information. Thus to the extent rigid restrictions limiting discovery are imposed, they will disproportionately fall upon the individual.

The employee, who maintains the ultimate burden of persuasion, must usually seek most of the proof from the employer. Direct evidence of employment discrimination is typically difficult, if not impossible, to obtain. Courts sometimes disregard discriminatory comments, which would otherwise evidence a discriminatory mindset, when they are characterized as mere "stray remarks." It has been uniformly acknowledged that employers do not announce their discriminatory intent, thus requiring reliance upon circumstantial evidence to prove pretext in order to survive summary judgment, prevail at trial, or sustain the burden in a mixed-motive case, when appropriate. Issues in employment discrimination litigation involve intent; review of comparator qualifications, actions and treatment; simple or complex statistical information; electronic records and oral and written communications between multiple persons; and expert testimony.

Therefore, considering the kind and amount of information that must be obtained to meet even the indirect standard of proof in an individual disparate treatment case,[2] imposing additional discovery limitations, such as a flat number or amount, inherently disadvantages plaintiffs. To adduce such evidence, a plaintiff must usually examine employer documentation relevant both to plaintiff(s) and comparator employees. Even a straightforward case will, for example, often run up against the limited number of depositions: one or more levels of supervision involved in a discharge, a human resources representative, an internal EEO investigator, co-workers who may be witnesses or comparators – all of whom are necessary to get the basic information in the employer's possession – may easily exceed five in number. Additionally, there may be witnesses to testify with subject matter expertise and about emotional and/or financial damages. If there is more than one plaintiff, a group case, more than one adverse action with associated witnesses, or claims of discrimination and also retaliation, then the proposed limitations will not suffice.

Similar considerations apply to documentary evidence. Proof of

---

[2] Demonstration of pretext may involve showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find the employer's justification unworthy of credence and therefore probative of intentional discrimination. *See, e.g., Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000).

inconsistency, contradiction and dissimilar treatment necessarily involve comparisons calling for examination of multiple information sources, decisions and modes of communication. We fear that limiting the number of document requests will, at best, unfortunately engender gamesmanship regarding the specific language of the requests, and, at worst, permit a greater reliance on "hide the ball" litigation tactics. Requests for production of documents are also necessary for gathering the kind of circumstantial (and in certain instances, direct) evidence necessary to meet requirements of proof described above. Curtailment of this device also runs counter to the goal of efficiency. Existing and developing procedures that require litigants' cooperation in identifying and producing electronically stored information for the particular case, rather than a uniform limit on production, should be used to deal with costs and burdens in that case.

Requests for admission in particular serve the "vital purposes" of facilitating proof and narrowing issues. (Fed. R. Civ. P. R. 36 Advisory Committee Note on 1970 amendments.) When properly utilized, requests for admission are an important tool for efficiency and streamlining the presentation of evidence both at trial and for summary judgment purposes. Placing new numerical limitations does not serve the ostensible purpose of efficient case administration.

Finally, because interrogatories are a very useful procedure – both at the beginning of a case to identify information and witnesses (including R. 30(b)(6) witnesses) and at the close of discovery to sharpen contentions and issues – any supposed gain in efficiency by decreasing the number of interrogatories will likely be offset by generating more requests for judicial approval to enlarge the number.

Because the important evidence is held primarily by one party, new and reduced limits will curtail discovery of basic facts needed both to prove claims and to oppose dispositive motions, thus preventing discrimination plaintiffs from having a fair opportunity to be heard. Without tangible need for change, there is no legitimate reason to alter a system that works.

2. The proposed changes will not make case administration more efficient but will likely generate new motion practice.

Not only do the proposed solutions not fit the problem (presuming it even exists to the degree supposed, see below), it will also engender new applications and perhaps motions to increase the number of discovery items sought. "An important common feature of all of these sketches is that the limits are merely presumptive. They can be set aside by agreement of the parties or by court order." (Advisory Committee on Civil Rules Report to the Standing Committee, December 5, 2012, Briefing Book at 228.) This statement invites judicial intervention that will legitimately be necessary and justified to obtain proportional discovery in all but the simplest cases. It is also an invitation to more aggressive motion practice, seeking or trying to prevent discovery, since lower limits increase what is at stake. Finally, it may also invite "inglorious motives" (Briefing Book at 229) to cause use of unreasonable discovery behavior cloaked in a new standard that signals (whether purposely or not) less entitlement to information.

3. The limited and distinct problem identified does not warrant the overbroad, restrictive and uniform solution proposed.

The Advisory Committee does not describe a clamor for change, much less for the particular changes proposed. According to the Advisory Committee, at the Duke conference,

> There was *little call for drastic revision*, and it was recognized that *the rules can be made to work better* by renewing efforts to educate lawyers and judges in the *opportunities already available*. It also was recognized that many possible rules reforms should be *guided by empirical work, both in the form done by the Federal Judicial Center and other investigators* and also in the form of pilot projects.

(Briefing Book at 218, emphasis added.) It defined the problem as limited, since "Only a relatively small fraction of cases involve extensive discovery"; and of this relatively small fraction, "in some of those cases extensive discovery may be reasonably proportional to the needs of the case." (*Id.*) Applying the concept

of proportionality to employment discrimination cases and their proof requirements, it follows that these cases may justifiably need more discovery and relief from lower limits. Moreover, in the problem cases:

> Many reasons may account for unreasonable discovery behavior — ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives.

(Briefing Book at 229.) The identified problem appears to be unprofessional behavior, not a general need to increase efficiency and decrease cost.[3] Addressing these issues directly makes more sense than an across-the-board response to a problem that is concededly not widespread.

At present, there apparently is insufficient empirical research by the Federal Judicial Center and others to support the proposed reductions in limits. But even without definitive study, it is logical that if the present limits work well in most cases and the problems identified are limited to a small fraction, it is more appropriate to keep the present discovery parameters and specifically address the small fraction of actual problem cases. The situation does not compel a choice to "manage up from a lower limit than to manage down from a higher limit" (Briefing Book at 231) – but rather to manage what the problem is instead of changing the present structure.

Limiting discovery would also result in an increased burden on courts by plaintiffs seeking, and defendants opposing, judicial relief in the absence of a stipulated agreement. Concededly, plaintiffs generally know significantly less than the employer about both the evidence for and against the asserted rationale for treating an employee a particular way and the methodologies by which an employer maintains its records. Plaintiffs therefore face a disadvantage in persuading a court to depart from a fixed numerical standard. This is especially true at the commencement of a case. It is more appropriate to put the burden on employers, who know what information they have and its

---

[3] To the extent that some may see a further problem of unmeritorious cases that should not burden employers with futile discovery, present practice to test whether such cases meet the pleading standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), is the frequently used response. If a case survives such scrutiny, the plaintiff should be permitted necessary, proportional discovery without numerical limitations.

availability, to ask for a downward departure. The rules could be specifically amended to suggest this would be a reasonable course.

If the basic goal is indeed more efficient case administration, that should be accomplished by "early, hands-on case management" (*id.* at 218), including the scheduling conference, rather than setting the stage for more subsequent discovery conferences and pre-motion and potential motion practice.[4] Increased case management activity is the logical way to apply the concept of proportionality to the individual case, as well as to remind counsel of their professional obligation of cooperation. The proposal to move proportionality language into the basic scope of discovery (*id.* at 227-228) provides a more flexible and appropriate standard. The problem cases should be dealt with by limiting the offending conduct, not by limiting, hindering or preventing the discoverability of relevant evidence.

We are happy to provide any further information or comment as may be requested.

Respectfully submitted,

Herbert Eisenberg
Julian R. Birnbaum
Eisenberg & Schnell, LLP
233 Broadway, Suite 2704
New York, New York 10279
(212) 966-8900

---

[4] Another alternative would be full utilization of the protocols of the Federal Judicial Center's Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action. These protocols could be adapted for other types of cases and do not impose discovery limitations but organize and mandate production early in a case to improve efficiency and decrease costs. Utilization of and compliance with these protocols would not only inform later discovery requests but naturally limit them as well. (http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf)