

Wait! Is that supposed to be a *material* fact?

A refresher on the tedious journey through summary judgment in employment cases

By Karine Bohbot and Elizabeth Riles

Summary judgment or adjudication is only appropriate when *no material issue of fact exists* and where the record establishes as a matter of law that a cause of action asserted cannot prevail. (*Avila v. Standard Oil Co.* (1985) 167 Cal.App.3d 441, 446.) It is *on the moving party* (i.e., the Defendant) to "conclusively negate" a necessary element of the plaintiff's case or demonstrate "that *under no hypothesis is there a material issue of fact*" "that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (emphasis added); *Ann M. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.)

To meet this burden, the defendant *must* "present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id*. at 854 (emphasis added); *Pisaro v. Brantley* (1996) 42 Cal.App.4th 1591, 1601.)

As such, the Court must determine:

> [whether] the defendant [is] claiming [that] the plaintiff cannot establish the cause of action pled (1) because the plaintiff's factually insufficient discovery responses demonstrate the plaintiff cannot prove an essential element of that cause of action; or (2) because the defendant's affirmative evidence discloses facts which negate the existence of an essential element of the plaintiff's claim by proving the contrary is true[.]

(*Ibid*.)

This burden – shifting standard thus requires that Courts strictly construe the moving party's papers, while liberally construing the opposing party's papers, resolving "all doubts" against the *moving parties* and viewing all the evidence and all the inferences in the light most favorable to the *opposing* party. (*Aguilar*, 25 Cal.4th at 843; *Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20; *Empire West v. Southern California Gas Co.* (1974) 12 Cal.3d 805, 808.)

Material facts

"Only when the defendant has satisfied this burden does the burden shift and does the Court have to determine whether the plaintiff has demonstrated the existence of a triable issue of material fact." (*Pisaro*, 42 Cal.App.4th at 1602.)

That is the standard we Plaintiff attorneys must know well when dealing with the inevitable summary judgment motion.

Many of us have gotten into the office on a morning to find a large box on our desk consisting of *thousands* of pages with the title being "Defendant's Motion for Summary Judgment or, in the Alternative, Summary Adjudication" and our first thought is, "%$*!"

When the initial anxiety and irritation subsides, and we recognize that there are plenty of facts in dispute to survive summary judgment, the second anxiety-inducing thought comes, "Could there be any more Separate Statements of Undisputed Facts to respond to?" Finally, when you actually peruse those "facts," your last thought, also laden with inappropriate expletives, is, "These are not 'facts' and they are certainly not material!"

We have all seen these kinds of "material" facts in a separate statement:

- Plaintiff began working at Defendant in 1992.
- The contract states she may not be terminated without cause.
- Plaintiff signed the contract on June 4, 1995
- The sky was blue on Monday!

Though there are times when it appears unfathomable that the defense would bring such a motion in what are often very fact-driven cases, we all understand that the defense has every right to bring these motions. It is at those times, especially, when it behooves us to use these tactics to our advantage. There are several ways to do that.

First, you should ask, "do any of the above "facts" fit Code of Civil Procedure section 437c(p)(2)'s definition of a "material" fact?" Do any of these types of facts, even collectively, "conclusively negate [ ] a necessary element of the plaintiff's case or demonstrate [ ] that under no hypothesis is there a material issue of fact" "that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not"? Do these "facts" suffice to shift the burden from defendant to the Plaintiff? The answer is almost always no.

Then it is time to put the Defendant's feet to the fire. We often skip the first hurdle of summary judgment, but when the

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Defendant includes a spate of statements of facts that are neither material nor "facts," it is important to make sure that the Court analyzes and determines whether the Defendant has even met its initial burden on summary judgment.

Burden of proof

Make sure that your opposition emphasizes to the Court that the defense has the burden in these cases and must meet that initial burden through *material and undisputed facts*. Point out that the defense cannot simply cite to what amounts to *evidence* that may or may not support a material fact. (See *Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95, 105-106; California Code of Civil Procedure §473c.) That only where the Court finds that the defense has met that burden should the Plaintiff even have to oppose the motion.

Additionally, make sure that the no doubt numerous issues raised for summary adjudication completely dispose of the cause of action to which it is directed. If they do not, you may have "countless pages of utterly unnecessary – and necessarily unavailing – material." (*Nazir v. United Airlines* (2009) 143 Cal.App.4th 243, 251.) End that first section by asking the Court to deny the motion based on the fact that defendant has failed to meet its burden as seen by the lack of *material* issues of fact set forth in its separate statements and/or that failed to completely dispose of causes of actions with the issues raised as required.

We have actually seen some success in this approach in the past where Courts have actually found that the defense had failed to meet their initial burden and denied on that basis. Unfortunately, this rarely suffices alone to move the Court to deny the motion. Nonetheless, it should be included in your arguments arsenal every time.

The next step is to make sure that the Court recognizes that "separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for [summary adjudication] and summary judgment to determine quickly and efficiently whether material facts are undisputed. (*Nazir*, 178 Cal.App.4th at 251-252.) When the defense puts forth separate statements with facts like that above, it is unnecessarily and unreasonably wasting the Court's time.

> Every meaningless and non-material fact should include a response, like the following:
>
> Plaintiff objects to this "fact" as this type of statement is defective and in violation of the requirements of the California Code of Civil Procedure. (*Reeves v. Safeway Stores* (2004) 121 Cal.App.4th 95, 105-106; California Code Civ. Proc., § 473c.) Specifically, this statement of fact is not a material fact, but instead is *evidence*. Additional-ly, this evidence does not even support a material fact; rather, it is simply background information. As such, *there is no material fact* to dispute. (or a variation on that language)

Then, of course, as it is our main objective, add in whatever disputed facts and evidence that you have. Although for many there is simply no way to dispute the fact presented, as we can't dispute our Plaintiff *was born*, can we? But be sure to make the objection first.

It can appear schizophrenic to on the one hand argue that the fact is not material and to make great effort disputing it, but it is important to dispute as many of the facts as you can, even if it really does not fit the definition of "material." Again, you can put the Defendant's feet to the fire, because by including the fact in the separate statement the defense has conceded that the fact is material. (*Nazir*, 143 Cal.App.4th at 252; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) § 10:95.1, p. 10-35.) So use that against them. Any fact that you dispute in the separate statement should mean that the motion *must* be denied. (*Ibid.*) Therefore, dispute these ridiculous facts wherever and whenever you can. Dispute them so that the Court has no choice but to deny the motion.

Turn the table on the defense

That is not the end of the story, however. Although one would believe that disputing even one material fact raised by the defense should suffice to survive the motion, such is simply not the case. And of course the defense *will* insert *some* facts that would be considered "material" within their separate statement. What we have found to be effective, however is, when appropriate, to turn the table on the defense by submitting our own Separate Statement listing facts we believe are either in dispute or facts that create a triable issue. This is the last nail in the summary judgment coffin. These are detailed *material* facts supported by evidence cited to in your declarations or requests for judicial notice, provided in the same format as the Separate Statement. Cite to it in your brief at every opportunity.

In almost every case, the defense will dispute these facts or claim that they are not material. Either way, you will have presented the facts you need to survive summary judgment. That the defense claims the fact is *not* material or not relevant or objects to it, but that is neither here nor there. The Court will be the final adjudicator of the relevance and materialness of the fact. The point here is that putting more facts before the Court, that *actually* fit the definition of "material" under Code of Civil Procedure section 437c, will maximize the likelihood that the Court will deny defendant's motion.

So the lesson of this story is . . . although you will hate life for the days before the opposition is due because of the time-consuming nature of the beast, if you really pay attention to what has been submitted by the defense, prepare a response that not only reflects the lack of legitimacy to the motion (i.e., the defense is wasting the Court's time and resources), and establish to the Court that the defense has failed to meet their

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burden, when the motion is denied, and those hours you spent are paid for through your attorney fees' motion (following your win at trial of course!), you can thank us for our unbelievable wisdom . . . no . . . just kidding . . . you can smile and pat yourself on the back for a win well deserved.

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