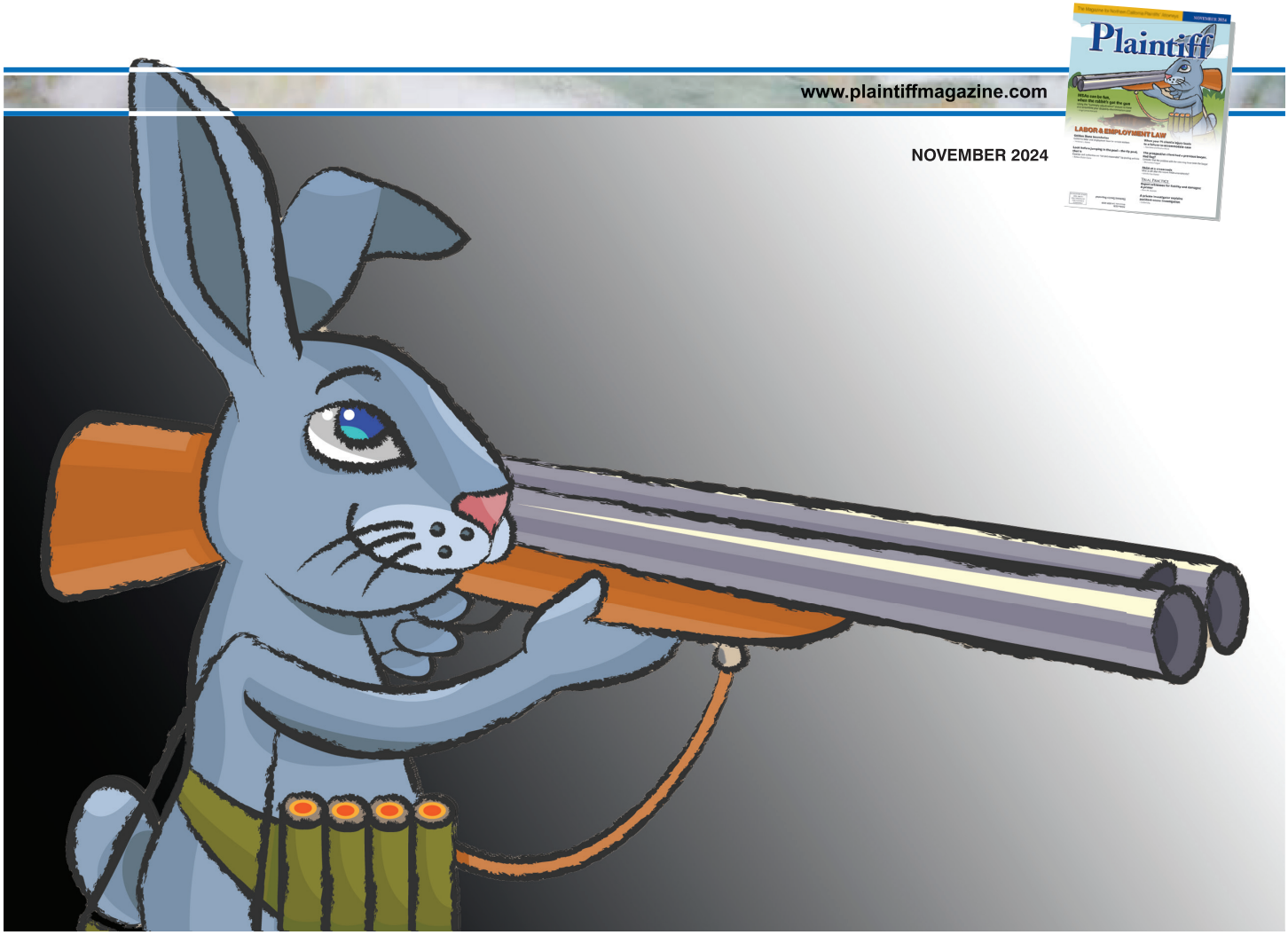


MSAs can be fun, when the rabbit's got the gun

The summary adjudication statute can be used to hone your case and streamline the issues to be tried

By Angel James Horacek

For far too long, the words "summary judgment," or in the alternative, "summary adjudication" have made many a plaintiff's attorney shake with fear. But summary adjudication is a tool that the plaintiff can use. With a little planning, the summary adjudication statute can be used successfully to hone the plaintiff's case and streamline the issues to be tried. This article will demonstrate how to use the summary adjudication process to your advantage in a disability discrimination case.

Disability discrimination occurs when a person is denied the terms or privileges of employment due to a medical condition, physical disability, or mental disability. (Gov. Code, § 12940, subd. (a).) An entity can refute this charge by either (1) negating one of plaintiff's elements of the disability discrimination, or (2) affirmatively asserting a defense against a claim of disability discrimination. This article focuses on the affirmative defenses to disability discrimination.

Generally, there are a few affirmative defenses specific to disability discrimination and the related cause of action for failure to reasonably accommodate:

- *Bona fide occupational qualification* (BFOQ). This means that "the [employment] practice [of excluding the disabled employee] is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined." (Cal. Code Regs., tit. 2, § 11010.)
- *Risks to health or safety*. "…after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health or safety" or "the health or safety of others." (Cal. Code Regs., tit. 2, § 11067.)
- *Undue hardship*. "…after engaging in the interactive process, that the

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accommodation would impose an undue hardship," after considering costs, financial resources, and operations of the employer. (Cal. Code Regs., tit. 2, § 11068(j); Code Civ. Proc., § 12926.)

A plaintiff may want to move for summary adjudication to eliminate an affirmative defense because of the risk that the jury may be confused about the defendant's burden to provide a reasonable accommodation. If none of the regulatory defenses are actually at issue, it removes an obstacle to the jury finding for the plaintiff. Depending on the timing of the motion hearing, these motions can also drive settlement discussions.

The statute for MSA

The statute providing the authority to move for summary adjudication is Code of Civil Procedure section 437c, subdivision (f). The timing of a summary adjudication motion and all supporting documents proceeds as it would if it were a motion for summary judgment. (Code Civ. Proc., § 437c, subd. (f)(2).) The summary judgment statute is found at Code of Civil Procedure section 437c, subdivision (a). This motion is very timing-specific; if the timing is off, the court has the ability to deny the motion entirely. The summary adjudication timing is therefore:

- Motion must be made *no earlier than 60 days following the general appearance* of the party against whom the motion is directed. (Code Civ. Proc., § 437c, subd. (a)(1).);
- Motion must be heard *at least 30 days before the date of trial*. (Code Civ. Proc., § 437c, subd. (a)(3)); and
- Notice of the motion and the supporting documents must be filed *at least 75 days prior to the hearing*, an opposition must be filed no less than 14 days prior to the hearing, and a reply must be filed no less than five days prior to the hearing. (Code Civ. Proc., § 437c, subds. (a)(2), (b)(2), (b)(4).)

As of January 1, 2025, some of this timing will change. Under the newly enacted AB 2049, section 437(c) will require an 81-day notice period, a 20-day opposition period, and an 11-day reply period.

It is not sufficient to add the timing provisions above together and assume that a party then has 105 days to file the motion. Each date should be calculated by first finding (and reserving) an acceptable hearing date, and then counting backward to allow for the 75-day notice.

Service of an MSA also has special rules. "If the notice is served by mail, the required 75-day period of notice shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days." (Code Civ. Proc., § 437c, subd. (a)(2).)

Be aware that this notice provision differs from the general notice provision for motions found at Code of Civil Procedure section 1005. Section 437c is silent as to electronic service. However, electronic service of a summary judgment motion is subject to the two court days' extension provided by Code of Civil Procedure section 1010.6. (*Cole v. Superior Court* (2022) 87 Cal.App.5th 84, 87.)

When selecting a hearing date for the motion for summary adjudication, do not pick the thirty-first day before trial. The conscientious plaintiff's attorney should at that point be drilling down into the issues that will actually be tried. Reserve an earlier date to ensure that you are only trial-prepping those issues that will be the subject of motions in limine or going to the jury.

Issues for summary adjudication

Now, on what issue(s) would a plaintiff's attorney be moving for summary adjudication? In a disability discrimination case, it would be prudent to move to adjudicate the earlier defenses mentioned: BFOQ, Risks to Health or Safety, or Undue Hardship. They can only be summarily adjudicated if "there is no merit to an affirmative defense." (Code Civ. Proc., § 437c, subd. (f)(1).)

First, review the answer to determine whether the defendant is actually asserting any of these defenses. Many times, the answer is not thoughtfully prepared or reviewed before filing, and some affirmative defenses may not be listed. "The failure to assert an affirmative defense by demurrer or answer results in the waiver or, more accurately, forfeiture of the defense unless the defense concerns the lack of subject matter jurisdiction or failure to state facts sufficient to state a cause of action." (*Vitkievicz v. Valverde* (2012) 202 Cal.App.4th 1306, 1314 (citing Code Civ. Proc., § 430.80).)

The way to determine whether the affirmative defenses are truly meritless is through discovery. The simplest way to conduct discovery on affirmative defenses is to ask what facts exist that support the affirmative defenses asserted. Thankfully, Form Interrogatory – General 15.1 requires a defendant to identify, inter alia, each affirmative defense pleaded and to provide, inter alia, "all facts" on which those defenses are based, as well as the witnesses who are aware of those facts and the contact information for those people. The same interrogatory is listed in the Form Interrogatory – Employment Law No. 216.1 (DISC-002) if propounding that set is preferred.

Once the defendant provides verified responses to this interrogatory, review them carefully. Did the employer provide specific facts that support the defense? Did the employer list the individuals aware of those facts? Did the employer identify the documents that support the affirmative defense?

The plaintiff should propound requests for production pursuant to Code of Civil Procedure section 2031.010 et seq. to obtain copies of the documents, if not done concurrently with the

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propounding of the Form Interrogatory – General 15.1. Review the documents properly, and make sure that the response is compliant with Code of Civil Procedure section 2031.280, subdivision (a), which requires that "any documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling shall be identified with the specific request number to which the documents respond."

The plaintiff should consider depositions of (1) the persons identified as having facts that support the defense; (2) the person who verified the response, and; (3) the person most qualified to testify on the employer's behalf about the affirmative defenses propounded, pursuant to Code of Civil Procedure section 2025.230. Review the testimony properly. Did the employer provide any facts to support their affirmative defenses at all? For instance, in a reasonable accommodation case, did the employer perform an undue hardship analysis, or provide merely conclusory statements? If the latter, then the matter may be ripe to be summarily adjudicated.

The hearing date and costs

As previously stated, a plaintiff should reserve a hearing date with enough time to be heard before preparing for trial. After the case management conference where the trial date is set, ask the court clerk or courtroom attendant on what date hearings are being set. This will give you insight as to when to reserve the hearing date. One can also refer to the electronic reservation system, if maintained by the court, to determine how far in advance you should reserve the hearing date.

The cost to file a motion for summary adjudication is pricey. While regular motions in state court cost $60 to file, summary judgment and summary adjudication motions cost $500. (Gov. Code, § 70617, subd. (d).)

Because filing these motions is expensive and time-consuming, it is imperative that the discovery to elicit information about the affirmative defenses is done early so that if plaintiff determines that it is worth filing a motion for summary adjudication to narrow the issues, there is time to file the motion and have it heard before trial. Once an answer is filed and the case is at issue, there is no reason to delay on serving the discovery.

Once plaintiff has determined that the defendant has pled affirmative defenses to the disability discrimination action, but they are not supported by any facts, the motion needs to be drafted.

The format for submission of the SMA

Summary adjudication motions are very specific in terms of the format for submissions. The California Rules of Court govern which documents are required and the manner in which they need to be drafted. At a minimum, a party seeking summary adjudication must file (1) Notice of Motion, (2) Separate Statement of Undisputed Material Facts in support, (3) Memorandum of Points and Authority in support, and (4) Evidence in support. (Cal. Rules of Court, rule 3.1350(c).) A party may also file a request for judicial notice. (*Ibid*.)

In the notice of the motion, the plaintiff's counsel must state which issue(s) they seek to have adjudicated. It is easiest to put this information directly into the caption: "PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION OF DEFENDANT'S THIRD AFFIRMATIVE DEFENSE." The text of the notice should include the statement "Plaintiff will and hereby does move for summary adjudication of the third affirmative defense pleaded by Defendant in their Answer to Plaintiff's Complaint, which reads as follows: THIRD AFFIRMATIVE DEFENSE: Defendant alleges that the accommodation sought by Plaintiff would impose an undue hardship on Defendant in that such an accommodation would require significant difficulty or expense."

Thereafter, plaintiff will use this language to frame the issue in the separate statement. The separate statement serves two important functions in a summary judgment proceeding: It notifies the parties which material facts are at issue, and it provides a convenient and expeditious vehicle permitting the trial court to home in on the truly disputed facts. (*Collins v. Hertz Corp*. (2006) 144 Cal.App.4th 64, 74.) If the separate statement is not clearly written, or not compliant with the rules, it makes the job of the judge and the research attorneys very difficult. "The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion." (Code Civ. Proc., § 437c, subd. (b)(1).) If a fact is not stated in the summary adjudication motion, it does not exist for purposes of determining the motion.

The separate statement must identify each affirmative defense that is the subject of the motion and thereafter each supporting material fact claimed to be without dispute with respect to the affirmative defense. (Cal. Rules of Court, rule 3.150(d)(1).) The separate statement must be in the form of two columns with the undisputed fact and supporting evidence on the left, and a space for the employer's response on the right. (Cal. Rules of Court, rule 3.1350(d), (h).)

In our example, the plaintiff would list ISSUE NO. 1: PLAINTIFF IS ENTITLED TO SUMMARY ADJUDICATION ON THE THIRD AFFIRMATIVE DEFENSE BECAUSE DEFENDANT CANNOT PROVE THAT REASONABLY ACCOMODATNG PLAINTIFF WOULD HAVE CONSTITUTED AN UNDUE HARDSHIP.

In the column with plaintiff's supporting material facts, the plaintiff will list the undisputed facts that support that there is no evidence supporting this defense. Such as:

1. Defendant pled undue hardship as an affirmative defense.

Evid: Answer.

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2. Plaintiff requested the ability to remain seated during their shift.
Evid: HR Depo.
3. Defendant denied Plaintiff the ability to remain seated during their shift.
Evid: Responses to Plaintiff's Form Interrogatories – Emp.
4. Defendant allowed other employees to remain seated during their shift.
Evid: HR Depo.
5. Defendant does not consider cost when providing reasonable accommodation.
Evid: HR Depo.
6. Defendant does not consider financial resources when providing reasonable accommodation.
Evid: HR Depo.
7. Defendant did not conduct an undue hardship analysis.
Evid: HR Depo.

These facts would all be supported by the evidence that the plaintiff's attorney obtained in discovery, through written responses to interrogatories, requests for production, and depositions of the appropriate individuals, including witnesses and PMQs.

It is best to make the evidence a direct quote, if possible. (But do not fall into the trap of drafting your undisputed fact to say that "Witness X testified to Fact Y." That fact asserts what the witness testified to, not that the testimony was accurate.)

Be diligent in reviewing all the evidence to make sure that these facts are truly undisputed. If a triable issue is raised as to any of the facts in your separate statement, the motion must be denied. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.)

Include any facts that you want the court to consider in the separate statement submitted with your motion. There is no right to submit a reply separate statement. (*Nazir, supra*, 178 Cal.App.4th at 252.)

Maintain a clean and unannotated copy of the document that you used to prepare the separate statement. The defendant may ask you for a copy of the electronic version. Provide it to them. (Cal. Rules of Court, rule 3.1350(i).) The plaintiff will have the same right to ask for their electronic version of their opposing separate statement of additional facts, if any are provided with the opposition.

If the plaintiff's counsel has properly drafted the separate statement, the memorandum of points and authorities should be fairly easy to compile, as one would use the facts in the separate statement for the factual basis for the claim that defendant has failed to provide evidence supporting its affirmative defense. Remember, the defendant is making an affirmative statement that its actions did not constitute disability discrimination. They have failed to provide evidence that this claim is true.

On the reply, after reviewing the opposition, continue to stress that there is no genuine dispute as to a material fact as to your issue.

Before the hearing, check to determine whether the judge issued a tentative ruling. If so, review it closely to see if the judge needs additional argument on something not addressed in your papers.

If the judge grants the motion, this means that the affirmative defenses to the disability discrimination claims are dismissed, such that (1) any evidence about that defense does not get put before the jury, and (2) the employer cannot rely on that defense at trial. You will be able to fashion a motion in limine to properly exclude any evidence relating to that defense. The plaintiff will still need to prove the prima facie case, but the issues will be fairly streamlined, possibly to the point where the employer does not have a defense for the actions they took.

A lot of work – and worth it

MSAs require a lot of work but nothing sharpens the knowledge of the plaintiff's case like filing an MSA to dispose of an affirmative defense. If the plaintiff makes an attorneys' fee motion, these fees can be requested even if the motion is unsuccessful. Hopefully, more plaintiff's attorneys will be encouraged to add MSAs of meritless defenses to their tool sets as they fight for justice.


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