

12 Types of Summary Judgment.

Seriously? So what?

**“no genuine issue as to
any material fact”**

Categories of the types of summary judgment motions:

- --material facts not disputed
- --material facts are disputed
- --other

Material facts not disputed

(1) Agreed upon facts: fact framed question about what the legal standard is
E.g., what is the statute of limitations

Material facts not disputed

**(2) Agreed upon facts: fact bound
application of agreed upon legal
standard**

**E.g., First Amendment parade permit
case**

Material facts not disputed

(3) Material facts not really disputed

Material facts not disputed

(4) Undisputed facts are conclusive,
so disputes of fact are not material

Material facts disputed

**(5) Non-moving party evidence
insufficient for reasonable jury**

Material Facts Disputed

(6) Non-moving party has no evidence at all
Celotex v. Catrett

Material Facts Disputed

(7) Moving party evidence is conclusive

Video tape of the chase in Scott v. Harris

Material Facts Disputed

(8) Special summary judgment-only rules

Material Facts Disputed

(9) Judge just decides the issue

No explanation of why judge can do that

Material Facts Disputed

(10) No need for a bench trial

Other Type of Motion

(11) Contract interpretation

**Supreme Court decisions interpreting
arbitration contracts**

Other Type of Motion

(12) Review of an administrative record

E.g., denial of Social Security benefits

Complex motions:

Multi-claim motions

Multi-ground motions

(Avowedly) compound motions

Embedded compound motions

Why judges disagree about point-counterpoint

PCP works for conclusive moving party evidence motion, but not for evidence insufficiency motion

8 reasons why moving parties avoid evidence sufficiency motions

- --what could a reasonable or rational jury conclude
- --all reasonable inferences drawn in favor of non-moving party
- --interpret evidence in light most favorable to non-moving party
- --non-moving party witness to be believed
- --moving party witness usually to be disbelieved (*Reeves*; in theory)
- --no resolve conflicts in testimony (or inferences)
- --no assessment of credibility
- --no weighing of evidence (or inferences)

**Moving party usually
never uses “the J word”**

Moving party strategies

Call it a “no evidence” motion; all moving party evidence “not evidence”

- Legal bars to evidence (stray remark, inconsistent with deposition, own hours worked)**
- Imperfect evidence (does not rule out all legit. expectations, remark vague)**
- Make up some new exclusionary rule to fit your case**

Ask court to decide the issue; like a fact bound application of a legal standard

--hostile work environment

--bad enough to deter under *Burlington Northern*

--failure to complain unreasonable under *Faragher/Ellerth*

--“plaintiff did not prove”

Invoke a summary judgment-only rule: no prima facie case, no need to even decide if reasonable jury could rule for plaintiff

--not the rule at trial, Aikens

--some other circuits apply Aikens at summary judgment

--other summary judgment only rules: inconsistency with deposition

**Initially frame as a conclusive evidence motion;
opening brief just leaves out the moving party
evidence**

--favorable first impression with judge

**--you can recast the motion in your rely
brief if necessary (e.g. to no evidence)**

“No disputes of fact” motion.

Observable facts—who said what to whom—may not be disputed. Don’t treat as a disputed “fact” the factual inferences (e.g., about motive) to be drawn from the observable facts.

- **Frame the moving party contention as one about which there is no genuine dispute.**
- **Ignore the moving party's other contentions.**

Reframe the proffered justification for the adverse employment action so that it is not as vulnerable to attack as pretextual; e.g., leave out the part of the justification regarding which non-moving party has contrary evidence

Common Non-Moving Party Errors

- Just tell your client's story and lay out your evidence
- Often this is not responsive to the arguments in the motion
- At best the court just has two very different stories
- Need to understand how the moving party is suggesting this is not an evidence-insufficiency motion, and address that

- Recite all those wonderful maxims for evidence insufficiency motions
- The moving party is not ignoring those maxims
- The moving party has filed a type of summary judgment motion to which the maxims do not apply
- Need to understand what type of motion moving party claims to be filing

- Let the moving party define the key subsidiary issues
- Motion will focus on your weakest factual or legal argument
- What the motion ignores may be your best argument, and what you should focus on
- Be sure you agree with the way the moving party describes your factual or legal contention

- Take the bait: argue, for example, that the harassment DID create a hostile environment
- This abandons a contention that the underlying question is a jury issue

- Just argue about what the evidence is
- Most summary judgment motions are embedded compound motions
- They rest on assumptions about subsidiary legal standards, like what type of evidence is “not evidence” for some reason
- Need to identify the legal premise standards in the motions, and do some serious research; law is often inconsistent within a circuit

- Don't (try to) file a sur-reply
- Moving party reply brief usually raises new issues
- Moving party often postpones attacking some or all of known non-moving party evidence until the reply brief
- This violates Rule 7(b)(1)(B) (“state with particularity the grounds”) and Rule 56(f)(2) (summary judgment cannot be granted on a “ground not raised” by the moving party)