

F. MOTIONS FOR SUMMARY JUDGMENT

OVERVIEW:

Pursuant to § [2423.27](#), ALJs have the authority to rule on Motions for Summary Judgment. The Authority has applied the criteria in [Rule 56 of the FRCP](#) to these motions. Typically, the GC initiates a Motion for Summary Judgment after a Respondent's answer admits all material facts or the Respondent fails to answer the complaint.

OBJECTIVE:

To provide: (1) criteria for determining whether to file a Motion for Summary Judgment and (2) guidance on processing requirements (when, where, what, and how).

1. CRITERIA FOR FILING:

The Authority has adopted [FRCP Rule 56](#) as the criteria for Motions for Summary Judgment.

U.S. Equal Employment Opportunity Commission, 51 FLRA No. 26, 51 FLRA 248, 252-53 (1995) (citing U.S. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky, 33 FLRA No. 1, 33 FLRA 3, 4-6 (1988)), rev'd on other grounds sub nom. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky v. FLRA, No. 88-1861 (D.C. Cir. Aug. 9, 1990) (unpublished)).

a. *When is the filing of a Motion for Summary Judgment appropriate?*

When the facts alleged in the complaint support judgment as a "matter of law." On a Motion for Summary Judgment, the ALJ cannot decide the facts; s/he can only determine whether there are material issues of fact; if so, the motion must be denied.

Three situations in which the filing of a Motion for Summary Judgment is appropriate are:

- i. Where Respondent fails to answer a properly served complaint.

E.g., U.S. Department of Treasury, Customs Service, Washington, D.C. and Customs Service, Region IV, Miami, Florida, 37 FLRA No. 44, 37 FLRA 603, 610 (1990); U.S. Department of Energy, Washington, D.C., OALJD 98-39 (1998)

- ii. Where Respondent admits all material facts alleged in the complaint.

E.g., Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee, 50 FLRA No. 40, 50 FLRA 220, 227 (1995).

- iii. Where Respondent does not admit every fact, but the contested facts can be proven by uncontested documents or affidavits.

Id. at 222 (facts in an affidavit showing that the foreseeable impact of change was more than de minimis were correctly considered by ALJ).

Motions for Summary Judgment are probably not appropriate in cases where motive or intent is a necessary element of proof. This is typically shown by testimony at the hearing. But see U.S. Customs Service, St. Louis, Missouri, DE-CA-70590, ALJD Rpt. No. 134 (1998) at pages 5-11 (ALJ granted Respondent's motion for summary judgment in 7116(a)(1) and (2) case over GC's objection finding that GC had not made a sufficient showing that Respondent's asserted reasons for taking the allegedly discriminatory action were motivated by consideration of protected activity).

The Trial Attorney discusses the litigation strategy with the RA. Specifically, given the facts and circumstances of a particular case,

consideration must be given to whether to file a motion for summary judgment or whether to file a joint motion to rule on a case based on the parties' stipulations of fact.

- b. *Supporting documents, affidavits, applicable precedent, or other appropriate materials:*
- i. Section [2423.27](#)(a) requires that a Motion for Summary Judgment include supporting documents, affidavits, applicable precedent, or other appropriate materials. Presumably, other forms of uncontested evidence would be acceptable to the Authority as "other appropriate materials," such as interrogatories, admissions, or depositions. See [FRCP 56\(a\), and \(b\)](#).
 - ii. If affidavits are provided by a moving party, the response to the Motion must be countered with affidavits, not mere assertions.

Vreeken v. Davis, 718 F.2d 343, 347 (10th Cir. 1983); *Holland v. Bank of America*, 673 F. Supp. 1511, 1514 (S.D. Cal. 1987).

- c. *When:*

Although **no rule governs**, to move the process along, file the motion as soon as possible after the Answer is due or has been filed. Judges usually postpone the hearing indefinitely upon receipt of the motion.

- d. *What is filed:*

An original and four copies of supporting documents, except when filing is by facsimile when one copy is sufficient. The motion typically consists of at least three documents.

- Motion for Summary Judgment;
- Brief or memorandum in support of the Summary Judgment;
- Supporting affidavit(s), document(s), or other appropriate material(s).

- e. *Service:*

- i. All parties must be served with motions. §§ [2423.21](#)(a); [2429.27](#)(b).
- ii. Service is by certified mail, first-class mail, commercial delivery in person, or by facsimile where appropriate. §§ [2429.24\(e\)](#); [2429.27](#)(b).
- iii. Filing date is the date deposited in the mail, or date of personal or commercial delivery, or the date the facsimile is transmitted. § [2429.27](#)(d).

- f. *Response:*

Is made within five days after service (mailing date) plus five days for mailing (if applicable). See § [2423.27](#)(b). When a Motion for Summary Judgment is filed by facsimile transmission, a response must be filed within five days after service. However, an ALJ may issue an Order to Show Cause to the parties providing a set period of time in which to file responses to the Order to Show Cause Why the Motion Should Not Be Granted.

2. CONTENTS OF THE MOTION FOR SUMMARY JUDGMENT:

Sets out the procedural background of the case. The motion then either sets out in full the paragraphs of the complaint which were admitted or attaches and incorporates the complaint (and the Answer, if there is one) to show all material facts were plead and the complaint states the basis for a ULP.

3. CONTENTS OF BRIEF IN SUPPORT OF MOTION COVER FIVE MAIN POINTS:

- Procedural bases for the motion;
- Discussion of the facts, as admitted;

- Argument that the admitted facts constitute a ULP;
- Discussion of the recommended remedy; and
- Inclusion of references to documents, affidavits, etc., to support motion.

See [ATTACHMENT 1F1](#) for an example of a Motion for Summary Judgment and Supporting Brief and [ATTACHMENT 1F2](#) for an example of an Opposition to a Motion for Summary Judgment noting, in particular, the affidavit in support of the opposition.

4. CROSS-MOTION FOR SUMMARY JUDGMENT:

In addition to opposing a Motion for Summary Judgment, the Trial Attorney may file a Cross-Motion for Summary Judgment. This motion asserts that there are no material issues of fact and that judgment should be granted on behalf of the cross-motion--not in favor of the party filing the original Motion for Summary Judgment.

5. ALJ RULINGS ON MOTIONS FOR SUMMARY JUDGMENT:

A Motion for Summary Judgment may be granted in whole or in part. § [2423.27\(c\)](#). If all issues are decided by summary judgment, no hearing is held. If summary judgment is denied or is granted only in part, the hearing shall proceed, as necessary.

- Q [Part 1, Chapter G](#) concerning Stipulations; and
[Part 1, Chapter L](#) concerning Motions.

RESERVED

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