

# Summary Judgment in the Federal Sector EEO Process



# Regulations and Authority Governing the Summary Judgment Process

- EEOC Regulations - 29 C.F.R. Section 1614.109(g)
- Commission's Management Directive 110 - Chapter 7, Section III.E
- Commission's Handbook for Administrative Judges - Chapter 5
- Federal Rules of Civil Procedure - Rule 56
- Commission and court decisions



# Summary Judgment Time Limits

## Administrative Judge Notice

- Administrative Judge can issue *sua sponte* Notice at any time.
- Party may file Opposition or Response no later than 15 days after receiving Notice.
- Party may file Reply to other party's Opposition or Response no later than 5 days after receiving Opposition/Reply.

# SUMMARY JUDGMENT

## Time Limits

### Motion by Party

- Acknowledgement Order
  - Not later than **15 days after close of discovery**
  - Response **15 days after receipt of Motion**
  - Reply: **5 days after receipt of Response**
    - Receipt presumed 5 days after mailing

# SUMMARY JUDGMENT

## Time Limits

- 29 C.F.R. Section 1614.109(g)
  - Motion: at least 15 days prior to date of hearing
  - Response: within 15 days of receipt of motion
  - As practical matter, few, if any, AJs allow just 15 days prior to hearing because this does not allow opposition before the date of hearing

# SUMMARY JUDGMENT

## Legal Standards

1. No genuine issue of material facts
2. Party entitled to judgment as matter of law

Anderson v. Liberty Lobby, Inc.,  
477 U.S. 242, 255 (1986)

# SUMMARY JUDGMENT STANDARDS GENUINE ISSUES

- Issue of fact is “genuine”
  - If reasonable factfinder
  - Could find in favor of non-moving party
- If more than one “plausible inference can be drawn from undisputed facts, summary judgment is not appropriate.”

*Dunnington v. Department of the Army*

EEOC Appeal No. 01973339 (1999)

# SUMMARY JUDGMENT STANDARDS

## MATERIAL FACT

- Has the potential to affect the outcome of the case.
- Established by substantive law that governs the case
- Interpreted in light most favorable to non-moving party (or party against whom summary judgment will be entered)

# SUMMARY JUDGMENT STANDARDS

- AJ does not weigh conflicting evidence  
*Murphy v. Army*, EEOC Appeal No. 01A04099  
(July 11, 2003)
- Record must be sufficiently developed to allow for summary disposition  
***Petty v. DSS***, EEOC Appeal No. 01A24206  
(July 11, 2003)  
Usually means discovery

# SUMMARY JUDGMENT

## What Does AJ Look For - Motion

- All Issues/Bases Covered/Discussed
- Accurate Recitation of Facts Contained in ROI
- Citation to Record
- Separate Statement of Undisputed Material Facts
  - WITH Citation to Record
- Except in extraordinary case, not necessary to present lengthy explanation of well-known substantive law, e.g., McDonnell Douglas standards



# SUMMARY JUDGMENT

## What Does AJ Look For - Motion

- Evidence in ROI and additional evidence presented in support of Motion is admissible
  - Witness testimony: Declaration under penalty of perjury or testimony under oath at deposition
  - Documents: Authenticated; indicia of reliability
- Arguments supported by evidence in record



# **SUMMARY JUDGMENT**

## **What Does AJ Look For - Opposition**

- Separate statement of Facts in Dispute
- Clear explanation of materiality
- Citation to Record
- Accurate Recitation of Facts in ROI
- Clear explanation of credibility issues and how create material dispute of fact

# SUMMARY JUDGMENT

## What Does AJ Look For - Opposition

- If additional evidence to be presented at hearing, must be admissible
- Witness testimony: Declaration under penalty of perjury or testimony under oath at deposition
  - If not possible, id witness, present proffer of proposed testimony at hearing
  - Documents: Authenticated; indicia of reliability
- Arguments clearly supported by evidence in record or to be placed into evidence in record at hearing

# SUMMARY JUDGMENT

## Appellate



*Petty/Murphy* standards:

- Hearing process is extension of investigative process
- Truncation deprives complainant of full, fair investigation of claims

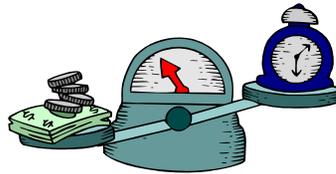
*Mi S. Bang v. United States Postal Service*, EEOC  
Appeal No. 01961575 (March 26, 1998)

# SUMMARY JUDGMENT

## *Petty Standard*

AJ cannot issue SJ if any of following exist

1. Hearing would aid in the development of an appropriate factual record;
2. There are genuine issues of material fact
3. AJ will have to find facts to do so (weigh evidence, make credibility determinations);  
or



# SUMMARY JUDGMENT

## *Petty* Standard (cont.)

4. Opposing party not given:
  - a) ample notice of proposal to issue decision without hearing;
  - b) comprehensive statement of allegedly undisputed material facts;
  - c) opportunity to respond to such a statement; and
  - d) chance to engage in discovery before responding, if necessary.

***Petty v. DSS***, EEOC Appeal No. 01A24206  
(July 11, 2003)

## SUMMARY JUDGMENT

### *Murphy v. Army*

- In deciding case on SJ, AJ of necessity made credibility determination
  - Credited agency witnesses
- AJ did not allow evidence or cross-examination re destruction of records

# SUMMARY JUDGMENT

## Application of *Petty/Murphy* on appeal

1. Issue properly before OFO
2. Proper procedures followed
3. Record/discovery completed
4. Inferences, if any, drawn in favor of non-moving party
5. Material facts remaining in dispute
6. Whether AJ
  - a. Weighed conflicting evidence
  - b. Reached factual findings
  - c. Engaged in credibility determinations

# Would You Grant SJ Motion?

- Issue: Non-promotion because of gender (female) to supervisory mechanical position at military installation
- Facts: Complainant is female; she applied for promotion, was interviewed but not selected; a male with fewer years of experience was selected. After discovery completed, agency makes a motion for summary judgment. Agency asserts:

# Would You Grant SJ Motion?

Proposed Undisputed Facts (ROI cited for all these facts)

1. Agency followed its usual promotion procedures
2. Complainant one of four best qualified based on applications (two women, two men)
3. Complainant had the longest tenure of all four applicants, but selectee had more directly related experience because had been detailed to the position for six months three years ago
4. Panel (3 males) interviewed all four applicants
5. Panel ranked four individuals in 3 areas: technical competence; communication skills; leave record

# Would You Grant SJ Motion?

6. Per declaration of selecting official, three applicants had “equal” leave records; but male selectee had taken two months of sick leave the previous year because he needed surgery
7. After interview, complainant ranked top in technical competence by all 3 people; selectee second; other female 3<sup>d</sup> and other male 4<sup>th</sup>
8. After interview, complainant ranked last by all three panel members in “communication skills”; selectee ranked first; other female applicant ranked next to last
9. Per declaration of selecting official, selected male selectee because had (a) equal leave record; (b) did basically the same on the technical questions and (c) was able to articulate his plan for supervising other mechanics and how he would organize the work; thus SO believed selectee proved himself to be the most qualified person for the job
10. SO’s declaration added that selectee had done a “terrific” job during his detail three years ago