ROBIN POTTER & ASSOCIATES, P.C.

ATTORNEYS AT LAW

111 East Wacker Drive • Suite 2600 • Chicago, Illinois 60601
Telephone [312] 861-1800 • Facsimile [312] 861-3009
potteroffice@robinpotter.org

February 14, 2014

Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Suite 7-240
Washington, D.C. 20544

**Re: Proposed Amendments to the Federal Rules of Civil Procedure**

To the Advisory Committee on Civil Rules:

I am an attorney and have practiced law for 35 years. My firm represents employees, unions, and whistleblowers in employment discrimination, retaliation, sexual harassment, wage and hour, FMLA, False Claims Act, and other matters, primarily as plaintiffs in individual and class actions. The individuals that we represent come from all walks of life, from hourly workers to professionals and executives.

We strongly oppose the proposed amendments to Federal Rules of Civil Procedure 26, 30, 31, 33, and 36.

In employment cases, the employer has access to, and control over, documents, information, and witnesses (other employees) that the employer can access informally but that the plaintiff employee can obtain only by way of discovery. Plaintiffs have the burden of proof and need to be able to obtain evidence to support their claims. Discovery levels the playing field; the proposed amendments give the advantage to the employer.

**Discovery plays a critical role in employment cases.** Rarely does an employment case present "smoking gun" evidence of, say, an employer paying a black employee less because of his race, and then terminating his employment when he voiced concerns about his pay. Pieces of evidence that separately are not conclusive of discrimination can together compose a "mosaic of discrimination" that proves the case.[1] The proposed changes to Rule 26 which explicitly eliminate the "reasonably calculated to lead to the discovery of admissible evidence" standard and replace it with a standard that requires direct relevance and proportionality will allow defendants to object to and withhold evidence that develops the chain of facts and inferences that prove the intangibles of motive, intent, bias, and pretext.

[1] *See, Morgan v. SVT, LLC*, 724 F.3d 990, 995-997 (7th Cir. 2013) (mosaic of evidence consisting of "individual pieces of circumstantial evidence that do not, in and of themselves, conclusively point to discrimination might nevertheless be sufficient to allow a trier of fact to find discrimination when combined.")

The U.S. Congress passed important employment-related laws (Title VII, ADA, ADEA, FMLA, etc.) to promote a fair and just society for people of all walks of life in their employment. We are concerned that a rule of "proportionality" would hurt low-wage workers and make it more difficult for them to obtain counsel. It is easy to see how defendants will argue – and judges will rule – that discovery should be severely restricted because the plaintiff's economic damages are relatively low. No matter that for this individual, for example, a sexually harassed waitress, her employment means the world to her, even if it means so little to the defendant.

Rules 30 and 31: The proposed changes to depositions will make it more difficult for plaintiffs to develop evidence. Plaintiff employees do not have access to decision-makers and other witnesses except by deposition. It is not uncommon for an employer's counsel to assert that it represents all or many of the employer's employees and that we cannot communicate with them except by deposition. We have had many cases where between five and ten depositions are needed (decision-makers, supervisors, human resources representatives, coworkers and comparators, experts). Often, depositions of company representatives are needed to discover the existence of important relevant documents and information which the employer failed to disclose either in Rule 26(a)(1) disclosures or in Rule 33 or Rule 34 responses. We have no incentive to take depositions that are not needed, because of the time and cost and because we typically have a contingency fee arrangement. Limiting depositions as proposed will also result in parties having to bring more discovery motions before the courts.

Rule 33: Interrogatories, already limited to 25, are an important tool to obtain information necessary to meet the plaintiff's burden of proof, as well as identification of witnesses and subjects for depositions. In my practice, it has not been burdensome to be on the receiving end of 25 interrogatories nor have I heard from other counsel that 25 interrogatories is burdensome.

Rule 36: Requests for admissions help to narrow issues for trial and promote the efficient resolution of a case. Because of the nature of requests for admission, a numerical limit of 25 will severely restrict the usefulness of this discovery tool. Each fact or matter must be separately and concisely set forth; requests for admissions should not contain compound statements. Responding to requests for admissions therefore is not time-consuming, and often the response is a simple "admitted" or "denied."

**Summary judgment practice has driven up the cost of discovery**. It has become a routine, practically knee-jerk reaction, for defendants to announce at the beginning of the case that they intend to file a summary judgment motion, even before the parties have even exchanged any information or conducted any discovery. The fact is, discovery is geared toward summary judgment, and more discovery is needed in order to respond to and defeat a motion for summary judgment than is needed for trial. For example, defendants commonly produce affidavits when filing a summary judgment motion; during discovery, plaintiffs must anticipate whose testimony defendants will use at summary judgment and take depositions accordingly. Therefore, any limits on discovery of plaintiffs, who bear the burden of proof, without any corresponding limits on summary judgment practice by defendants, will work an injustice on plaintiffs. We believe that restrictions on filing summary judgment would have the effect of lowering costs of discovery.

Thank you for your attention to these important matters.

Sincerely,

ROBIN POTTER & ASSOCIATES, P.C.

Robin Potter