

Follow-up on: Be Careful What You Say—It Might End Up in a Declaration to Defeat Summary Judgment

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In a recent Ninth Circuit decision, the court held that “a piece of evidence [may not be disregarded] at the summary judgment stage solely based on its self-serving nature.” As a result, declarations created **after** summary judgment motions are filed may be sufficient to create genuine issues of material fact and, therefore, defeat summary judgment. This decision is particularly concerning because it allows a party to thwart summary judgment with little to no credible or corroborated evidence.

In the case before the Ninth Circuit, the employee alleged claims for: (1) disability discrimination in violation of the Fair Employment and Housing Act (“FEHA”); (2) failure to accommodate in violation of FEHA; (3) failure to engage in the interactive process in violation of FEHA; and (4) wrongful termination in violation of public policy.

In support of his claims, the employee submitted **his own declaration** relaying an alleged phone conversation with his General Manager. In his declaration, the employee alleged he was told “[i]f you’re going to stick with being sick, it’s not helping your situation . . . you’re not going to be accommodated.” He also testified in his deposition that he was told he should not be concerned regarding his pay because he was “not going to be [there] anymore.” Nevertheless, the district court granted summary judgment and disregarded the evidence proffered by the employee because “the source of [the] evidence [was the employee’s] own self-serving testimony.” The employee appealed the decision.

On appeal, the Ninth Circuit held that a court may not disregard evidence on summary judgment simply because it is self-serving. Indeed, the court found that declarations are often self-serving in nature. That is, the party submitting the declaration is doing so to support his or her position. While the court acknowledged that the source of the evidence may have some bearing on its credibility and the weight it should be given, the Ninth Circuit found that the reliability of the evidence is for the trier of fact to determine at trial and not the court. Thus, the court reversed the district court’s ruling.

Based on this standard, it is not only important to be careful what you say (as discussed previously), but from a legal perspective, a party need only create a self-serving declaration in order to create a

triable issue of fact. Thus, going forward, the low evidentiary threshold promulgated by the Ninth Circuit may make it more difficult for employers to obtain summary judgment.

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