Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action

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Executive Summary

In November 2011, a task force of plaintiff and defendant attorneys, working in cooperation with the Institute for the Advancement of the American Legal System (IAALS), released a pattern discovery protocol for adverse action employment cases. The task force intended for this protocol to serve as the foundation for a pilot project examining whether it reduced costs or delays in this subset of cases. About seventy-five federal judges nationwide have adopted the protocols; in some districts, multiple judges have been using them.

The Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center (FJC) to report on the pilot. FJC researchers identified almost 500 terminated cases that had been included in the pilot since late 2011. For purposes of comparison, the researchers created a random sample of terminated employment discrimination cases from approximately the same filing cohorts. Information was collected on case processing times, case outcomes, and motions activity in the pilot and comparison cases. Following are the key findings summarized in this report.

- There was no statistically significant difference in case processing times for pilot cases compared to comparison cases.
- There was generally less motions activity in pilot cases than in comparison cases.
- The average number of discovery motions filed in pilot cases was about half the average number filed in comparison cases.
- Both motions to dismiss and motions for summary judgment were less likely to be filed in pilot cases.
- Although the nature of private settlements makes it difficult to determine conclusively, it appears that pilot cases were more likely to settle than comparison cases. On average, however, pilot cases did not settle faster than comparison cases.

Background

In May 2010, the Judicial Conference Advisory Committee on Civil Rules sponsored a major Civil Litigation Review Conference at Duke University School of Law. The Duke conference was motivated by the perception that cost and delay in civil litigation required a reevaluation of the Federal Rules of Civil Procedure. One idea to arise from the conference was that pattern discovery in certain types of civil cases could streamline the discovery process and reduce delays and costs.

A committee of plaintiff and defendant attorneys highly experienced in employment matters began meeting to debate and finalize the details of what became the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action. Joseph Garrison chaired the plaintiffs' subcommittee, and Chris Kitchel chaired the defendants' subcommittee. District Judge John G. Koeltl (Southern District of New York) and the Institute for the Advancement of the American Legal System (IAALS) and its director, Rebecca Love Kourlis, facilitated these meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were formalized in November 2011 and posted, along with a standing order and model protective order, to the Federal Judicial Center (FJC) public website (www.fjc.gov). Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. As of this writing, about seventy-five judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, several judges have participated.

The introduction to the protocols identifies the pilot's purposes:

> The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use [as] a basis for discussion.

In spring 2015, FJC researchers searched court electronic records to identify cases that participating judges had included in the pilot. This search used key words likely to be found on the dockets of pilot cases, with the language largely drawn from the standing order made available as part of the protocols.

The searches resulted in a sample of 477 pilot cases, which was determined to be adequate for analysis. Pilot cases were identified in ten districts: Arizona, California Northern, Connecticut, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern. Not all districts are represented evenly in the terminated pilot cases. More than half (55%) were in Connecticut, and almost another quarter were in New York Southern (22%). The finding that more than three-quarters of pilot cases came from only two of the districts could reflect differing docketing practices, the number of judges employing the protocols, the number of eligible cases in the various districts, or a combination of these factors.

A nationwide random sample of terminated employment discrimination cases filed in 2011 or later was drawn for a comparison sample. The comparison sample included 672 terminated cases alleging employment discrimination.

Findings

Disposition times. The mean disposition time for pilot cases (N=477) was 312 days, with a median of 275 days. The mean disposition time for comparison cases (N=672) was 328 days, with a median of 286 days. These miniscule differences in disposition times, although in the expected direction, are not statistically significant ($p = .241$).

Case outcomes. The most common case outcome for pilot cases (N=477) was settlement, observed in 51% of cases. The second-most common outcome for pilot cases was voluntary dismissal, observed in 27% of cases. Many, if not most, voluntary (stipulated, in most cases) dismissals are probably settlements, but for this project a case was only coded as settled if there was some positive indication on the docket or in the stipulation that a settlement had been reached. If every voluntary dismissal is presumed to be a settlement, adding that number to the number of settlements provides a maximum estimate of 78% of cases settling.

Pilot cases were dismissed on a Rule 12 motion 7% of the time and resolved by summary judgment 7% of the time. Three pilot cases (< 1%) were resolved by trial. Seven percent of the pilot cases were resolved some other way, including dismissals for want of prosecution and for failure to exhaust administrative remedies.

The most common case outcome for comparison cases (N=672) was voluntary dismissal, observed in 35% of the cases. Settlement was the second-most common outcome, at 30%. The maximum, combined estimate for the settlement rate in the comparison cases is around 65%. Thus, the lower settlement rate for comparison cases corresponds with these cases being much more likely to be dismissed on a Rule 12 motion (13%) or resolved through summary judgment (12%). These two

outcomes account for fully a quarter of dispositions in comparison cases but only about an eighth of dispositions in pilot cases. Ten comparison cases (2%) were resolved by trial. Eight percent of the comparison cases were resolved in some other way.

Comparing the pilot cases and comparison cases that were either settled or voluntarily dismissed, the pilot cases did not reach settlement earlier. The pilot and comparison cases have essentially the same mean disposition time (just under 300 days).

Motions practice. Fewer discovery motions were filed in the pilot cases than in the comparison cases. This analysis is limited to motions for protective orders and motions to compel discovery, including motions to compel initial disclosures required under the pilot. One or more discovery motions were filed in 21% of the comparison cases, compared to only 12% of the pilot cases. The difference of means for the number of discovery motions filed between pilot and comparison cases is statistically significant ($p < .001$).

Cases with more than two discovery motions were quite rare. Three or more discovery motions were observed in about 1% of pilot cases and 2% of comparison cases.

Motions to dismiss were filed in 24% of the pilot cases and in 31% of the comparison cases. Motions for summary judgment were filed in 11% of pilot cases and in 24% of comparison cases. The court decided 71% of the motions to dismiss in the pilot cases and 87% of the motions to dismiss in the comparison cases.

Discussion

Some of the findings summarized above are consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that fewer motions correspond with lower costs overall. (Costs are difficult to measure directly.) The findings are also consistent with the hypothesis that the pilot cases were more likely to result in settlement, although not necessarily an earlier settlement. Indeed, the findings indicate that case processing times were very similar for the pilot and comparison cases overall and for settlement cases. The pilot does not, in short, appear to have an appreciable effect on reducing delay.

Two caveats are in order, however. First, while the initial disclosures required by the pilot were docketed in some cases, this does not appear to be standard practice. Thus, it is impossible to determine how often the parties in the pilot cases actually complied with the discovery protocols and exchanged the required initial disclosures. In fact, in some cases, it was relatively clear that the parties delayed the

exchange while engaging in settlement efforts. Second, this report makes no claim that the *only* factor differing between the pilot and comparison cases was the pattern discovery in the former. Cases were not randomly assigned to be pilot or comparison cases. Individual judges' practices vary, and judges inclined to adopt new discovery procedures may vary in some systematic fashion from judges who decline to do so. Individual districts' local rules and procedures also vary. Some districts in the study appear to commit more resources to mediating employment disputes than others, which may explain some of the variation in settlement rates. Thus, some caution is warranted before concluding that the pilot program caused the above described differences between the pilot and comparison cases.

Appendix A: Comparison cases

This section summarizes the results of a study of a random, nationwide sample of terminated employment discrimination cases filed after January 1, 2011 (N=672). Because of the focus on terminated cases, cases filed in 2011–2013 comprise the bulk of the sample; only about 11% of the sample cases were filed in 2014 or 2015.

Disposition times by case outcomes. The median time to disposition for all comparison cases was 286 days (9.4 months). The mean time to disposition was 328 days (10.8 months). Leaving aside other outcomes, voluntary dismissals had the shortest median disposition time, 239 days (7.9 months), followed by dismissal on motion, 247 days (8.1 months), and settlement, 290 days (9.5 months). Not surprisingly, cases decided by summary judgment took much longer to resolve, median time to disposition, 504 days (16.6 months), and the small number of cases decided by trial had the longest disposition time of all, median 526 days (17.3 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cutoff was 186 days (6.1 months). The median time from filing to the first discovery cutoff (in the first scheduling order, if any) was 299 days (9.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 69 days (2.3 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in three cases had a motion to dismiss, and about one in four had a motion for summary judgment. Motions to dismiss were filed in 31% of the sampled cases, and motions for summary judgment were filed in 24%. More than one motion for summary judgment was filed in about 5% of the sample cases. Motions to compel were filed in 10% of the sampled cases, and motions for protective orders were filed in 18%. The latter figure includes stipulated protective orders.

Appendix B: Pilot cases

This section summarizes more detailed findings of the identified pilot cases (N=477).

Disposition times by case outcomes. The median time to disposition for all pilot cases was 275 days (9.1 months). Leaving aside other outcomes, dismissal on motion had the shortest median time to disposition, 236 days (7.8 months), followed by voluntary dismissals, 237 days (7.8 months), and settlement, 280 days (9.2 months). Again, cases decided by summary judgment took much longer to resolve—median time to disposition, 623 days (20.5 months)—but the small number of cases decided by trial was shorter—median 459 days (15.1 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cutoff was 168 days (5.5 months). The median time from filing to the first discovery cutoff (in the first scheduling order, if any) was 329 days (10.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 75 days (2.5 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in four cases had a motion to dismiss, and about one in ten had a motion for summary judgment. Motions to dismiss were filed in 23% of the sampled cases, and motions for summary judgment were filed in 11%. More than one motion for summary judgment was filed in about 1% of the sample cases. Motions to compel were filed in 5% of the sampled cases, and motions for protective orders were filed in 9%. The latter figure includes stipulated protective orders.