'Self-serving' affidavit: Countering this defense objection in employment cases

By Robert B. Landry III; Robert B. Landry III, PLC; Baton Rouge, Louisiana

Rob Landry

The importance of the summary judgment stage in employment cases cannot be over-emphasized. Losing a motion for summary judgment can be a wake-up call for overconfident employment defense counsel. A plaintiff who defeats an employer's summary judgment motion is better positioned to settle the case.

If a trial is on the horizon, the district court has previewed the evidence and, in denying the employer's summary judgment motion, has found that there are issues of material fact for the jury to decide. The plaintiff, therefore, is a step closer to a favorable verdict.

Plaintiffs must tell their side of the story to effectively oppose a motion for summary judgment. Often, the plaintiff will attach her own supporting declaration or affidavit to an opposition memorandum. Rather than risk disputing the inconvenient facts the plaintiff presents, the employer frequently will object to the entire declaration as "self-serving" and ask that the court disregard it entirely.

Never mind that much of an employer's evidence consists of exceedingly self-serving testimony and statements from witnesses still employed at the company — employees who are highly motivated to toe the company line or lose their paychecks. You can even argue that virtually all witness testimony is self-serving — the job of the jury is to sort out who is credible and who isn't.

There is nothing inherently wrong with "self-serving" statements.

Recently, in *Salazar v. Lubbock County Hospital District*, 982 F.3d 386, 389 (5th Cir. 2020), the Fifth Circuit affirmed the district court's summary judgment dismissal of a plaintiff's age discrimination claim, reasoning that the plaintiff's "self-serving statements that she was performing adequately" were insufficient to create a triable issue of fact that her employer fired her because of her age. In a concurring opinion, Judge James C. Ho clarified that "[t]here is nothing inherently wrong with self-serving statements."[1]

Courts expect litigants to present statements that serve their interests, and the adversarial system is premised on this practice.[2] Nor do self-serving statements prevent a party's assertions from creating a dispute of fact.[3] As Judge Ho pointed out, the problem occurs when statements are not simply self-serving, they are conclusory.[4]

Affidavits or declarations setting forth conclusory assertions are sometimes described disparagingly as "self-serving."[5] A party cannot rely on "mere conclusory statements" to create an issue of fact when opposing a summary judgment motion.[6]

While there may be nothing wrong with a "self-serving" statement, how do you ensure that the plaintiff's affidavit or declaration is not comprised of mere conclusory statements?

Identifying conclusory statements

The concept of "conclusoriness" can be elusive, which may lead the practitioner to echo Justice Potter Stewart's standard for identifying pornography in First Amendment cases: "I know it when I see it."[7]

Luckily, the Fifth Circuit has provided some guidance. "A non-conclusory affidavit

can create genuine issues of material fact that preclude summary judgment, even if the affidavit is self-serving or uncorroborated."[8] An affidavit that presents "[b]road legal or factual assertions" that are "unsupported by specific facts" is generally considered conclusory.[9]

In contrast, an affidavit with more detailed and fact-intensive assertions can raise genuine issues of material fact that preclude summary judgment.[10] Put another way, a conclusory statement is devoid of specific factual allegations.[11]

In *Marsh v. Hog Slat, Inc.*, an Iowa district court provided examples of what does and does not constitute a conclusory statement in an employment discrimination case.[12] While an affidavit merely stating that the plaintiff was meeting the legitimate expectations of his employer is conclusory and cannot generate a genuine issue of material fact, the plaintiff's recitation of specific facts in support of that conclusory statement, based on personal knowledge, will be sufficient to preclude summary judgment.[13]

The *Marsh* court disagreed with the employer that the plaintiff's affidavit contained conclusory allegations about his performance, finding that the affidavit was based on the plaintiff's personal knowledge and provided "*fact-specific rebuttals* to each of the instances of supposed poor performance detailed in [the employer's] statement of facts and affidavits."[14] (Emphasis added.)

The *Marsh* court collected other examples of affidavits found conclusory in employment cases: (1) an Equal Pay Act claim wherein a plaintiff's affidavit was deemed conclusory "because she failed to articulate which particular male managers had jobs similar to hers, or how the males compared in experience, education, and training;"[15] (2) an employment retaliation plaintiff who failed to establish the causal connection element of a *prima facie* retaliation case because her only evidence on that element was her own conclusory affidavit, devoid of any specific factual allegations;[16] and (3) a disability discrimination plaintiff who made only general statements about being substantially limited in a long list of major life activities.[17]

In other words, generalizations should be avoided. Instead, affidavits or declarations should set forth detailed and fact-intensive assertions.

A plaintiff's non-conclusory statements, even if self serving, deserve respect.

The Fifth Circuit made clear that a plaintiff's non-conclusory affidavit that provides detailed factual allegations based on personal knowledge is just as deserving of deference as those of an employer and its representatives. In *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 245 (5th Cir. 2016), the Fifth Circuit determined that the district court erred in rejecting as "self-serving" the affidavit of a plaintiff alleging violations of the Family and Medical Leave Act. In fact, rejecting the plaintiff's statements while accepting those of the employer was deemed "an approach … inconsistent with the fundamental rules governing summary judgment."[18]

When a court rejects a plaintiff's non-conclusory statements but accepts those of the employer, it weighs the evidence and makes impermissible credibility determinations that should be reserved for the finder of fact at trial.[19] The employee's statements should not be rejected as "self-serving" just because the employer or its representatives make divergent statements.[20] The court concluded that:

> To hold otherwise would signal that an employee's account could never prevail over an employer's. This would render an employee's protections against discrimination meaningless.[21]

When the defendant improperly seeks to characterize an employee's non-conclusory affidavit as "self-serving," federal and state statutory goals of eradicating discrimination and other inequities in the workplace are in danger of being undermined and rendered ineffectual. Employees are entitled to tell their side of the story, just as employers are. In fact, employers and employees are on an equal playing field when it comes to so-called "self-serving" statements and testimony.

When defense counsel argues that your client's affidavit or declaration is self-serving and should be disregarded for purposes of summary judgment, be prepared to argue that even self-serving affidavits are permissible as long as they are not conclusory. In defeating a motion for summary judgment, the plaintiff's non-conclusory, detailed, and fact-specific affidavit or declaration will assist in establishing that genuine issues of material fact exist, precluding summary judgment.

An employee's side of the story is not entitled to less deference just because he may be the little guy in a David and Goliath battle. Both sides utilize so-called self-serving or self-interested statements and testimony in the summary judgment battle. The trick is to identify and avoid mere conclusory allegations that may give your opponent the edge.

Endnotes

1. *Id.* at 392.
2. *Id.*
3. *Id.*, citing *Bargher v. White*, 928 F.3d 439, 445 (5th Cir. 2019).
4. *Id.* at 392.
5. *Id.*
6. *Id.*
7. Erichson, Howard M. "What's the Difference Between a Conclusion and a Fact?," 41 *Cardozo L. Rev.* 899, 906 (2020). While this article discusses the difference between conclusory

statements and allegations of facts at the pleading stage under the U.S. States Supreme Court's *Iqbal* and *Twombly* standard, the analysis is also helpful in discerning whether an affidavit's assertions are conclusory.

8. *Lester v. Wells Fargo Bank*, N.A., 805 Fed. Appx. 288, 291 (5th Cir. 2020).
9. *Id*. at 292, citing *Kariuki v. Tarango*, 709 F.3d 495, 505 (5th Cir. 2013) (vague and general statements about moral character insufficient to create genuine issue of material fact); *Chavers v. Exxon Corp*., 716 F.2d 315, 318 (5th Cir. 1983) (statement that a defendant's "trade[,] business and occupation is the location, production and sale of oil and gas" was conclusory because defendant's status under Louisiana law depended on other, unstated, facts); *Fowler v. S. Bell Telephone & Telegraph Co*., 343 F.2d 150, 154 (5th Cir. 1965) (defendants' sworn, conclusory statements that they were acting within scope of employment did not support summary judgment where unsupported by specific facts).
10. *Id.* at 292. See also, *Weed v. Sidewinder Drilling, Inc*., 245 F. Supp. 3d 826, 845 n. 19 (S.D. Tex. 2017) (plaintiff's "self-serving" affidavit contradicted employer's assertions and raised genuine issues of fact for trial in an Americans with Disabilities Act case).
11. *Marsh v. Hog Slat, Inc*., 79 F. Supp. 2d 1068, 1073 (N.D. Iowa 2000).
12. *Id.* at 1074-75, 1077.
13. *Id*. at 1074-75.
14. *Id*.
15. See *Berg v. Norand Corp*., 169 F.3d 1140, 1146 (8th Cir.), *cert. denied*, 528 U.S. 872, 120 S. Ct. 174, 145 L. Ed.2d 147 (1999).
16. *Pony Computer, Inc. v. Equus Computer Sys. of Mo., Inc*., 162 F.3d 991, 997 (8th Cir.1998).
17. *Helfter v. United Parcel Serv., Inc*., 115 F.3d 613, 616 (8th Cir.1997).
18. *Id*.
19. *Id.*
20. *Id*.
21. *Id*.