



A. INTRODUCTION

This section of the *Manual* discusses the standards and procedures for motions for judgment as a matter of law and motions for a new trial, and indicates some of the circumstances in which Commission attorneys should consider moving for judgment as a matter of law. As emphasized in subsection E., the Commission cannot base an appeal on the lack of sufficient evidence to support the jury's verdict unless the Commission has made a motion for judgment as a matter of law under Fed. R. Civ. P. 50 at the appropriate times and the motion includes the specific grounds relied on. **In situations where there are insufficient grounds for requesting judgment as a matter of law, trial attorneys should still consider moving for a new trial under Fed. R. Civ. P. 59.** As indicated in subsection D. below, the standard for a new trial is much more lenient than for judgment as a matter of law. Where a Rule 59 motion is made on the ground that the verdict is against the weight of the evidence, the court is free to weigh the evidence and can grant a new trial “[i]f, having given full respect to the jury’s findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2806, at 75 (2d ed. 1995).



**B. RULE 50 PRACTICE:
MOTION FOR JUDGMENT AS A MATTER OF LAW**

1. The Rule

- Rule 50(a) provides for a motion for judgment as a matter of law (JMOL) which may be made at any time before submission of the case to the jury. This was previously known as a motion for a directed verdict. It allows the trial court to determine whether there is any question of fact to go to the jury and whether any finding other than the one requested would be erroneous as a matter of law.

- Rule 50(b) allows the court to reserve decision on the question of law until after the case has been submitted to the jury and the jury has reached a verdict or is unable to agree. If the court decides the initial motion should have been granted, it may set aside the verdict of the jury and enter judgment as a matter of law. This was previously known as judgment notwithstanding the verdict. Rule 50(b) also allows a motion for a new trial under Rule 59 to be joined in the alternative with a renewed motion for judgment as a matter of law..

- The 1993 amendment to Rule 50 makes clear that JMOL may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of an entire claim or defense.

- If the party with the burden of proof has established the elements of its case by testimony that the jury is not at liberty to disbelieve, JMOL in that party's favor may be granted on motion. However, entering JMOL for the party bearing the burden of proof on an issue is generally viewed as an extreme step, to be taken only "when the evidence favoring the claimant is so one-sided as to be of overwhelming effect." *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997); see *Grey v. First Nat'l Bank in Dallas*, 393 F.2d 371 (5th Cir.), *cert. denied*, 393 U.S. 961 (1968); 9A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2535, at 325-29 (1995).

2. Standard of Sufficiency

- The question of whether the evidence is sufficient to create an issue of fact is a question of law and is the same regardless of whether the motion is being considered before or after submission to the jury.



- The standard for evaluating the sufficiency of the evidence under Rule 50 is the same as the standard for reviewing a motion for summary judgment as well. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). **But even where a court has denied a motion for summary judgment it can still enter judgment as a matter of law.**
- The court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. It must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences that may be drawn from the evidence.
- The court must review all of the evidence in the record, not just the evidence favorable to the nonmoving party, *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 149-51 (2000); however, “it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Id.* at 151.
- Thus, “the court should give credence to the evidence favoring the nonmovant as well as that ‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.’” *Id.* (quoting 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2529, at 300 (2d ed. 1995)).
- **The analysis is the same in the trial court and on appeal.**



C. PRACTICE POINTS

1. Opposition to Defendant's Rule 50 Motion

- Always object where a Rule 50(a) motion does not specify the factual and legal basis for the proposed judgment as a matter of law (JMOL).
- When the motion is renewed after the verdict under Rule 50(b), object if the grounds proposed differ in any material way from the grounds previously offered. It is settled law that "where a party did not object to a movant's Rule 50(b) motion specifically on the grounds that the issue was waived by an inadequate Rule 50(a) motion, the party's right to object on that basis is itself waived." *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997) (collecting cases).

2. Rule 50(a)

- The motion must specify the judgment sought and the law and facts on which the moving party is entitled to the judgment. **This is mandatory.** Failure to state the specific grounds relied on is in itself a sufficient basis for denial of the motion.
- A court can consider a motion for JMOL made at the close of the opponent's case and a similar motion made at the close of all the evidence together to determine whether specific grounds were made sufficiently clear.
- Statement of one ground precludes a party from later claiming the motion should have been granted on a different ground.
- While it is preferable that the motion be in writing, this is not mandatory under the rule, so an oral motion based on the record can suffice.
- The court will not err if it denies a motion for JMOL that does not state the grounds sufficiently and the **moving party cannot complain about the denial on appeal.**
- If the court grants a motion for JMOL that does not state the ground sufficiently, and the opposing party did not object to the lack of grounds in the trial court, **the opposing party may not raise this point in the appellate court.**



- A trial court should usually submit a case to the jury even if it thinks the evidence insufficient because then if it grants JMOL on a renewed motion after the verdict and the appellate court holds that the trial court was in error in its appraisal of the evidence, the appellate court can reverse and order judgment on the verdict of the jury without the need for a new trial.

- The grounds for JMOL in the Rule 50(a) and (b) motions must be identical. An inconsistency in verdicts arising as a result of jury instructions and the jury's answers gives rise to a basis for a postverdict motion for a new trial or for further deliberation by the jury under Rule 49(b), not for a renewed motion for JMOL.

3. Rule 50(b) -- Renewed Motion for JMOL After the Verdict

- A postverdict motion cannot be made unless a previous motion for JMOL was made by the moving party prior to submission of the case to the jury.

- If the evidence was insufficient as a matter of law to support the verdict but no motion for JMOL was made under Rule 50(a), even though the court cannot grant a Rule 50(b) motion, it can set aside the verdict and order a new trial.

- The renewed motion for JMOL must state the grounds on which it is made and it cannot assert a ground that was not included in the earlier motion.

- The standard is precisely the same as for the presubmission motion.

- The party who moved for JMOL at the close of all the evidence under Rule 50(a) may make the renewed post-verdict motion under Rule 50(b) within 28 days after entry of judgment or, if a verdict was not returned, within 28 days after the jury has been discharged. This time period cannot be enlarged by the court or by stipulation of the parties, and an untimely motion cannot be considered.



D. ALTERNATIVE MOTION FOR NEW TRIAL

- Rule 50(b) permits joinder of a Rule 59 motion for a new trial with a renewed motion for judgment as a matter of law (JMOL). Any grounds that would support a motion for a new trial can be asserted and will be tested under the same standards that would apply if the motion were made independently under Rule 59.

- One ground that should ordinarily be included in every alternative motion for a new trial under Rule 50(b) is that the verdict is contrary to the clear weight of the evidence. The standard for a new trial is obviously much more lenient: the court may consider the credibility of witnesses and the weight of the evidence and may set aside a verdict supported by substantial evidence where the court thinks it is contrary to the clear weight of the evidence or is based upon evidence which is false.

- The district court has to rule on both branches of the alternative motions. If it grants the motion for JMOL, it is required to specify the grounds for granting or denying the motion for new trial.

- Appellate review of these rulings is complex, but should be considered to assure all procedural steps have been taken to maximize success on appeal. Basically there are four possible outcomes in ruling on the alternative motions under Rule 50(b):
 - The trial court may deny the motion for JMOL and grant a new trial. If it does, the order is not appealable and the new trial will proceed. In practice, this means there is no appellate review of the ruling because it is difficult to show on appeal following the second trial that even if the denial of the motion for JMOL was erroneous it had a prejudicial effect in the second trial.

 - The court may deny both the Rule 50(b) motion and the motion for a new trial. If it does, the jury's verdict stands and the appeal is from the judgment entered on the verdict. Both the refusal of JMOL and errors of law in the trial court may be raised on appeal. **Review is de novo.**
 - ◆ If the appellate court concludes it was error to deny the motion for JMOL, it has the same choice among ordering entry of judgment for the moving party,



ordering a new trial, or remanding for the trial court to determine whether there should be a new trial that it has whenever it reverses a denial of a motion for judgment.

- ◆ It will consider but is not limited to any grounds that the winning party below has asserted as appellee for the grant of a new trial in the event the decision below on the motion for judgment is reversed.
- ◆ If the appellate court concludes that the district court was correct in denying the motion for judgment it may also consider whether the court erred in denying the alternative motion for new trial.
 - The court may grant both the Rule 50(b) motion and the motion for a new trial. If it does so, the grant of a new trial is conditional and becomes effective only if the appellate court reverses the grant of JMOL. Though conditional, the judgment is final and appealable.
 - ◆ The party for whom the verdict was returned is entitled to urge that trial errors entitle him to a new trial rather than to entry of judgment against him. That party may move for a new trial within 28 days after the entry of the JMOL, and whether the party has moved for a new trial or not, may argue on appeal that a new trial should be granted rather than judgment entered against him.
 - ◆ If the appellate court affirms the grant of JMOL, the case is ended.
 - ◆ If it reverses the grant of that judgment, the new trial must proceed unless the appellate court orders otherwise.
 - ◆ In passing on the conditional new trial grant, the appellate court may consider only reviewable matters. The grant of a new trial on the ground that the verdict is against the weight of the evidence is generally not reviewable, so the new trial order cannot be examined absent a finding of abuse of discretion below.
 - The trial court may grant the motion for JMOL and conditionally deny the new trial.
 - ◆ The party for whom the verdict was returned is entitled to urge that trial errors entitle him to a new trial rather than to entry of judgment against him. That party may move for a new trial within 28 days after the entry of the JMOL, and whether the party has moved for a new trial or not, may argue on appeal that a new trial should be granted rather than judgment entered against him.



◆ The party in whose favor the motion for JMOL was granted may argue on appeal as appellee, as an alternative to affirmance, that the denial of the alternative new trial motion was error, and **that party need not take a cross-appeal** to do so. If the denial of the new trial is challenged in this fashion, the appellate court, after reversing the grant of judgment, will determine whether judgment should be entered on the jury verdict or whether there should be subsequent proceedings.



**E. CIRCUMSTANCES IN WHICH EEOC ATTORNEYS
SHOULD CONSIDER RULE 50 MOTIONS
AND MOTIONS FOR NEW TRIAL**

● Motions for judgment as a matter of law (JMOL) under Fed. R. Civ. P. 50(a), and for new trial after verdict under Rule 59, should be made on any issues on which the defendant bears the burden of proof, for example (**this list is illustrative only**):

- Bona fide occupational qualification (BFOQ) defenses to discriminatory policies or qualification standards under Title VII or the Age Discrimination in Employment Act (ADEA)
 - Reasonable factor other than age (RFOA) defense under the ADEA
 - Waiver under the Older Workers Benefits Protection Act (OWBPA)
 - Statutory defenses under the Equal Pay Act (EPA)
 - Business necessity defense in disparate impact cases under Title VII or the ADEA
 - Less discriminatory alternative rejected under Title VII or the ADEA in an impact case
 - Undue hardship in religious accommodation cases
 - Americans with Disabilities Act (ADA) accommodation cases – failure to participate in interactive process where accommodation exists; undue hardship
 - ADA qualification cases – business necessity for standard; direct threat
 - Harassment cases (any basis) – in supervisor harassment context, *Faragher-Ellerth* defense

In these cases if we are entitled to JMOL because the defendant failed to establish one of these defenses, we would ordinarily be entitled to judgment on liability.



- Motions for JMOL should be made, where appropriate, even in cases involving shifting burdens of proof, despite the fact that the EEOC bears the ultimate burden of persuasion. Since the burden of persuasion is merely proof by a preponderance, we should consider arguing that we have met that standard as a matter of law in **disparate treatment cases** where the employer's assertion of a nondiscriminatory reason is weak and/or our evidence is strong on **pretext**; in any cases with **direct evidence** in which the employer has not asserted an affirmative defense and proven by a preponderance of the evidence that it would have made the same decision absent the prohibited motive; and in any cases involving **facially discriminatory policies** where proffered defenses are weak.

Remember -- the sufficiency of the evidence is not reviewable on appeal unless a motion for JMOL has been made in the trial court prior to submission of the case to the jury and renewed on the same ground after an adverse verdict. Nor is sufficiency of the evidence reviewable if the trial court denied a motion that does not state specific grounds as required by Rule 50(a). Only in rare cases will an appellate court look at the sufficiency of the evidence to support a verdict absent a motion for JMOL—when it would constitute plain error apparent on the face of the record that, if not noticed, would result in a manifest miscarriage of justice.

* As indicated in the Introduction to this section (see section III.A., above), even where sufficient grounds for JMOL are absent, the legal unit should consider moving for a new trial under Rule 59 where the verdict is against the weight of the evidence.