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Summary Judgement in Employment Discrimination Cases in the Eastern District of New York

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SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES IN THE EASTERN DISTRICT OF NEW YORK

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I. INTRODUCTION

In federal court, summary judgment motions are governed largely by Rule 56 of the Federal Rules of Civil Procedure (FRCP) and the cases construing this provision. Summary judgment may also be governed by the local rules of the district court and/or the district judge's individual practices. In the Eastern District of New York, Local Civil Rule 56.1, as well as the individual practices of each judge, govern summary judgment practice.

In employment discrimination cases specific analytical frameworks have been developed to govern a court's analysis of evidence whether presented on a motion for summary judgment or at trial. In my experience with employment discrimination cases, it is rare for a defendant employer not to move for summary judgment challenging the plaintiff's claim of invidious discrimination. Consequently, counsel must understand these

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various provisions and the analytical frameworks to successfully bring or defend an employment discrimination case.

This article will discuss these provisions and analytical frameworks in some detail focusing on both the technical and practical considerations for bringing or defending a motion for summary judgment. In addition, because a district judge may refer a summary judgment motion to a magistrate judge for determination or the parties may consent to a magistrate judge for all purposes in the action (including trial), I will also briefly discuss the role of a magistrate judge in summary judgment practice.

II. RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. General Principles

1. Standard and Burdens on Summary Judgment Motion

Rule 56 of the Federal Rules of Civil Procedure (FRCP) establishes the following standard governing summary judgment motions: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] The moving party has the initial burden of demonstrating, with or without supporting affidavits, the absence of a genuine issue of material fact.[3] The nonmoving party may defeat the summary judgment motion by producing evidence sufficient to establish a genuine issue of material fact.[4] "Conclusory allegations,

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[2] FED. R. CIV. P. 56(c).

[3] Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994).

[4] *Celotex*, 477 U.S. at 322-23 (stating "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). *See also* Gallagher v. Delaney, 139 F.3d 338, 345 (2d Cir.

conjecture, and speculation, however, are insufficient to create a genuine issue of fact."[5]

The moving party may obtain summary judgment by showing that "little or no evidence" may be found in support of the nonmoving party's case.[6] In other words, "[t]here must either be a lack of evidence in support of the plaintiff's position, or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error."[7] "[W]hen no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper."[8]

Although it has been recognized that summary judgment is a "drastic procedural weapon because 'its prophylactic function, when exercised, cuts off a party's right to present his case to the jury,'"[9] the United States Supreme Court has recognized that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'"[10]

1998) (stating that "If a reasonable jury might evaluate the evidence to find the material propositions of fact a plaintiff must prove, summary judgment dismissing her suit must be denied.").

[5] Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998); D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir.), *cert. denied*, 524 U.S. 911 (1998). *See, e.g.*, Fagan v. New York State Elec. & Gas Corp., 186 F.3d 127, 134 (2d Cir. 1999) (affirming grant of summary judgment on age discrimination claim, holding that plaintiff employee's "unparticularized characterization that his job responsibilities were 'effectively' reassigned to three younger employees" was "too vague to create a genuine issue as to how his work was reassigned.").

[6] *Celotex*, 477 U.S. at 325.

[7] Danzer v. Norden Systems, Inc., 151 F.3d 50, 54 (2d Cir. 1998).

[8] *Gallo*, 22 F.3d at 1224. *See* Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). *See also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.*

[9] Garza v. Marine Transp. Lines, Inc., 861 F.2d 23, 26 (2d Cir. 1988) (quoting Donnelly v. Guion, 467 F.2d 290, 291 (2d Cir. 1972)).

[10] *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

2. Court's Role on Summary Judgment Motion

The court's role on a summary judgment motion is limited to "discerning whether there are any genuine issues of material fact to be tried, not to deciding them."[11] In so doing, the court must construe the evidence in a light most favorable to the nonmoving party, resolving all ambiguities and drawing all reasonable inferences in favor of the nonmoving party.[12]

3. Employment Discrimination Cases

In an employment discrimination case discriminatory intent generally is the central issue.[13] The determination of intent typically presents an issue of fact for a jury.[14] Given this reality, the Second Circuit has repeatedly emphasized that "in an employment discrimination case when . . . the employer's intent is at issue, the trial court must be especially cautious about granting summary judgment."[15] Nevertheless, a plaintiff employee, as a nonmoving party, must present sufficient evidence to raise a genuine issue of material fact as to the elements of the claim.[16] To do so, the plaintiff employee can present direct, circumstantial, or statistical evidence to establish genuine issues of material fact.[17] However, as in other

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[11] *Gallo*, 22 F.3d at 1224. *See also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). On summary judgment motion, the "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.*

[12] *Id.* at 255. *See Gallo*, 22 F.3d at 1223. *See also* Donohue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987).

[13] Gill v. Reorganized School District R-6, 32 F.3d 376, 378 (8th Cir. 1994).

[14] Malladi v. Brown, 987 F. Supp. 893, 921 (D. Ala. 1997).

[15] Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998); *Gallo*, 22 F.3d at 1224. *See also* Gallagher v. Delaney, 139 F.3d 338, 345 (2d Cir. 1998). "The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases." *Id.*

[16] *See* Ray v. Tandem Computers, Inc., 63 F.3d 429, 434 (5th Cir. 1995).

[17] *See Kerzer*, 156 F.3d at 401. *See, e.g.*, Stratton v. Department for the Aging, 132 F.3d 869, 876-77 (2d Cir. 1997) (upholding the admissibility of organizational charts showing ages of defendant employer's senior staff before

substantive areas, "[c]onclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact."[18] Thus, absent sufficient evidence to support a reasonable finding of discriminatory intent, summary judgment is appropriate.[19]

B. Partial Summary Judgment

A party may move for summary judgment on some, but not all, of the claims or defenses in an action, i.e., for "partial summary judgment."[20] Moreover, the rule expressly provides that the

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and after new commissioner was appointed, which indicated a drop in the average age after appointment, and noting relevance and admissibility of statistics to support not only disparate impact case but also disparate treatment claim involving single plaintiff.) *See also* Hollander v. American Cyanamid Co., 172 F.3d 192, 202 (2d Cir. 1999). "As this court has held in several cases, disparate treatment plaintiffs may introduce statistics as circumstantial evidence of discrimination." *Id.*

[18] *Kerzer*, 156 F.3d at 400. *See* D'Amico v. City of New York, 132 F.3d 145, 149 (2d Cir.), *cert. denied*, 524 U.S. 911 (1998). *See also* Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985). Although Meiri alleged that 'Dacon conspired to get rid of her'; that he 'misconceived her work habits because of his subjective prejudice against her Jewishness'; and that she 'heard disparaging remarks about Jews, but, of course, don't ask me to pinpoint people, times or place . . . . It's all around us,' such conclusory allegations of discrimination are insufficient to satisfy the requirements of Rule 56(e). *Id.*

[19] *See, e.g.*, Barth v. CBIS Federal, Inc., 849 F. Supp. 864, 870 (E.D.N.Y.) (stating that circumstances of plaintiff's discharge were insufficient to raise inference of age discrimination), *aff'd*, 43 F.3d 1458 (2d Cir. 1994). *See also Gallo*, 22 F.3d at 1224. "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Id.*; Danzer v. Norden Systems, Inc., 151 F.3d 50, 54 (2d Cir. 1998). "There must either be a lack of evidence in support of the plaintiff's position, or the evidence must be so overwhelmingly tilted in one direction that any contrary finding would constitute clear error." *Id.*; *Kerzer*, 156 F.3d at 400; Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988).

[20] Advanced Semiconductor Materials America v. Applied Materials, No. C-93-20853 RMW, 1995 U.S. Dist. LEXIS 22123, at 6 (N.D. Ca. July 7, 1995) (citing FED R. CIV. P. 56 (a)). *See also* State Farm Fire & Casualty Co. v. Geary, 699 F. Supp. 756, 759 (N.D. Cal. 1987) (stating "Partial summary judgement that falls short of a final determination, even of a single claim, is authorized by Rule 56 in order to limit the issues to be tried.")

court may enter summary judgment on the issue of liability although there is a genuine issue as to the amount of damages.[21] In situations where judgment is not rendered on the whole case or for all the relief sought, the court may streamline the trial by ascertaining and rendering an order specifying those material facts that are "without substantial controversy."[22] At trial, those material facts will be deemed established.[23]

In employment discrimination cases, it is common for a defendant employer to move for summary judgment focusing only on the issue of liability, i.e., whether the employer discriminated or not.[24] Similarly, plaintiff employees sometimes, though rarely, move for summary judgment on liability while leaving the issue of damages for later determination.[25] Since plaintiff employees frequently join supplemental state claims with federal employment discrimination claims,[26] defendant's counsel must consider whether to seek summary judgment on some or all of the supplemental state claims when seeking summary judgment on the federal claims. Obviously, to the extent a state claim mirrors a federal claim,[27] counsel should move as to both claims. Otherwise, counsel may choose to move against the federal claims and seek dismissal of the supplemental state claims should the federal claims be dismissed.[28]

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[21] FED. R. CIV. P. 56(c).

[22] FED. R. CIV. P. 56(d).

[23] *Id.*

[24] *Advanced,* 1995 U.S. Dist. LEXIS 22123, at 6 (stating "Rule 56(c) of the Federal Rules of Civil Procedure clearly allows a party to bring a motion for summary judgement 'on the issue of liability alone.'")

[25] *See id.*

[26] *See* 28 U.S.C. § 1367 (1994).

[27] *See, e.g.*, Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180 (2d Cir. 1992). The elements of proof for claim under New York Human Rights Law § 297(9), N.Y. Exec. Law § 297(9) are the same as those for claim under Age Discrimination in Employment Act (ADEA).

[28] *See* 28 U.S.C. § 1367(c)(3) (providing that district court may decline to exercise supplemental jurisdiction over a claim if the district court dismissed all claims over which it had original jurisdiction).

C. Timing of Summary Judgment Motions

1. General Principles

A defending party may move for summary judgment at any time after the action is commenced.[29] However, a plaintiff must wait twenty days from the date of commencement of the action or after service of a summary judgment motion by a defending party before making a summary judgment motion.[30] The rule provides that the moving party's papers must be served at least ten days before the hearing on the motion, while the opposing party may serve opposing affidavits prior to the day of the hearing.[31]

2. Employment Discrimination Cases

Determining when to make a summary judgment motion is an important decision in any action. In employment discrimination cases, where the issue is whether the employer discriminated or not, the defendant employer normally will, and generally should, wait until the close of discovery before bringing a summary judgment motion. Having already established that the issue of discriminatory intent generally is the central issue in employment discrimination cases, summary judgment generally is not appropriate until both parties, the plaintiff in particular, have been allowed an adequate opportunity for discovery. A premature motion for summary judgment is likely to be met with an objection that there has not been sufficient opportunity for discovery.[32]

Certain dispositive issues may, if based on undisputed facts, lend themselves to summary judgment early in the action. For example, the defendant employer may contend that the plaintiff employee executed a release thereby barring the action or a particular claim. There may or may not be disputed factual issues concerning the release and either party may seek an early

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[29] FED. R. CIV. P. 56(b).
[30] FED. R. CIV. P. 56(a).
[31] FED. R. CIV. P. 56(c).
[32] *See* FED. R. CIV. P. 56(f).

determination by the court as to whether there are genuine issues of material fact regarding the validity of the release.[33]

3. Eastern District Practice

In the Eastern District, a magistrate judge (as discussed below) generally presides over discovery and other pretrial matters. Pursuant to FRCP 16(b)[34] and Local Civil Rule 16.2,[35] the magistrate judge will issue a pretrial order shortly after the action is commenced providing, among other things, a limit on the time to make pretrial motions including motions for summary judgment. The date will generally be set at or around the discovery cutoff date. Even if no cutoff date is fixed for motion practice, counsel should be cautious not to wait too long from the close of discovery to either make the motion or to request a pre-motion conference before making the motion. Additionally, most of the Eastern District's judges require a pre-motion conference before a party may move for summary judgment. If counsel delays there may be insufficient time before trial to completely brief and submit the motion to the court for adequate consideration before trial unless counsel can persuade the court to adjourn the trial date. Counsel should consult with the district judge's case manager/courtroom deputy as to the judge's trial calendar.

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[33] *See, e.g.*, Butcher v. Gerber Prods. Co., 8 F. Supp. 2d 307, 309 (S.D.N.Y. 1998) (granting plaintiffs employees' motion for summary judgment as to enforceability of release of employees' Age Discrimination in Employment Act (ADEA) claim where release held invalid under Older Workers Benefit Program Act (OWBPA)); Connors v. Miller Adver. Agency, Inc., 1997 WL 1102028, at *5 (S.D.N.Y. Dec. 18, 1997) (denying defendant employer's motion for summary judgment as to enforceability of release); Joseph v. Chase Manhattan Bank, N.A., 751 F. Supp. 31, 33-36 (E.D.N.Y. 1990) (granting defendant employer's motion for summary judgment dismissing employment discrimination claims based on release where employee failed to show economic duress sufficient to invalidate release).

[34] FED. R. CIV. P. 16(b).

[35] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 16.2 (1999).

D. Adequate Discovery and Unavailability of Affidavits

Where a nonmoving party can show that it is unable to present by affidavit facts essential to oppose a summary judgment motion, the court may deny the motion or order a continuance to permit further time for discovery and to procure affidavits.[36] To invoke this provision, counsel should, in response to the summary judgment motion, move for a continuance supported by affidavits.[37] To make the necessary showing, the Second Circuit requires that the supporting affidavit explain, "(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." [38] Indeed, the failure to file such an affidavit is fatal to a request for a continuance to obtain discovery even if the nonmoving party refers to the need for discovery in a memorandum of law.[39] Thus, absent a proper FRCP 56(f) affidavit, counsel risks being denied further discovery prior to the district court's ruling on the motion for summary judgment.[40]

Given these requirements, the nonmoving party cannot rely on mere assertions that it needs additional discovery, that discovery is ongoing, or that the matter sought is within defendant's knowledge or possession. If, for instance, the nonmoving party claims that it needs certain discovery, it must explain the facts that are sought and the type of discovery it requires (e.g.,

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[36] FED. R. CIV. P. 56(f).

[37] *See* FED. R. CIV. P. 56(f); *Celotex*, 477 U.S. at 326.

[38] Hudson River Sloop Clearwater, Inc. v. Department of Navy, 891 F.2d 414, 422 (2d Cir. 1989). *See also* Meloff v. New York Life Ins. Co., 51 F.3d 372, 375 (2d Cir. 1995); Jones v. Long Island Railroad, 1998 WL 221365, at *6 (E.D.N.Y. May 1, 1998); Davis v. Goode, 995 F. Supp. 82, 91 (E.D.N.Y. 1998).

[39] *See* Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994).

[40] *See, e.g.*, Shafik v. City of New York, 1996 WL 14060, at *1 (2d Cir. Jan. 12, 1996) (unpublished summary order). "In the absence of an affidavit pursuant to FED. R. CIV. P. 56(f) affidavit, the district court was not required to order further discovery prior to ruling on defendants' motion for summary judgment." *Id.*

depositions of specific witnesses or responses to specific document requests or interrogatories), why that discovery has not already been sought, and how that discovery is expected to create genuine issues of fact.[41] As a practical matter, the nonmoving party should attach copies of the proposed requests to the affidavit. Similarly, if the nonmoving party contends that it has outstanding discovery requests that have not been responded to, it should attach copies of those requests. Additionally, if the nonmoving party contends that responses to its requests were inadequate to facilitate a response to the motion such party should attach its requests and responses with an explanation as to their inadequacy.

The moving party may respond to the nonmoving party's continuance request by, *inter alia*, showing that the nonmoving party unreasonably delayed in seeking the purportedly necessary discovery, that the discovery requested could not be expected to raise genuine issues of material fact, or that the issues to be determined are based purely on questions of law or uncontested facts.[42]

As discussed previously, summary judgment in an employment discrimination case generally is not appropriate until the parties, particularly the plaintiff, have been allowed an adequate opportunity for discovery.[43] Accordingly, counsel for a plaintiff

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[41] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (stating "Rule 56(e) provides that, when a properly supported motion for summary judgement is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'"). *See also* Sanders v. Quikstak, Inc., 889 F. Supp. 128, 132 (1995).

[42] *Id.*

[43] *Anderson,* 477 U.S. at 250 n.5 (stating "This requirement in turn is qualified by Rule 56(f)'s provision that summary judgement be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.'"). *See also* Dasher v. New York City Police Department, No. 94 CV 3847 SJ, 1999 WL 184118, at 1 (E.D.N.Y. March 18, 1999) (citing *Anderson*, 477 U.S. at 250, which stated that "[o]nce the movant has come forward with appropriate support demonstrating that there is no genuine issue of material fact to be tried, the burden shifts to the nonmoving party to present similar support setting forth specific facts about which a genuine triable issue remains.").

employee should be prepared to make the required showing if the defendant employer brings the motion prematurely or if further discovery is needed to oppose the motion.[44]

E. Affidavits on Summary Judgment Motions

1. Need for Affidavits

FRCP 56(e) provides that when a motion for summary judgment is made and supported with affidavits, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading.[45] The adverse party's response must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue for trial.[46] The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.[47]

2. Personal Knowledge and Facts Admissible in Evidence

FRCP 56(e) requires that supporting and opposing affidavits be made on "personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[48] A court may "strike" portions of an affidavit that are "not based upon the affiant's personal knowledge, contain inadmissible

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[44] *See, e.g.*, Meloff v. New York Life Ins. Co., 51 F.3d 372, 375 (2d Cir. 1995) (holding plaintiff employee's affidavit sufficient under FED. R. CIV. P. 56(f) and district court's grant of summary judgment for employer premature, where affidavit explained that plaintiff received documents and interrogatories from employer only two days before response to summary judgment motion was due and requested opportunity to take depositions and seek further discovery).

[45] FED. R. CIV. P. 56(e).

[46] *Id.*

[47] *Id.*

[48] *Id. See, e.g.*, Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997) (finding that the district court erred in excluding evidence presented in affidavit where affiant's recount of event was based on personal knowledge and sufficiently particular to satisfy FED. R. CIV. P. 56(e)).

hearsay or make generalized and conclusory statements."[49] Significantly, the district court's decision to strike will not be disturbed on appeal unless "manifestly erroneous."[50]

Counsel must object, i.e., move to strike evidence submitted on the motion that it claims is inadmissible under the Federal Rules of Evidence or Federal Rules of Civil Procedure.[51] If a party fails to move to strike the affidavit, the defect is waived and the court may consider the evidence.[52] Moreover, "even if a motion to strike is made, it will be ineffective unless it identifies the defects in the affidavit under attack with adequate specificity." [53]

FRCP 56(e) further requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith."[54] Thus, to be admissible, "documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)."[55] Generally, the

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[49] *Hollander,* 172 F.3d at 198 (upholding, in employment discrimination action, district court's grant of motion to strike portions of plaintiff employee's affidavit which was "'riddled with inadmissible hearsay, conclusory statements and arguments, and information clearly not made on the affiant's personal knowledge,' and 'more resemble[d] an adversarial memorandum than a bona fide affidavit'"); Morris v. Northrop Grumman Corp., 37 F. Supp. 2d 556, 567-69 (E.D.N.Y. 1999) (refusing, on summary judgment motion in employment discrimination action, to consider portions of affidavits containing hearsay statements not within hearsay exception, conclusory allegations, legal arguments, and statements not based upon personal knowledge).

[50] Hollander v. American Cyanamide Co., 172 F.3d 192, 198 (2d Cir. 1999).

[51] *See* DeCintio v. Westchester County Med. Ctr., 821 F.2d 111, 114 (2d Cir. 1987).

[52] *Id. See* Teltronics Servs., Inc.v. Hessen, 762 F.2d 185, 192 (2d Cir.1985). *See also* Starter v. Converse, Inc., 1996 WL 706837, at *1 n.1 (S.D.N.Y. Dec. 3, 1996) (holding "a party must move to strike an affidavit that violates FED. R. CIV. P. . 56(e) . . . if no such motion is made, the party waives objection to the affidavit and the Court may consider the affidavit in absence of 'a gross miscarriage of justice.'").

[53] *DeCintio,* 821 F.2d at 114. *See, e.g.,* Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 579 n.10 (2d Cir.1969) (noting that "motion to strike was much too general in that it did not specify which parts of the [challenged] affidavit should be stricken and why.").

[54] FED. R. CIV. P. 56(e).

[55] National Union Fire Ins. Co. v. Miller, 1989 WL 39677, at *2 (S.D.N.Y. Apr. 14, 1989).

affiant must authenticate the documents by identifying and qualifying them as admissible evidence.[56]

3. Form of Affidavit

The affidavit should identify the affiant, state the reason the affidavit is being submitted, and then present the affiant's statement in a clear and logical order, demonstrating the relevance of the matter asserted and the relevance, authenticity and admissibility of documents submitted, attaching those documents to the affidavit. Although the affidavit should be drafted by counsel, it should accurately reflect the affiant's statement and be written in the affiant's voice.[57] Should the matter proceed to trial, a trial witness's affidavit is open for cross-examination.[58]

4. Attorney's Affidavit (Affirmation)

Because an affidavit must be based on personal knowledge, an attorney's affidavit or affirmation[59] is not a "competing" affidavit.[60] Generally, it is inappropriate for an attorney to present legal arguments in the attorney's affidavit or to make

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[56] *See* Miller v. Hotel, Motel & Restaurant Employees & Bartenders Union, Local 471, 1990 WL 134847, at *12, n.6 (N.D.N.Y. Sep 17, 1990); *National Union Fire Ins. Co.*, 1989 WL 39677, at *2; *In re Teltronics Servs., Inc.*, 18 B.R. 705, 707 (E.D.N.Y. 1982).

[57] Chemical Bank v. Hartford Accident & Indem. Co. No. 78 Civ. 34748 KTD, 1979 U.S. Dist. LEXIS 13165, at 5 (S.D.N.Y. April 9, 1979).

[58] *Id.* at 8.

[59] 28 U.S.C. § 1746 (1994). In practice, an attorney's submission typically will be made by unsworn "affirmation" rather than a sworn affidavit. Indeed, with limited exception, any witness may submit an "unsworn declaration, certificate, verification, or statement" made "under penalty of perjury" as to "any matter . . . required or permitted to be supported, evidenced, established, or proved by . . . sworn declaration, verification, certificate, statement, oath, or affidavit." *Id.*

[60] *See, e.g.*, Attorney General v. Irish Northern Aid Comm., 668 F.2d 159, 162 (2d Cir.1982) (holding attorney's "conclusory affidavit," admittedly not based on personal knowledge, insufficient to create genuine issue of material fact to defeat summary judgment motion).

factual assertions on the subject matter of the action.[61] On a summary judgment motion, an attorney's affidavit should be used only to present the relevant procedural background and various matters such as pleadings, deposition excerpts, and responses to interrogatories and requests to admit. Thus, the attorney's affidavit should (1) identify the attorney and the party whom the attorney represents; (2) succinctly explain the reason the affidavit is being submitted to the court and the procedural background as necessary for the motion; and (3) identify the relevant matter attached for consideration with the motion.[62]

5. Employment Discrimination Cases

Affidavits are usually critical to a plaintiff employee's successful defense of a summary judgment motion in an employment discrimination case.[63] In such cases, as in other areas of law, competing affidavits generally will defeat a summary judgment motion.[64] Obviously, the plaintiff's affidavit is critical. However, an affidavit of a disinterested nonparty, particularly a non-disgruntled former employee, will likely be viewed more favorably. For example, in *Kerzer*, the Second Circuit reversed a district court's award of summary judgment for a defendant former employer in a pregnancy discrimination claim. The court based its determination on the plaintiff former employee's affidavit and a third-party affidavit despite the fact that plaintiff's "evidence . . . pales in volume and comparison to the numerous

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[61] *See id.*

[62] FED. R. CIV. P. 56(e).

[63] *See, e.g.*, Kerzer v. Kingly Mfg., 156 F.3d 396, 401; Danzer v. Norden Sys., Inc., 151 F.3d 50, 57 (2d Cir. 1998); Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997).

[64] Sean Mossman v. Transamerica Insurance Company, 816 F. Supp. 633, 636 n.8 (D. Haw. 1993) (citing T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626 (9th Cir. 1987)). "However, when 'direct evidence' produced by the moving party conflicts with 'direct evidence' produced by the party opposing summary judgement, 'the judge must assume the truth of the evidence set forth by the non-moving party with respect to that fact.'" *Id.*

[defendant] affidavits."[65] Through the affidavits, the employee presented both direct and circumstantial evidence which raised genuine issues of material fact as to whether the employer replaced her with a nonpregnant employee and whether her discharge occurred under circumstances giving rise to an inference of discrimination.[66]

However, as previously discussed, affidavits can only be sufficient to overcome summary judgment if they are based on personal knowledge and are not conclusory.[67] For example, in *Danzer*, the Second Circuit reversed a district court's award of summary judgment to the defendant former employer in an age discrimination claim where the plaintiff former employee apparently relied exclusively on his own affidavit.[68] Over the defendant's contention that the affidavit was "self-serving" and "conclusory," the court found no "evidentiary infirmity" in the plaintiff's affidavit which "chronicled in depth the various episodes giving rise to his suit" and rejected defendant's argument that the plaintiff's affidavit was insufficient.[69] For instance, the affidavit, among other things, rebutted one of the employer's proffered nondiscriminatory reasons for terminating him, i.e., that the employee's job performance had deteriorated and had become unacceptable because he was not bringing in new business.[70] In his affidavit, the employee denied that his actual performance had declined and stated that the employer caused the poor performance by denying him funding necessary to generate new business.[71] The employee also overcame another reason for his termination, i.e., that the employee was "downsized" as part of a reduction in force ("RIF"). Although the employee admitted that he was let go as part of a RIF and was not replaced, the court found the evidence sufficient to raise an issue as to whether

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[65] *Kerzer*, 156 F.3d at 401.
[66] *See id.* at 401-02.
[67] *Danzer*, 151 F.3d at 57 n.7.
[68] *See id.* at 57.
[69] *Id.*
[70] *Id.* at 54-55.
[71] *Id.*

the selection of the employee as part of the RIF was influenced by his age.[72]

Affidavits are also useful to the defendant employer, particularly for proffering the legitimate, nondiscriminatory reason for the employment action. Generally, the most important affidavits are those of the responsible decision-makers. Just as a jury would be skeptical if the defendant failed to call the decision-maker as a witness at trial, a judge would likely be skeptical if the defendant failed to proffer the decision-maker's affidavit on summary judgment.

6. Contradicting Deposition Testimony

Another important point counsel must consider when proffering an affidavit is that it is well established in the Second Circuit that a nonmoving party "may not create an issue of fact precluding summary judgment by offering an affidavit that contradicts his earlier sworn testimony in the case."[73] However, a material issue of fact may be established by subsequent sworn testimony that "amplifies or explains, but does not merely contradict," prior testimony, "especially where the party was not asked sufficiently precise questions to elicit the amplification or explanation."[74] Provided there is a plausible explanation for the discrepancies in

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[72] *Id.* at 55.

[73] Langman Fabrics v. Graff Californiawear, Inc., 160 F.3d 106, 112 (2d Cir. 1998) (citing Mack v. United States, 814 F.2d 120, 124-25 (2d Cir.1987) and Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 925 F.2d 566, 572 (2d Cir.1991)), *amended by* 169 F.3d 782 (2d Cir. 1998). *See also* Raskin v. Wyatt Co., 125 F.3d 55, 63 (2d Cir. 1997) (holding that plaintiff employee's affidavit stating that decisionmaker made certain statement at meeting could not raise issue of fact on motion for summary judgment because affidavit contradicted earlier deposition testimony by plaintiff that he could not remember points covered at meeting); Miller v. International Telephone & Telegraph Corp., 755 F.2d 20, 24 (2d Cir. 1985) (holding that plaintiff's deposition testimony that he received oral notice of termination of employment on specified date "could not later be contradicted for the purpose of creating an issue of fact" on motion for summary judgment where oral notice triggered running of statute of limitations).

[74] *Langman Fabrics*, 160 F.3d at 112 (citing Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996)).

a party's testimony, the court "should not disregard the later testimony because of an earlier account that was ambiguous, confusing, or simply incomplete."[75]

Given that a court's suspicion will be heightened when a plaintiff's affidavit recites facts not testified to at the deposition, plaintiff's counsel should be prepared to question plaintiff at the deposition, in order to potentially elicit favorable facts that plaintiff may have failed to state or to clarify testimony that plaintiff may have inaccurately stated or unfavorably characterized.[76]

F. Bad Faith Affidavit

A court may impose sanctions against any party submitting any affidavit in bad faith or solely for the purpose of delay.[77]

III. LOCAL CIVIL RULE 56.1

A. Statements of Material Facts

Local Civil Rule 56.1 of the Eastern District of New York (entitled, "Statements of Material Facts on Motion for Summary Judgment")[78] provides that on a motion for summary judgment, the moving party "shall . . . annex[] to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."[79] The statement is not optional. Indeed, the rule

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[75] *Id.*

[76] *See generally Langman Fabrics,* 160 F.3d at 112 (stating that although plaintiff's later account was much more detailed than his earlier account, the additional facts were not inconsistent with the first account. The district court ordered further discovery, which invited further development of the record by the parties.)

[77] FED. R. CIV. P. 56(g). *See also* FED. R. CIV. P. 11 (general sanctions provision).

[78] Former U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 3(g) (1999).

[79] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(a) (1999).

provides expressly that "[f]ailure to submit such a statement may constitute grounds for denial of the motion."[80]

The non-moving party is required to file a responding statement. In this respect, the rule provides that opposing papers "shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried."[81] More importantly, any of the material facts set forth by the moving party are "deemed to be admitted, unless controverted by the statement required to be served by the opposing party."[82] The Second Circuit has noted that "[i]t is well established that if a party fails to object or respond to the factual assertions in an opposing party's [Local Civil Rule 56.1] statement, those factual assertions will be deemed true."[83]

B. Content of Statement

Beside requiring that the statement be "short and concise," the rule requires that "[e]ach statement of material fact by a movant or opponent must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)."[84] Beyond these requirements, however, the rule provides no further guidance. As a result, the practice concerning these statements varies greatly. However, better statements share certain characteristics.

First, absent exceptional circumstances, the moving party's statement should be five pages or less -- otherwise, it's probably not "short and concise."[85] Second, each of the material facts

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[80] *Id.*

[81] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(b) (1999).

[82] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(c) (1999).

[83] Titan Indem. Co. v. Triborough Bridge & Tunnel Auth., Inc., 135 F.3d 831, 835 (2d Cir.1998).

[84] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(d) (1999).

[85] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(a) (1999). *See also* Champion v. Artuz, 76 F.3d 483, 485 (2d Cir. 1996) (per curiam), in which the court examined in detail the requirement of Rule 56 (e) and stated:

should be stated in separately numbered paragraphs and, as the rule requires, followed by a citation to evidence in the record.[86] The citation should either specifically identify the referenced matter (e.g., "Jane Doe Aff. § 6"), or identify lettered or numbered exhibits attached to the attorney's affidavit or the party or third-party affidavits (e.g., "Exh. 6, John Doe Tr. 110-13"). Abbreviations to the various sources can be provided in an introductory paragraph or footnote to the statement. Third, each of the material facts should accurately state and characterize the evidence and other matter supporting it.[87] While reasonable inferences certainly can be argued in the memorandum of law, counsel loses credibility with the court by inaccurate or misleading statements or characterizations of the evidence in the Local Civil Rule 56.1 statement and does not further the client's interest. Fourth, the nonmoving party's statement should both directly address each of the moving party's allegations of undisputed material facts and state the material facts that are in dispute.[88] In this respect, as to each paragraph of the moving party's statement, the nonmoving party should either agree that it is undisputed or state that it is disputed and provide citations to evidence in the record demonstrating the dispute.[89] The

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> [W]hen a motion for summary judgment is made and properly supported, you may not simply rely upon your complaint, but you must respond by affidavits or as otherwise provided in that rule, setting forth specific facts showing that there is a genuine issue of material fact for trial. Any factual assertions in our affidavits will be accepted by the District Judge as being true unless you submit affidavits or other documentary evidence contradicting out [sic] assertions.

Id.

[86] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(d) (1999).

[87] U.S. Dist. Ct. Rules N.D.N.Y., L.R. 7.1(a) (1999), which states that "failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion." *Id.*

[88] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(b) (1999).

[89] *See* Davis v. Goode, 995 F.Supp. 82, 86 (E.D.N.Y. 1998). The court stated:

> [O]nce the moving party discharges its burden of proof under Rule 56(c), the party opposing summary judgment 'has the

nonmoving party should then present additional material facts which it contends are in dispute and raise genuine issues to be tried.[90]

C. Reply Statement

The rule does not provide for a reply statement by the moving party. However, in practice, the court may allow counsel for the moving party, upon request, to serve and file a reply statement.[91]

IV. INDIVIDUAL JUDGE'S PRACTICES

A. Model Individual Judge's Practices

In July 1998, the judges of the Eastern District of New York adopted a "Model for Individual Judge's Practices"[92] to eliminate

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> burden of coming forward with specific facts showing that there is a genuine issue for trial.' However, Rule 56(e) 'provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading.' Indeed, 'the mere existence of some alleged factual dispute between the parties' alone will not defeat a properly supported motion for summary judgment.

Id.

[90] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1(b) (1999).

[91] *Recommended Model for Individual Judge's Practices* (visited September 25, 2000) <http://www.nyed.uscourts.gov/motion-practices.pdf> [hereinafter *Recommended Model*].

[92] Deborah Pines, *Federal Judges Adopt New Individual Rules, Model Discards Excess but Permits Variety*, 220 N.Y. L.J. 13 (1998). It was reported:

> [F]orty-six district judges – who for years have adopted their own detailed rules for matters such as how and when lawyers should contact chambers – changed their rules to make them simpler and more uniform. Of the group, 14 magistrate judges and 17 district judges adopted in its entirety a model set of rules which permits some variations. Another 15 district judges adopted the model with some additions or reconfigured their own rules to match the sequence in which the model addresses three subject areas: communications

the proliferation of disparate individual judge's "rules" throughout the district.[93] The model practices cover three major areas: (1) communications with chambers, (2) motions, and (3) pretrial procedures.[94] Many of the provisions include several alternative versions. With the exception of several judges and magistrate judges who have opted not to have individual practices, each judge has selected from the various alternatives. Attached to the model practices are schedules reflecting each judge's choices and an information sheet.[95] Note that Senior District Judges Mishler and Weinstein elected not to have individual practices as did Chief Magistrate Judge Chrein and Magistrate Judge Azrack. Copies of the model practices, along with the schedules and information sheet, can be obtained at the clerk's offices in Hauppauge, Uniondale, and Brooklyn. In addition, all of the Eastern District's judges' practices are published in full in the New York Law Journal's monthly "Judges' Part Rules."[96] This monthly publication is a comprehensive listing of rules for all federal courts and state appellate and supreme courts in the first and second departments.

> with chambers, motions and pretrial procedures. Ten district judges stuck with their existing rules.

Id.

[93] *Id.* The New York Law Journal reported:

> [A] turning point. . .came in June 1994 when Manhattan attorney, Daniel A. Pollack, son of Southern District Judge Milton Pollack, denounced the rules proliferation at a Second Circuit Judicial Conference. Waving a phonebook-sized sheaf of rules, Mr. Pollack question whether the widely variant individual rules undermined a key Federal Rule mandating that courts resolve controversies in a just, speedy and inexpensive manner.

Id.

[94] *Recommended Model, supra* note 91.

[95] *See supra* note 91 and accompanying text.

[96] *See supra* note 91 and accompanying text.

B. Motion Practices

The motion practices are relevant to summary judgment motions. They address pre-motion conferences in civil actions, courtesy copies, memoranda of law, filing of motion papers, and oral argument on motions.[97]

C. Pre-Motion Conference

Some judges require a conference before a summary judgment motion is made while others do not.[98] In fact, some of the judges require a conference for any dispositive motion, change of venue motion, and motion to amend a pleading where leave is required, while others do not require a conference on any motion.[99] Thus, counsel must consult the assigned judge's individual practices before bringing any motion, particularly one for summary judgment.[100]

Where the judge requires a pre-motion conference, counsel is required to submit a letter to the court not exceeding three pages, "setting forth the basis for the anticipated motion."[101] Opposing counsel has seven days to submit a responsive letter not exceeding three pages.[102] The rule does not specify the content of the letter. However, certain characteristics are found among better letters. The letter should identify the represented party, request the conference, state whether the motion is for full or partial summary judgment, identify the claims or defenses being

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[97] *Recommended Model, supra* note 91. Some judges disregard the requirement of pre-motion conferences altogether. Others require a pre-motion conference before making a motion for summary judgment in "cases where the parties are represented by counsel." Others require a pre-motion conference before making "any dispositive motion, motion for a change of venue or to amend a pleading pursuant to Rule 15 of the Fed. R. Civ. P. where leave of court is required." *Recommended Model, supra* note 91.

[98] *See supra* note 91 and accompanying text.

[99] *See supra* note 91 and accompanying text.

[100] *See supra* note 91 and accompanying text.

[101] *See supra* note 91 and accompanying text.

[102] *See supra* note 91 and accompanying text.

challenged, and succinctly state the grounds for the motion.[103] The last point is the significant one. Better letters will succinctly state the claims or defenses challenged, the controlling statute and case law, and the salient undisputed facts warranting summary judgment.

After receiving the parties' letters, the court will advise counsel of the conference date and time.[104] Notably absent from the model practices is any requirement that the Local Civil Rule 56.1 statements be filed with the court at or before the pre-motion conference which some judges had previously required under their individual rules.[105] Be aware that the judge may (and some do) request that the statements be provided before the conference.[106] Be prepared for such a request or ask the judge's law clerk if the statements are required at or before the pre-motion conference.

D. Briefing Schedule

The parties generally are permitted to agree on their own briefing schedule, either at or after the pre-motion conference, or the court will impose a briefing schedule.[107] The parties generally are permitted to revise the schedule on consent unless the court has directed otherwise. The parties should advise the court of the revised schedule. If counsel is concerned that the proposed revised schedule may not meet the court's approval then counsel should first consult the court before agreeing on a revised schedule.

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[103] *See supra* note 91 and accompanying text.

[104] *Recommended Model, supra* note 91. Judges have a choice on whether to require a statement to be filed with the court at or before the pre-motion conference. They may choose to do away with the requirement altogether or require the moving party to "submit a letter not to exceed three (3) pages in length setting forth the basis for the anticipated motion." *Recommended Model, supra* note 91.

[105] *See supra* note 91 and accompanying text.

[106] *See supra* note 91 and accompanying text.

[107] *See supra* note 91 and accompanying text.

E. Filing Motion Papers

As for filing the motion papers, nearly every Eastern District judge requires that the original moving party file all the motion papers with the court after the motion is fully briefed.[108] Counsel should file the papers with a cover letter specifying each document included. All of the district judges require courtesy copies.[109] Accordingly, courtesy copies of the motion papers must be furnished to chambers.

F. Page Limits on Memoranda of Law

In the Eastern District, Local Civil Rule 7.1 requires that a memorandum of law be submitted in support of or in opposition to any motion, unless the court directs otherwise.[110] Indeed, failure to comply with the rule may be deemed sufficient grounds for denial of the motion.[111] Moreover, counsel should be aware of page limits on the memoranda of law imposed by the judge. In this regard, some judges have opted to limit supporting and opposing memoranda of law to twenty-five pages and reply memoranda to ten pages, unless the judge grants permission to exceed the page limits.[112] Generally, there should be no need to exceed these page limits. However, if counsel anticipates a need to exceed the limit then counsel should request permission from the court in advance.[113] Such a request can be made at the pre-motion conference or later by request to the court.[114] Counsel should advise opposing counsel that a request will be made particularly because both parties may desire permission to exceed

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[108] *See supra* note 91 and accompanying text.

[109] *See supra* note 91 and accompanying text.

[110] *See* U.S. Dist. Ct. Rules N.D.N.Y., Civil Rule 7.1 (1999).

[111] *Recommended Model, supra* note 91. "The court expects counsel to exercise their professional judgment as to the length of briefs and may impose limits if that expectation is not met." *Recommended Model, supra* note 91.

[112] *Recommended Model, supra* note 91. Some courts "expect counsel to exercise their professional judgment as to the length of briefs and may impose limits if that expectation is not met." *Recommended Model, supra* note 91.

[113] *See supra* note 91 and accompanying text.

[114] *See supra* note 91 and accompanying text.

the page limits; the court is more likely to grant the request if both parties believe lengthier briefs are required.

Other judges have no page limits, but require that counsel use reasonable judgment as to the length of legal memoranda. Counsel should not attempt to evade the page limits on legal memoranda by presenting legal argument in either counsel's affidavit or the Local Civil Rule 56.1 statement. Generally, counsel should not omit the factual statement in a legal memorandum by incorporating by reference the affidavits and other matter submitted.[115] It is generally preferable to the court for counsel to set forth the facts in the legal memorandum.

G. Oral Argument

The individual rules also govern oral arguments.[116] Some judges require an oral argument on all motions, including summary judgment. These judges will either determine the argument date and notify the parties, or require the parties to select a date designated by the judge for hearing oral argument on motions. Most judges, however, allow counsel to request oral argument on motions, with the court determining whether argument will be heard and, if so, when.

A few important points regarding oral arguments: First, consult the assigned judge's individual practices. If you have a choice, don't request an oral argument if you feel your position and papers are particularly strong. However, you may want to request an oral argument if you can articulate your arguments persuasively, or if you have concerns about the strength of your case. The nonmoving party, in particular, may consider requesting argument to enable counsel to address (or object to) matter raised for the first time in the moving party's reply papers. Alternatively, you may consider submitting, with the court's permission, sur-reply papers to address (or object to) those matters.

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[115] *See supra* note 91 and accompanying text.

[116] *See supra* note 91 and accompanying text.

V. EMPLOYMENT DISCRIMINATION ANALYTICAL FRAMEWORKS

A. The Two Types of Cases

An employment discrimination action may present a "single issue motivation case" (also referred to as a "pretext case"[117]) or a "mixed-motives case."[118] The Second Circuit has distinguished single issue motivation cases from mixed-motives cases as follows:

> Cases in the first category are often called "pretext cases," because the plaintiff usually challenges the defendant's proffered assertion of a permissible reason as a pretext for the impermissible reason of discrimination. . . . [H]owever, it might be more useful to call such cases "single issue motivation cases," because the fact-finder must decide only the single issue of whether an impermissible reason motivated the adverse action. Cases in the second category are appropriately called "dual issue motivation cases" because the fact-finder must decide both the issue of whether the plaintiff has proved that an impermissible reason motivated the adverse action and the additional issue of whether the defendant has proved that it would have taken the same action for a permissible reason.[119]

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[117] Fields v. New York State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 119, 124 & n.4 (2d Cir. 1997).

[118] Stratton v. Department for the Aging, 132 F.3d 869, 878-79 & n.4 (2d Cir. 1997); *see* Renz v. Grey Advertising, Inc., 135 F.3d 217, 221-23 (2d Cir. 1997); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180-81 (2d Cir. 1992); Harris v. New York City Dep't of Homeless Servs., 1998 WL 205334, at *3 (S.D.N.Y. Apr. 28, 1998), *aff'd*, 1999 WL 314158 (2d Cir. May 14, 1999).

[119] *Fields*, 115 F.3d at 119-20; *see also Stratton*, 132 F.3d at 878 (comparing the two types of cases); Fagan v. New York State Elec. & Gas Corp., 1999 WL 557016, slip op. at 11 n.1 (2d Cir. Aug. 2, 1999) (noting that burden-

Generally, in single issue motivation cases both sides agree that there is only one motivation, and the issue in those cases is whether the motivation was the impermissible reason or the employer's proffered nondiscriminatory reason.[120] An example of the former is where "the plaintiff claims that he was fired because of his race, and the employer responds that he was fired because he was regularly late for work."[121] "If the plaintiff proves that the adverse action was motivated by race, he has necessarily disproved that it was motivated by lateness."[122] An example of the latter is where an employee acknowledges the existence of a permissible factor (such as lateness) that might have contributed to the employer's motivation, but contends that an impermissible factor (such as race) was also a substantial factor of the motivation.[123]

B. Single Issue Motivation Case

A single issue motivation case is analyzed under the three-step, burden-shifting framework originally enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[124] and clarified in later cases.[125] In a discriminatory discharge claim, for example,

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shifting analysis that occurs under mixed-motives cases was irrelevant to case given parties' arguments).

[120] *See id.* at 120.

[121] *Id.*

[122] *Id.*

[123] *See id.*

[124] 411 U.S. 792, 802 (1973). Although the Supreme Court in *McDonnell Douglas* established the burden-shifting framework to govern a court's analysis of evidence presented in an employment discrimination claim under Title VII, courts, including the Second Circuit, have applied the same framework to employment discrimination claims under the Age Discrimination in Employment Act (ADEA) and the American with Disabilities Act (ADA). *See, e.g.*, Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 52 (2d Cir. 1998) (applied to ADA claim); *Stratton*, 132 F.3d at 878-81 (applied to ADEA claim).

[125] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); *see also* Fisher v. Vassar College, 114 F.3d 1332, 1336 (2d Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 851 (1998); de la Cruz v. New York City

the following analysis applies. First, the plaintiff must establish a "*prima facie*" case of unlawful discrimination.[126] To establish a prima facie case, the plaintiff must present evidence sufficient to establish that: (1) she is a member of a protected class; (2) she performed her job satisfactorily; (3) she was discharged; and (4) her discharge occurred under circumstances giving rise to an inference of discrimination.[127] The level of proof a plaintiff is required to present to establish a prima facie case of discrimination is "minimal."[128] For instance, to satisfy the second element, the employee need not demonstrate that his performance was "flawless" or "superior," but that he "'possesses the basic skills necessary for performance of [the] job.'"[129]

Second, if the plaintiff establishes a prima facie case, then a "rebuttable presumption" or "rebuttable inference" of discrimination arises and the burden shifts to the defendant to "proffer a legitimate non-discriminatory reason" for its actions.[130] This step "force[s] the defendant to give an explanation for its conduct, in order to prevent employers from simply remaining silent while the plaintiff flounders on the

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Human Resources Admin. Dep't of Social Servs., 82 F.3d 16, 20 (2d Cir.1996).

[126] *Stratton*, 132 F.3d at 879.

[127] *Stratton*, 132 F.3d at 879. *See McDonnell Douglas*, 411 U.S. at 802; Hollander v. American Cyanamid Co., 172 F.3d 192, 199 (2d Cir. 1999); Kerzer v. Kingly Mfg., 156 F.3d 396, 401 (2d Cir. 1998); Grady v. Affiliated Cent., Inc., 130 F.3d 553, 559 (2d Cir. 1997), *cert. denied*, 119 S. Ct. 349 (1998); Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 63 (2d Cir.1997); Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir.1994).

[128] *Hollander*, 172 F.3d at 199; *Fisher*, 114 F.3d at 1335, 1340 & n.7; *de la Cruz*, 82 F.3d at 20; Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994); *see also Burdine*, 450 U.S. at 253 (plaintiff's burden in establishing prima facie case "is not onerous").

[129] *de la Cruz*, 82 F.3d at 20 (quoting Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir. 1978)).

[130] *Id.* at 20; *see also Hollander*, 172 F.3d at 199 (burden shifts to defendant to "articulate a legitimate, non-discriminatory reason" for its action).

difficulty of proving discriminatory intent."[131] In this respect, the Second Circuit observed in *Fisher*:

> [I]n the absence of a special policy-based rule similar to that promulgated by *McDonnell Douglas*, a plaintiff avoids a directed verdict only by establishing a prima façie case that assures that at the end of the trial there will be enough evidence to support a verdict in his favor (unless the defendant's evidence conclusively undermines some element of plaintiff's prima facie case).[132]

Because of the Supreme Court's adoption of a particular framework in *McDonnell Douglas* and *Burdine*, the same is not true of a discrimination case: a plaintiff alleging discrimination can satisfy the prima facie case and avoid dismissal at the conclusion of the plaintiff's direct case without submitting evidence sufficient to support a finding in his favor on each element that the plaintiff must ultimately prove to win. The burden-shifting presumption excuses the plaintiff at that stage from showing that discrimination was present and caused the adverse employment action plaintiff suffered. If the plaintiff submits evidence of the minimal elements of the special discrimination prima facie case--membership in the protected class, qualification, adverse employment action, and preference for someone outside the protected class--the remaining elements (discrimination and causation) are presumed at this stage of the litigation, and the defendant must take up the burden of going forward.[133]

Notably, however, the defendant's 'burden' is merely to 'articulate' or 'proffer' a reason for its actions. The defendant need not 'persuade' the factfinder that it was actually motivated by the proffered reason or reasons.[134]

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[131] *Fisher,* 114 F.3d at 1335.
[132] *Id.* at 1336.
[133] *Id.* at 1336-37.
[134] *Burdine*, 450 U.S. at 254; *Fisher*, 114 F.3d at 1336.

Third, if the defendant articulates a legitimate, nondiscriminatory reason for its actions, the presumption of discrimination is rebutted and "drops out of the picture."[135] At that point, the special rules provided by the burden-shifting framework "drop" from the case.[136] Once the presumption drops out, the plaintiff's burden is enlarged to include every element of the claim. Discrimination and cause are no longer presumed. To sustain the burden of putting forth a case that can support a verdict in his favor, plaintiff must then (unlike the prima facie stage) point to sufficient evidence to reasonably support a finding that he was harmed by the employer's illegal discrimination.[137]

In other words, once the defendant has offered a legitimate, nondiscriminatory reason for its actions, the plaintiff must show that the proffered reason is a "pretext" for unlawful discrimination. [138] A showing of pretext may, but does not necessarily, serve as evidence that the defendant intentionally discriminated.[139]

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[135] *St. Mary's Honor Ctr.*, 509 U.S. at 510-11.

[136] *Fisher*, 114 F.3d at 1336.

[137] *Id.* at 1337; *Grady*, 130 F.3d at 560 (once the presumption drops out, the plaintiff employee "must present evidence sufficient to allow a rational factfinder to infer that the employer was actually motivated in whole or in part by [invidious] discrimination"); *see also St. Mary's Honor Ctr.*, 509 U.S. at 515 (a proffered "reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason"); *Kerzer*, 156 F.3d at 401 (same).

[138] *Fisher*, 114 F.3d at 1337; Scaria v. Rubin, 117 F.3d 652, 654 (2d Cir. 1997) (holding that plaintiff must point to evidence from which reasonable factfinder could imply "pretext masking unlawful discrimination"); *see also Hollander*, 172 F.3d at 200 ("to survive summary judgment [the plaintiff employee] had to show not only pretext, but also either use of a pretext that itself implies a discriminatory stereotype, or use of a pretext to hide age discrimination.").

[139] *Fisher*, 114 F.3d at 1338; *see, e.g., Fagan*, 1999 WL 557016, slip op. at 16 (in affirming grant of summary judgment dismissing discrimination action, concluding that even if evidence was sufficient for finding of pretext, such finding did not tend to show discrimination); *Scaria*, 117 F.3d at 654 (in affirming grant of summary judgment dismissing discrimination action, concluding that there was "nothing in the facts from which a reasonable finder of fact could imply pretext masking unlawful discrimination" in employer's decision to hire another person rather than plaintiff).

As explained in *Fisher*:

> The sufficiency of the finding of pretext to support a finding of discrimination depends on the circumstances of the case. This is an unremarkable principle: the sufficiency of any evidentiary finding depends on the other findings and evidence that accompany it. What is at issue is the drawing of inferences from human behavior. Once the trial has moved to the stage at which the plaintiff must prove discrimination by a preponderance of the evidence, a defendant's false statements are nothing more than pieces of circumstantial evidence, which may be employed, as in many other types of cases, to reveal the speaker's state of mind. To the extent that an actor in defendant's position is unlikely to have proffered a false explanation except to conceal a discriminatory motive, then the false explanation will be powerful evidence of discrimination. On the other hand, if the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent. And if, on examination of the circumstances, there are many possible reasons for the false explanation, stated or unstated, and illegal discrimination is no more likely a reason than others, then the pretext gives minimal support to plaintiff's claim of discrimination.[140]

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[140] *Fisher*, 114 F.3d at 1338; *see also Grady*, 130 F.3d at 560:

> Thus, when the district court considers whether the evidence can support a verdict of discrimination on a motion for summary judgment, it 'must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination.'

Id. (quoting *Fisher*, 114 F.3d at 1347). The burden-shifting framework also applies to a claim for retaliation, as follows:

C. Mixed-Motives Case

A plaintiff may attempt to prove discrimination without proving pretext by proceeding on a 'mixed-motives' theory. The framework for a mixed-motives case stems largely from *Price Waterhouse v. Hopkins*,[141] and *Mt. Healthy City School District Board of Education v. Doyle*[142] A plaintiff may establish a 'mixed-motives' case by "convinc[ing] the trier of fact that an impermissible criterion in fact entered into the employment decision."[143] To do so, the plaintiff "must initially proffer evidence that an impermissible criterion was in fact a 'motivating' or 'substantial' factor in the employment decision."[144] "This burden is greater than the level of proof necessary to make out a *McDonnell Douglas* prima facie case."[145]

> (1) plaintiff must demonstrate a prima facie case of retaliation, (2) defendant then has the burden of pointing to evidence that there was a legitimate, non-retaliatory reason for the complained of action, and (3), if the defendant meets its burden, plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation.

Gallagher v. Delaney, 139 F.3d 338, 349 (2d Cir. 1998); *see also* Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir.1995); *Fisher*, 114 F.3d at 1335. To establish a prima facie case of retaliation, plaintiff must show: "1) participation in a protected activity known to the defendant; 2) an employment action disadvantaging the plaintiff, and 3) a causal connection between the protected activity and the adverse employment action." *Gallagher*, 139 F.3d at 349; *see also* Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996); *Tomka*, 66 F.3d at 1308.

[141] 490 U.S. 228 (1989).

[142] 429 U.S. 274 (1977). *See also Stratton*, 132 F.3d at 878 n.4; *de la Cruz*, 82 F.3d at 23; *Tyler*, 958 F.2d at 1180-81.

[143] *Tyler*, 958 F.2d at 1181.

[144] *de la Cruz*, 82 F.3d at 23; *see Price Waterhouse*, 490 U.S. at 258; *Tyler*, 958 F.2d at 1181.

[145] *de la Cruz*, 82 F.3d at 23; *see also* Raskin v. Wyatt Co., 125 F.3d 55, 60 (2d Cir. 1997).

As the Second Circuit explained in *Raskin*:

> Because the plaintiff must show that the evidence is sufficient to allow a factfinder to infer both permissible and discriminatory motives, the plaintiff's initial burden in a *Price Waterhouse* mixed-motive case is heavier than the de minimis showing required to establish a prima facie *McDonnell Douglas* case. The types of indirect evidence that suffice in a pretext case to make out a prima facie case--or even to carry the ultimate burden of persuasion--do "not suffice, even if credited, to warrant" a *Price Waterhouse* burden shift. Evidence potentially warranting a *Price Waterhouse* burden shift includes, inter alia, policy documents and evidence of statements or actions by decisionmakers "that may be viewed as directly reflecting the alleged discriminatory attitude." In short, to warrant a mixed-motive burden shift, the plaintiff must be able to produce a "smoking gun" or at least a "thick cloud of smoke" to support his allegations of discriminatory treatment.[146]

If the plaintiff demonstrates that a discriminatory motive played such a role in the employment decision (even if a legitimate motive also existed), the burden of proof shifts to the defendant to demonstrate that it "would have reached the same decision even in the absence of the impermissible factor."[147]

D. Same Actor Inference

Although the sufficiency of evidence to prove invidious discrimination depends on the circumstances of each case, certain

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[146] *Raskin*, 125 F.3d at 60-61 (citations omitted; emphasis in original).

[147] *Price Waterhouse*, 490 U.S. at 250; *see, e.g.*, Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir.1997) (holding that district court properly found that plaintiff produced sufficient evidence to warrant a mixed-motive instruction); *see also de la Cruz*, 82 F.3d at 23; *Tyler*, 958 F.2d at 1181.

factors may suggest that invidious discrimination was unlikely.[148] One such factor is when the plaintiff is hired and fired by the same decisionmaker.[149] The Second Circuit has recognized that a "same actor" inference arises in such circumstances:

> [W]hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring.[150]

E. Inexplicable Negative Treatment

On the other hand, certain factors suggest that invidious discrimination was likely, such as inexplicable negative treatment of the plaintiff employee.[151] In this regard, the Second Circuit has recognized that "[a]ctions taken by an employer that disadvantage an employee for no logical reason constitute strong evidence of an intent to discriminate."[152] However, the Second

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[148] Grady v. Affiliated Central, Inc., 130 F.3d 553, 560 (1997).

[149] *Id.* at 560.

[150] *Grady*, 130 F.3d at 560; *see, e.g. Renz*, 135 F.3d at 224 (harmless error in instructing jury that employee was required to prove "age was the real reason" for her discharge, where, *inter alia*, plaintiff was terminated by same person who hired her less than two years earlier); Shabazz-Allah v. Guard Mgmt. Serv., 1999 WL 123641, at *4 (S.D.N.Y. Mar. 8, 1999) (granting defendant's motion for summary judgment where plaintiff hired and fired by same person within two years); Brennan v. Bausch & Lomb, Inc., 950 F. Supp. 545, 551-52 (E.D.N.Y. 1997) (granting summary judgment on ADEA claim where plaintiff hired and fired by same individuals and employment with defendants lasted under three years).

Notably, the Second Circuit recently refused to adopt a rule requiring district courts to instruct jurors on the availability of the "same actor" inference. *See* Banks v. Travelers Cos., 180 F.3d 358, 366-67 (2d Cir. 1999).

[151] *Stratton*, 132 F.3d at 879-80.

[152] *Id.* at 880 & n.6 (evidence of age discrimination included inexplicable negative treatment of plaintiff after new and substantially younger commissioner was appointed).

Circuit also recognizes that "sudden and unexpected downturns in performance reports cannot, by themselves, provide the basis for a discrimination action."[153] Nevertheless, evidence of sudden downturns in evaluations "even if insufficient alone, may nonetheless work with other submitted proofs (such as biased remarks) to support a [finding] of discrimination."[154]

VI. MAGISTRATE JUDGE'S AUTHORITY REGARDING SUMMARY JUDGMENT MOTIONS

A. Jurisdiction and Powers of Magistrate Judge

In the Eastern District of New York, with certain exceptions, both a district judge and a magistrate judge are assigned to a civil action upon commencement.[155] The jurisdiction and powers of a magistrate judge in a civil action are largely governed by 28 U.S.C. § 636,[156] FRCP 72[157] and 73,[158] and Local Civil Rules 72.1,[159] 72.2,[160] and 73.1.[161] Together, these provisions determine those matters that may be heard and determined by a magistrate judge, whether by referral from the district judge or by consent of the parties.

FRCP 72 addresses court-ordered referrals of "nondispositive"[162] and "dispositive"[163] matters to magistrate judges. Magistrate judges generally have jurisdiction (with the district judge) over any "nondispositive" pretrial matters.[164]

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[153] Danzer v. Norden Systems, Inc., 151 F.3d 50, 56 (2d Cir. 1998) (citing Viola v. Philips Med. Sys., 42 F.3d 712, 718 (2d Cir.1994)).
[154] *Id.* (reversing grant of summary judgment where plaintiff's evidence included sudden deterioration in employee's evaluations).
[155] *See* U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.2(a)(2000)(with certain exceptions, requiring assignment of a magistrate judge in each case).
[156] 28 U.S.C. § 636 (2000).
[157] FED. R. CIV. P. 72.
[158] FED. R. CIV. P. 73.
[159] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.1 (2000).
[160] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.2 (2000).
[161] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 73.1 (2000).
[162] FED. R. CIV. P. 72(a).
[163] FED. R. CIV. P. 72(b).
[164] FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b) (1994).

Such pretrial matters include those relating to discovery and issues of relevance and privilege. However, magistrate judges have jurisdiction to handle dispositive motions, such as motions for summary judgment under FRCP 56, by referral from the district judge.[165]

In the Eastern District, the practice during the pretrial phase of civil actions is for the magistrate judge to handle all discovery and nondispositive pretrial matters; the district judge handles the dispositive pretrial motions.[166]

B. Referral of Summary Judgment Motions

The parties may request that a magistrate judge handle a summary judgment motion or the district judge may make the referral without the parties' consent (and even over their objection), although referrals of summary judgment motions are not common.[167] The referral order requests the magistrate judge to hear and determine the motion and issue a recommended disposition.[168] In such instance, the magistrate judge will prepare for the district judge proposed findings and recommendation in the form of a "Report and Recommendation," a so-called "R&R."

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[165] FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1)(B) (1994).

[166] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.1(c) (2000) (providing that "magistrate judges may issue subpoenas, writs of habeas corpus ad testificandum or ad prosequendum or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings, and may sign in forma pauperis orders").

[167] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.1(d) (2000) (stating that "[a] magistrate judge may perform any or all of the duties imposed upon a judge by the rules governing such proceedings in the United States district courts").

[168] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.1(d) (2000) (providing that " . . . a magistrate judge may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for disposition of the matter by a judge").

C. Objection to Magistrate Judge's R&R

The rules provide for objections to the district judge of a magistrate judge's R&R.[169] A party may object to an R&R of a dispositive motion by serving and filing written objections within 10 days of being served with the R&R.[170] The other party then has 10 days from service of the objecting party's papers to serve papers responding to the objections.[171] The rules makes no provision for reply papers. If counsel desires to serve reply papers, counsel should request permission from the court (and anticipate that, if permission is granted, the papers must be short and filed promptly).

The district judge reviews the R&R "de novo," and may accept, reject, or modify the R&R, in whole or in part.[172] As the R&R should indicate, failure to object precludes any right to appeal the district court's order.[173] If the magistrate judge has a less congested docket than the assigned district judge, the magistrate judge may determine the motion sooner than the district judge. Nevertheless, final determination of the motion may then be delayed by objections to the R&R to the district judge.

D. Consent to Magistrate Judge Trial

Parties to a civil action may consent to have the case handled by a magistrate judge for all purposes.[174] By statute, a district court may, by local rule or order, designate magistrate judges to

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[169] *See* FED. R. CIV. P. 72.
[170] *See* FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1)(C) (1994).
[171] *See* FED. R. CIV. P. 72(b).
[172] FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1)(C) (1994).
[173] FED. R. CIV. P. 72(a)(stating that "a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made").
[174] FED. R. CIV. P. 73(a) (providing that "When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto...and may conduct any or all proceedings...in a civil case").

hear any and all proceedings in jury or nonjury civil actions.[175] The consent to have a case handled by a magistrate judge for all purposes, confers on the magistrate judge the jurisdiction and power to handle all pretrial and trial matters in the case.[176] Any appeal from a final judgment is taken to the court of appeals.[177]

In the Eastern District, consistent with this statutory authority, Local Civil Rule 72.1(a) empowers the district's magistrate judges to conduct all proceedings in a jury or nonjury civil matter on consent, and Local Civil Rule 73.1 provides the procedure for consent.[178] There may be advantages to consenting to a trial before the magistrate judge. Typically, the parties can obtain a date certain for trial at an earlier date than available with the district judge. Moreover, the magistrate judge, having handled most pretrial matters in the case, may be more familiar with the case than the district judge.

VII. CONCLUSION

Counsel bringing or defending an employment discrimination case must be fully familiar with the rules governing summary judgment. In the Eastern District of New York, counsel must be familiar with FRCP 56,[179] Local Civil Rule 56.1,[180] and the assigned judge's (and magistrate judge's) individual practices. Moreover, counsel must understand the analytical frameworks developed to govern the court's analysis of evidence in employment discrimination action.

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[175] FED. R. CIV. P. 73(a); 28 U.S.C. § 636(c) (1994).
[176] FED. R. CIV. P. 73(a).
[177] FED. R. CIV. P. 73(c); 28 U.S.C. § 636(c)(3) (1994).
[178] *See* U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 72.1, 73.1 (2000).
[179] FED. R. CIV. P. 56 (setting forth rules for Summary Judgment).
[180] U.S. Dist. Ct. Rules S.&E.D.N.Y., Civil Rule 56.1 (providing rules for Statements of Material Facts on Motion for Summary Judgment).